

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

between

MR. JOSHUA DEAN NELSON

Claimant

and

THE UNITED MEXICAN STATES

Respondent

ICSID Case No. UNCT/17/1

FINAL AWARD

Members of the Tribunal

Dr. Eduardo Zuleta, President

Mr. V.V. Veeder, QC

Mr. Mariano Gomezperalta Casali

Secretary of the Tribunal

Ms. Sara Marzal Yetano

5 June 2020

REPRESENTATION OF THE PARTIES

Representing Mr. Joshua Dean Nelson:

Mr. Timothy J. Feighery
Mr. Lee M. Caplan
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
U.S.A.

and

Mr. G. David Carter
Mr. Ernesto Mendieta
WOMBLE BOND DICKINSON
1200 19th Street, NW
Suite 500
Washington, DC 20036
U.S.A.

and

Mr. Martin Cunniff
RUYAKCHERIAN LLP
1901 L Street, NW
Suite 700
Washington, DC 20036
U.S.A.

Representing the United Mexican States:

Mr. Orlando Pérez Garate
Ms. Cindy Rayo Zapata
Mr. Rafael Rodríguez Maldonado
Mr. Alan Bonfiglio
DIRECCIÓN GENERAL DE CONSULTORÍA
JURÍDICA DE COMERCIO INTERNACIONAL
Secretaría de Economía
Calle Pachuca número 189, Piso 19
Colonia Condesa, Demarcación Territorial
Cuauhtémoc
Mexico City, C.P. 06140
Mexico

and

Mr. J. Cameron Mowatt
Mr. Vincent DeRose
Mrs. Jennifer Radford
Mr. Alejandro Barragán
Mrs. Ximena Iturriaga
TEREPOSKY & DEROSE LLP
Suite 1000, 81 Metcalfe Street
Ottawa, Ontario
K1P 6K7
Canada

TABLE OF CONTENTS

I. INTRODUCTION AND PARTIES 1

II. PROCEDURAL HISTORY..... 2

 A. Constitution of the Tribunal and Administration of the Proceedings 2

 B. The First Procedural Hearing and the Confidentiality Order 4

 C. The Parties’ First Round of Written Pleadings and Document Production Requests 4

 D. The Parties’ Second Round of Written Pleadings and Document Production Requests 7

 E. The Organization of the Hearing and Mr. Blanco’s Withdrawal as Claimant 10

 F. The Hearing and Post-Hearing Briefs 13

III. FACTUAL BACKGROUND..... 20

IV. THE PARTIES’ CLAIMS AND REQUESTS FOR RELIEF..... 34

 A. The Parties’ Claims and Requests for Relief on the Matter of Jurisdiction 34

 (1) Respondent’s objection on jurisdiction and request for relief 34

 (2) Claimant’s response on jurisdiction and request for relief 35

 B. Parties’ Claims and Requests for Relief on the Merits 35

 (1) Claimant’s claims on the merits and request for relief 35

 (2) Respondent’s defenses on the merits and request for relief..... 37

V. JURISDICTION 38

 A. The Parties’ Positions..... 38

 (1) Respondent’s Position..... 38

 (2) Claimant’s Position..... 42

 B. The Tribunal’s Analysis 46

 (1) Meaning and scope of the word “controls” in Article 1117 46

 (2) Did Mr. Nelson legally control Tele Fácil for purposes of NAFTA Article 1117?..... 49

VI. LIABILITY 52

 A. Did Respondent Breach NAFTA Article 1110?..... 52

 (1) The Parties’ Positions 52

 a. Claimant’s Position 52

 b. Respondent’s Position..... 56

 (2) The Tribunal’s Analysis..... 58

a.	Is there an investment capable of being expropriated?	59
b.	Did Claimant have rights under the interconnection agreement as determined by Resolution 381?.....	61
B.	Did Respondent breach Article 1105 of NAFTA?.....	81
(1)	The Parties' Positions	81
a.	Claimant's Position	81
b.	Respondent's Position	87
(2)	The Tribunal's Analysis.....	90
a.	The standard of Fair and Equitable Treatment under NAFTA Article 1105(1)	92
b.	The request for Confirmation Criteria and Decree 77.....	94
c.	The decisions of the Mexican courts	110
VII.	COSTS	112
A.	Claimant's Cost Submissions	112
B.	Respondent's Cost Submissions.....	113
C.	The Tribunal's Decision on Costs	113
VIII.	AWARD	115

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

<i>Azinian v. Mexico (or “Azinian”)</i>	<i>Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States</i> , ICSID Case No. ARB (AF)/97/2, Award dated 1 November 1999
Bankruptcy Order	Bankruptcy order issued by the Judge for the United States Bankruptcy Court for the Southern District of Florida in relation to Mr. Blanco dated 29 May 2019
Bello First Statement	First Witness Statement of Carlos Bello dated 6 November 2017
<i>Bilcon v. Canada (or “Bilcon”)</i>	<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 dated 17 March 2015
Buccirossi Report	Expert Report of Dr. Paolo Buccirossi dated 7 September 2018
C-[#]	Claimant’s Exhibit
<i>Cargill v. Mexico (or “Cargill”)</i>	<i>Cargill, Incorporated v. United Mexican States</i> , ICSID Case No. ARB(AF)/05/2, Award dated 18 September 2009
CDRs	Call Detail Records
CL-[#]	Claimant’s Legal Authority
Claimant’s Post-Hearing Brief	Claimant’s Post-Hearing Brief dated 15 August 2019
Decree 77	Decree P/IFT/EXT/080415/77 issued by the IFT on 8 April 2015
FTBL	Federal Telecommunications and Broadcasting Law enacted on 14 July 2014
FTL	Federal Telecommunications Law enacted on 7 June 1995

<i>GAMI v. Mexico (or “GAMI”)</i>	<i>GAMI Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Award dated 15 November 2004</i>
GLMC	Mexican General Law of Mercantile Companies published on 4 August 1934
Hearing	Hearing on the Merits held on 22-26 April 2019
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IFT	Federal Institute of Telecommunications (<i>Instituto Federal de Telecomunicaciones</i>)
Joint Chronology of <i>Amparos</i>	Joint chronology of the basic facts regarding the <i>amparos</i> submitted by the Parties on 13 June 2019
Joint Chronology of Events	Joint chronology of events submitted by the Parties on 8 April 2019
Jurisdictional Objection	Respondent’s Objection to the Jurisdiction of the Tribunal date 13 June 2019
Memorandum of Understanding	Memorandum of Understanding by and between Jorge Blanco, Joshua Nelson and Miguel Sacasa dated 20 July 2009
<i>Metalclad v. Mexico (or “Metalclad”)</i>	<i>Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000</i>
MXN	Mexican Peso
NAFTA	North American Free Trade Agreement
NoA	Notice of Arbitration dated 26 September 2016
PO1	Procedural Order No. 1 issued on 18 July 2017
PO14	Procedural Order No. 14 issued on 17 May 2019
PO3	Procedural Order No. 3 issued on 28 September 2017

Public Deed No. 9,581	Public Deed No. 9,581 that contains the notification by which Telmex proposes the Draft Local Interconnection Agreement to Tele Fácil dated 26 August 2013
R-[#]	Respondent's Exhibit
Rejoinder	Respondent's Rejoinder on the Merits dated 10 September 2018
Reply	Claimant's Reply on the Merits dated 5 June 2018
Resolution 127	Resolution P/IFT/EXT/071015/127 issued by the IFT on 7 October 2015
Resolution 381	Resolution P/IFT/261114/381 issued by the IFT on 26 November 2014
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief dated 15 August 2019
Response to Supplemented Jurisdictional Objection	Claimant's Response to Respondent's Supplemented Objection to Jurisdiction dated 27 November 2019
Response to the Jurisdictional Objection	Claimant's Response to Respondent's Objection to Jurisdiction dated 15 August 2019
RL-[#]	Respondent's Legal Authority
Sacasa First Statement	First Witness Statement of Miguel Sacasa dated 3 November 2017
Statement of Claim	Claimant's Statement of Claim dated 7 November 2017
Statement of Defense	Respondent's Statement of Defense dated 13 March 2018
Supplemented Jurisdictional Objection	Respondent's Supplemented Objection to Jurisdiction dated 19 October 2019
<i>TECO v. Guatemala (or "TECO")</i>	<i>TECO Guatemala Holdings, LLC v. Republic of Guatemala</i> , ICSID Case No. ARB/10/23, Award dated 19 December 2013
Tele Fácil	Tele Fácil México, S.A. de C.V.

Telmex	Teléfonos de México and Teléfonos del Noroeste
Tr. Day [#] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal composed by Mr. Eduardo Zuleta, Mr. V.V. Veeder and Mr. Mariano Gomezperalta Casali
UNCITRAL Rules or the Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law as adopted by the UN General Assembly on 15 December 1976
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
<i>Waste Management v. Mexico (or “Waste Management”)</i>	<i>Waste Management, Inc. v. United Mexican States</i> , ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted pursuant to Articles 1116(1), 1117(1) and 1120(1)(c) of the North American Free Trade Agreement (“**NAFTA**”) and the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the United Nations General Assembly on 15 December 1976 (the “**UNCITRAL Rules**”). By agreement of the Parties, the International Centre for Settlement of Investment Disputes (“**ICSID**”) serves as the administering authority for this proceeding.
2. The claims in this arbitration were initially brought by Mr. Joshua Dean Nelson (“**Mr. Nelson**” or “**Claimant**”), and Mr. Jorge Blanco (“**Mr. Blanco**”), both natural persons having the nationality of the United States of America. Mr. Blanco later withdrew from this arbitration as claimant.¹
3. Mr. Nelson brings his claims on his own behalf and on behalf of Tele Fácil México, S.A. de C.V. (“**Tele Fácil**”), a corporation organized under the laws of the United Mexican States, which Mr. Nelson alleges is majority owned and controlled by him.
4. The respondent is the United Mexican States (“**Mexico**” or “**Respondent**”).
5. Claimant and Respondent are collectively referred to as the “**Parties.**”
6. This dispute arises from an investment that Claimant alleges to have made in Mexico’s telecommunications sector. Claimant alleges that a series of measures by Mexico’s telecommunications regulator, the Federal Institute of Telecommunications (“**IFT**” for its acronym in Spanish), have destroyed Claimant’s investment and all prospects of entering the Mexican telecommunications market, in violation of the protections afforded to U.S. investors under Chapter Eleven of NAFTA.
7. According to Claimant, the IFT measures that breached Chapter Eleven of NAFTA are three: (i) the confirmation of criteria proceedings initiated by the Compliance Unit of the

¹ See ¶ 66 below.

IFT; (ii) Decree 77 issued by the IFT on 8 April 2015 (“**Decree 77**”) and; (iii) Resolution 127 issued by the IFT as well, on 7 October 2015 (“**Resolution 127**”).

8. Claimant further alleges that two decisions from the Mexican courts breached Chapter Eleven of NAFTA. Particularly, Claimant alleges that the Specialized Telecommunications Court that decided Tele Fácil’s *amparo* action against Decree 77 acted with gross incompetence and that the Appellate Court unjustifiably denied Tele Fácil access to justice.

II. PROCEDURAL HISTORY

9. On 21 April 2016, Claimant delivered a Notice of Intent to Submit a Claim to Arbitration (“**Notice of Intent**”) to Respondent. On 26 April 2016, Respondent acknowledged receipt of the Notice of Intent via email.

10. On 26 September 2016, Claimant commenced this arbitration by filing a Notice of Arbitration (“**NoA**”), pursuant to Article 3 of the UNCITRAL Rules and NAFTA Articles 1116(1), 1117(1), and 1120(1)(c).

A. CONSTITUTION OF THE TRIBUNAL AND ADMINISTRATION OF THE PROCEEDINGS

11. As envisaged in NAFTA Article 1123, the Parties agreed that the Tribunal would be composed of three arbitrators, one appointed by each Party and the third, presiding arbitrator, appointed by agreement of the Parties.
12. On 31 October 2016, Claimant appointed Mr. V.V. Veeder QC, a national of the United Kingdom, as arbitrator. On 23 December 2016, Respondent appointed Mr. Mariano Gomezperalta Casali, a Mexican national, as arbitrator.
13. On 9 January 2017, Claimant requested that the ICSID Secretary-General appoint the third, presiding arbitrator pursuant to NAFTA Article 1124.
14. By letter dated 17 January 2017, the Secretary-General accepted Claimant’s request and proposed a ballot process to assist the Parties in selecting a mutually agreeable presiding arbitrator. On 24 January 2017, the Parties accepted the Secretary-General’s proposal.

15. On 27 February 2017, in accordance with the Parties' agreed procedure, the Secretary-General provided the Parties with a list of seven candidates. Each Party submitted its completed ballot on 13 March 2017.
16. By letter on 14 March 2017, the Secretary-General informed the Parties that the ballot process did not result in the selection of a mutually agreeable candidate and that, accordingly, the Secretary-General would proceed to appoint the presiding arbitrator following the list-procedure established under Article 6.3 of the UNCITRAL Rules, selecting all candidates from the ICSID Panel of Arbitrators, pursuant to NAFTA Article 1124(3).
17. On 27 March 2017, the Secretary-General provided the Parties with a list of three candidates. Both Parties submitted their completed lists on 11 April 2017.
18. On 12 April 2017, the Secretary-General informed the Parties that the list-procedure had not been successful in the selection of a mutually agreeable candidate, and that as a result, and pursuant to the Parties' agreement, the Secretary-General would exercise her discretion in appointing the Presiding Arbitrator among the ICSID Panel of Arbitrators.
19. On 1 May 2017, the Secretary-General appointed Mr. Eduardo Zuleta as the third and presiding arbitrator, pursuant to NAFTA Article 1123 and Article 6.3 of the UNCITRAL Rules.
20. By letter to the Secretary-General of ICSID of 20 June 2017, the Parties requested that ICSID provide full administrative services in this arbitration. On 21 June 2017, the Secretary-General confirmed that ICSID would provide such services and sent the terms thereof. On 26 June 2017, the Parties confirmed their agreement with the terms of the administration services of ICSID.

B. THE FIRST PROCEDURAL HEARING AND THE CONFIDENTIALITY ORDER

21. On 7 July 2017, the Tribunal held a first procedural hearing with the Parties via conference-call.
22. Following this first procedural hearing, on 18 July 2017, the Tribunal issued Procedural Order No. 1 (“**PO1**”), embodying the agreements of the Parties and the decisions of the Tribunal on disputed procedural matters. PO1 provided, *inter alia*, that the applicable arbitration rules would be the UNCITRAL Rules, except to the extent that they are modified by Section B, Chapter 11 of NAFTA, that the procedural languages would be English and Spanish, and that the place of the proceedings would be Toronto, Canada. PO1 also established rules on the confidentiality and publication of documents (which would be developed in a subsequent procedural order), the procedural calendar and a document production schedule. The Parties also confirmed that the Tribunal had been properly constituted and that neither party had an objection to the appointment of any of its members.
23. As envisaged in PO1, on 11 August 2017, the Tribunal invited the Parties to submit a joint proposal on the Confidentiality Order. On 30 August 2017, the Parties submitted a joint proposal on the Confidentiality Order reflecting the agreements and disagreements between the Parties. On 7 September 2017, the Tribunal issued Procedural Order No. 2 (“**Confidentiality Order**”), indicating the procedures governing the designation of confidential information and the preparation of redacted copies of documents for publication.

C. THE PARTIES’ FIRST ROUND OF WRITTEN PLEADINGS AND DOCUMENT PRODUCTION REQUESTS

24. In accordance with the document production schedule included in PO1, and following exchanges between the Parties, on 12 September 2017, Claimant filed a request for the Tribunal to decide on production of documents (“**Claimant’s First Request for Documents**”).

25. On 28 September 2017, the Tribunal issued Procedural Order No. 3 (“**PO3**”), deciding on Claimant’s outstanding document production requests. In PO3, the Tribunal accepted a number of Claimant’s requests and asked Respondent to confirm that it had undertaken and would undertake a good faith effort to search for the documents responsive to certain others.
26. On 25 October 2017, Respondent informed the Tribunal that the IFT had completed a new search diligently and in good faith without finding other responsive documents. Respondent made additional observations regarding PO3.
27. In accordance with the Tribunal’s invitation, on 1 November 2017, Claimant sent his comments on Respondent’s communication of 25 October 2017, stating that Respondent had failed to comply with PO3. Claimant also indicated that Respondent’s officials had intimidated one of Claimant’s witness and requested a procedural hearing to evaluate Respondent’s conduct. In light of these allegations and Claimant’s request for a procedural hearing, the Tribunal invited Respondent to provide comments.
28. On 7 November 2017, pursuant to the procedural calendar established in PO1, Claimant filed his Statement of Claim (“**Statement of Claim**”).
29. On 15 November 2017, Respondent denied having failed to comply with PO3. Respondent also stated that it was not aware of any witness interference and offered to conduct a more thorough investigation should the Tribunal request it.
30. On 23 November 2017, the Tribunal asked Respondent to provide answers to a list of issues that were still unclear for the Tribunal. On 30 November 2017, Respondent provided such answers.
31. On 6 December 2017, at the Tribunal’s request, Claimant submitted his comments on Respondent’s answers of 30 November 2017, explaining that Respondent had provided incomplete answers because it did not comment on relevant IFT internal regulations. The Tribunal invited Respondent to comment on these internal regulations and Claimant to submit a brief comment afterwards.

32. In the aforementioned communication of 6 December 2017, Claimant reiterated his request to hold a procedural hearing and stated that he could share more information on the allegations of witness interference through an *in-camera* process. The Tribunal invited Claimant to provide more details and Respondent to comment on Claimant's requests afterwards.
33. Pursuant to the Tribunal's invitation, the Parties submitted their final comments on the above referred issues on 18 and 22 December 2017.
34. On 2 January 2018, the Tribunal issued Procedural Order No. 4 ("**PO4**") where, *inter alia*, the Tribunal: (i) asked Respondent for additional information regarding the search conducted to find the documents requested by Claimant; (ii) deemed unnecessary to schedule a separate hearing to discuss document production as well as an *ex parte* hearing *in camera* regarding the alleged interference with a witness; and, (iii) directed Respondent to produce a draft of Decree 77, or explain why it could not be produced.
35. On 16 January 2018, Respondent filed its response to the Tribunal's request in PO4. On 22 January 2018, the Tribunal invited Respondent to provide additional information on whether it conducted a search or requested responsive documents within the IFT Plenary, the IFT Commissioners and their offices and what was the result of such search or request. Respondent filed its response on 26 January 2018 and on 1 February 2018, the Tribunal ordered Respondent to produce all responsive documents found in the IFT Commissioner's offices.
36. In accordance with the document production schedule, and following exchanges between the Parties, on 5 January 2018, Respondent filed its first request for the Tribunal to decide on production of documents ("**Respondent's First Request for Documents**").
37. Claimant objected to a number of documents requested by Respondent on the basis of Article 9(2)(b) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"), and invoked both provisions of U.S. and Mexican law on privilege.

38. On 12 January 2018, the Tribunal invited Claimant to submit by 17 January 2018 a brief with his comments on (i) the criteria to select the applicable law to the issue of privilege (Mexican or U.S. law); and (ii) Respondent's interpretation of Mexican and U.S. law on privilege. The Tribunal also invited Respondent to submit its comments on Claimant's brief by 23 January 2018. The Tribunal also directed Claimant to prepare a privilege log for each document in respect of which he claimed privilege and to share it with Respondent. Respondent was granted an opportunity to respond to the privilege log.
39. In accordance with the Tribunal's instructions, on 17 January 2018, Claimant submitted his views on applicable law on issues of privilege, and his comments on Mexico's responses on interpretation of Mexican and US law on privileges. On 23 January 2018, Respondent submitted its comments in response. A second round of written comments was submitted by the Parties on 29 January 2018 and 1 February 2018, respectively. Additionally, on 2 February 2018, Respondent submitted to the Tribunal Claimant's Privilege Log with Respondent's comments.
40. On 13 February 2018, the Tribunal issued Procedural Order No. 5, on Respondent's First Request for Documents.
41. On 21 February 2018, Respondent submitted a letter to the Tribunal asking for a one-month extension for the filing of its Statement of Defense. By email of 23 February 2018, Claimant agreed to a two-week extension which was confirmed by the Tribunal on 6 March 2018.
42. On 14 March 2018, and in accordance with the agreed two-week extension, Respondent filed its Statement of Defense ("**Statement of Defense**").

D. THE PARTIES' SECOND ROUND OF WRITTEN PLEADINGS AND DOCUMENT PRODUCTION REQUESTS

43. Following exchanges between the Parties, on 1 May 2018, Claimant submitted to the Tribunal his second request for production of documents ("**Claimant's Second Request for Documents**").

44. On 9 May 2018, the Tribunal issued Procedural Order No. 6 on Claimant's Second Request for Documents.
45. On 24 May 2018, the Tribunal approved the Parties' agreement to extend the deadline for the submission of Claimant's Reply to Respondent's Statement of Defense ("**Reply**").
46. On 5 June 2018, Claimant filed his Reply.
47. On 8 June 2018, the Tribunal issued Procedural Order No. 7 clarifying the deadline for the submission of the Redfern Schedules to the Tribunal and amending Section 18.11 of PO1 accordingly.
48. Following exchanges between the Parties, on 17 July 2018, Respondent submitted to the Tribunal its second request for production of documents ("**Respondent's Second Request for Documents**").
49. On 9 August 2018, the Tribunal issued Procedural Order No. 8 ("**PO8**") on Respondent's Second Request for Documents.
50. On 14 August 2018, with a view to maintain an orderly conduct of the proceedings, the Tribunal proposed to amend the procedural calendar in order to (i) include a deadline for the submissions of non-disputing NAFTA Parties; (ii) set the new deadline for the submission of Respondent's Rejoinder on the Merits ("**Rejoinder**"); and (iii) fix the dates for the Hearing on Jurisdiction and Merits (the "**Hearing**").
51. On 16 August 2018, Respondent requested a three-week extension for the filing of its Rejoinder based on different grounds, including the fact that Claimant had yet to produce the Call Detail Records ("**CDRs**") in accordance with the terms set forth in PO8.
52. On 17 August 2018, the United States of America requested an extension of the deadline for the filing of non-disputing Party submissions pursuant to NAFTA Article 1128.
53. On 22 August 2018, Claimant objected to Respondent's request for an extension to file the Rejoinder and explained, among other things, that the Parties had not reached an agreement regarding the production of the CDRs.

54. On 27 August 2018, the Tribunal issued Procedural Order No. 9, suspending the deadline for filing the Rejoinder, inviting the Parties to reach an agreement on the applicable procedure to produce the CDRs, and informing the Parties that in the absence of an agreement, the Tribunal would make the corresponding decisions.
55. On 29 August 2018, the Parties reported to the Tribunal that they had reached an agreement on the terms of production of the CDRs and on the deadline for the submission of the Rejoinder. They also requested the Tribunal to formalize the Parties' agreement in a procedural order and confirmed that on that same date the CDRs had been transferred to Respondent.
56. On 4 September 2018, the Tribunal issued Procedural Order No. 10, which: (i) formalized the Parties' agreement on the terms of production of the CDRs and the deadline for the submission of the Rejoinder; (ii) lifted the suspension for filing the Rejoinder; (iii) granted the deadline extension requested by the United States of America and set the date for filing non-disputing Party submissions pursuant to NAFTA Article 1128; and (iv) amended the procedural calendar accordingly.
57. On 10 September 2018, pursuant to the amended procedural calendar, Respondent submitted its Rejoinder, accompanied, *inter alia*, by an expert report of Dr. Paolo Buccirosi (the "**Buccirosi Report**").
58. On 28 September 2018, Claimant requested the Tribunal to reject the Buccirosi Report on the grounds that it (i) violated PO1 and (ii) contravened Claimant's rights to equal treatment and a full opportunity to present his case. Pursuant to the Tribunal's invitation, Respondent submitted its comments to Claimant's request on 5 October 2018.
59. On 22 October 2018, the Tribunal issued Procedural Order No. 11 ("**PO11**"), granting Claimant an opportunity to reply to the Buccirosi Report and to submit evidence, but solely to rebut the new material contained in the Buccirosi Report and referring to earlier reports submitted by Claimant with his Statement of Claim.

60. On 8 November 2018, the Tribunal informed the Parties that the Secretariat had not received non-disputing party applications or non-disputing NAFTA Party submissions in connection with this arbitration.
61. On 27 November 2018, in accordance with PO11, Claimant submitted the expert reports of Dr. Christian Dippon from NERA Economic Consulting, and Dr. Elisa Mariscal from Global Economic Group in response to the Buccirossi Report.

E. THE ORGANIZATION OF THE HEARING AND MR. BLANCO'S WITHDRAWAL AS CLAIMANT

62. On 9 January 2019, pursuant to the procedural calendar as amended by agreement of the Parties, both Parties submitted their respective lists of the witnesses and experts they intended to call for cross-examination at the Hearing.
63. In accordance with Section 21.3 of PO1, on 30 January 2019, the Tribunal informed the Parties that it wished to question Dr. Pablo Buccirossi, expert for Respondent, during the Hearing. On this same day, Respondent informed the Tribunal of its decision not to cross-examine certain witnesses.
64. Pursuant to Section 22 of PO1, on 1 February 2019, the Tribunal notified the Parties of its availability to conduct a pre-hearing conference call and circulated a draft agenda, inviting the Parties to submit a joint proposal advising the Tribunal of any agreements they were able to reach. On 5 February 2019, the Tribunal also invited the Parties to submit the lists of witnesses or experts they intended to call for direct examination at the Hearing.
65. Pursuant to the Tribunal's invitation, on 12 February 2019 the Parties submitted the lists of witnesses and experts that each one intended to call for direct examination, and on 20 March 2019, the Parties submitted their joint proposal on the draft agenda for the pre-hearing conference call, which included their agreement to submit a joint chronology of events ("**Joint Chronology of Events**") before the Hearing. As the Parties had reached an agreement on almost all relevant issues, on 25 March 2019, the Tribunal informed the Parties that the pre-hearing conference call foreseen in PO1 was deemed unnecessary and was therefore cancelled.

66. On 26 March 2019, Claimant's counsel notified Respondent and the Tribunal of a finding that Mr. Jorge Luis Blanco filed for bankruptcy in 2011 under Chapter 7 of the U.S. Bankruptcy Code, and that Mr. Blanco inadvertently failed to disclose his interests at the time in Tele Fácil. Claimant's counsel further informed that, as a result of such filing and the circumstances surrounding it, Mr. Blanco was not, as of the date of Claimant's counsel letter, the owner of his original shareholdings in Tele Fácil and that the steps required to remedy the situation created by the filing for bankruptcy could not be completed during the time available before the Hearing. Claimant's counsel stated that Mr. Blanco did not want to unnecessarily delay or complicate the arbitration and, consequently had instructed counsel to withdraw Mr. Blanco as a claimant in these proceedings. However, Mr. Blanco would continue to participate as a fact witness in support of Mr. Nelson and Tele Fácil.
67. By letter dated 27 March 2019, Respondent posed various questions to Claimant regarding Mr. Blanco's bankruptcy filing. Claimant responded to such questions by letter dated 29 March 2019.
68. On 29 March 2019, the Centre transmitted to the Parties a communication on behalf of the U.S. Government requesting to attend the Hearing, together with the affirmative response sent on behalf of the Tribunal.
69. By letter of 3 April 2019, Respondent indicated that it was likely that it would have to change its defense on jurisdiction based on the new facts regarding the bankruptcy of Mr. Blanco that was only informed to the Tribunal and Respondent in Claimant's letter of 29 March 2019. Respondent also indicated that it may have to initiate judicial proceedings seeking the annulment of the transfer of shares of Tele Fácil to Mr. Nelson made on 26 March 2016, unless Claimant was willing to accept that on the date of the NoA Mr. Nelson's participation as shareholder in the capital of Tele Fácil was 40%.
70. By letter dated 5 April 2019, Claimant's counsel alleged, *inter alia*, that Mr. Blanco's withdrawal as claimant in this arbitration would not affect the status of Mr. Nelson's 60% shareholding because his share increase occurred through a transaction that did not involve Mr. Blanco and that was done in accordance with Tele Fácil's by-laws. Claimant's counsel further indicated that Mr. Blanco's withdrawal as claimant has no impact whatsoever on

Mr. Nelson's standing to claim in this arbitration and on Respondent's position in the arbitration.

71. Respondent replied on 8 April 2019 requesting authorization to amend its defense to include new jurisdictional objections based on the new facts regarding the bankruptcy and requested that the Tribunal either postpone submissions on jurisdiction until after the Hearing or postpone the Hearing.
72. On the same date, the Parties submitted the Joint Chronology of Events.
73. By letter of 9 April 2019, Claimant's counsel reiterated that Mr. Blanco's current status has no bearing on Mr. Nelson's standing to claim on his own behalf or on behalf of Tele Fácil and that the issue of whether or not additional briefings on the matter were required should be decided at the close of the Hearing. Finally, Claimant's counsel indicated that Mr. Blanco withdrew as claimant to minimize any potential disruption to the Hearing and that, to the extent that the Tribunal permits Respondent to present a new defense, Mr. Blanco reserved his right to be reinstated as a claimant if and when the bankruptcy court abandons Mr. Blanco's shares back to him.
74. On 10 April 2019, the Tribunal issued Procedural Order No. 12 concerning the organization of the Hearing.
75. On 11 April 2019, the Tribunal informed the Parties that it intended to issue an order for the termination of the proceedings with respect to Mr. Blanco, pursuant to Article 34.2 of the UNCITRAL Rules. On the same date, Claimant's counsel replied referring to the reservation of rights made in their letter of 9 April 2019 and requested that the Tribunal's order terminating the proceedings with respect to Mr. Blanco be made either conditionally or be delayed until the course of action with respect to the treatment of Mr. Blanco's bankruptcy is determined at the end of the Hearing.
76. On 16 April 2019, Respondent reiterated the need to file additional jurisdictional objections and opposed to Claimant's proposal that the Tribunal's order terminating the proceedings with respect to Mr. Blanco be made conditionally or be delayed until Mr. Blanco's bankruptcy is resolved. Respondent added that the withdrawal of Mr. Blanco as a claimant

was unconditional and must be treated as such. According to Respondent, if Mr. Blanco was no longer being withdrawn as a claimant, or was conditionally withdrawn or if the election to withdraw him as a claimant was deferred to the end of the Hearing, this would cause serious prejudice to Respondent. A fundamental right of Respondent is to know who is or are the claimant parties before the Hearing. If Claimant’s requests were granted, then Respondent would be denied procedural fairness. Respondent concluded that if the issue of Mr. Blanco’s status as a claimant was not defined before the Hearing, Respondent would not agree to proceed to the Hearing on the merits prior to the determination of the Tribunal’s jurisdiction. Respondent stressed that it categorically opposed allowing Mr. Blanco’s status as a claimant to continue as an outstanding issue to the detriment of Respondent’s defense.

77. On 17 April 2019, the Tribunal issued Procedural Order No. 13, accepting Mr. Blanco’s withdrawal as co-claimant in this arbitration, and notifying the Parties that the consequences of Mr. Blanco’s withdrawal would be addressed by the Tribunal with the Parties at the Hearing. Consequently, Mr. Blanco was removed from the list of claimants.

F. THE HEARING AND POST-HEARING BRIEFS

78. The Hearing on jurisdiction and the merits was held at the World Bank C Building in Washington, D.C. from 22 April 2019 to 26 April 2019. The following individuals were present at the Hearing:

TRIBUNAL	
Dr. Eduardo Zuleta	President
Mr. V.V. Veeder, QC	Co- Arbitrator
Mr. Mariano Gomezperalta Casali	Co-Arbitrator

ICSID SECRETARIAT	
Ms. Sara Marzal Yetano	Secretary of the Tribunal
Ms. Lorena Guzmán-Díaz	Intern

CLAIMANT	
<i>Counsel:</i>	
Mr. Timothy Feighery	Arent Fox LLP
Mr. Lee Caplan	Arent Fox LLP
Mr. Jason Rotstein	Arent Fox LLP
Mr. Carlos Matsui Zayas	Arent Fox LLP
Mr. Mohamed Al Ahmadani	Arent Fox LLP
Ms. Maruja Kiener	Arent Fox LLP
Mr. G. David Carter	Womble Bond Dickinson (US) LLP
Mr. Ernesto Mendieta	Womble Bond Dickinson (US) LLP
Ms. Mary Beth Caswell	Womble Bond Dickinson (US) LLP
Mr. Martin Cunniff	Ruyak Cherian LLP
<i>Parties:</i>	
Mr. Joshua Dean Nelson	Tele Fácil México, S.A. de C.V.
<i>Witness(es):</i>	
Mr. Jorge Blanco Luis Jr.	Tele Fácil México, S.A. de C.V.
Mr. Miguel Sacasa	Tele Fácil México, S.A. de C.V.
Mr. Carlos Bello	Bello, Gallardo, Bonequi y Garcia, S.C.
<i>Experts:</i>	
Ms. Clara Luz Alvarez	Universidad Panamericana
Mr. Gerardo Soria	Soria Abogados, S.C.
Mr. Pablo Márquez	Márquez Barrera Castañeda Ramírez
Mr. Christian Dippon	NERA Economic Consulting
Ms. Elisa Mariscal	Global Economics Group, LLC

RESPONDENT	
<i>Counsel:</i>	
Mr. Orlando Pérez Gárate	Secretaría de Economía
Ms. Cindy Rayo Zapata	Secretaría de Economía
Mr. Alan Bonfiglio Ríos	Secretaría de Economía
Mr. Rafael Rodríguez Maldonado	Secretaría de Economía
Mr. Vincent DeRose	Tereposky & DeRose LLP
Mr. J. Cameron Mowatt	Tereposky & DeRose LLP
Ms. Jennifer Radford	Tereposky & DeRose LLP
Mr. Alejandro Barragán	Tereposky & DeRose LLP
Ms. Ximena Iturriaga	Tereposky & DeRose LLP
Mr. Stephan Becker	Pillsbury

Mr. Jorge Vera	Pillsbury
Parties:	
Mr. Aristeo López Sánchez	Secretaría de Economía
Witness(es):	
Mr. Sóstenes Díaz González	Instituto Federal de Telecomunicaciones
Mr. Luis Fernando Peláez Espinosa	AGON
Mr. David Gorra Flota	Instituto Federal de Telecomunicaciones
Mr. Luis Gerardo Canchola Rocha	Instituto Federal de Telecomunicaciones
Experts:	
Mr. Rodrigo Buj García	Malpica, Iturbe, Buj & Paredes, S.C.
Mr. Joan Obradors Samarra	Analysys Mason
Mr. Daniel Ponte Fernández	Analysys Mason
Mr. Paolo Buccirossi	Lear

UNITED STATES OF AMERICA	
Representatives:	
Ms. Terra L. Gearhart-Serna	U.S. Department of State
Ms. Nicole Thornton	U.S. Department of State

COURT REPORTERS	
Mr. Dante Rinaldi	D-R Esteno, Spanish Court Reporter
Mr. David Kasdan	Worldwide Reporting, LLP, English Court
Mr. Randy Salzman	Worldwide Reporting, LLP, English Court

INTERPRETERS	
Mr. Charles Roberts	English-Spanish Interpreter
Ms. Elena Howard	English-Spanish Interpreter
Ms. Judith Letendre	English-Spanish Interpreter

79. On 26 April 2019, the last day of the Hearing, the Parties were invited by the Tribunal to discuss and seek an agreement on (a) the sequence and timing of the post-hearing briefs; and (b) whether additional submissions on the consequences of the withdrawal of Mr. Blanco were required and, if so, the sequence and timing thereof.

80. On the same date, at the Hearing, the Tribunal asked the Parties to prepare a joint schedule of the basic facts regarding the *amparos* (a “**Joint Chronology of Amparos**”) and invited the Parties to reach an agreement on the submission deadline.
81. The Parties agreed to one round of simultaneous post-hearing briefs and one round of consecutive submissions regarding Mr. Blanco’s withdrawal. However, the Parties did not agree on the scope of the submission regarding the withdrawal. Respondent intended to address: (a) whether the transfer of the shares to Mr. Nelson dated 29 March 2016 is valid in light of the circumstances that resulted in Mr. Blanco’s withdrawal and the implications of the foregoing for this arbitration (the “**Share Transfer Issue**”); and (2) whether *de facto* control suffices as a matter of law for purposes of NAFTA Article 1117 and whether Mr. Nelson has *de facto* control of Tele Fácil (the “**De Facto Issue**”). Claimant in turn considered that Respondent only needed to address the Share Transfer Issue because the *De Facto* Issue had already been thoroughly briefed in this process.
82. On 17 May 2019, the Tribunal issued Procedural Order No. 14 (“**PO14**”) where it decided: (i) to approve the agreement of the Parties on one round of simultaneous post-hearing briefs and one round of consecutive submissions on Mr. Blanco’s withdrawal; and (ii) to allow the Parties to address the *Share Transfer Issue* as well as the *De Facto Issue* in their submissions regarding Mr. Blanco’s withdrawal.
83. In accordance with PO14, on 13 June 2019 Respondent filed its submission on Mr. Blanco’s withdrawal. This submission was Respondent’s Objection to the Jurisdiction of the Tribunal (“**Jurisdictional Objection**”).
84. On the same date, and within the agreed deadline, the Parties submitted the Joint Chronology of *Amparos* requested by the Tribunal at the Hearing.
85. On 1 July 2019, Claimant informed the Tribunal about a disagreement between the Parties regarding the procedure and timing of the post-hearing submissions related to Mr. Blanco’s withdrawal. On 3 July 2019, Respondent replied to Claimant’s request.
86. On 9 July 2019, the Tribunal issued Procedural Order No. 15 (“**PO15**”) which, *inter alia*, provided that (a) if Claimant intended to present arguments and evidence on Mr. Blanco’s

withdrawal not in the evidentiary record at the time of issuance of PO14, the Parties had to confer and agree on a new procedural calendar by 22 July 2019; and (b) if Claimant did not intend to submit new arguments and evidence on Mr. Blanco's withdrawal, the procedural calendar determined by the Tribunal in PO14 would be maintained.

87. On 15 July 2019, Claimant informed the Tribunal and Respondent about his intention to submit arguments and evidence on Mr. Blanco's withdrawal not in the evidentiary record at the time of issuance of PO14.
88. On 16 July 2019, Claimant reported areas of agreement and disagreement between the Parties on the new procedural calendar and requested the Tribunal's intervention to resolve the disagreements. On 19 July 2019, Respondent submitted its comments on Claimant's report.
89. On 24 July 2019, the Tribunal issued Procedural Order No. 16 ("**PO16**") deciding on the disagreement between the Parties, in the following terms:
 - a) Claimant could, no later than 15 August 2019:
 - i. Submit new arguments and evidence regarding the bankruptcy order of 29 May 2019 issued by the Judge for the United States Bankruptcy Court for the Southern District of Florida in relation to Mr. Blanco (the "**Bankruptcy Order**").
 - ii. Submit, in connection with the *De Facto* and the Share Transfer Issues, factual documents that were previously produced in this arbitration, though not submitted as exhibits into the record of this arbitration, and expert reports as well as legal authorities on the matter, provided that they are based on the evidentiary record existing at the time PO14 was issued.
 - b) Respondent could, no later than 19 October 2019:
 - i. Submit new arguments and evidence regarding the Bankruptcy Order in response to Claimant's submission of August 15, 2019.

- ii. Amend its jurisdictional objections to (i) include the Bankruptcy Order and submit new arguments and evidence regarding the Bankruptcy Order; and (ii) address the *De Facto* and the Share Transfer Issues and introduce in connection therewith factual documents that were previously produced in this arbitration, though not submitted into the record of this arbitration, and expert reports as well as legal authorities, provided that they are based on the evidentiary record existing at the time PO14 was issued.
 - c) Claimant could submit his response to the amended objections on jurisdiction no later than 8 December 2019.
 - d) No new arguments or evidence not related to the above issues could be submitted without previous authorization from the Tribunal.
90. In accordance with PO15, on 15 August 2019 both Parties submitted their post-hearing briefs (“**Post-Hearing Briefs**”) and, in accordance with PO16, Claimant filed his Response to Respondent’s Objection to Jurisdiction (“**Response to the Jurisdictional Objection**”).
91. In accordance with PO16, on 19 October 2019, the Respondent submitted its Supplemented Jurisdictional Objection (“**Supplemented Jurisdictional Objection**”) and, on 27 November 2019, the Claimant submitted his response to Respondent’s Amended Jurisdictional Objections (“**Response to the Supplemented Jurisdictional Objection**”).
92. On 15 January 2020, the Parties submitted their respective statements of costs (“**Statements of Costs**”).
93. By letter of 9 March 2020, the Secretary of the Tribunal informed the Parties of the passing of Mr. Veeder on 8 March 2020. The remaining arbitrators, Dr. Zuleta and Mr. Gomezperalta, invited the Parties to hold a conference call to discuss the next steps in the proceeding, which was held on 20 March 2020.
94. During the conference call of 20 March 2020, Dr. Zuleta and Mr. Gomezperalta explained that: (a) after the Hearing on jurisdiction and the merits held on 22 – 26 April 2019, the Tribunal deliberated in person and by email and reached a unanimous decision; (b) a draft

award was circulated on 21 February 2020; (c) Mr. V.V. Veeder approved the circulated award as drafted on 3 March 2020; (d) after the passing of arbitrator Mr. V.V. Veeder on 8 March 2020, one of the remaining arbitrators considered that some adjustments should be made to the draft award to clarify specific sections of the text; and (e) such adjustments do not change the unanimous decision taken in the deliberations or the main rationale and the decision contained in the draft award approved by Mr. V.V. Veeder.

95. During the conference call, the Tribunal and the Parties discussed the following alternatives to continue this arbitration and issue the corresponding award:

(1) The two remaining arbitrators would introduce the adjustments proposed by one of them to clarify specific sections of the draft award and thereafter the remaining arbitrators, Dr. Zuleta and Mr. Gomezperalta, would sign the award. Pursuant to Article 32(4) of the UNCITRAL Arbitration Rules, the award will indicate that Mr. V.V. Veeder approved the decision but passed away before signing the award; or

(2) The Tribunal would be reconstituted, a new arbitrator would be appointed by the Claimant, and the Tribunal so reconstituted would decide, in consultation with the Parties, the stage at which the new Tribunal would resume proceedings and conclude the arbitration.

96. The discussions held during the conference call were recorded in a letter sent to the Parties on 24 March 2020, in which the remaining arbitrators reiterated their invitation for the Parties to agree on one of the alternatives and proposed a second conference call in which the Parties would inform as to whether an agreement was reached.

97. Further to the aforesaid letter, the Parties and the Arbitral Tribunal held a second conference call on 26 March 2020. During this second conference call the Parties informed the Arbitral Tribunal that they had agreed with Option 1 of the letter of 24 March 2020. The terms of the Parties' agreement were summarized in a letter to the Parties dated 31 March 2020 as follows:

1. The two remaining arbitrators, Messrs. Eduardo Zuleta and Mariano Gomezperalta, will introduce in the award the adjustments

proposed by one of them after the passing of arbitrator V.V. Veeder to clarify specific sections of the draft award.

2. The adjustments will be introduced in footnotes that will identify each one of them. Correction of typographical errors will be made directly in the text of the award.

3. After completing the adjustments and the Spanish version of the award, containing the same adjustments in footnotes, the remaining arbitrators, Messrs. Eduardo Zuleta and Mariano Gomezperalta, will sign the award.

4. Pursuant to Article 32(4) of the UNCITRAL Arbitration Rules, the award will indicate that Mr. V.V. Veeder approved the decision but passed away before signing the award.

5. The Tribunal confirms that it is agreeable, upon request by either Party, to sharing a copy of Mr. V.V. Veeder's email to the President of the Tribunal of March 3, 2020 confirming his approval to the draft award.

98. By emails of 4 and 7 April 2020, the Parties confirmed that the 31 March 2020 letter reflected the agreement reached by the Parties on the treatment of the award after Mr. Veeder's passing.

III. FACTUAL BACKGROUND

99. Mr. Joshua Dean Nelson and Mr. Jorge Luis Blanco, nationals of the United States of America, together with Mr. Miguel Sacasa, a national of Mexico, wanted to enter and participate in the telecommunications market of Mexico.² For such purposes, on 7 January 2010, they incorporated Tele Fácil under the laws of, and domiciled in, Mexico.³

² **C-013**, Memorandum of Understanding by and between Jorge Blanco, Joshua Nelson and Miguel Sacasa (20 July 2009) ("**Memorandum of Understanding**"); NoA, ¶¶ 14, 18; Amended NoA, ¶¶ 18, 19, 23; Statement of Claim (7 November 2017), ¶ 50; Joint Chronology of Events, p. 1.

³ **C-014**, Public Deed No. 16,778 containing Tele Fácil's incorporation (7 January 2010).

100. By 2010, the Mexican Federal Telecommunications Law (“FTL”) restricted foreign ownership of telecommunication concessions to 49%.⁴ Therefore Mr. Nelson, Mr. Blanco and Mr. Sacasa agreed on the following:
- a) Mr. Nelson and Mr. Blanco would own respectively, 40% and 9% of Tele Fácil and Mr. Sacasa would own 51%.⁵
 - b) Mr. Nelson would be the primary financial investor in the company and in exchange for his investment he would receive 60% of the profits.⁶
 - c) Mr. Nelson would assume majority control of Tele Fácil once Mexican law permitted him to do so.⁷
101. On 25 August 2011, Mr. Blanco filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Florida without identifying his shares in Tele Fácil as an asset of the bankruptcy estate.⁸ On 2 December 2011, Mr. Blanco was discharged of the bankruptcy proceeding.⁹
102. Under Chapter 7 of the U.S. Bankruptcy Code, once Mr. Blanco filed for bankruptcy, an estate was created and all of Mr. Blanco’s legal and equitable interests, whether disclosed or not, became property of that estate.¹⁰ Mr. Blanco’s shares in Tele Fácil became part of

⁴ **CL-001**, FTL (7 June 1995), Article 12 (stating that “[...] concessions referred to in this Law shall only be granted to individuals and entities 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 by the National Commission of Foreign Investment will be required, so that the foreign investment may participate in a larger percentage.”).

⁵ **C-014**, Public Deed No. 16,778 containing Tele Fácil’s incorporation (7 January 2010), First Transitory Clause; Joint Chronology of Events, p. 1.

⁶ **C-013**, Memorandum of Understanding (20 July 2009), pp. 1-2.

⁷ **C-013**, Memorandum of Understanding (20 July 2009), p. 1; **C-001**, Witness Statement of Joshua Dean Nelson (2 November 2017), ¶ 31; **C-002**, Witness Statement of Jorge Blanco (3 November 2017), ¶ 20; **C-003**, First Witness Statement of Miguel Sacasa (3 November 2017) (“**Sacasa First Statement**”), ¶ 18; **C-004**, First Witness Statement of Carlos Bello (6 November 2017) (“**Bello First Statement**”), ¶ 18.

⁸ Claimant’s communication of 29 March 2019; Joint Chronology of Events, p. 1. *See also*, **R-86**, Claimant’s correspondence to Tribunal (26 March 2019).

⁹ Claimant’s communication of 29 March 2019; Joint Chronology of Events, p. 1.

¹⁰ Jurisdictional Objection (13 June 2019), ¶ 9.

the bankruptcy estate, but because they were not disclosed in the bankruptcy proceedings, they could not be administered by the appointed trustee and abandoned back to Mr. Blanco once discharged of the proceedings. As such, they remained the property of the estate even after the case closed, on 2 December 2011.¹¹

103. On 21 February 2012, Mr. Blanco’s bankruptcy proceeding was closed and Ms. Marcia T. Dunn (Mr. Blanco’s trustee) was discharged.¹²
104. On 27 May 2011, Tele Fácil applied to the Ministry of Communications and Transportation for a concession to install, operate and exploit a public telecommunications network.¹³
105. On 17 May 2013, the Mexican Secretariat of Communications and Transport granted Tele Fácil a concession to operate a public communications network for a period of 30 years.¹⁴ The concession authorized Tele Fácil to offer “[a]ny telecommunication service which can technically be provided by its infrastructure, except broadcasting services” in Mexico City (DF), Guadalajara (Jalisco), La Soledad (Jalisco) and Monterrey (Nuevo León).¹⁵
106. In order to provide its services, Tele Fácil had to interconnect with a Mexican carrier, otherwise Tele Fácil’s customers would only be able to communicate with other customers in the same network. Under Mexican law, interconnection of telecom networks, interconnection rates and interconnection’s terms and conditions are of public interest (“*orden público e interés social*”).¹⁶
107. Tele Fácil decided to interconnect with Teléfonos de México and Teléfonos del Noroeste (jointly, “**Telmex**”), the largest telecommunications carrier in Mexico, on an indirect interconnection basis so that Tele Fácil could route its traffic through a larger carrier, which

¹¹ Jurisdictional Objection (13 June 2019), ¶ 9.

¹² Claimant’s communication of 29 March 2019; Joint Chronology of Events, p. 1.

¹³ **C-016**, Request to obtain a public telecommunications concession (27 May 2011).

¹⁴ **C-019**, Concession to Install, Operate and Exploit a Public Telecommunications Network (17 May 2013).

¹⁵ **C-019**, Concession to Install, Operate and Exploit a Public Telecommunications Network (17 May 2013), Background and Annex A, ¶ A.1.

¹⁶ **CL-004**, FTBL, Article 125.

had already established sufficient capacity with Telmex and was able to lease excess capacity to Tele Fácil to indirectly deliver traffic to Telmex. Tele Fácil selected Nextel to indirectly interconnect to Telmex's network through Nextel.¹⁷

108. Tele Fácil therefore prearranged an indirect interconnection scheme.¹⁸ This scheme required “one direct interconnection with one of the concessionaires [...] to use its network and circuits in order to reach the rest of the concessionaires ‘indirectly.’”¹⁹ Tele Fácil commenced negotiations with Nextel and simultaneously requested interconnection with Telmex.²⁰

109. On 11 June 2013, Mexico enacted several amendments to the Mexican Constitution on telecommunication matters. These amendments included:

- a) The creation of the IFT. The IFT was granted the power to oversee matters concerning economic competition in the telecommunications sector, including the power to declare the existence of preponderant economic agents and to impose on them asymmetrical regulations.
- b) The creation of specialized courts and tribunals to handle matters concerning telecommunications, radio broadcasting and economic competition in those sectors;
- c) The creation of a new type of concession called “Sole Concession” (“*Concesión Única*”) to simplify the provision of additional services to those established in the concession title, and to permit concessionaries to render more services through their respective networks as long as they comply with certain obligations;

¹⁷ Statement of Claim (7 November 2017), ¶ 11.

¹⁸ **R-003**, Letter explaining Tele Fácil's interconnection scheme (8 November 2013), pp. 1-2.

¹⁹ **R-003**, Letter explaining Tele Fácil's interconnection scheme (8 November 2013), p. 1.

²⁰ **C-058**, Request to initiate negotiations of interconnection submitted by Tele Fácil to Telmex (7 August 2013); **C-003**, Sacasa First Statement (3 November 2017), ¶ 59; **C-004**, Bello First Statement (6 November 2017), ¶ 61.

- d) The elimination of the possibility to seek for a stay of an IFT's ruling when challenged through an *amparo* proceeding;
 - e) The elimination of the restrictions to allow foreign ownership of telecommunication businesses;
 - f) The order to enact a new telecommunications law.²¹
110. On 26 August 2013, Telmex offered Tele Fácil a draft standard interconnection agreement for a period expiring on 31 December 2017.²² This draft: (i) included a reciprocal interconnection rate of USD 0.00975 per minute;²³ (ii) did not expressly allow indirect interconnection²⁴ and; (iii) incorporated portability charges.²⁵
111. On 6 March 2014, the IFT declared América Móvil, S.A.B. de C.V. and its subsidiaries, which included Telmex, as a preponderant economic agent in the telecommunications sector.²⁶ Twenty days later, on 26 March 2014, the IFT issued specific asymmetrical regulations, including the obligation of Telmex to provide indirect interconnection and a special interconnection rate of MXN 0.2015, approx. USD 0.00172.²⁷
112. On 8 July 2014, Tele Fácil sent to Telmex its comments on the draft standard interconnection agreement that Telmex had sent on 26 August 2013.²⁸ Tele Fácil requested Telmex to include provisions allowing indirect interconnection and to revise the provisions

²¹ **CL-002**, Decree by which several provisions are amended and added to the Political Constitution of the United Mexican States, in telecommunications matters (11 June 2013); Joint Chronology of Events, p. 2.

²² **C-021**, Public Deed No. 9,581 that contains the notification by which Telmex proposes the Draft Local Interconnection Agreement to Tele Fácil (26 August 2013) ("**Public Deed No. 9,581**").

²³ **C-021**, Public Deed No. 9,581, Exhibit C, p. 41.

²⁴ **C-021**, Public Deed No. 9,581, First Clause (defining "interconnection"), Second Clause 2.1.

²⁵ **C-021**, Public Deed No. 9,581, Second Clause 2.1, Nineteenth Clause.

²⁶ **CL-010**, Resolution P/IFT/EXT/060314/76 (6 March 2014).

²⁷ Statement of Defense, ¶ 49; Joint Chronology of Events, p. 3.

²⁸ **C-024**, Comments to the draft local interconnection agreement sent by Tele Fácil to Telmex (7 July 2014); Joint Chronology of Events, p. 3.

on portability charges.²⁹ Tele Fácil indicated that it would appreciate Telmex to consider the comments and amend the agreement accordingly so that Tele Fácil could proceed to sign it.³⁰

113. Three days thereafter, on 11 July 2014, Tele Fácil initiated disagreement proceedings under Article 42 of the FTL before the IFT to resolve the divergences between Tele Fácil and Telmex over: (i) indirect interconnection and; (ii) portability charges.³¹
114. On 14 July 2014, Mexico enacted the new Federal Telecommunications and Broadcasting Law (the “**FTBL**”).³² This law, which became effective on 13 August 2014,³³ introduced measures applicable to preponderant and dominant carriers, such as the “zero interconnection fee” forbidding the preponderant agent — therefore, Telmex — to charge interconnection fees to other carriers for calls ending in its network.³⁴
115. On 26 August 2014, Telmex submitted to the IFT a reply within the disagreement proceedings initiated by Tele Fácil.³⁵ With its reply, Telmex submitted a different draft agreement than the one presented to Tele Fácil on 26 August 2013. This draft did not include portability charges and allowed indirect interconnection.³⁶ Telmex argued that the

²⁹ **C-024**, Comments to the draft local interconnection agreement sent by Tele Fácil to Telmex (7 July 2014); Joint Chronology of Events, p. 3.

³⁰ **C-024**, Comments to the draft local interconnection agreement sent by Tele Fácil to Telmex (7 July 2014).

³¹ **C-025**, Interconnection disagreement procedure submitted by Tele Fácil before the IFT (10 July 2014); Joint Chronology of Events, p. 4.

³² **CL-004**, FTBL.

³³ Statement of Defense, ¶ 29; Joint Chronology of Events, p. 4.

³⁴ **CL-004**, FTBL, Article 131(a).

³⁵ **C-027**, Telmex’s reply to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (26 August 2014); Joint Chronology of Events, p. 4.

³⁶ **C-027**, Telmex’s reply to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (26 August 2014), § IX; Joint Chronology of Events, p. 4.

parties had a disagreement on the applicable rates and requested the IFT to determine the rates.³⁷

116. On 26 November 2014, the IFT, by unanimous decision, issued Resolution 381.³⁸ In Resolution 381, the IFT, *inter alia*:

- a) Concluded that Telmex, in the course of the interconnection disagreement proceeding, had accepted to include the provision of indirect interconnection service and eliminate the portability clause.³⁹
- b) Dismissed Telmex’s argument in connection with an alleged disagreement on interconnection rates and concluded that these rates “were defined in the draft agreement for the provision of fixed local interconnection services and its exhibits, sent by Telmex [...] to Tele Fácil [on 26 August 2013], and which are part of the evidence”.⁴⁰
- c) Ordered the parties to “interconnect their telecommunications networks and initiate the provision of the corresponding interconnection services” and “execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution” within 10 business days following the notification of the resolution.⁴¹

³⁷ **C-027**, Telmex’s reply to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (26 August 2014), § X. *See also*, **C-028**, Telmex’s closing arguments to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (24 September 2014), § Sixth; Joint Chronology of Events, p. 4.

³⁸ **C-029**, Resolution by means of which the *Pleno* of the IFT determines the conditions of interconnection not agreed between Tele Fácil and Telmex, P/IFT/261114/381 (26 November 2014) (“**Resolution 381**”). *See also*, **C-030**, Transcript of Plenary’s XVII Ordinary Session (26 November 2014), p. 8; Joint Chronology of Events, p. 5.

³⁹ **C-029**, Resolution 381 (26 November 2014), pp. 14-15; Joint Chronology of Events, p. 5.

⁴⁰ **C-029**, Resolution 381 (26 November 2014), p. 13; Joint Chronology of Events, p. 5.

⁴¹ **C-029**, Resolution 381 (26 November 2014), pp. 16-17; Joint Chronology of Events, p. 5.

117. On 10 December 2014, Telmex sent to Tele Fácil a new draft agreement.⁴² This agreement included indirect interconnection and did not include portability charges.⁴³ It also included an annex (Exhibit C) specifying that the rate of USD 0.00975 would be valid until 31 December 2014.⁴⁴
118. On 12 December 2014, Tele Fácil executed with Nextel an interconnection agreement.⁴⁵ They also signed two side letters setting rates effective until 31 December 2014.⁴⁶
119. On 16 December 2014, Tele Fácil sent Telmex a draft interconnection agreement for signature, based on the terms and conditions established in Resolution 381.⁴⁷
120. On 19 December 2014, 28 and 30 January 2015 Tele Fácil requested the IFT to enforce Resolution 381.⁴⁸
121. On 26 December 2014, Telmex challenged Resolution 381, the FTBL and the IFT's determination of Telmex's status as a preponderant economic agent through an *amparo indirecto* (Amparo proceedings 351/2014).⁴⁹ Later on, Telmex amended this complaint to

⁴² **R-009**, Public Minute 21,013 certifying the delivery of a new draft agreement sent by Telmex in Tele Fácil's offices.

⁴³ See *i.e.*, **C-031**, New Draft of Local Interconnection Agreement sent by Telmex to Tele Fácil (9 December 2014), First Clause; Joint Chronology of Events, p. 5.

⁴⁴ **C-031**, New Draft of Local Interconnection Agreement sent by Telmex to Tele Fácil (9 December 2014), First Clause, Exhibit C, § 1 (stating that "[t]he rates mentioned in this number 1 shall be in effect during the period comprised between January 1, 2014 and December 31, 2014").

⁴⁵ **C-032**, Master Local Interconnection Services Agreement executed by and between NII Digital S. de R.L. de C.V. and Tele Fácil (12 December 2014); Joint Chronology of Events, p. 5.

⁴⁶ **C-032**, Master Local Interconnection Services Agreement executed by and between NII Digital S. de R.L. de C.V. and Tele Fácil (12 December 2014); Joint Chronology of Events, p. 5.

⁴⁷ **C-033**, Public Deed 255 which contains the notification performed by Tele Fácil to Telmex with Interconnection Agreement (16 December 2014); Joint Chronology of Events, p. 6.

⁴⁸ **C-035**, Notice of Compliance of Interconnection Resolution submitted by Tele Fácil before the Plenary of the IFT (19 December 2014); **C-038**, Notice of Breach by Telmex to Interconnection Resolution submitted by Tele Fácil before the Compliance Unit of the IFT (28 January 2015); Joint Chronology of Events, pp. 6-7.

⁴⁹ **C-036**, *Amparo* proceedings 351/2014 filed by Telmex before the Second District Judge for Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications (26 December 2014); Joint Chronology of Events, p. 6; Joint Chronology of *Amparos*, p. 1.

also challenge Decree 77.⁵⁰ Decree 77 is discussed below.⁵¹ Tele Fácil was allowed to participate in these proceedings as an “interested third party”.⁵²

122. On 9 January 2015, Telmex sent a communication to Tele Fácil through which it sought to initiate negotiations to determine interconnection rates.⁵³ Telmex explained that it could not offer the same terms and conditions offered in 2013 because they were contrary to the Constitutional Reform and the FLTB and proposed using the regulated rate that the IFT published on 29 December 2014 (MXN 0.004179).⁵⁴
123. On 10 February 2015, invoking the difference of positions between Tele Fácil and Telmex the IFT’s Compliance Unit requested a confirmation of criteria from the Legal Affairs Unit to confirm whether, in addition to compelling interconnection, the IFT had the power to compel the execution of an interconnection agreement.⁵⁵ Under Mexican law, a confirmation of criteria is a legal mechanism to confirm a proposed legal interpretation by an individual or government entity of a legal or administrative provision issued by the IFT.⁵⁶
124. On 18 February 2015, Telmex sought a confirmation of criteria from the IFT to determine whether the terms in the draft agreement proposed on 26 August 2013 by Telmex to Tele Fácil were consistent with the new telecommunications regime.⁵⁷

⁵⁰ **C-054**, Amendment of the *Amparo* proceedings 351/2014 (11 May 2015); Joint Chronology of *Amparos*, p. 1.

⁵¹ See ¶ 125 below.

⁵² Joint Chronology of Events, p. 6.

⁵³ **C-037**, Request sent by Telmex to Tele Fácil to initiate negotiations regarding the 2015 interconnection rates (9 January 2015).

⁵⁴ **C-037**, Request sent by Telmex to Tele Fácil to initiate negotiations regarding the 2015 interconnection rates (9 January 2015), p. 3.

⁵⁵ **C-040**, Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the IFT (10 February 2015); Joint Chronology of Events, p. 7.

⁵⁶ First Witness Statement of David Gorra Flota (7 March 2018), ¶ 6.

⁵⁷ **C-041**, Confirmation of Criteria submitted by Telmex to the IFT (18 February 2015).

125. On 8 April 2015, the IFT, by a majority vote, approved and issued Decree 77 in response to the confirmation of criteria sought by Telmex and the IFT's Compliance Unit.⁵⁸ Decree 77 determined that the IFT's powers were restricted to resolving the conditions not agreed upon by the parties which were in the case of Tele Fácil and Telmex, indirect interconnection and portability charges.⁵⁹ Decree 77 ordered the parties to interconnect their systems physically within ten business days counted from the date in which both Telmex and Tele Fácil were notified of the resolution and obligated the parties to execute the corresponding interconnection agreement without specifying any deadline for doing so.⁶⁰
126. On 16 April 2015, Telmex informed Tele Fácil of its intention to interconnect its network and that it had requested Nextel the traffic service to set up the indirect interconnection and carry out interconnection tests.⁶¹ The same day, Nextel sent the information requested and confirmed its readiness to bring about the interconnection testing.⁶² Tests were performed between 17 and 21 April 2015 without Tele Fácil's participation.⁶³
127. On 23 April 2015, Telmex informed Tele Fácil of the tests' results; confirmed it was ready to process calls between Telmex and Tele Fácil's networks in Area Codes 58, 118 and 223 and reiterated its willingness to continue with the negotiation of the interconnection agreement.⁶⁴

⁵⁸ **C-051**, Decree 77 (8 April 2015); Joint Chronology of Events, p. 9.

⁵⁹ **C-051**, Decree 77 (8 April 2015), p. 13.

⁶⁰ **C-051**, Decree 77 (8 April 2015), Second and Third Decision, p. 14.

⁶¹ **R-015**, Public Deed No. 5,545 that contains a letter from Telmex to Tele Fácil (16 April 2015), pp. 3-4 of the pdf document.

⁶² **R-017**, Letter from Nextel to Telmex (16 April 2015).

⁶³ Joint Chronology of Events, pp. 9-10.

⁶⁴ **R-023**, Public Deed No. 5,572 that contains a letter from Telmex to Tele Fácil (23 April 2015), pp. 2-3 of the pdf document; Joint Chronology of Events, p. 10.

128. On 7 May 2015, Tele Fácil filed an *amparo* suit (*Amparo* proceedings 1381/2015).⁶⁵ This *amparo* aimed at challenging the IFT's failure to enforce Resolution 381, the request for confirmation of criteria presented by the Compliance Unit before the Legal Affairs Unit, and the IFT's proposal on the interpretation of Resolution 381 and Decree 77.⁶⁶
129. On 9 and 10 June 2015 and 20, 21 and 27 October 2015, the IFT made physical inspections in Tele Fácil.⁶⁷ When the IFT notified Tele Fácil of these inspections, it stated that they were made for the purposes of verifying, *inter alia*, that Telmex and Tele Fácil's networks were interconnected in accordance with Decree 77.⁶⁸ Nextel was also subject to a similar inspection on 20 and 27 October 2015.⁶⁹
130. On 16 June 2015, Telmex submitted a new interconnection disagreement to the IFT, claiming that there was a disagreement on different terms, including the applicable interconnection rates for 2015.⁷⁰ Three days later, on 19 June 2015, the IFT accepted Telmex's application.⁷¹
131. On 4 August 2015, Tele Fácil applied to the IFT for the conversion of its original public telecommunications network concession into a sole concession for commercial use.⁷²

⁶⁵ **C-053**, *Amparo* proceedings 1381/2015 filed by Tele Fácil before the First District Judge for Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications (7 May 2015).

⁶⁶ **C-053**, *Amparo* proceedings 1381/2015 filed by Tele Fácil before the First District Judge for Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications (7 May 2015), pp. 2-3; Joint Chronology of Events, p. 10.

⁶⁷ **C-059**, Document IFT/225/UC/DG-VER/3661/2015 issued by the Compliance Unit of the IFT (15 September 2015), pp. 1-2; **C-064**, Document IFT/225/UC/DG-VER/222/2016 issued by the Compliance Unit of the IFT (3 February 2016).

⁶⁸ **R-040**, IFT's Visit Order No. IFT/DF/DGV/562/2015 (8 June 2015); **R-050**, IFT's Visit Order No. IFT/DF/DGV/988/2015 (19 October 2015), p. 2.

⁶⁹ **R-053**, IFT's Visit Minutes (20 and 27 October 2015).

⁷⁰ **C-055**, Interconnection disagreement procedure submitted by Telmex before the IFT (16 June 2015), p. 3; Joint Chronology of Events, p. 10.

⁷¹ **C-061**, Resolution 127 (7 October 2015), p. 3, ¶ XII.

⁷² **C-057**, Request to transition to a sole concession for commercial use submitted by Tele Fácil before the IFT (4 August 2015); Joint Chronology of Events, p. 10.

132. On 5 August 2015, Tele Fácil filed before the IFT a complaint against Telmex for breach of Decree 77.⁷³
133. On 7 October 2015, the IFT issued Resolution 127 deciding Telmex's interconnection disagreement of 16 June 2015 in Telmex's favor.⁷⁴ According to the IFT, the original interconnection agreement between Telmex and Tele Fácil was null and void⁷⁵ because it was never signed by Telmex. The IFT also found that the applicable interconnection rate until 31 December 2015 was MXN 0.004179 (USD 0.000253).⁷⁶ Two IFT Commissioners, Ms. Adriana Sofía Labardini Inzunza and Mr. Adolfo Cuevas Teja dissented.⁷⁷
134. On 11 November 2015, Tele Fácil filed an *amparo* action against Resolution 127 on the ground that it had illegally left without effect Resolution 381 (*Amparo* proceedings 1694/2015).⁷⁸
135. On 22 January 2016, the First District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications dismissed Tele Fácil's *amparo* action of 7 May 2015 (*i.e.*, *Amparo* proceedings 1381/2015).⁷⁹ As a consequence, on 12 February 2016, Tele Fácil filed an appeal, which was also dismissed on 21 April 2016 by the First Court of Appeals in Administrative Matters Specialized in Economic

⁷³ **R-014**, Tele Fácil's complaint against Telmex for failure to comply with Decree 77 in accordance with Resolution 381 (5 August 2015); Joint Chronology of Events, p. 10.

⁷⁴ **C-061**, Resolution 127 (7 October 2015).

⁷⁵ **C-061**, Resolution 127 (7 October 2015), pp. 19-20. The two remaining arbitrators consider that since according to the IFT there was no signature evidencing the parties' consent, it would be more precise to state that according to the IFT, the original interconnection agreement between Telmex and Tele Fácil did not legally exist.

⁷⁶ **C-061**, Resolution 127 (7 October 2015), p. 35, First Decision.

⁷⁷ **C-061**, Resolution 127 (7 October 2015), p. 37. *See also* **C-060**, Stenographic record of the IFT's Plenary meeting held on 7 October 2015, pp. 40-41, 59-60.

⁷⁸ **C-062**, *Amparo* proceedings 1694/2015 filed by Tele Fácil before the Second District Judge for Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications (11 November 2015), p. 23; Joint Chronology of Events, p. 11.

⁷⁹ **C-063**, Decision of the First District Judge for Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications in *Amparo* proceedings 1381/2015 (22 January 2016), p. 18.

Competition, Broadcasting and Telecommunications on the ground it had been untimely filed.⁸⁰

136. Under Mexican law, the deadline to bring the appeal against the judgment in *Amparo* proceedings 1381/2015 expired on 11 February 2016.⁸¹ Claimant alleges that Tele Fácil's counsel on 11 February 2016 intended to file the appeal two minutes before midnight but that the security guard did not allow counsel to enter the courthouse.⁸²
137. On 11 March 2016, the Second District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications dismissed Telmex's *amparo* action (*i.e.*, *Amparo* proceedings 351/2014).⁸³ Later on, both Tele Fácil and Telmex appealed this decision but Tele Fácil withdrew the appeal on 13 July 2016.⁸⁴
138. Four days later, on 15 March 2016, the Second District Court for Administrative Matters also rejected Tele Fácil's challenge of Resolution 127 filed on 11 November 2015 (*i.e.*, *Amparo* proceedings 1694/2015).⁸⁵ Tele Fácil appealed that decision on 7 April 2016⁸⁶ but withdrew from such appeal on 13 July 2016.⁸⁷

⁸⁰ **C-075**, Decision of the First Court of Appeals in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications in Appeal 35/2016 (21 April 2016), p. 7; Joint Chronology of Events, p. 13.

⁸¹ **CL-003**, *Amparo* Statute (2 April 2013), Article 86.

⁸² Statement of Claim (7 November 2018), ¶¶ 269-70. *See also*, **C-004**, Bello First Statement, ¶¶ 139-142.

⁸³ **C-069**, Decision of the Second District Judge for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications in *Amparo* proceedings 351/2014 (11 March 2016); Joint Chronology of *Amparos*, p. 1.

⁸⁴ Joint Chronology of Events, pp. 12-13; Joint Chronology of *Amparos*, p. 1.

⁸⁵ **C-070**, Decision of the Second District Judge for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications in *Amparo* proceedings 1694/2015 (15 March 2016), p. 43; Joint Chronology of Events, p. 12.

⁸⁶ Joint Chronology of Events, p. 13; Joint Chronology of *Amparos*, p. 3.

⁸⁷ **C-076**, Withdrawal of appeal in *Amparo* proceedings 1694/2015 (13 July 2016).

139. On 29 March 2016, Tele Fácil's shareholders transferred their shares so Mr. Nelson would own 60% of the company and Mr. Blanco and Mr. Sacasa would own 20% each.⁸⁸
140. On 24 August 2016, the IFT's Compliance Unit initiated sanction proceedings against Tele Fácil for failure to comply with Resolution 127 and specifically, for failure to execute an interconnection agreement⁸⁹.
141. On 21 December 2016, the IFT approved Tele Fácil's request to transition the concession to a sole concession for commercial use.⁹⁰
142. On 3 April 2017, the IFT imposed on Tele Fácil a fine of MXN 2,571.94 for breaching Resolution 127.⁹¹
143. On 28 April 2017, Tele Fácil presented a written submission before the IFT objecting to this sanction and informed the IFT of the claim initiated by Tele Fácil against Mexico under Chapter Eleven of NAFTA.⁹²
144. On 25 March 2019, Mr. Blanco filed a motion to reopen his bankruptcy case⁹³ and on 18 April 2019, the U.S. Bankruptcy Court for the Southern District of Florida: (i) granted this motion; (ii) granted leave to amend his schedules to list his interest in Tele Fácil; and (iii) reappointed the bankruptcy estate's trustee.⁹⁴

⁸⁸ **C-072**, Public Deed No. 10,911 containing the Minutes of the Extraordinary Shareholders Meeting of Tele Fácil (29 March 2016), p. 7. *See also* **C-001**, Witness Statement of Joshua Dean Nelson (2 November 2017), ¶ 38; Joint Chronology of Events, p. 12.

⁸⁹ **C-077**, Decision of the IFT's Compliance Unit to initiate sanction proceedings against Tele Fácil (24 August 2016).

⁹⁰ **C-079**, Resolution by which the IFT authorized Tele Fácil to transition to a sole concession for commercial use (21 December 2016), p. 9, First Decision.

⁹¹ **C-081**, IFT's Resolution IFT.UC.DG-SAN.II.0168/2016 imposing sanctions to Tele Fácil (3 April 2017), pp. 99-100, First and Second Decision.

⁹² **C-082**, Letter from Tele Fácil to the IFT (28 April 2017), p. 4.

⁹³ **C-136**, Debtor's Motion to Reopen Case and for Authority to Prosecute his Minority Interest in Tele Fácil in an Impeding NAFTA Arbitration (25 March 2019).

⁹⁴ **C-137**, Order on Debtor's Motion to Reopen Case and Determination of Entitlement to Settlement Proceeds (18 April 2019).

145. On 25 April 2019, Mr. Blanco and the trustee entered into a Stipulation whereby Mr. Blanco would provide security for any potential remaining claims by creditors in exchange for the return of his shares on a retroactive basis as of the date of the filing of his initial bankruptcy petition.⁹⁵
146. On 29 May 2019, the U.S. Bankruptcy Court for the Southern District of Florida approved the Stipulation and incorporated the Stipulation’s operative provision whereby “[i]n exchange for [Mr. Blanco’s security], the Trustee hereby conveys the Estate’s interest, and the Debtor repurchases his interest, in Tele Fácil, *nunc pro tunc*, to the Petition Date [25 August 2011].”⁹⁶

IV. THE PARTIES’ CLAIMS AND REQUESTS FOR RELIEF

A. THE PARTIES’ CLAIMS AND REQUESTS FOR RELIEF ON THE MATTER OF JURISDICTION

(1) Respondent’s objection on jurisdiction and request for relief

147. Respondent objects the Tribunal’s jurisdiction to decide Claimant’s claim filed on behalf of Tele Fácil. According to Respondent, under NAFTA Article 1117, Claimant had to control Tele Fácil, direct or indirectly, when he submitted the claim to arbitration, but that was not the case.
148. On this basis, Respondent requested that the Tribunal:
- a) “Determine that Mr. Nelson has no procedural legitimacy to file a claim on behalf of Tele Fácil and, reject the claim submitted under Article 1117 in its entirety;
 - b) Order the Claimant to indemnify the Respondent for the costs incurred at this jurisdictional stage.”⁹⁷

⁹⁵ C-138, Stipulation and Settlement Agreement (25 April 2019).

⁹⁶ C-139, Order Granting Trustee’s Motion to Approve Stipulation to Compromise Controversy (29 May 2019), ¶ 5.

⁹⁷ Supplemented Jurisdictional Objection (19 October 2019), ¶ 83. *See also* Jurisdictional Objection (13 June 2019), ¶ 86.

(2) Claimant’s response on jurisdiction and request for relief

149. On the matter of jurisdiction, Claimant alleges that he has standing to claim under Article 1117 because he had legal control of Tele Fácil by the time he submitted the claim to arbitration and in any case, he also had *de facto* control of the company.

150. On this basis, Claimant requests the following relief, as regards jurisdiction:

- a) a decision that Respondent’s original and amended objection to jurisdiction is dismissed on all counts; and
- b) an award of costs in favor of Claimant in connection with its response to Respondent’s original and amended objection to jurisdiction.⁹⁸

B. PARTIES’ CLAIMS AND REQUESTS FOR RELIEF ON THE MERITS

(1) Claimant’s claims on the merits and request for relief

151. On the merits, Claimant alleges that Respondent expropriated his investments in breach of NAFTA Article 1110. Claimant groups his investments in two different types, namely (i) corporate rights, defined as the right to interconnect with Telmex and to earn revenues based on the interconnection rate of USD 0.00975; and (ii) shareholders rights, understood as his rights of share ownership and to a return on Tele Fácil’s profits.⁹⁹

152. According to Claimant, the measures that resulted in the expropriation are three: (i) the confirmation of criteria proceedings initiated by the Compliance Unit of the IFT that allegedly avoided the enforcement of Resolution 381; (ii) Decree 77 through which Resolution 381 was allegedly repudiated and; (iii) Resolution 127 that according to Claimant imposed a new rate detrimental to Tele Fácil but favorable to Telmex. These

⁹⁸ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶ 74. *See also* Response to Jurisdictional Objection (15 August 2019), ¶ 91.

⁹⁹ Statement of Claim (7 November 2017), ¶ 365.

three measures are seen by Claimant as a three-part scheme which deprived Claimant's investments of all economic viability.

153. Claimant also alleges that Respondent breached its obligation under NAFTA Article 1105 to grant investors a fair and equitable treatment. Claimant contends that both the IFT and the Mexican courts acted in an unfair and inequitable way towards his investment.
154. As far as the IFT is concerned, Claimant alleges that the confirmation of criteria requested by its Compliance Unit and the *Pleno's* Decree 77 were arbitrary and lacked due process. Claimant also adds that Decree 77 was discriminatory. Finally, Claimant refers to IFT's Resolution 127 as a "direct consequence of the IFT's arbitrary, secretive and discriminatory scheme to save Telmex from its deal with Tele Fácil" and "derivatively [also in breach of] Article 1105."¹⁰⁰
155. Regarding the Mexican courts, Claimant alleges that the Specialized Telecommunications Court that decided Tele Fácil's *amparo* action against Decree 77 acted with gross incompetence¹⁰¹ and that the Appellate Court unjustifiably denied Tele Fácil access to justice.¹⁰²
156. On this basis, Claimant requests the following relief:
 - a) A final declaration that Respondent has breached its obligations to Claimant under NAFTA;
 - b) An order that Respondent pays Claimant compensation for his losses that by the time the Statement of Claim was filed, were quantified at USD 472,148,929;
 - c) An order that Respondent pays Claimant pre-award compound interest, at a commercially reasonable rate or such other rate determined by the applicable law;

¹⁰⁰ Statement of Claim (7 November 2017), ¶ 597.

¹⁰¹ Statement of Claim (7 November 2017), ¶¶ 613-628.

¹⁰² Statement of Claim (7 November 2017), ¶¶ 629-640.

- d) An order that Respondent pays Claimant 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 Respondent pays the costs of this arbitration proceeding, including the costs of the Tribunal and the legal and other costs incurred by Claimant, 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.

(2) Respondent's defenses on the merits and request for relief

- 157. Respondent denies a breach of NAFTA Article 1110 for several reasons. Respondent contends that Claimant's alleged rights are not protected under NAFTA, Claimant can only challenge the measures taken by the IFT as a denial of justice under Article 1105 and, in any case, Claimant did not show a radical deprivation of the economic value of his rights.
- 158. Respondent also denies a breach of NAFTA Article 1105 for various reasons. First, Respondent's position is that Claimant can only challenge the IFT measures under a denial of justice claim. In any case, Respondent denies that the IFT acted in an arbitrary, secretive and discriminatory scheme to save Telmex from its deal with Tele Fácil and that its courts incurred in denial of justice.
- 159. On this basis, Respondent requests the Arbitral Tribunal to dismiss all of Claimant's claims, in their entirety, and order Claimant to indemnify Respondent for the arbitration costs, including travel expenses of its legal team, witnesses and experts.
- 160. The respective positions of the Parties in relation to the issues presented in the arbitration, both on matters of jurisdiction and merits, will be synthesized throughout this decision and as the issues raised are resolved by the Tribunal. The Tribunal wishes to emphasize that it has considered all of the Parties' arguments, both written and oral. The fact that an argument is not expressly summarized in the synthesis of the Parties' positions should not be considered as an indication that the Tribunal has not considered such argument.

V. JURISDICTION

A. THE PARTIES' POSITIONS

(1) Respondent's Position

161. Respondent objects the Tribunal's jurisdiction to decide the claim submitted by Claimant on behalf of Tele Fácil¹⁰³ under NAFTA Article 1117. Respondent understands the word "owns" in NAFTA Article 1117 as "full ownership"¹⁰⁴ and the word "controls" as only covering "legal control of the enterprise",¹⁰⁵ meaning that *de facto* control is excluded. As further explained below, Respondent's position is that Claimant neither owned nor legally controlled Tele Fácil at the time the arbitration claim was filed and therefore lacked standing to sue Mexico. Respondent also alleges that assuming the word "controls" also covers *de facto* control, Claimant did not have it either.¹⁰⁶
162. For Respondent, "full ownership" of an enterprise means having 100% of its shares.¹⁰⁷ Since Claimant did not own 100% of the shares in Tele Fácil when the arbitration claim was submitted, Respondent's position is that under NAFTA Article 1117 Claimant did not have "full ownership" of Tele Fácil.¹⁰⁸
163. Further, for Respondent "legal control of the enterprise" means legal corporate control of a company under the *lex situs* (i.e., Mexican law in this case). Therefore, if Article 178 of the Mexican General Law of Mercantile Companies ("GLMC") states that legal control of an anonymous corporation — such as Tele Fácil — resides in the General Shareholders Meeting,¹⁰⁹ whoever controlled the General Shareholders Meeting of Tele Fácil at the

¹⁰³ Jurisdictional Objection (13 June 2019), ¶ 1.

¹⁰⁴ Jurisdictional Objection (13 June 2019), ¶ 67. *See also*, Supplemented Jurisdictional Objection (19 October 2019), ¶¶ 19-20.

¹⁰⁵ Jurisdictional Objection (13 June 2019), ¶ 71; Supplemented Jurisdictional Objection (19 October 2019), ¶ 64.

¹⁰⁶ Jurisdictional Objection (13 June 2019), ¶¶ 3, 68; Supplemented Jurisdictional Objection (19 October 2019), ¶ 82.

¹⁰⁷ Jurisdictional Objection (13 June 2019), ¶ 67.

¹⁰⁸ Jurisdictional Objection (13 June 2019), ¶ 67.

¹⁰⁹ Jurisdictional Objection (13 June 2019), ¶¶ 71-75.

time the arbitration claim was submitted had control of the enterprise under NAFTA Article 1117. Mr. Nelson, however, did not control Tele Fácil's General Shareholders Meeting at the time the arbitration claim was submitted because he was a minority shareholder — with only 40% of the company's shares —.¹¹⁰

164. Although in the extraordinary shareholders meeting of 29 March 2016, Messrs. Blanco, Nelson and Sacasa intended to approve a corporate restructuring to increase Mr. Nelson's shareholding from 40% to 60% — what would have caused Mr. Nelson to have legal control of the company —, Respondent states that this meeting was null and of no legal effect.¹¹¹ According to Respondent, Mr. Blanco's bankruptcy petition of 25 August 2011 caused him to lose his shares and, as a result, since that day, he lost his right to vote in the shareholders meetings.¹¹²
165. Respondent obtained an expert report from Mexican legal expert Mr. Rodrigo Buj to address whether the increase of Mr. Nelson's shares on 29 March 2016 was valid under Mexican law. Buj's conclusion is that it was not. *First*, the procedure provided for in the Eleventh Clause of Tele Fácil's by-laws establishes that shares of restricted circulation can only be transferred with the shareholders' approval.¹¹³ However, the Third Clause of the Transfer of Shares Contract shows that the approval was granted by the Board of Directors, not the shareholders.¹¹⁴ *Second*, GLMC Articles 186, 187 and 188 require that prior to an ordinary shareholder meeting, a summon be published 15 days in advance. This requirement does not apply only when all shareholders are present (*i.e.*, a “totalitarian meeting”). On 29 March 2016, Mr. Blanco's bankruptcy estate was Tele Fácil's shareholder, not Mr. Blanco himself. Therefore, the 29 March 2016 shareholders meeting was not a meeting in which all shareholders were present and consequently, a prior

¹¹⁰ Jurisdictional Objection (13 June 2019), ¶ 53.

¹¹¹ Jurisdictional Objection (13 June 2019), ¶¶ 6, 41, 44, 47-49, 52; Supplemented Jurisdictional Objection (19 October 2019), ¶¶ 44-49.

¹¹² Jurisdictional Objection (13 June 2019), ¶ 6. *See also*, Supplemented Jurisdictional Objection (19 October 2019), ¶ 45.

¹¹³ Jurisdictional Objection (13 June 2019), ¶ 48.

¹¹⁴ Jurisdictional Objection (13 June 2019), ¶ 49.

summon would have been necessary.¹¹⁵ In his fourth report, Mr. Buj underlines an additional ground on which the transfer of shares should be deemed as null and of no legal effect. According to Mr. Buj's fourth report, Tele Fácil's Shareholders' Registry Corporate Book does not demonstrate that the notification requirements set forth in the Eleventh Clause of Tele Fácil's by-laws were complied with.¹¹⁶

166. As stated above, Respondent argues that the term "controls" in NAFTA Article 1117 does not encompass *de facto* control, *inter alia*, because the term is "highly subjective" and "introduces uncertainty and ambiguity."¹¹⁷ However, assuming that this word does encompass *de facto* control, Respondent submits that Claimant did not have such type of control over Tele Fácil at the time the arbitration claim was submitted.¹¹⁸ Respondent acknowledges that the tribunal's decision in *Thunderbird v. Mexico* ("**Thunderbird**"),¹¹⁹ in which Claimant relied, stated that a showing of *de facto* control was sufficient for the purposes of NAFTA Article 1117.¹²⁰ However, according to Respondent, the facts upon which *de facto* control was found in *Thunderbird* and the requisite evidentiary threshold applied in that case (*i.e.*, "beyond any reasonable doubt") are absent in this case.¹²¹ According to Respondent, the record shows that Mr. Nelson did not exercise *de facto* control because: (i) his responsibilities in Tele Fácil were limited to providing initial funding to the company, providing technical and engineering support and providing useful

¹¹⁵ Jurisdictional Objection (13 June 2019), ¶ 52.

¹¹⁶ According to Mr. Buj and Respondent, Clause 11 of Tele Fácil's by-laws established that, prior to the transfer of shares, the shareholders had to notify the Board of Directors and the Board of Directors had to notify the Secretariat of Communications and Transportation. *See* Supplemented Jurisdictional Objection (19 October 2019), ¶¶ 46-47.

¹¹⁷ Supplemented Jurisdictional Objection (19 October 2019), ¶ 66.

¹¹⁸ Jurisdictional Objection (13 June 2019), ¶ 16.

¹¹⁹ **CL-049**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA) (Award, 26 Jan. 2006) (van den Berg, Portal Ariosa, Wälde) ("**Thunderbird v. Mexico**").

¹²⁰ Jurisdictional Objection (13 June 2019), ¶¶ 78-79.

¹²¹ Jurisdictional Objection (13 June 2019), ¶ 81; Supplemented Jurisdictional Objection (19 October 2019), ¶¶ 75-76.

technology;¹²² and (ii) he did not have day-to-day “managerial control”¹²³ or an extensive control over the operations of Tele Fácil.¹²⁴

167. Respondent holds that the U.S. bankruptcy proceedings had automatic effects in Mexico. Therefore, it is Respondent’s position that (i) the appointed trustee in the U.S. bankruptcy proceedings did not take legal action to dispose of the shares in Tele Fácil because Mr. Blanco did not disclose the existence of the shares, not because the bankruptcy proceedings did not have automatic effects in Mexico;¹²⁵ (ii) Article 13 of the Mexican Federal Civil Code states that legal situations validly created in a foreign State must be recognized in Mexico, without having to initiate judicial recognition proceedings;¹²⁶ and (iii) in any case, Title Twelve of the Mexican Law on Commercial Bankruptcy does not purport to recognize foreign bankruptcy proceedings in Mexico but rather to solicit a “Mexican court [to] act in cooperation with the foreign court.”¹²⁷
168. Respondent, based in Mr. Buj’s opinion, also stresses that the Shareholders’ Registry Corporate Book did not determine the ownership of the shares. Accepting the contrary “would imply granting undue protection to a person who, by their omission, prevented the corresponding entries in the Shareholder’s Book and gave legal effect to acts performed by such person as a shareholder of Tele Fácil without having that status on the date on which those acts were carried out”.¹²⁸

¹²² Jurisdictional Objection (13 June 2019), ¶ 16.

¹²³ Jurisdictional Objection (13 June 2019), ¶ 17. *See also* Jurisdictional Objection (13 June 2019), ¶ 21 (stating that “Mr. Nelson confirmed that he did not ‘make or send’ Tele Fácil’s Concession Application”); ¶ 23 (stating that “Mr. Nelson did not participate in negotiations between Tele Fácil and Telmex”). Jurisdictional Objection (13 June 2019), ¶¶ 84-85.

¹²⁴ Jurisdictional Objection (13 June 2019), ¶¶ 38-40 (explaining that in 2013, Mr. Nelson made multiple requests to change the ownership structure of Tele Fácil but such requests did not materialize until two years and a half later, in March 2016).

¹²⁵ Supplemented Jurisdictional Objection (19 October 2019), ¶ 28.

¹²⁶ Supplemented Jurisdictional Objection (19 October 2019), ¶ 29.

¹²⁷ Supplemented Jurisdictional Objection (19 October 2019), ¶ 30.

¹²⁸ Supplemented Jurisdictional Objection (19 October 2019), ¶ 43.

169. With respect to Claimant’s *nunc pro tunc* argument, Respondent asserts that it is irrelevant.¹²⁹ According to Respondent, “the question for this Tribunal is not who should be considered today as the owner of the shares, but who was the owner of those shares when the NOA was filed and when the Totalitarian Assembly took place.”¹³⁰ Respondent also claims that the *Eurogas* case brought up by Claimant “differs materially” from the present case.¹³¹

(2) Claimant’s Position

170. Claimant considers that Respondent’s objection is unfounded¹³² because the word “controls” in NAFTA Article 1117 includes both, legal and *de facto* control¹³³ and under this provision Mr. Nelson could file an arbitration claim on behalf of Tele Fácil because he had both: (i) legal; and (ii) *de facto* control of Tele Fácil.¹³⁴

171. According to Claimant, under the by-laws of Tele Fácil and Mexican corporate law, Mr. Nelson had legal control of Tele Fácil because once Mr. Blanco filed his bankruptcy petition he did not cease to: (i) be a shareholder in Tele Fácil and, (ii) have the authority to approve the share transfer from Mr. Sacasa to Mr. Nelson.¹³⁵ Claimant’s position is based on three main arguments: (i) that the forfeiture of Mr. Blanco’s shares in the U.S. bankruptcy proceedings did not automatically translate into a denial of Mr. Blanco’s standing as a shareholder in Tele Fácil; (ii) that the 2016 share transfer was valid under Mexican law and Tele Fácil’s by-laws; and (iii) in any event, Mr. Blanco’s share ownership

¹²⁹ Supplemented Jurisdictional Objection (19 October 2019), ¶¶ 50-63.

¹³⁰ Supplemented Jurisdictional Objection (19 October 2019), ¶ 54 (émphasis in original).

¹³¹ Supplemented Jurisdictional Objection (19 October 2019), ¶ 61.

¹³² Response to Jurisdictional Objection (15 August 2019), ¶ 1.

¹³³ Response to Jurisdictional Objection (15 August 2019), ¶¶ 54-55.

¹³⁴ Response to Jurisdictional Objection (15 August 2019), ¶ 26.

¹³⁵ Response to Jurisdictional Objection (15 August 2019), ¶¶ 12, 30.

was restored by way of a *nunc pro tunc* order of a U.S. court, thus any possible defect in the 2016 share transfer was repaired.¹³⁶

172. According to Claimant, Mr. Blanco's U.S. bankruptcy proceedings did not have automatic effects in Mexico.¹³⁷ Relying in his legal expert, Mr. Oscar Vasquez, Claimant explains that transnational bankruptcy matters are governed by Article 292 of the Mexican Law of Commercial Bankruptcy, providing for specific judicial proceedings on recognition, which should have been carried out to cause Mr. Blanco to lose his status as a shareholder of Tele Fácil, as a matter of Mexican law.¹³⁸
173. Moreover, Claimant alleges that the transfer of shares from Mr. Sacasa to Claimant was valid under Mexican law and Tele Fácil's by-laws. Claimant explains that because the results of Mr. Blanco's bankruptcy proceedings were never implemented into the Mexican legal system, the question of Mr. Blanco's status as a shareholder in Tele Fácil is governed exclusively by Mexican law. Applying the GLMC to the facts, Claimant alleges that there were no defects in the process by which Claimant became the majority shareholder of Tele Fácil and acquired its legal control because on 29 March 2016 (i) Mr. Blanco was registered as the owner of shares in Tele Fácil' Shareholders' Registry Corporate Book; (ii) Mr. Blanco possessed the corporate rights allowing him to vote in favor of that transfer, and (iii) since all of Tele Fácil's shareholders were present the requirement of the prior summon was unnecessary. Further, even if the Tribunal were to accept that Mr. Blanco's U.S. bankruptcy had an effect in Mexico, under Mexican law, company acts are not void simply because they fail to comport with required formalities but rather voidable; for the act to be void a court must determine that it fails to comply with the pertinent requirements.¹³⁹ In its response on jurisdiction, Claimant also addressed the alleged fourth ground on which the transfer of shares is not valid under Mexican law (*i.e.*,

¹³⁶ Response to Jurisdictional Objection (15 August 2019), ¶ 30.

¹³⁷ Response to Jurisdictional Objection (15 August 2019), ¶¶ 31-37.

¹³⁸ Response to Jurisdictional Objection (15 August 2019), ¶ 32. *See also* Response to Supplemented Jurisdictional Objection (27 November 2019), ¶¶ 27-39.

¹³⁹ Response to Jurisdictional Objection (15 August 2019), ¶ 41. *See also* Response to Supplemented Jurisdictional Objection (27 November 2019), ¶¶ 40-51.

that the notification requirements set forth in the Eleventh Clause of Tele Fácil’s by-laws were not complied with), pointing out Tele Fácil’s Notice of Restructuring and arguing that the transfer of shares was “duly and timely” notified to the IFT.¹⁴⁰

174. In any event, Claimant states that by order of a U.S. bankruptcy judge, Mr. Blanco now owns his shares in Tele Fácil *nunc pro tunc* (i.e., as of the date of his original bankruptcy petition). This means that as a matter of U.S. law, Mr. Blanco’s ownership of Tele Fácil’s shares has existed uninterruptedly and in its entirety since their issuance on 7 January 2010. Thus, the transfer of shares to Claimant is unassailable.¹⁴¹ Based on the *Eurogas v. Slovakia* decision, Claimant maintains that the legal effect of a U.S. bankruptcy order restoring ownership to a debtor *nunc pro tunc* has been recognized in investor-State arbitration.
175. Finally, Claimant asserts that the facts in this case also demonstrate that Mr. Nelson exercised *de facto* control over Tele Fácil at all relevant times during his dispute with Mexico. To justify its position, Claimant first explains why the word “controls” in NAFTA Article 1117 can be interpreted to include *de facto* control. According to Claimant, under the principles in the Vienna Convention on the Law of Treaties (“VCLT”), the term “control” includes *de facto* control because: (i) no textual evidence in NAFTA supports a restricted and specialized interpretation of the word “control” and therefore it should be interpreted based on its ordinary meaning; (ii) context also confirms that it should be broadly interpreted; (iii) tribunal practice confirms that a showing of *de facto* control is sufficient (citing *Thunderbird*); (iv) moreover, the term “controlled” in Article 25 of the ICSID Convention has been interpreted to mean “both actual exercise of powers or direction and the rights arising from the ownership of shares” and; (v) NAFTA Parties have not expressed their agreement with Respondent’s interpretation.¹⁴²
176. Then, Claimant refers to Respondent’s assertion that *de facto* control must be proven beyond a reasonable doubt and states that: (i) there is no provision in NAFTA indicating

¹⁴⁰ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶ 51.

¹⁴¹ Response to Jurisdictional Objection (15 August 2019), ¶¶ 44-53.

¹⁴² Response to Jurisdictional Objection (15 August 2019), ¶¶ 55-68; Response to Supplemented Jurisdictional Objection (27 November 2019), ¶¶ 54-62.

that this standard applies; and (ii) the UNCITRAL Arbitration Rules say nothing about the strictness of that burden.

177. Finally, Claimant refers to the evidence to show that he exercised *de facto* control over Tele Fácil at all relevant times.¹⁴³ Based on the definition of *de facto* control in *Thunderbird* (*i.e.*, “the ability to exercise significant influence on the decision-making” and being “the consistent driving force behind [the enterprise’s] business”),¹⁴⁴ Claimant sustains that the facts in this case meet such standard because: (i) not only Claimant was the sole financier of Tele Fácil but in that role, he also provided capital on an iterative basis which means that Tele Fácil could not act before Claimant’s funds were sent; (ii) Mr. Nelson was the exclusive provider of all critical technology for the venture, which means that from a technical perspective, Tele Fácil could not function without his equipment and know-how. According to Claimant, the fact that the transfer of shares did not take place in 2013, when Claimant requested it, does not mean that there was no *de facto* control; during the Hearing it was demonstrated that the transfer of shares was a simple formality that did not affect Mr. Nelson’s interests. Claimant also alleges that the fact of not being in the day-to-day management of the company did not affect his *de facto* control.¹⁴⁵
178. Claimant argues that the argument of Respondent’s expert, Mr. Buj, to the effect that U.S. bankruptcy proceedings had automatic effects in Mexico under Article 13 of the Mexican Civil Code is disproved by Claimant’s expert, Mr. Vásquez.¹⁴⁶ Claimant criticizes as a “false counterfactual” Respondent’s premise that if Mr. Blanco had disclosed his Tele Fácil shares in the bankruptcy, such shares would have been disposed of by the bankruptcy estate’s trustee.¹⁴⁷ Based on his U.S. bankruptcy expert, Ms. Cyganowski, Claimant submits that by the time the bankruptcy petition was filed “Tele Fácil was nothing more

¹⁴³ Response to Jurisdictional Objection (15 August 2019), ¶ 65.

¹⁴⁴ **CL-049**, *Thunderbird v. Mexico*, ¶ 107.

¹⁴⁵ Response to Jurisdictional Objection (15 August 2019), ¶ 82; Response to Supplemented Jurisdictional Objection (27 November 2019), ¶¶ 63-72.

¹⁴⁶ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶ 11.

¹⁴⁷ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶¶ 13-18.

than a paper company and Mr. Blanco's shares in the company lacked any value"¹⁴⁸ therefore, "Mr. Blanco's trustee would not have taken the costly steps of selling off his Tele Fácil shares which had no value to the bankruptcy estate."¹⁴⁹ Moreover, Claimant also criticizes Respondent's position on the *nunc pro tunc* order stating that "Respondent wants to have it both ways" because "when the results of the U.S. bankruptcy appear to be good for Respondent's case [...] Respondent embraces the alleged automatic effect of the process" but "when the results are bad [...] Respondent denies any automatic effect of the bankruptcy in Mexico."¹⁵⁰

B. THE TRIBUNAL'S ANALYSIS

179. The issue on jurisdiction before this Tribunal is whether under NAFTA Article 1117 Mr. Nelson could file a claim on behalf of Tele Fácil. As stated above, Respondent's position is that under NAFTA Article 1117 Mr. Nelson does not have standing to assert a claim on behalf of this company. On the contrary, Claimant asserts that he does.

180. The Tribunal will first review NAFTA Article 1117, particularly as to the meaning and scope of the term "controls" and subsequently, based on such meaning and scope, the Tribunal will determine whether Mr. Nelson actually exercised control over Tele Fácil.

(1) Meaning and scope of the word "controls" in Article 1117

181. NAFTA Article 1117(1) in its relevant part provides as follows:

Claim by an Investor of a Party on Behalf of an Enterprise

1. An 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:

¹⁴⁸ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶ 16.

¹⁴⁹ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶ 18.

¹⁵⁰ Response to Supplemented Jurisdictional Objection (27 November 2019), ¶ 20.

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

182. As stated above, the Parties dispute the meaning and scope of the word “controls” in NAFTA Article 1117(1).
183. To determine the meaning and scope of the word “controls,” the Tribunal will rely on the general rule of interpretation provided for in VCLT Article 31. The Parties seem to agree with this approach and both referred to this rule.¹⁵¹
184. According to VCLT Article 31(1) “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵²
185. The Tribunal views VCLT Article 31 as a set of elements for interpretation that are to be appreciated in the context and circumstances of the particular case. This implies that Article 31 as a whole—including all of its paragraphs and not limited to the standpoint of Article 31(1)—is an integral single rule for interpretation of treaties. This is underscored by the fact that Article 31 is entitled the “General Rule [in the singular] of Interpretation”.
186. This means that the interpreter shall consider the ordinary meaning of the words, in their context, and considering the object and purpose of the treaty. Hence, the starting point of interpretation is the elucidation of the meaning of the text. In this case, the Parties seem to accept, and the Tribunal agrees, that dictionary meanings are of assistance in this process. If the meaning of the text does not reveal a single meaning, the Tribunal must then consider the context of the treaty, its object and purpose.

¹⁵¹ See *i.e.*, Jurisdictional Objection (13 June 2019), ¶ 62; Response to Jurisdictional Objection (15 August 2019), ¶ 56.

¹⁵² VCLT, Article 31(1).

187. The Parties agree that the word “controls” encompasses legal or corporate control. However, NAFTA does not define this term. Thus, the Tribunal may resort to the definitions found in dictionaries.

188. The Black’s Law Dictionary defines “corporate control” as:

1. Ownership of more than 50% of the shares in a corporation. – Also termed effective control; working control.

*2. The power to vote enough of the shares in a corporation to determine the outcome of matters that the shareholders vote on.*¹⁵³

189. To determine whether in this case Claimant had legal control of Tele Fácil, the Tribunal will refer to the definition of “corporate control” in the Black’s Law Dictionary. However, that is not enough.

190. Based on this definition and other definitions of “control” according to English and Spanish language dictionaries, Respondent sustains that the meaning of corporate control must be determined considering the *lex situs* (i.e., in this case Mexican law).¹⁵⁴

191. The Tribunal agrees with Respondent in that, in the case of a company such as Tele Fácil, the determination of whether or not Claimant has “corporate control” of the corporation is also a matter of Mexican law.

192. According to Respondent, under Mexican law, “legal corporate control” of a company refers to “the investor’s power to decide on substantive matters, such as: the appointment and removal of the company’s directors and officers, the approval and amendment of the company’s by-laws, the transfer of shares or admission of new partners, or the dissolution of the company.”¹⁵⁵

¹⁵³ **R-92**, Black’s Law Dictionary, 10th Edition for the iPhone and iPad, version 1.4; Thomson Reuters (2014).

¹⁵⁴ Jurisdictional Objection (13 June 2019), ¶¶ 68-71.

¹⁵⁵ Jurisdictional Objection (13 June 2019), ¶ 71.

193. For the reasons explained below, the Tribunal concludes that under Mexican law Mr. Nelson has, and had at the time of submitting the arbitration claim, corporate control of Tele Fácil and therefore had control of Tele Fácil for purposes of NAFTA Article 1117.
194. At this stage, it is important to highlight that in addition to legal control, Claimant maintains that the word “controls” in Article 1117 also encompasses situations of *de facto* control. Claimant cites to *International Thunderbird v. Mexico* in support of his interpretation. However, based on the facts and the evidence submitted by the Parties and considering the circumstances of the instant case, the Tribunal finds that it is not necessary to enter into the debate as to whether the term “control” is limited to corporate control or may be extended to include *de facto* control.

(2) Did Mr. Nelson legally control Tele Fácil for purposes of NAFTA Article 1117?

195. The agreement between Claimant, Mr. Sacasa and Mr. Blanco, contained in the Memorandum of Understanding, dated 20 July 2009, outlined the parties’ “understanding of the structure of ownership of the proposed Mexican Telecom Project [which turned to be Tele Fácil] and the scope of responsibilities by each of the individuals/groups which are party to the Project.”¹⁵⁶ Acknowledging that Mexican law in force at that time did not allow Claimant a majority shareholding of the project, the parties in any case agreed that Claimant “will have a majority interest as well as majority control equal to [...] 60%” and that Mr. Sacasa and Mr. Blanco could not “sell their shares without offering [Claimant] the Right of First Refusal.”¹⁵⁷
196. Under Mexican law, the Memorandum of Understanding is a shareholder’s agreement binding for the signatory parties.¹⁵⁸

¹⁵⁶ C-013, Memorandum of Understanding (20 July 2009), p. 1.

¹⁵⁷ C-013, Memorandum of Understanding (20 July 2009), p. 1.

¹⁵⁸ C-004, Bello First Statement (6 November 2017), ¶ 18.

197. Based on the definitions of corporate control, both under the Black’s Law Dictionary and the definition of corporate control provided by Respondent, Claimant had corporate control of Tele Fácil according to the Memorandum of Understanding of 20 July 2009. The Memorandum of Understanding clearly stated that Mr. Nelson had “majority interest as well as majority control equal to [...] 60%” of Tele Fácil.¹⁵⁹ This means that he had the power to vote enough of the shares to determine the outcome of matters that the shareholders vote on. This also means that he had power to decide on substantive matters, such as the appointment and removal of the company’s directors and officers, or the approval and amendment of the company’s by-laws. A clear manifestation of this is that the Memorandum of Understanding explicitly said that the transfer of shares or admission of new partners required Mr. Nelson’s approval since he had the Right of Refusal.¹⁶⁰
198. Moreover, it is undisputed by the Parties that majority ownership is a manner of legal control for purposes of NAFTA Article 1117.¹⁶¹ Claimant’s position is that on 29 March 2016, as a result of Mr. Sacasa’s transfer of shares, he gained majority ownership of Tele Fácil (with 60% of the shares).¹⁶² Respondent’s position is that Mr. Sacasa’s transfer of shares to Mr. Nelson is invalid and of no legal effect, which would mean that Mr. Nelson’s never became the majority owner of Tele Fácil.¹⁶³
199. According to Respondent, Mr. Sacasa’s transfer of shares is invalid because the shareholders’ meeting in which the transfer was approved does not comply with certain legal requirements under Mexican law, mainly derived from the fact that under U.S. law, Mr. Blanco ceased to be a shareholder of Tele Fácil when he filed for bankruptcy, on 25 August 2011.
200. This Tribunal is not convinced that the transfer of shares is invalid. *First*, Respondent failed to prove that Mr. Blanco’s bankruptcy petition in the U.S. had automatic legal effects in

¹⁵⁹ C-013, Memorandum of Understanding (20 July 2009), p. 1.

¹⁶⁰ C-013, Memorandum of Understanding (20 July 2009), p. 1.

¹⁶¹ See ¶¶ 163, 173 above.

¹⁶² See ¶ 173 above.

¹⁶³ See ¶¶ 164-165 above.

Mexico. Respondent referred to Article 13 of the Mexican Federal Civil Code to argue that “legal situations validly created in a foreign State must be recognized in Mexico”¹⁶⁴ without providing further analysis or interpretation. As shown by Claimant, Article 8 of the Mexican Law of Commercial Bankruptcy preempts the application of Article 13 because the Mexican Law of Commercial Bankruptcy specifically regulates the recognition of foreign bankruptcy proceedings.¹⁶⁵ *Second*, even if the approval of the transfer of shares lacked certain legal requirements under Mexican law, such approval would be at most voidable, not invalid *per se*.¹⁶⁶ This means that the nullity of the transfer would have to be declared by a court and therefore, that shareholders’ approval would be “effective until a judge declares the corresponding nullity.”¹⁶⁷ *Third*, even on Respondent’s case, if the initial order of the U.S. Bankruptcy Court had automatic effects in Mexico, then the *nunc pro tunc* order from the same court had also automatic effects, which would mean that Mr. Blanco owns his shares in Tele Fácil uninterruptedly and in its entirety since their issuance, on 7 January 2010.¹⁶⁸

201. Under these circumstances, the Tribunal is not persuaded that the share transfer is null and void. Therefore, the Tribunal concludes that Mr. Nelson acquired majority ownership of Tele Fácil on 29 March 2016 and since that date, had legal control for purposes of NAFTA Article 1117.
202. The evidence on the record as to corporate control resulting from the ownership of the majority and the decisive vote of the shareholders of Tele Fácil is more than sufficient to conclude that Mr. Nelson had legal control of Tele Fácil. But, the Tribunal notes that, in addition, Mr. Nelson was the sole financier of Tele Fácil during the critical start-up period, allowing the company, *inter alia*, to hire staff, lawyers and accountants, to obtain a

¹⁶⁴ Supplemented Jurisdictional Objection (19 October 2019), ¶ 29.

¹⁶⁵ **C-148**, Second Expert Report of Oscar Vasquez del Mercado Cordero (27 November 2019) (“**Vasquez Second Report**”), ¶¶ 40-46.

¹⁶⁶ **C-143**, First Expert Report of Oscar Vasquez del Mercado Cordero (13 August 2019) (“**Vasquez First Report**”), ¶¶ 59-64; **C-148**, Vasquez Second Report (27 November 2019), ¶ 73.

¹⁶⁷ **C-143**, Vasquez First Report (13 August 2019), ¶ 63.

¹⁶⁸ **C-147**, Supplemental Expert Report by Melanie L. Cyganowski (Ret.) (26 November 2016), ¶ 14.

telecommunications concession, pay the rent and litigate Tele Fácil's interests.¹⁶⁹ Mr. Nelson's funding was provided on an iterative basis,¹⁷⁰ which could permit Mr. Nelson to control the money spending and correlatively the company's actions. Moreover, Mr. Nelson was the sole provider of crucial technology for Tele Fácil's corporate purpose (*v. gr.*, Genband softswitch and related items, A/C power equipment, Cambium Network wireless broadband Point-to-Multipoint radios and related equipment, Ethernet cabling, IP network equipment, servers, equipment racks, and various other tools and wiring).¹⁷¹

203. In conclusion, the Tribunal finds that, under any standard, Mr. Nelson exercised legal (corporate) and *de facto* control over Tele Fácil at all relevant times. Consequently, Mr. Nelson had standing to file a claim on behalf of Tele Fácil.

VI. LIABILITY

A. DID RESPONDENT BREACH NAFTA ARTICLE 1110?

(1) The Parties' Positions

a. Claimant's Position

204. Claimant contends that Respondent unlawfully expropriated Claimant's investments in breach of NAFTA Article 1110.¹⁷²
205. According to Claimant, the Tribunal must follow a three-prong test to determine whether there was an unlawful expropriation in this case.¹⁷³ The three prongs are (i) whether there is an investment capable of being expropriated; (ii) whether that investment has in fact

¹⁶⁹ **C-001**, Witness Statement of Joshua Dean Nelson (2 November 2017), ¶¶ 59-63.

¹⁷⁰ **C-141**, List of wire transfers made by Mr. Nelson (produced in 22 April 2017 by Miguel Sacasa).

¹⁷¹ Tr. Day 2 325:8-14.

¹⁷² Statement of Claim (7 November 2017), ¶ 342.

¹⁷³ Statement of Claim (7 November 2017), ¶ 345.

been expropriated — which in turn requires applying the substantial deprivation test based on the severity of the economic impact and its duration¹⁷⁴ — and; (iii) whether the conditions set forth in Article 1110(1)(b)-(d) have been satisfied. For Claimant, the test is satisfied in this case.

206. *First*, Claimant contends that he had investments capable of being expropriated.¹⁷⁵ The investments were: (i) the right to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017), which were established through Tele Fácil’s contract with Telmex, and administratively confirmed by the IFT;¹⁷⁶ and (ii) his rights of share ownership and to a return on Tele Fácil’s profits.¹⁷⁷
207. *Second*, Claimant alleges that by repudiating Tele Fácil’s interconnection rights with Telmex, the IFT destroyed Tele Fácil’s ability to operate in Mexico and Claimant’s ability to earn a commercial return on his investment.¹⁷⁸ According to Claimant, Respondent’s expropriation was implemented in a three-plot scheme: (i) the IFT’s refusal to enforce Resolution 381;¹⁷⁹ (ii) the repudiation of Resolution 381;¹⁸⁰ and (iii) IFT’s Resolution 127 which established a new interconnection rate between Telmex and Tele Fácil.¹⁸¹ In Claimant’s words, “[w]ithout 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.”¹⁸² Moreover according to Claimant, the economic impact was permanent because Tele Fácil’s window of opportunity to earn meaningful profits was time-limited (until the end of 2017) by the terms of the

¹⁷⁴ Statement of Claim (7 November 2017), ¶¶ 367-370.

¹⁷⁵ Statement of Claim (7 November 2017), ¶ 346.

¹⁷⁶ Statement of Claim (7 November 2017), ¶ 350.

¹⁷⁷ Statement of Claim (7 November 2017), ¶ 365.

¹⁷⁸ Statement of Claim (7 November 2017), ¶ 346.

¹⁷⁹ Statement of Claim (7 November 2017), ¶¶ 378-382.

¹⁸⁰ Statement of Claim (7 November 2017), ¶¶ 383-397.

¹⁸¹ Statement of Claim (7 November 2017), ¶¶ 398-400.

¹⁸² Statement of Claim (7 November 2017), ¶ 408.

interconnection, and therefore, each day that the IFT refused to enforce Resolution 381 was “a day of high revenues for Tele Fácil that was forever lost.”¹⁸³

208. *Third*, Claimant states that the IFT’s expropriation was unlawful because it failed to pay compensation to Claimant, discriminatorily targeted Tele Fácil, proceeded without due process, and contradicted the public interest.¹⁸⁴ Claimant also adds that in this case there is no regulation of general application in play, which means that there should not be any questioning “about where the line falls between unlawful expropriation and legitimate regulation.”¹⁸⁵

209. In his Reply, Claimant addressed Respondent’s argument denying the existence of an expropriation. *First*, Claimant explained that Tele Fácil’s rights under the interconnection agreement clearly constitute an investment under NAFTA Article 1139. According to Claimant, these rights qualify either as “intangible property”¹⁸⁶ or as “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory.”¹⁸⁷ Moreover, Claimant’s position is that the definition of investment in NAFTA Article 1139 does not exclude rights running between an investor and a third party.¹⁸⁸ Nothing in this provision can be reasonably interpreted as excluding agreements that create rights or interests between private parties¹⁸⁹ and other investments tribunals have already rejected the premise that contracts between private parties are not investments.¹⁹⁰ Also, based on the text of NAFTA Article 1110 and other international

¹⁸³ Statement of Claim (7 November 2017), ¶¶ 412-413.

¹⁸⁴ Statement of Claim (7 November 2017), ¶¶ 346; 417-429.

¹⁸⁵ Statement of Claim (7 November 2017), ¶¶ 430-434.

¹⁸⁶ Reply (5 June 2018), ¶¶ 177-182.

¹⁸⁷ Reply (5 June 2018), ¶¶ 183-185.

¹⁸⁸ Reply (5 June 2018), ¶¶ 186-197.

¹⁸⁹ Reply (5 June 2018), ¶¶ 188-192.

¹⁹⁰ Reply (5 June 2018), ¶¶ 193-197.

courts and tribunals' decisions, Claimant alleges that rights between private parties can also be expropriated.¹⁹¹

210. *Second*, Claimant disputes Respondent's argument that Claimant cannot allege an unlawful expropriation of Tele Fácil's assets. Claimant cites to NAFTA Article 1117, which entitles an investor to claim on behalf of an enterprise of another Party that the investor owns or controls directly or indirectly, and claims that this provision's requirements are met in this case.¹⁹² Claimant also refers to NAFTA Article 1116 and investment-arbitration cases to maintain that under this provision, investors may claim in relation to losses of their investment, which is what precisely happened in this case.¹⁹³
211. *Finally*, with respect to Respondent's argument that Claimant may only assert a denial of justice claim, Claimant asserts that he is entitled to claim separately for separate wrongful acts committed by the IFT and by the telecommunication courts¹⁹⁴ and that he is not alleging that Mexico's specialized courts expropriated his investment.¹⁹⁵
212. In the Reply, Claimant also insisted on the substantial deprivation in the value of his investment.¹⁹⁶ For Claimant, because neither the IFT nor the specialized courts found the rate to be inconsistent with the new telecommunications law, the argument that Tele Fácil would never have been able to benefit from the high rate because it was invalid is unavailing.¹⁹⁷ Moreover, even if Tele Fácil's bulk of profits were time-limited, Claimant alleges that a large part of those profits could have been reinvested in order to sustain the company's growth.¹⁹⁸ Finally, Claimant asserts that Tele Fácil "dire situation" following

¹⁹¹ Reply (5 June 2018), ¶¶ 198-207.

¹⁹² Reply (5 June 2018), ¶¶ 209-215.

¹⁹³ Reply (5 June 2018), ¶¶ 216-222.

¹⁹⁴ Reply (5 June 2018), ¶¶ 223-251.

¹⁹⁵ Reply (5 June 2018), ¶¶ 252-254.

¹⁹⁶ Reply (5 June 2018), ¶¶ 258-269.

¹⁹⁷ Reply (5 June 2018), ¶¶ 262-263.

¹⁹⁸ Reply (5 June 2018), ¶ 264.

Resolution 381 prevented the company from continuing to offer its services¹⁹⁹ and adds that there was no legal obligation on Tele Fácil to condone Respondent's actions to accept a fraction of what it was legally entitled to.²⁰⁰

213. Claimant also re-examines the argument that Respondent did not act for a public purpose and insists on the fact that by reversing Resolution 381, the IFT acted firmly against the public interest.²⁰¹

b. Respondent's Position

214. Respondent denies that there is an expropriation and therefore a breach of NAFTA Article 1110. Respondent's defense lies mainly in three arguments: (i) that besides the shares in Tele Fácil, Claimant did not own assets protected under Article 1110²⁰²; (ii) that the measures at issue do not amount to an unlawful expropriation²⁰³ and; (iii) that, in any case, these measures could be justified as *bona fide* regulation in the public interest.²⁰⁴
215. Respondent's first argument rests on the premise that NAFTA "covers only the assets and economic interests enumerated in Article 1139's definition of investment" which is "a closed list."²⁰⁵ According to Respondent, only Claimant's shares in Tele Fácil qualify as an investment under Article 1139.²⁰⁶ With respect to this investment, Respondent alleges that "[t]he only conceivable expropriation claim [...] would have to be based on an allegation that unlawful interference by the Mexican State was so invasive and devastating that Tele Fácil was rendered incapable of carrying on business and became effectively worthless," which Claimant failed to establish.²⁰⁷ Moreover, Respondent alleges that

¹⁹⁹ Reply (5 June 2018), ¶ 265.

²⁰⁰ Reply (5 June 2018), ¶¶ 267-269.

²⁰¹ Reply (5 June 2018), ¶¶ 270-273.

²⁰² Statement of Defense (13 March 2018), ¶ 262.

²⁰³ Statement of Defense (13 March 2018), ¶ 267.

²⁰⁴ Statement of Defense (13 March 2018), ¶ 270.

²⁰⁵ Statement of Defense (13 March 2018), ¶ 261.

²⁰⁶ Statement of Defense (13 March 2018), ¶ 262.

²⁰⁷ Statement of Defense (13 March 2018), ¶¶ 264-266.

because “Article 1110 does not protect *the investments of an investment* of an investor of a Party”, Claimant cannot allege unlawful expropriation over Tele Fácil’s assets.²⁰⁸ However, even if it could, Respondent’s position is that the interconnection rights do not fall under the definition of “investment” under Article 1139.²⁰⁹

216. Respondent’s second argument is that the measures in question cannot amount to an unlawful expropriation because they “can only be addressed in terms of denial of justice at customary international law.”²¹⁰ That is because Resolution 381, Decree 77 and Resolution 127 aimed at resolving a dispute between Tele Fácil and a third party (Telmex) which went on to Mexico’s specialized tribunals.²¹¹
217. Finally, Respondent’s third argument is that the measures at issue can be justified as *bona fide* regulation in the public interest due to Mexico’s long history of regulation in the public interest in the field of telecommunications.²¹² These regulations have sought the reduction of interconnection fees in the interest of promoting competition.²¹³
218. In its Rejoinder, Respondent maintains that “there isn’t an example of a Tribunal that have [*sic*] agreed that a claim can be filed for the alleged expropriation of an asset that is ‘investment of an investment’ of an investor, unless the effects of the measure in question have been so drastic that they eliminated the value of the investor’s investment.”²¹⁴ Therefore, according to Respondent, the only claim Claimant can file under Article 1110 is an indirect expropriation which requires him to prove: “(i) that the rights in question existed [...]; (ii) that the State interfered with these rights [...]; and (iii) that the effects of this interference were equivalent to an expropriation of Tele Fácil.”²¹⁵ Respondent denies

²⁰⁸ Statement of Defense (13 March 2018), ¶ 262. (Emphasis in the original).

²⁰⁹ Statement of Defense (13 March 2018), ¶ 263.

²¹⁰ Statement of Defense (13 March 2018), ¶ 269.

²¹¹ Statement of Defense (13 March 2018), ¶¶ 267-269.

²¹² Statement of Defense (13 March 2018), ¶¶ 270-271.

²¹³ Statement of Defense (13 March 2018), ¶ 271.

²¹⁴ Rejoinder (10 September 2018), ¶ 186.

²¹⁵ Rejoinder (10 September 2018), ¶¶ 188-189.

Claimant's contention that the IFT destroyed Tele Fácil's business contending that "Tele Fácil's right to provide any of the [telecommunication] services [...] has not suffered any changes, and the rate regime based on costs [...] did not interfere with the business."²¹⁶

219. In its Rejoinder, Respondent also insisted that Claimant's alleged interconnection rights are not an investment under NAFTA Article 1139.²¹⁷ Respondent asserts that Claimant relies on "non-NAFTA jurisprudence" for the contention that contractual rights can be the subject of expropriation.²¹⁸ Based on the terms of Article 1139, Respondent contends that the interconnection rights are not "intangible property" because they cannot be bought, sold or pledged²¹⁹ nor they can be "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" because they "have no relation whatsoever with capital contribution in any form, and least of all with the participation that results from the contribution of other 'resources' according to the circumstances described in Article 1139(h)(i) or (ii)."²²⁰
220. Finally, Respondent argues that an expropriation claim cannot be filed against the IFT's measures because the IFT acted in this case "as a quasi-judicial entity"²²¹ and "judicial and quasi-judicial decisions [...] taken in the course of resolving a dispute between private parties cannot be held to amount to expropriation under Article 1110."²²²

(2) The Tribunal's Analysis

221. Under NAFTA Article 1110(1),

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a

²¹⁶ Rejoinder (10 September 2018), ¶ 191.

²¹⁷ Rejoinder (10 September 2018), ¶¶ 193-199.

²¹⁸ Rejoinder (10 September 2018), ¶ 193.

²¹⁹ Rejoinder (10 September 2018), ¶ 196.

²²⁰ Rejoinder (10 September 2018), ¶¶ 197-198.

²²¹ Rejoinder (10 September 2018), ¶ 204.

²²² Rejoinder (10 September 2018), ¶¶ 200-201.

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.

222. To determine the existence of an unlawful expropriation in breach of NAFTA Article 1110(1), the Tribunal will follow a three-prong test that consists in asking: “(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.”²²³ Claimant asked the Tribunal to follow this test.²²⁴ Respondent did not oppose to this approach and the Tribunal agrees that it is the proper approach in this case.

a. Is there an investment capable of being expropriated?

223. The Parties do not dispute, and for the Tribunal is clear, that for purposes of NAFTA Article 1139 there is an enterprise (Tele Fácil) that constitutes an investment, there are shares held by Claimant in such enterprise that also constitute an investment and a concession agreement of Tele Fácil that is likewise an investment. However, the Parties heavily debated as to whether other investments, as alleged by Claimant, constituted an investment capable of being expropriated.

224. In the Statement of Claim, Claimant alleged that two type of assets were expropriated: (i) the “rights [...] to interconnect with Telmex and to earn revenues based on the

²²³ **CL-027**, *Chemtura Corporation v. Government of Canada*, UNCITRAL (Award, 2 August 2010) (Kaufmann-Kohler, Brower, Crawford), ¶ 242.

²²⁴ Statement of Claim (7 November 2017), ¶ 345.

interconnection rate (USD 0.00975 per minute of use through 2017)”²²⁵ and (ii) the rights of share ownership together with the rights to a return on Tele Fácil’s profits.²²⁶

225. During the course of the arbitration, Claimant varied this description, to an extent that the Tribunal in the Hearing had to ask the specific question of what was the investment that according to Claimant was subject to expropriation or to unfair and unequitable treatment.²²⁷

226. In his response, Claimant indicated that:

First, Claimants’ [sic] claims on the basis of Tele Fácil’s rights under the Interconnection Agreement as determined by the IFT in Resolution 381. [T]hese rights constitute intangible property and interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such territory.

Second, because the IFT’s destruction of Tele Fácil’s interconnection rights under Resolution 381 caused the destruction of the entire business venture, Claimant also claims for the loss of Tele Fácil, which meets the definition of “enterprise” under the [sic] NAFTA.

*Claimant also has standing to claim in relation to other assets owned by the enterprise that were neutralized by the IFT’s conduct, including the company’s Concession and the company’s lost business income.*²²⁸

227. Therefore, according to Claimant, Tele Fácil, Claimant’s shares in Tele Fácil, the Concession, Tele Fácil’s business income and other assets were destroyed as a result of the destruction of “Tele Fácil’s rights under the Interconnection Agreement as determined by

²²⁵ Statement of Claim (7 November 2017), ¶ 350.

²²⁶ Statement of Claim (7 November 2017), ¶ 365.

²²⁷ See Tr. Day 5 1245:10-13 (noting that the first question posed by the Tribunal to Claimant was “[w]hat is the Investment that according to Claimant was expropriated or subjected to unfair and inequitable treatment, both for Mr. Nelson and for Tele Fácil?”).

²²⁸ Tr. Day 5 1248:18 - 1249:13.

the IFT in Resolution 381”²²⁹ or, in the words of the Statement of Claim, Claimant alleges that Mexico expropriated the “rights [...] to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017).”²³⁰

b. Did Claimant have rights under the interconnection agreement as determined by Resolution 381?

228. Before determining whether the interconnection rights alleged by Claimant and described in the preceding paragraph constitute an investment under NAFTA, the Tribunal must determine (i) whether Tele Fácil had such rights; (ii) if so, what type of rights were they. This is an inquiry that must begin with an analysis of Mexican law.²³¹ The alleged rights under the interconnection agreement as determined by Resolution 381 derive from Mexican law. Both the alleged interconnection agreement between Tele Fácil and Telmex and any alleged rights under Resolution 381 are governed and derive from Mexican law. Therefore, Claimant has the burden to prove that, under Mexican law, Tele Fácil had the rights that Claimant considers were expropriated. The Parties do not dispute this approach.
229. According to the Claimant, these rights derive from the combination of: (i) the alleged agreement between Telmex and Tele Fácil on certain terms of a standard interconnection agreement proposed by Telmex (and among these terms the term related to the applicable rates is of particular relevance) and; (ii) the IFT’s Resolution 381.

²²⁹ Tr. Day 5 1248:19-20.

²³⁰ Statement of Claim (7 November 2017), ¶ 350.

²³¹ **CL-036**, *EnCana Corporation v. Republic of Ecuador*, UNCITRAL (Award, 3 February 2006) (Crawford, Grigera Naón, Thomas), ¶ 184.

(i) The alleged interconnection agreement

230. Under Mexican law, as in most civil law jurisdictions, a contract is formed if there is object and consent.²³² In the case of an offer to execute a contract, consent arises from an offer and the acceptance thereof.²³³
231. Article 42 of the FTL adds to this general rule of contracts an additional edge in the case of interconnection agreements. If an interconnection contract between telecommunication network carriers cannot be formed within 60 calendar days after one of the carrier requests interconnection to the other, the IFT shall resolve the terms on which the parties could not agree, at the request of one of the carriers.²³⁴ In other words, if within 60 calendar days after an interconnection request is made, the telecommunication carriers cannot execute an interconnection contract, the IFT can intervene to decide the disputed terms and mandate the parties to execute it.²³⁵ Once the IFT resolves the disputed terms, the parties are obliged to execute the interconnection contract²³⁶ which is composed of the terms and conditions agreed upon by the parties to the interconnection agreement and the disputed terms as decided by IFT.²³⁷
232. On 7 August 2013, Tele Fácil requested interconnection with Telmex.²³⁸ Telmex responded on 26 August 2013, by delivering a standard agreement for interconnection, which included a reciprocal interconnection rate expiring on 31 December 2017.²³⁹ The

²³² First Expert Report by Rodrigo Buj García (12 March 2018) (“**Buj First Report**”), ¶ 23 (citing Article 1794 of Mexico’s Federal Civil Code).

²³³ Buj First Report (12 March 2018), ¶ 26.

²³⁴ **CL-001**, FTL (7 June 1995), Article 42.

²³⁵ Tr. Day 1 181:8-14; Tr. Day 2 407: 14-22; Tr. Day 3, 721: 2-7.

²³⁶ Tr. Day 1 23:5-11.

²³⁷ Tr. Day 1 61:17-21.

²³⁸ **C-058**, Request to initiate negotiations of interconnection submitted by Tele Fácil to Telmex (7 August 2013); **C-003**, Sacasa First Statement (3 November 2017), ¶¶ 40-41; **C-004**, Bello First Statement (6 November 2017), ¶¶ 51-52.

²³⁹ **C-021**, Public Deed No. 9,581; **C-003**, Sacasa First Statement (3 November 2017), ¶ 42; **C-004**, Bello First Statement (6 November 2017), ¶ 53.

interconnection rate proposed by Telmex was of USD 0.00975 per minute of use.²⁴⁰ Tele Fácil only replied almost eleven months later, on 8 July 2014, with comments to the interconnection agreement.²⁴¹

233. Two relevant events occurred between the date of delivery of the draft by Telmex (26 August 2013) and the reply by Tele Fácil (8 July 2014): (a) on 6 March 2014, the IFT declared América Móvil, S.A.B. de C.V. and its subsidiaries, which included Telmex, as a preponderant economic agent in the telecommunications sector²⁴²; and (b) on 26 March 2014, the IFT issued specific asymmetrical regulations, including the obligation of Telmex to provide indirect interconnection and a special mandatory interconnection rate of MXN 0.2015, approximately USD 0.00172.²⁴³
234. The Parties dispute whether, under Mexican law, Tele Fácil's reply letter of July 2014 constitutes an acceptance of Telmex's offer. The issue is relevant because if the letter constitutes an acceptance, it would mean that there was consent on all of the terms and conditions of the interconnection agreement between Telmex and Tele Fácil, including the rates but excluding indirect interconnection and portability, as of the date of the acceptance. If the letter does not constitute an acceptance, it would mean that there was no consent on the terms and conditions of interconnection and therefore no agreement on the rates.
235. The reference included in Tele Fácil's letter of July 2014 to Telmex is "Comments on the draft local interconnection agreement" and it reads as follows:

In follow-up to the various negotiation meetings held at your clients' office, between the staff of Tele Fácil, S.A. de C.V. (hereinafter "Tele Fácil") and of Teléfonos de Mexico, S.A.B. de C.V. and Teléfonos del Noreste, S.A. de C.V. (hereinafter both referred to as "Telmex"), and in order to reach an agreement for the interconnection of the corresponding public telecommunications networks of both companies, attached please find Tele Fácil's comments on the draft framework agreement for the provision of fixed local

²⁴⁰ **C-021**, Public Deed No. 9,581, Exhibit C, p. 41; **C-003**, Sacasa First Statement (3 November 2017), ¶ 44; **C-004**, Bello First Statement (6 November 2017), ¶ 54.

²⁴¹ Joint Chronology of Events, p. 3.

²⁴² **CL-010**, Resolution P/IFT/EXT/060314/76 (6 March 2014).

²⁴³ Joint Chronology of Events, p. 3.

interconnection services between Telmex and Tele Fácil that you kindly sent us on August 26, 2013 and that we have already been reviewing with you.

Likewise, we ask that you sign the same agreement with the company, Teléfonos del Noreste, S.A. de C.V., to whom we also call upon to initiate negotiation of the interconnection agreement of August 7, 2013.

*We appreciate you taking into consideration our comments and modify the version we have received so that Tele Fácil may be in a position to sign the draft agreement.*²⁴⁴ (Emphasis added)

236. The second page of the letter contains the comments of Tele Fácil to the draft interconnection agreement, which are preceded by the following text: “[a]fter discussing our concerns with you and after reviewing the draft agreement, Tele Fácil has the following comments and suggestions, which we would appreciate to be included in order to sign the interconnection agreement.”²⁴⁵ Thereafter Tele Fácil made several comments on the text of the draft, particularly on indirect interconnection and portability, and suggested the modification of certain clauses and the elimination of others.
237. Nothing in the text of the letter suggests that Tele Fácil is accepting the draft interconnection agreement, either conditionally or unconditionally. On the contrary, the letter clearly indicates that Tele Fácil is requesting modifications, that the agreement needs to be signed, and that for Tele Fácil to be in a position to sign the interconnection agreement the modifications would have to be included in the agreement.
238. The Parties dispute if under Mexican law this letter constitutes a counteroffer. They also dispute whether there was a legal term to accept the offer and if so, whether Tele Fácil gave its acceptance after the expiration of such term. The Tribunal does not consider necessary to enter into these debates because the plain and clear text of the July 2014 letter indicates that it does not constitute a letter of acceptance, but a letter with comments to the draft

²⁴⁴ **C-024**, Comments to the draft local interconnection agreement sent by Tele Fácil to Telmex (7 July 2014), p. 1.

²⁴⁵ **C-024**, Comments to the draft local interconnection agreement sent by Tele Fácil to Telmex (7 July 2014), p. 2; Joint Chronology of Events, p. 3.

provided by Telmex, acknowledging that the agreement must be signed and that Tele Fácil will sign the agreement if the changes are made. It is clear, and no contemporaneous evidence on the record suggests otherwise, that Tele Fácil would only accept an agreement containing the modifications requested and that the signature of the agreement was required to conclude the agreement.

239. But Tele Fácil did not wait for Telmex’s comments or signature. On 11 July 2014, three days after having sent the letter to Telmex requesting modifications to the draft for it to be signed, Tele Fácil initiated disagreement proceedings under FTL Article 42 before the IFT to resolve the divergences between Tele Fácil and Telmex over: (i) indirect interconnection and; (ii) portability charges.²⁴⁶ It is undisputed that Telmex never signed the draft interconnection agreement that it sent to Tele Fácil on August 2013. It is also undisputed that Tele Fácil later submitted to the IFT that same unsigned draft with the request to initiate disagreement proceedings only as regards the aforementioned two divergences.²⁴⁷
240. Based on the above, the Tribunal considers that Claimant has not proven, for purposes of its claim in this arbitration, that under Mexican civil and commercial law there was an agreement on the rates between Tele Fácil and Telmex resulting from the draft submitted by Telmex on August 2013.
241. It is undisputed that after Telmex’s draft agreement of August 2013 containing a USD 0.00975 rate, a new rate regime applicable to Telmex, as the economic preponderant agent, entered into force.²⁴⁸ Under this new regime, Telmex could not charge a rate of USD 0.00975.²⁴⁹ This new legal and regulatory framework would have required Telmex and Tele Fácil to agree on a new rate. Claimant alleged, but was not able to prove, that under

²⁴⁶ **C-025**, Interconnection disagreement procedure submitted by Tele Fácil before the IFT (10 July 2014); Joint Chronology of Events, p. 4.

²⁴⁷ **C-025**, Interconnection disagreement procedure submitted by Tele Fácil before the IFT (10 July 2014); Joint Chronology of Events, p. 4.

²⁴⁸ See ¶ 111 above. This paragraph originally started with the following line: “Even assuming, *arguendo*, that there was an interconnection agreement, including an agreement on rates, between the Telmex and Tele Fácil.”. This line was removed because the remaining arbitrators consider that the evaluation of such assumption was unnecessary and added nothing to the conclusion.

²⁴⁹ **CL-004**, FTBL, Article 131(a).

this new legal framework Telmex renewed its USD 0.00975 rate offer of August 2013. There is no contemporaneous document evidencing the purported renewal of the offer and Claimant's witnesses were unconvincing and contradictory in this regard. The Tribunal finds it difficult to believe that an alleged agreement to renew the offer of what Claimant considers the key business of Tele Fácil was never documented by a letter or email. Given that Telmex and Tele Fácil did not reach an agreement within the terms of FTL Article 42, Telmex could then request the IFT's intervention to decide on the rates. The IFT decided on the applicable rate through Resolution 127.²⁵⁰

242. In the absence of convincing evidence as to the existence of an interconnection agreement between Telmex and Tele Fácil, the inevitable conclusion is that Tele Fácil had no "rights under the Interconnection Agreement" that could have been determined by Resolution 381.
243. But even if Tele Fácil had a valid and binding interconnection agreement with Telmex under Mexican law resulting from the draft of August 2013 in combination with the letter of July 2014, or from any alleged renewal of the offer resulting from such draft, the question remains as to whether Resolution 381 granted interconnection rate rights to Tele Fácil that were later on expropriated or subjected to treatment that amounts to the violation of NAFTA.

(ii) Resolution 381

244. Resolution 381 "by which the plenary of the [IFT] determine[d] the disputed interconnection terms between Tele Fácil México, S.A. de C.V. and the companies Teléfonos de México, S.A.B. de C.V. and Teléfonos del Noroeste, S.A. de C.V." was approved by the Plenary of the IFT in its XVII Ordinary Session held on 26 November 2014, by the unanimous vote of the Commissioners present at the Session.²⁵¹
245. Resolution 381 was issued "pursuant to the twentieth paragraph, subsection I and II, and the twenty first paragraph of article 28 of the Political Constitution of the United Mexican

²⁵⁰ Tr. Day 1 203:2-9.

²⁵¹ C-029, Resolution 381 (26 November 2014), p. 18.

States; articles 7, 16, and 45 of the Federal Telecommunications and Broadcasting Law; as well as articles 1, 7, 8 and 12 of the Organic Statute of the Federal Telecommunications Institute, through Resolution P/IFT/261114/381.”²⁵²

246. The Parties do not dispute that the IFT is an organ of the Mexican State, created through an amendment of the Mexican Constitution²⁵³ and that under Article 42 of the FTL, the IFT had authority to “resolve the [interconnection] conditions that could not be agreed [by the public telecommunications network carriers] within [...] 60 calendar days,” counted from “the moment one of the parties request so.”²⁵⁴

247. Under the new FTBL, the IFT retained the powers and authorities related to the resolution of divergences in the interconnection conditions not agreed upon by the carriers.²⁵⁵ Article 7 of the FTBL provides as follows as regards the IFT:

The Institute is an autonomous public agency, independent regarding its decisions and functioning, with legal status and own resources, and has the purpose of regulating and promoting competition and efficient development of telecommunications and broadcasting in the scope of the powers conferred by the Constitution and in the terms specified in this Law and other applicable legal provisions.

The Institute is responsible for the regulation, promotion and supervision of the use, enjoyment and exploitation of radio spectrum, orbital resources, satellite services, public telecommunication networks and broadcasting and telecommunication services provision, as well as access to active and passive infrastructure and other essential goods, without prejudice to the powers corresponding to other authorities in accordance with the corresponding laws.

Moreover, the Institute is the authority in terms of economic competition in broadcasting and telecommunication sectors, for

²⁵² **C-029**, Resolution 381 (26 November 2014), p. 18.

²⁵³ **CL-002**, Decree by which several provisions are amended and added to the Political Constitution of the United Mexican States, in telecommunications matters (11 June 2013), Article 28.

²⁵⁴ **CL-001**, FTL (7 June 1995), Article 42.

²⁵⁵ Statement of Defense (13 March 2018), ¶¶ 29, 35; Rejoinder (10 September 2018), ¶ 49 (citing **C-111**, Second Expert Report by Gerardo Soria Gutiérrez (1 June 2018), ¶ 45).

which it shall exclusively exercise the powers, set forth in article 28 of the Constitution, this Law and the Federal Economic Competition Law.

The Institute is the authority in terms of technical guidelines related to infrastructure and equipment connected to telecommunications networks, as well as for the homologation and conformity assessment of such infrastructure and equipment.

The officers of the Institute shall be guided by the principles of autonomy, legality, objectivity, impartiality, certainty, efficiency, efficacy, transparency and accountability. They shall carry out their duties with autonomy and probity.

*The Institute may establish delegations and representation offices in the Mexican Republic.*²⁵⁶

248. The Second Title of the FTBL refers to the functioning of the IFT and its Chapter I, Section I, deals with the powers and composition of the IFT. Article 15 provides that the IFT, for the exercise of its powers, shall: “[r]esolve and establish the interconnection terms and conditions that the concessionaires may not have agreed upon regarding their public telecommunication networks, in accordance with the provisions of this law.”²⁵⁷
249. When Tele Fácil initiated disagreement proceedings under Article 42 of the FTL before the IFT, it submitted that there were only two disagreements between Tele Fácil and Telmex: (i) indirect interconnection and; (ii) portability charges.²⁵⁸ Tele Fácil did not submit a disagreement on the rates.
250. In its response to Tele Fácil’s submission,²⁵⁹ Telmex filed a different draft agreement than the one presented to Tele Fácil on 26 August 2013. The draft submitted by Telmex to the

²⁵⁶ **CL-004**, FTBL, Article 7.

²⁵⁷ **CL-004**, FTBL, Article 15(x).

²⁵⁸ **C-025**, Interconnection disagreement procedure submitted by Tele Fácil before the IFT (10 July 2014); Joint Chronology of Events, p. 4.

²⁵⁹ **C-027**, Telmex’s reply to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (26 August 2014); Joint Chronology of Events, p. 4.

IFT did not include portability charges and allowed indirect interconnection.²⁶⁰ However, Telmex argued that the parties had a disagreement on the applicable rates and requested the IFT to determine the rates.²⁶¹

251. The Parties do not dispute that the IFT decided on the divergences submitted by Tele Fácil (indirect interconnection and portability charges). The issue is whether Resolution 381 upheld the rates contained in the draft presented by Telmex to Tele Fácil on 26 August 2013 and if so, whether as a result thereof, Resolution 381 granted Tele Fácil the right to a particular rate and to earn revenues based on such rate.
252. Claimant considers that Resolution 381 granted Tele Fácil the “rights [...] to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017).”²⁶² This rate granted Tele Fácil, according to Claimant, a competitive advantage. Without such advantage, says Claimant, Tele Fácil could simply not survive.
253. Claimant considers further that the operative part of Resolution 381, properly interpreted in conjunction with section Fifth thereof, clearly granted Tele Fácil a right to charge and being charged specific interconnection rates: on the one hand, to charge the interconnection rate of USD 0.00975 allegedly agreed by Telmex, and on the other hand, being charged the lower rate determined for Telmex as a preponderant agent. Respondent, in turn, considers that Resolution 381 did not decide on the applicable interconnection rates but simply dismissed Telmex’s request to decide on the rates because Telmex did not prove that a dispute on the rates existed.
254. The operative part of Resolution 381 provides as follows:

FIRST.- Within 10 (ten) business days following the date in which the notification of this Resolution is effective, Tele Fácil Mexico,

²⁶⁰ **C-027**, Telmex’s reply to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (26 August 2014), § IX; Joint Chronology of Events, p. 4.

²⁶¹ **C-027**, Telmex’s reply to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (26 August 2014), § X. *See also*, **C-028**, Telmex’s closing arguments to the interconnection disagreement procedure submitted by Tele Fácil before the IFT (24 September 2014), § Sixth; Joint Chronology of Events, p. 4.

²⁶² Statement of Claim (7 November 2017), ¶ 350.

S.A. de C.V., and the companies Teléfonos de Mexico, 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.²⁶³

255. The relevant portion of the Fifth Consideration referred to in the operative part of Resolution 381 and invoked by Claimant reads as follows:

[T]he Institute considers Telmex and Telnor's arguments to be inadmissible, given the fact that the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented to the same.

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.

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.

²⁶³ C-029, Resolution 381 (26 November 2014), pp. 16-17.

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.

In the following paragraphs, the Institute, under the terms established in article 42 of the FTL, strives to resolve the points of disagreement in interconnection matters that were submitted for its consideration, and which according to its judgment result admissible from Tele Fácil, Telmex and Telnor.²⁶⁴

256. At the outset the Tribunal notes that the text of the relevant part of Resolution 381 on which Claimant bases his claim is poorly drafted and may result in confusions and differences of interpretation. As mentioned in the Hearing, the drafting is at least “unfortunate.”²⁶⁵
257. However, Resolution 381 cannot be interpreted by taking in isolation the literality of certain sections. First, an interpretation of Resolution 381 requires the analysis of Resolution 381 in context, that is to say, considering the entire text of the Resolution and not isolated sections thereof. Second, the interpretation requires a consideration of the provisions of Mexican law applicable to Resolution 381 and particularly those that define the powers of the regulator (the IFT). Resolution 381 was issued in furtherance to the powers granted to the IFT by the Mexican Constitution and the legal provisions of Mexican law, particularly the FTL and the FTBL. Those provisions define the scope and limits of the powers and authorities of the IFT and therefore, the IFT’s decisions could not exceed such limits and powers. Third, as several tribunals have indicated, this Tribunal must grant

²⁶⁴ C-029, Resolution 381 (26 November 2014), pp. 13-14.

²⁶⁵ Tr. Day 3 827:17 – 828:7.

some deference to the regulator in technical matters such as the ones subject matter of the FTL and Resolution 381.²⁶⁶

258. It is correct, as submitted by Claimant, that Resolution 381 provided that Tele Fácil and Telmex “must interconnect their telecommunications networks and [...] execute the interconnection agreement of their telecommunications networks pursuant to the terms and conditions determined in the FIFTH Consideration section of this Resolution.”²⁶⁷ It is also correct that the Fifth Consideration provides that “the interconnection rates were completely determined by Telmex and Telnor in the draft interconnection agreement sent to Tele Fácil on August 26, 2013, and which Tele Fácil had full knowledge of and consented to the same”²⁶⁸ and that the same Fifth Consideration adds that “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.”²⁶⁹
259. But is the aforementioned language, as read and interpreted by Claimant, sufficient and clear enough to grant Tele Fácil the right to charge a specific rate? The answer, in the view of the Tribunal, is clearly in the negative for the reasons explained below.
260. In Resolution 381 the IFT makes a clear distinction between “the points of disagreement in interconnection matters that were submitted for its consideration, and which according to its judgment result admissible”²⁷⁰ and those points submitted to the IFT that are not admissible. In the words of the IFT:

²⁶⁶ See *i.e.*, **CL-061**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial Award, 13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 263; **CL-043**, *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL (Award, 15 November 2004) (Paulsson, Reisman, Lacarte) (“**GAMI v. Mexico**”), ¶¶ 93-94.

²⁶⁷ **C-029**, Resolution 381 (26 November 2014), pp. 16-17.

²⁶⁸ **C-029**, Resolution 381 (26 November 2014), p. 13.

²⁶⁹ **C-029**, Resolution 381 (26 November 2014), p. 13.

²⁷⁰ **C-029**, Resolution 381 (26 November 2014), p. 14.

[T]here 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.²⁷¹

261. The reason for considering inadmissible the submission by Telmex on the alleged dispute on the rates was that, according to the IFT, there was no evidence of a dispute on the rates. The IFT assumed that such dispute did not exist because the rates were defined in the August 2013 draft agreement for the provision of fixed local interconnection services and its exhibits, sent by Telmex to Tele Fácil.
262. In Resolution 381 the IFT clearly expressed that under the terms established in Article 42 of the FTL, the IFT “strives to resolve the points of disagreement in interconnection matters that were submitted for its consideration, and which according to its judgment result admissible from Tele Fácil, Telmex and Telnor.”²⁷² Therefore, Resolution 381 undoubtedly decided only on the issues that were submitted for consideration of the IFT and which the IFT considered admissible. Those issues are exclusively the indirect interconnection and portability. The alleged dispute on the rates submitted by Telmex was not decided because it was considered inadmissible.
263. Considering that Telmex had submitted a new draft in which it accepted the issues of indirect interconnection and portability, the IFT did not have to decide on those issues and

²⁷¹ C-029, Resolution 381 (26 November 2014), pp. 13-14.

²⁷² C-029, Resolution 381 (26 November 2014), p. 14.

therefore ordered Tele Fácil and Telmex to interconnect. The text of the reasoning of Resolution 381 leaves no doubt on the point:

*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 interconnection agreement draft which was presented as evidence in *Telmex and Telnor's Reply*, which has evidentiary value in terms of articles 197 and 200 of the Federal Code of Civil Proceedings (hereinafter, the "CFPC"), of supplemental application pursuant to article 8 section V of the FTL.*

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.²⁷³*
(Emphasis added)

264. In sum, the Tribunal considers that a reading of Resolution 381 in context leads to the following conclusions:
- a) Tele Fácil submitted for resolution only the issues on indirect interconnection and portability.
 - b) In its response, Telmex accepted to grant indirect interconnection and to eliminate portability charges, but Telmex submitted that there was a dispute on the rates.

²⁷³ C-029, Resolution 381 (26 November 2014), p. 15.

- c) The IFT considered that the dispute on the rates was inadmissible and in doing so, it justified the inadmissibility by indicating that there was no evidence of a dispute on the rates and assumed that the rates had been agreed upon by the parties according to the draft submitted by Tele Fácil.
 - d) The IFT considered that since there was an agreement on the pending issues (indirect connection and portability) and the alleged dispute on the rates was inadmissible because it was already agreed upon, the parties had to proceed with the interconnection.
 - e) Nowhere in Resolution 381 did the IFT decide a dispute on the rates. On the contrary, it clearly indicated that in its view there was no dispute because, according to IFT, the rates had been agreed, and that therefore, the dispute, as submitted by Telmex, was inadmissible. The only basis for the IFT to consider that the rates had been agreed was the draft submitted to Tele Fácil, the August 2013 draft that Telmex never signed.
265. The IFT dismissed Telmex's request for the resolution of an alleged dispute on the rates because, according to IFT, there was no dispute on the rates between Telmex and Tele Fácil. The Tribunal must then determine whether the IFT's conclusion resulted in the granting of rights to Tele Fácil.
266. As mentioned before, in interpreting Resolution 381, the Tribunal must consider which are the powers of the IFT under Mexican law. The IFT must perform its duties under the FTBL in the scope of the powers conferred by the Constitution and in the terms specified in this law and other applicable legal provisions.
267. The interpretation proposed by Claimant would mean that even though the IFT expressly dismissed and declared inadmissible Telmex' submission on the rates because no dispute was proven, the reference to the purported agreement on the rates had the same effects as if the IFT had issued a decision on a dispute on the rates. It would also result in that the reference to Telmex's draft of interconnection agreement in Resolution 381 would grant such draft the effects of a full final agreement, even if the parties had not agreed on certain terms and conditions that nevertheless were not presented to the IFT as disagreements.

268. It is undisputed that, under Mexican law, the powers of IFT as regards interconnection disputes are limited. The FTL grants the IFT the authority to decide on interconnection disputes submitted to it. It also has the authority to dismiss a dispute if it considers that the applicant did not prove the existence of the dispute. But nowhere in the FTL or in other provisions of Mexican law is the IFT authorized to decide or grant rights over terms and conditions of an interconnection agreement if such terms and conditions have not been submitted as disputed terms. Moreover, there is no evidence that the IFT has the legal authority to determine whether or not the draft agreement submitted by Tele Fácil was a full and final agreement binding on Telmex.
269. In Resolution 381 the IFT dismissed, on grounds of inadmissibility, the dispute on the rates submitted by Telmex. According to Resolution 381, the reason for the dismissal was that, according to the IFT, Telmex had not proven that there was a disagreement on the rates. The IFT considered that there was an agreement on the rates based on its assumption or understanding that the draft submitted by Tele Fácil contained a full agreement on all terms and conditions, except for indirect interconnection and portability. But there was not such agreement. An IFT's declaration that there is no dispute on the rates because they had been agreed does not decide a dispute on the rates and does not grant rights to Tele Fácil.²⁷⁴ The interpretation proposed by Claimant would result in an absurdity and in the IFT acting *ultra vires*. It would be an absurdity because it would mean that the dispute on the rates is at the same time dismissed and decided (*i.e.*, notwithstanding the dismissal of the dispute on the rates, a decision is made on such rates). It would also mean that the IFT would be acting *ultra vires* because it would be granting rights over rates that are not disputed and validating and giving effects to an unproven contract that one of the parties (Telmex) disputed.
270. In sum, Resolution 381 did not decide a dispute on the rates because it considered that there was no dispute. The IFT has no authority to decide whether or not the parties to an interconnection agreement have agreed on certain terms and conditions, it only has the

²⁷⁴ This sentence originally started with the text "And even if there was,". The remaining arbitrators consider that including such assumption (*arguendo*) was unnecessary as it added nothing to the conclusion. The introductory words were therefore removed.

authority to decide on those terms and conditions that are disputed and submitted for its consideration.²⁷⁵

271. The IFT may have erred in drafting Resolution 381 and indicating that Tele Fácil and Telmex had agreed on the rates. Clearly the IFT could have done better. But a party cannot attempt to benefit from such errors, much less when the party's interpretation based on those errors would be contrary to Mexican law as it would result in the regulator clearly exceeding its powers.
272. From the facts of the case and the considerations above, the Tribunal concludes that Tele Fácil opportunistically foresaw a business window and attempted to take advantage of the same. Tele Fácil received a draft interconnection agreement from Telmex and inexplicably waited for almost eleven months with no further action on the draft. The draft interconnection agreement contained reciprocal interconnection rates of USD 0.00975. But when Telmex was declared a predominant agent and forced to charge a lower interconnection rate (USD 0.00172), Tele Fácil rushed to send comments to Telmex on the draft interconnection agreement, did not wait for Telmex's reaction to its comments, and submitted a dispute to the IFT on the indirect interconnection and portability charges. Tele Fácil's bet was that if the dispute on indirect interconnection and portability was decided in its favor, as it was, then Tele Fácil could claim that it had an agreement where it could charge the interconnection rate reflected in Telmex's draft of August 2013, but Telmex could only charge the maximum rate allowed as from 26 March 2014, that is to say, an interconnection rate of MXN 0.2015, approximately USD 0.00172.²⁷⁶ This would have given an important margin to Tele Fácil until 31 December 2017.
273. Tele Fácil based this business opportunity on several assumptions. It assumed, incorrectly, that it had a valid and binding agreement with Telmex. The Tribunal has already explained that there is no evidence of such an agreement before this Tribunal. On the contrary, the evidence shows that there was no agreement on the rates and Telmex challenged the

²⁷⁵ For the sake of clarity, the remaining arbitrators wish to stress that even though the IFT also has authority to decide whether or not there is a dispute as to a rate, that does not change the conclusion that the IFT does not have the authority to decide whether or not an agreement on certain terms and conditions legally exists between the parties.

²⁷⁶ Joint Chronology of Events, p. 3.

existence of such agreement before the IFT. Tele Fácil further assumed that even though the alleged agreement between Tele Fácil and Telmex contained reciprocal rates, by operation of the new regulations applicable to Telmex as a preponderant agent a differential rate would be applicable. But there is no convincing²⁷⁷ evidence that Telmex maintained the original terms of the draft of August 2013 after the amendments in the legislation or that it ever agreed to such differential rates or that such differential rates would apply by operation of law. Tele Fácil also assumed that, as a result of the unfortunate drafting of certain sections of Resolution 381, such Resolution granted Tele Fácil rights over certain rates despite the fact that, on the one hand, it is clear that under Mexican law the IFT did not have the power or the authority to decide whether or not there was a binding agreement on the rates between Tele Fácil and Telmex and, on the other, Resolution 381 dismissed Telmex's submission that there was a dispute on the rates but did not solve such dispute.

274. In sum, the IFT was legally authorized only to decide interconnection disputes between the parties. Tele Fácil did not submit a dispute on the interconnection rates. Telmex submitted that there was a dispute on the interconnection rates but the IFT dismissed this claim because it assumed, incorrectly, that there was an agreement on the rates. In fact, the IFT ordered Telmex and Tele Fácil to interconnect referring to the "rates" as if there was a final and binding agreement between Tele Fácil and Telmex on all matters, including rates. However, the IFT did not have the authority to determine whether or not there was a valid and binding agreement between Tele Fácil and Telmex on all matters, including rates. Tele Fácil attempted and now Claimant is attempting to take advantage of a text that, that even though poorly drafted, cannot be interpreted in a sense that results in a violation of Mexican law.
275. Neither Tele Fácil nor Claimant may interpret an act of the IFT in a sense that would result in the IFT acting *ultra vires* and pretend to derive rights from such an interpretation. The IFT's intervention was limited to resolving the two disputed terms Tele Fácil invoked. Therefore, Resolution 381 cannot be interpreted as providing a decision on the rates.²⁷⁸

²⁷⁷ The word "convincing" was added by the two remaining arbitrators.

²⁷⁸ Tr. Day 1, 64:9-14; 94:1-5; 103: 12-16.

276. If the IFT did not have the authority to rule on whether or not there was an agreement between Tele Fácil and Telmex and could only decide on the disputes submitted to it, the confirmation of criteria that resulted in Decree 77 is fully justified. Tele Fácil requested the IFT to enforce Resolution 381 interpreting that such resolution had approved the rates contained in the August 2013 draft agreement originally submitted by Telmex. Telmex, in turn had challenged such an agreement on the rates by requesting the IFT to decide the dispute on the rates. The confirmation of criteria was aimed at whether, in addition to deciding on the dispute submitted to the IFT and compelling interconnection, the IFT had the power to compel the execution of an interconnection agreement in the forms and terms determined in Resolution 381.²⁷⁹
277. On 8 April 2015, the IFT issued Decree 77 which stated what, in the Tribunal's view and according to the evidence submitted in this arbitration, is clear: that the IFT's powers were restricted to resolving the conditions not agreed upon by Tele Fácil and Telmex, indirect interconnection and portability charges, and that no decision had been issued on the rates.²⁸⁰ Decree 77 simply clarified what would have resulted from an interpretation in good faith and in context of the wording of Resolution 381. Neither Tele Fácil nor Claimant can validly claim that a clarification of Resolution 381, the effect of which is to specify that an interpretation of Resolution 381 cannot result in the IFT exceeding its powers, is a violation of rights that were never granted.
278. Finally, through Resolution 127, the IFT decided the dispute on the rates submitted by Telmex as to the interconnection rates and determined a rate of MXN 0.004179 (USD 0.000253).²⁸¹ Again, in Resolution 381 the IFT had dismissed the dispute on the rates submitted by Telmex. Therefore, Resolution 127 is the decision on a matter that was pending: the dispute on the rates.

²⁷⁹ **C-040**, Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the IFT (10 February 2015); Joint Chronology of Events, p. 7. For consistency with the evidence on record, the remaining arbitrators deleted the text "decide on a dispute on the rates and", which was included after the words "the IFT had the power to."

²⁸⁰ **C-051**, Decree 77 (8 April 2015), p. 13.

²⁸¹ **C-061**, Resolution 127 (7 October 2015), p. 35, First Decision.

279. The Tribunal therefore finds that (a) Resolution 381 did not grant rights to Tele Fácil; (b) Tele Fácil simply made a bet, based on incorrect assumptions and interpretations, that Resolution 381 had upheld an interconnection rate, which it did not; (c) through Decree 77, the IFT had every right to interpret Resolution 381 in accordance with Mexican law: — acknowledging that it had limited powers when resolving disputed terms —. This interpretation was not only confirmed by the experts in this case, but also consistently by Mexican courts.²⁸² Finally, (d) the IFT had the obligation to decide the dispute on the interconnection rate through Resolution 127.
280. The analysis above leads to the inevitable conclusion that Tele Fácil had no “rights under the Interconnection Agreement as determined by the IFT in Resolution 381.” Thus, Claimant cannot claim that a right it does not have under Mexican law is capable of being expropriated.
281. As stated above, Tele Fácil had, at best, a business opportunity, a bet based on its own interpretations and speculations, that was proven wrong. The speculative nature of the business opportunity that Claimant unsuccessfully attempts to qualify as “rights” at the core of the business of Tele Fácil is further confirmed by the overwhelming evidence on the record. This alleged opportunity and the income related thereto were never included in any business plan prepared by Tele Fácil²⁸³. There is no explanation for the delay in accepting Telmex’s offer for interconnection and then Tele Fácil’s rush once Telmex was declared a preponderant agent. The main source of income of Tele Fácil, according to the evidence on the record, did not depend on the alleged “rights” purportedly granted by Resolution 381. On the contrary, the vast majority of the income depended on different lines of business, unrelated to these “rights”, lines of business that Tele Fácil could have pursued but it decided not to.²⁸⁴ Claimant cannot ask this Tribunal to find Respondent liable for Tele Fácil having failed on a bet supported on assumptions and speculations that were proven incorrect.

²⁸² Tr. Day 1, 16:13-17; Tr. Day 3 668: 7-11.

²⁸³ Tr. Day 1 244: 2-9, 246:6-17.

²⁸⁴ Tr. Day 1 257:17; 265:1.

282. In addition to the alleged interconnection rights with Telmex defined under Resolution 381, Claimant also claims for the expropriation of Tele Fácil and of the shares held by Claimant in Tele Fácil. According to Claimant, those investments were destroyed as a result of the actions of Mexico through the IFT and the destruction of the rights under Resolution 381, to an extent such that both Tele Fácil and Mr. Nelson's shares in Tele Fácil lack any value.
283. Considering that the Tribunal has already concluded that Resolution 381 did not grant rights on interconnection rates to Tele Fácil, there could have been no impact on Tele Fácil or its shares as a result of the actions following Resolution 381. Moreover, as already mentioned in paragraph 281 above, there is no evidence whatsoever that the income of Tele Fácil or the value of its shares were depending on the existence of such alleged rights. On the contrary, the overwhelming majority of the evidence on the record suggests that the main lines of business of Tele Fácil, as planned from the conception of the investment in Mexico, were unrelated to a difference in the rates. Moreover, there is no evidence that after Telmex was declared a preponderant agent and the opportunity to take advantage of the difference in the interconnection rates arose, the business plans of Tele Fácil changed. The main lines of business of Tele Fácil were completely unrelated with what Claimant now portrays as the core business of Tele Fácil (the differential in the rates) and Tele Fácil simply decided, with no reasonable business explanation, to abandon such main lines of business. If Tele Fácil or the shares lost value, such loss is the result of a business decision of Tele Fácil and its shareholders and not of actions or omissions of Respondent.
284. The Tribunal therefore finds that there is no violation of NAFTA Article 1110.

B. DID RESPONDENT BREACH ARTICLE 1105 OF NAFTA?

(1) The Parties' Positions

a. Claimant's Position

285. According to Claimant, the IFT's three measures purportedly aiming at repudiating Resolution 381 also violated NAFTA Article 1105.²⁸⁵ Claimant contends that the IFT

²⁸⁵ Statement of Claim (7 November 2017), ¶ 436.

“arbitrarily, discriminatorily and secretly repudiated the interconnection terms established in Resolution 381 with the effect of gutting Claimants’ investments in Mexico.”²⁸⁶

286. Focusing first in the text of NAFTA Article 1105 and NAFTA Free Trade Commission Notes of Interpretation regarding this provision, Claimant concludes that the concept of “fair and equitable treatment” in Article 1105’s first paragraph “is part of the customary international minimum standard of treatment and, thus, its content is defined exclusively by customary international law.”²⁸⁷
287. Regarding the standard of “fair and equitable treatment”, Claimant refers to the formulation of such standard in the *Waste Management v. Mexico* decision. After citing the award, Claimant explains that under this decision, different types of State misconduct may fall below the minimum standard of treatment and they fall into three categories: (i) arbitrariness, (ii) lack of due process; and (iii) discrimination.²⁸⁸
288. In Claimant’s view, “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.”²⁸⁹ Claimant infers this definition from the *Cargill v. Mexico* award, which cited the judgment of a chamber of the International Court of Justice in the *ELSI* case.²⁹⁰ In this sense, Claimant cites to NAFTA cases to imply that a State’s measure is not based on a system of law when there is “an abrupt change in the treatment of a foreign investor

²⁸⁶ Statement of Claim (7 November 2017), ¶ 436.

²⁸⁷ Statement of Claim (7 November 2017), ¶¶ 438-441.

²⁸⁸ Statement of Claim (7 November 2017), ¶¶ 442-444.

²⁸⁹ Statement of Claim (7 November 2017), ¶ 454.

²⁹⁰ Statement of Claim (7 November 2017), ¶ 453.

contrary to law”²⁹¹ or when it is “unsupported by a reasonable and established policy rationale.”²⁹² Claimant also refers to CAFTA-DR cases to strengthen his interpretation.²⁹³

289. Based on this definition of the standard, Claimant contends that the IFT’s Compliance Unit confirmation criteria and Decree 77 were arbitrary.²⁹⁴

290. Regarding the lack of due process, Claimant associates this type of misconduct with “[a] serious failure in the administration of justice”²⁹⁵ which “is sometimes described in terms of a ‘complete lack of transparency and candour in an administrative process’ or a ‘denial of justice.’”²⁹⁶ Claimant adds that “[t]he 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.”²⁹⁷ In the context of judicial proceedings Claimant cites the *Azinian v. Mexico* case to explain “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” to conclude that this standard cover at least “two types of misconduct where the State engages in unfair discrimination or commits gross incompetence in the administration of justice.”²⁹⁸

²⁹¹ Statement of Claim (7 November 2017), ¶ 456 (citing **CL-043**, *GAMI v. Mexico* (15 November 2004)).

²⁹² Statement of Claim (7 November 2017), ¶¶ 457-462 (citing **CL-026**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (Award, 18 September 2009) (Pryles, Caron, McRae) (“*Cargill v. Mexico*”); and **CL-072**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL (Award on Jurisdiction and Liability, 17 March 2015) (Simma, Schwartz, McRae) (“*Bilcon v. Canada*”)).

²⁹³ Statement of Claim (7 November 2017), ¶¶ 464-465 (citing **CL-059**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (Award, 29 June 2012); and **CL-066**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 (Award, 19 December 2013) (Mourre, Park, von Wobeser) (“*TECO v. Guatemala*”)).

²⁹⁴ Statement of Claim (7 November 2017), ¶¶ 493-506; ¶¶ 530-563.

²⁹⁵ Statement of Claim (7 November 2017), ¶ 466.

²⁹⁶ Statement of Claim (7 November 2017), ¶ 466.

²⁹⁷ Statement of Claim (7 November 2017), ¶ 469.

²⁹⁸ Statement of Claim (7 November 2017), ¶ 475 (citing **CL-060**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award, 1 November 1999) (Paulsson, Civiletti, von Wobeser) (“*Azinian v. Mexico*”)).

291. Based on these criteria, Claimant contends that the IFT's Compliance Unit confirmation criteria and Decree 77 lacked due process.²⁹⁹ Claimant also alleges that the Specialized Telecommunications Courts acted with gross incompetence³⁰⁰ and the Appellate Court unjustifiably denied Tele Fácil access to justice.³⁰¹
292. With respect to discrimination, Claimant argues that "Article 1105 precludes unjustified targeting of investors and their investments"³⁰² and cited to the *Waste Management, Cargill* and *Loewen* decisions to show that NAFTA tribunals have recognized this aspect of the fair and equitable treatment standard.³⁰³ Claimant later alleges that Decree 77 was discriminatory.³⁰⁴
293. Further, Claimant refers to Resolution 127 as 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."³⁰⁵
294. In his Reply, Claimant notes that Respondent did not provide a reasonable explanation for the Compliance Unit's request for confirmation criteria.³⁰⁶ Claimant's explanation is that the IFT's Chairman (Mr. Contreras) ordered the head of the Compliance Unit (Mr. Sanchez Henkel) not to enforce Resolution 381 in the portion ordering the parties to execute the interconnection terms determined in Resolution 381.³⁰⁷ Claimant regrets that

²⁹⁹ Statement of Claim (7 November 2017), ¶¶ 507-516, 564-578.

³⁰⁰ Statement of Claim (7 November 2017), ¶¶ 613-628.

³⁰¹ Statement of Claim (7 November 2017), ¶¶ 629-640.

³⁰² Statement of Claim (7 November 2017), ¶ 479.

³⁰³ Statement of Claim (7 November 2017), ¶¶ 480-484 (citing **CL-071**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 (Award, 30 April 2004) (Crawford, Civiletti, Magallón Gómez) ("**Waste Management v. Mexico**"); **CL-026**, *Cargill v. Mexico* (18 September 2009); and **CL-069**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Award, 26 June 2003) (Mason, Mikva, Mustill)).

³⁰⁴ Statement of Claim (7 November 2017), ¶¶ 579-590.

³⁰⁵ Statement of Claim (7 November 2017), ¶ 597.

³⁰⁶ Reply (5 June 2018), ¶ 278.

³⁰⁷ Reply (5 June 2018), ¶ 279.

there is no statement by Mr. Contreras denying this allegation³⁰⁸ and questions Mr. Gorra’s witness statement, intending to deny the existence of those instructions, for not being present at the meeting in which Mr. Contreras’ instructions were delivered to Mr. Sanchez Henkel.³⁰⁹

295. Claimant also asserts that if it hadn’t been for Mr. Contreras instructions there would be no explanation of why Mr. Sánchez Henkel on 12 January 2015 first assured Tele Fácil’s representatives that the IFT would enforce Resolution 381 but later changed its mind.³¹⁰ Further, Claimant alleges that the fact that Decree 77 addressed only Mr. Sánchez Henkel request of confirmation criteria and not Telmex’s arguments regarding the inconsistency of the rate with the new regulatory regime, “suggest[s] that the path chosen for the destruction of Tele Fácil’s business, and protection of Telmex, was carefully orchestrated from the inside [of the IFT].”³¹¹
296. Claimant refers to Respondent’s and Mr. Gorra’s explanation of Mr. Sánchez Henkel’s request for confirmation criteria — that the scope of Resolution 381 needed to be determined because both Telmex and Tele Fácil had submitted complaints — and stresses the contradiction between such an explanation and Respondent’s prior statements that before Telmex filed its request for confirmation criteria, which happened after Mr. Sánchez Henkel’s request, the IFT had not heard from it.³¹²
297. Claimant also contends that Respondent did not provide a reasonable explanation for Decree 77’s reversal of Resolution 381 and the IFT’s interpretation of its limited authority to resolve interconnection disputes³¹³ and contends that Decree 77 had “extreme consequences” if it applied broadly to Mexico’s entire telecommunications industry.³¹⁴

³⁰⁸ Reply (5 June 2018), ¶ 280.

³⁰⁹ Reply (5 June 2018), ¶ 281.

³¹⁰ Reply (5 June 2018), ¶¶ 283-284.

³¹¹ Reply (5 June 2018), ¶ 288.

³¹² Reply (5 June 2018), ¶¶ 289-291.

³¹³ Reply (5 June 2018), ¶¶ 299-301.

³¹⁴ Reply (5 June 2018), ¶ 302.

Claimant also alleges that the differences between a draft version of Decree 77 and its final version reveals its arbitrariness because according to the draft version, the disputing parties could themselves seek to enforce their rights in Mexico’s commercial courts but the final version eliminated this prerogative, leaving Tele Fácil with the only options of renegotiating the agreed rates or refusing to renegotiate them.³¹⁵ Finally, Claimant contends that he finds disturbing the erratic swing of the IFT’s decision-making between Resolution 381 and Decree 77.³¹⁶

298. Regarding Decree 77, Claimant also emphasized on the reasons why he believes it was unprecedented. In this respect, Claimant referred to Mr. Gorra’s witness statement, which attempted to show that the *Pleno* regularly issues decrees like Decree 77 and explained that the decrees brought up by Mr. Gorra are distinguishable.³¹⁷ Claimant also emphasized that prior to Decree 77, Tele Fácil was never provided a meaningful opportunity to be heard.³¹⁸
299. Finally, Claimant asserted that Respondent could not defend the District Court’s *amparo* decision regarding Decree 77³¹⁹ and qualified this decision as “judicial opinion devoid of any application of legal principles or substantive reasoning.”³²⁰ Claimant also contended that Respondent could not defend the Appellate Court’s denial of Tele Fácil’s Right of Appeal³²¹ arguing that the court “unjustifiably rejected” it, “having previously been accepted.”³²²

³¹⁵ Reply (5 June 2018), ¶¶ 303-306.

³¹⁶ Reply (5 June 2018), ¶¶ 307-308.

³¹⁷ Reply (5 June 2018), ¶¶ 312-323.

³¹⁸ Reply (5 June 2018), ¶¶ 324-339.

³¹⁹ Reply (5 June 2018), ¶¶ 344-355.

³²⁰ Reply (5 June 2018), ¶ 345.

³²¹ Reply (5 June 2018), ¶¶ 356-385.

³²² Reply (5 June 2018), ¶ 358.

b. Respondent's Position

300. Respondent asserts that the IFT's measures challenged by Claimant under NAFTA Article 1105 "pertain to the adjudication of a dispute between *Tele Fácil* and *Telmex* with respect to the terms of interconnection that each says should apply in the commercial relationship between them" therefore, Claimant can only assert a claim of denial of justice "which has a more onerous set of requirements."³²³ Respondent cites extensively to the United States submission under NAFTA Article 1128 in the *Eli Lilly* case³²⁴ and later concludes that "none of the required elements of denial of justice at customary international law have been established with respect to any of the impugned administrative resolutions or court decisions."³²⁵ Further, Respondent refers to the IFT's measures and the Specialized Courts' judgments as stated below.
301. Regarding Resolution 381, Respondent asserts that the IFT concluded that there was no disagreement on rates and therefore, requirements set forth in article 42 of FTL were not met. According to Respondent "[t]he meaning and effect of Resolution 381 became the subject of conflicting submissions to the IFT by both *Tele Fácil* and *Telmex*."³²⁶ Nonetheless, "there was no denial of justice to *Tele Fácil* in the proceedings [that followed] Resolution 381, or in IFT's alleged failure to enforce said resolution."³²⁷
302. With respect to Decree 77, Respondent relies on Mr. Gorra's witness statement, which explains that in a criteria confirmation request, the parties are not asked to state their positions, it does not generate rights or obligations and in this case, Decree 77 was only a clarification of the scope of Resolution 381.³²⁸ Respondent indicates that the finding in Decree 77 is "entirely within the realm of reason" and that "given the consistency of the

³²³ Statement of Defense (13 March 2018), ¶ 275 (Emphasis in the original); Rejoinder (10 September 2018), ¶¶ 208-211.

³²⁴ Statement of Defense (13 March 2018), ¶ 276; Rejoinder (10 September 2018), ¶¶ 209-210.

³²⁵ Statement of Defense (13 March 2018), ¶ 306.

³²⁶ Statement of Defense (13 March 2018), ¶ 281.

³²⁷ Statement of Defense (13 March 2018), ¶ 282.

³²⁸ Statement of Defense (13 March 2018), ¶ 283.

court decisions, one can only conclude that Decree 77 was legally correct.”³²⁹ Respondent also asserts that under the FTL, every concessionaire has a right to request a hearing with the IFT and that in this case Tele Fácil presented four written submissions and met with the head of the IFT’s Compliance Unit and before the *Pleno* of the IFT,³³⁰ therefore, “[t]here was no denial of justice to Tele Fácil.”³³¹ Respondent notes that Tele Fácil challenged Decree 77 through an *amparo* proceeding.³³²

303. As long as Resolution 127 is concerned, Respondent states that the IFT resolved the disagreement on the rates “based on the Regulated Rates 2015 published on December 2014 in accordance with Article 137 of the FLTB through the Rate Agreement of 2015.”³³³ Respondent concludes that through Resolution 127 the IFT did not deny justice to Tele Fácil because the latter “had notice of the proceeding and made submissions” and “[t]he IFT’s decision was reasoned and fully transparent.”³³⁴ Respondent also observes that Tele Fácil challenged Resolution 127 through an *amparo* proceeding and later withdrew from it.³³⁵

304. On the *Amparo* proceedings 351/2014 filed by Telmex against Resolution 381, Respondent indicates that Tele Fácil participated in each stage of this proceeding, provided evidence, pleadings and appealed the judgment (which was later withdrawn), as an interested party.³³⁶ Accordingly, Respondent contends, “Claimant cannot affirm seriously that access to justice has been denied.”³³⁷

³²⁹ Statement of Defense (13 March 2018), ¶ 311.

³³⁰ Statement of Defense (13 March 2018), ¶ 284.

³³¹ Statement of Defense (13 March 2018), ¶ 285.

³³² Statement of Defense (13 March 2018), ¶ 286.

³³³ Statement of Defense (13 March 2018), ¶ 288.

³³⁴ Statement of Defense (13 March 2018), ¶ 289.

³³⁵ Statement of Defense (13 March 2018), ¶ 290.

³³⁶ Statement of Defense (13 March 2018), ¶¶ 291, 294.

³³⁷ Statement of Defense (13 March 2018), ¶ 294.

305. On the *Amparo* proceedings 1381/2015 filed by Tele Fácil against Decree 77, Respondent notes that “Tele Fácil sought to challenge the 1381/2015 judgment through appeal 35/2016, which was rejected by the First Collegiate Court because its submission was untimely.”³³⁸
306. Finally, on the *Amparo* proceedings 1694/2015 filed by Tele Fácil against Resolution 127, Respondent recalls that the Second District Judge denied it and that Tele Fácil appealed the judgment but later withdrew from it.³³⁹
307. With respect to these measures, Respondent considers that as “adjudicative bodies — the *Pleno* and the specialized tribunals — considered the arguments of both parties and gave reasons for their decisions.”³⁴⁰
308. Respondent refers to the *Azinian* decision, which held that “holding a State internationally liable for judicial decisions does not [...] entitle a claimant to seek international review of the national court decisions” and that a claimant “must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.”³⁴¹
309. Moreover, Respondent points out to certain paragraphs of the Statement of Claim that show that Claimant “have spun a series of allegations amounting to collusion between IFT and Telmex to ensure that Telmex would defeat Tele Fácil in their ongoing interconnection rate dispute.”³⁴² On this regard, Respondent alleges that Claimant’s allegations “are based solely on the illogical premise that IFT would wish to favor the interests of Telmex, recently declared a PEA and subject of a zero rate over the interests of a new entrant in the market”³⁴³ and that “[r]emoving this allegation of collusion or conspiracy, one is left with

³³⁸ Statement of Defense (13 March 2018), ¶ 297.

³³⁹ Statement of Defense (13 March 2018), ¶¶ 300-301.

³⁴⁰ Statement of Defense (13 March 2018), ¶ 306; Rejoinder (10 September 2018), ¶ 212.

³⁴¹ Statement of Defense (13 March 2018), ¶ 303 (citing **CL-060**, *Azinian v. Mexico* (1 November 1999)).

³⁴² Statement of Defense (13 March 2018), ¶ 307.

³⁴³ Statement of Defense (13 March 2018), ¶ 308.

specialist decision-makers arriving at decision on a 4-3 majority vote that Tele FÁCil simply does not like.”³⁴⁴

310. In its Rejoinder, Respondent emphasizes that: (i) the concept of denial of justice applies to administratively adjudicatory proceedings as well as court proceedings; (ii) the thresholds to establish a denial of justice is very high; (iii) it does not suffice to establish that domestic adjudicators have erred, misapplied or misinterpreted domestic law; and; (iv) a claim of denial of justice can only be based on adjudicative measures that are final, which means that a claimant must exhaust its rights of appeal unless obvious futility or manifest inefficiency.³⁴⁵

(2) The Tribunal’s Analysis

311. As stated previously, Claimant alleges that Respondent breached its obligation of according fair and equitable treatment. Pursuant to NAFTA Article 1105(1),

1. 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.

312. From the text of the treaty, it is clear that the obligation of fair and equitable treatment is limited to the treatment of “investments of investors”. Therefore, before reviewing Claimant’s allegations of unfair and inequitable treatment, the Tribunal must first clarify what is the investment that, according to Claimant, suffered from unfair and inequitable treatment.

313. As stated above, the expropriation claim assumed that Claimant had an investment consisting of “rights [...] to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017)”³⁴⁶ until 31 December

³⁴⁴ Statement of Defense (13 March 2018), ¶ 310.

³⁴⁵ Rejoinder (10 September 2018), ¶ 211.

³⁴⁶ Statement of Claim (7 November 2017), ¶ 350.

2017. The Tribunal, however, has found that Tele Fácil did not have such rights under Mexican law and therefore, no expropriation occurred.

314. However, the claim raised by Claimant under NAFTA Article 1105 is slightly different. Claimant does not refer to “rights [...] to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017)” as the investment that suffered unfair and inequitable treatment. According to Claimant, the investment that was not granted fair and equitable treatment is Tele Fácil. The Parties do not dispute that Tele Fácil is an investment protected by NAFTA Chapter Eleven.
315. Despite its difference with the expropriation claim as to the specific investment affected by the measures of Mexico, Claimant basically challenges the same measures as in the expropriation claim. The alleged unfair and inequitable treatment of Tele Fácil results from the treatment granted in the issuance of the measures that allegedly destroyed interconnection rights recognized by Resolution 381.³⁴⁷ Therefore, the conclusions of the Tribunal as regards Resolution 381 in the expropriation claim analysis are also relevant to decide Claimant’s claim under NAFTA Article 1105.
316. Considering, on the one hand, the Tribunal’s findings that Tele Fácil had no interconnection rights under the August 2013 draft agreement sent by Telmex to Tele Fácil and no rights were created in favor of Tele Fácil by Resolution 381, and on the other, that the claims of Claimant as regards the alleged violation of the obligation of fair and equitable treatment refer to acts and omissions of Mexico in connection with Resolution 381, the Tribunal could dismiss, without further analysis whatsoever, the claim for violation of the obligation of fair and equitable treatment³⁴⁸.
317. However, given the different characterizations and descriptions that Claimant gave to his investment throughout this arbitration and the fact that the allegations related to the

³⁴⁷ Although Claimant questions additional measures (*i.e.*, two decisions of the Mexican courts), these measures are substantially related to the IFT’s measures. Through them, the Mexican courts confirmed and validated Decree 77.

³⁴⁸ This sentence originally contained the text “that, even if it had”, right after “the Tribunal’s findings that Tele Fácil had no interconnection rights under the August 2013 draft agreement sent by Telmex to Tele Fácil and.” The remaining arbitrators consider that including such assumption (*arguendo*) was unnecessary as it added nothing to the conclusion. The text was therefore removed.

violation of the obligation of fair and equitable treatment do not refer to “rights [...] to interconnect with Telmex and to earn revenues based on the interconnection rate (USD 0.00975 per minute of use through 2017)” or to the rights under the interconnection agreement as determined by Resolution 381, but to Tele Fácil as an investment of Claimant, the Tribunal considers necessary to determine whether Tele Fácil received treatment by Mexico, other than treatment related to Resolution 381, that could amount to a violation of NAFTA Article 1105(1).

a. The standard of Fair and Equitable Treatment under NAFTA Article 1105(1)

318. In this case, Claimant contends that both the IFT and the Mexican courts acted in an unfair and inequitable manner in connection with his investment (Tele Fácil). According to Claimant, the confirmation criteria requested by the IFT’s Compliance Unit and the *Pleno*’s Decree 77 were arbitrary³⁴⁹ and lacked due process.³⁵⁰ Claimant also adds that Decree 77 was discriminatory.³⁵¹ Finally, Claimant refers to IFT’s Resolution 127 as a “direct consequence of the IFT’s arbitrary, secretive and discriminatory scheme to save Telmex from its deal with Tele Fácil” and “derivatively [also in breach of] Article 1105.”³⁵²
319. With respect to the Mexican courts, Claimant alleges that the Specialized Telecommunications Court that decided Tele Fácil’s *amparo* action against Decree 77 acted with gross incompetence due to the fact that it confirmed the decision taken in Decree 77³⁵³ and that the Appellate Court unjustifiably denied Tele Fácil access to justice when it dismissed Tele Fácil’s appeal against the *amparo* decision regarding Decree 77.³⁵⁴

³⁴⁹ Statement of Claim (7 November 2017), ¶¶ 493-506, 530-563.

³⁵⁰ Statement of Claim (7 November 2017), ¶¶ 507-516, 564-578.

³⁵¹ Statement of Claim (7 November 2017), ¶¶ 579-586.

³⁵² Statement of Claim (7 November 2017), ¶ 597.

³⁵³ Statement of Claim (7 November 2017), ¶¶ 613-628.

³⁵⁴ Statement of Claim (7 November 2017), ¶¶ 629-640.

320. According to the notes of interpretation of NAFTA’s Free Trade Commission, adopted on 31 July 2001:

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.

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.

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).

321. In order to define the minimum standard of treatment under customary international law, Claimant invokes the *Waste Management v. Mexico* tribunal who stated 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 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.³⁵⁵

322. The Tribunal agrees with Claimant in that the *Waste Management* standard has been widely accepted and followed by other NAFTA tribunals that have addressed fair and equitable treatment claims.³⁵⁶ Moreover, the Tribunal also agrees with Claimant in that “different types of State misconduct” may fall below the customary international law minimum standard of treatment.³⁵⁷ Indeed, according to the formulation of the standard in *Waste*

³⁵⁵ **CL-071**, *Waste Management v. Mexico* (30 April 2004), ¶ 98.

³⁵⁶ See, e.g., **CL-072**, *Bilcon v. Canada* (17 March 2015), ¶¶ 427, 442; **CL-043**, *GAMI v. Mexico* (15 November 2004), ¶¶ 95-96.

³⁵⁷ Statement of Claim (7 November 2017), ¶ 444.

Management, a claimant can show a breach of the minimum standard of treatment if it establishes State misconduct that is (i) arbitrary, (ii) grossly unfair, unjust or idiosyncratic; (iii) discriminatory or; (iv) absent of due process.

323. The Tribunal notes that the use of language such as “gross,” “manifest,” and “complete lack” indicates that the threshold for showing a breach of this obligation is particularly high.

b. The request for Confirmation Criteria and Decree 77

(i) Arbitrariness

324. With respect to arbitrariness, the International Court of Justice, in the *ELSI* case, defined this concept as “something opposed to the rule of law” rather than “something opposed to a rule of law.”³⁵⁸ This definition has been accepted by at least two NAFTA Parties³⁵⁹ and prior NAFTA tribunals.³⁶⁰

325. The implication of the *ELSI* standard is that arbitrariness requires more than a showing of illegality under domestic law. Besides illegality, arbitrariness also demands a showing that the challenged State measure “manifest[ly] lack[s] of reasons”³⁶¹ or seeks an “ulterior motive.”³⁶² Thus, the arbitrariness analysis consists in reviewing the stated purposes of a certain measure and whether the measure effectively addresses the stated purposes. Other NAFTA tribunals have approached the arbitrariness analysis in these terms. The *Glamis*

³⁵⁸ **CL-034**, *Elettronica Sicula S.p.A (ELSI) (United States v. Italy)*, 1989 ICJ Reports 15 (20 July 1989), ¶ 128.

³⁵⁹ See, e.g., **CL-025**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (Rejoinder, 2 May 2007), ¶¶ 328-329; **CL-020**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 (Award, 9 January 2003) (Feliciano, de Mestral, Lamm), ¶ 121 (describing Canada’s approval of the standard).

³⁶⁰ See, e.g., **CL-026**, *Cargill v. Mexico* (18 September 2009), ¶ 291; **CL-044**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (Award, 8 June 2009) (Young, Hubbard, Caron) (“*Glamis v. United States*”), ¶ 625.

³⁶¹ **CL-044**, *Glamis v. United States* (8 June 2009), ¶ 803.

³⁶² **CL-026**, *Cargill v. Mexico* (18 September 2009), ¶ 293.

tribunal, for example, approached arbitrariness by inquiring into the motives behind the challenged measure and the relationship between the measure and the stated motives.³⁶³

326. For the arbitrariness analysis, Claimant invited the Tribunal to consider the *Bilcon v. Canada* decision.³⁶⁴ The *Bilcon* tribunal found that the Canadian authorities' decision to reject the Whites Point project was arbitrary because it "effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law".³⁶⁵ The Tribunal later insisted that "the approach of the JRP departed in fundamental ways from the standard of evaluation required by the laws of Canada"³⁶⁶ and that "[t]he Tribunal's concern is actually that the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada was not in fact carried out."³⁶⁷
327. For the reasons developed below, the Tribunal concludes that even if it were to apply the *Bilcon* tribunal standard, the claim of arbitrariness under NAFTA Article 1105 by Claimant will fail as the IFT neither created a new standard of assessment, much less departed from the standard of evaluation required under Mexican law.
328. Claimant alleges that the confirmation criteria was arbitrary because it was misused to "allow Telmex to challenge and ultimately reverse critical aspects of Resolution 381, to

³⁶³ **CL-044**, *Glamis v. United States* (8 June 2009), ¶ 763 (holding that the M-Opinion was not arbitrary because "it was thought by the government that litigation was likely"); ¶¶ 804-805 (stating that "[i]t is clear from the record that the bill addresses some, if not all, of the harms caused to Native American sacred sites by open-pit mining" and that "[t]he fact that [the bill] mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary"); ¶¶ 817-818 (holding that the fact that the SMGB Regulations excluded non-metallic mines from regulation "does not appear to be manifestly without reason" and that the inquiries behind these regulations were "sufficient to achieve the stated goal of the board: 'to ensure that there would be no future mines that would be left in an unreclaimed condition'").

³⁶⁴ Statement of Claim (7 November 2017), ¶¶ 461-462.

³⁶⁵ See, e.g., **CL-072**, *Bilcon v. Canada* (17 March 2015), ¶ 591.

³⁶⁶ See, e.g., **CL-072**, *Bilcon v. Canada* (17 March 2015), ¶ 594.

³⁶⁷ See, e.g., **CL-072**, *Bilcon v. Canada* (17 March 2015), ¶ 598.

Tele Fácil’s great detriment.”³⁶⁸ In other words, Claimant alleges that helping Telmex to reverse Resolution 381 was the ulterior motive for requesting the criteria confirmation.

329. Claimant further claims that Decree 77 was arbitrary because it (i) contradicted Resolution 381;³⁶⁹ (ii) was inconsistent with fundamental norms of Mexican telecom law and policy;³⁷⁰ (iii) leads to truly absurd results wholly inconsistent with recent Mexican telecommunications reforms;³⁷¹ and (iv) blatantly violated Mexican administrative law.³⁷²
330. The Tribunal has already found that the IFT did have authority under Mexican law to decide Telmex’s alleged dispute on rates, that the IFT dismissed Telmex’s alleged dispute on the rates on grounds of admissibility and that Resolution 381 could not grant rights on specific rates to Tele Fácil. The Tribunal also found that the language of Resolution 381 could not be interpreted as proposed by Tele Fácil before the IFT and the Mexican courts and by Claimant in this arbitration.
331. The Parties do not dispute that Mexican law allows requests for confirmation criteria and that the IFT has the right to issue confirmation criteria. Claimant challenges, however, the form and purpose of the confirmation criteria and the issuance of Decree 77 in response to the request for confirmation criteria.
332. After the issuance of Resolution 381, Telmex and Tele Fácil debated as to the interconnection agreement that had to be executed. Tele Fácil referred to the draft agreement originally submitted by Telmex on 26 August 2013 because that was one of the agreements referred to in Resolution 381.³⁷³ Telmex in turn considered that an agreement on the rates had to be reached as a result of the change in legislation, particularly the

³⁶⁸ Statement of Claim (7 November 2017), ¶ 498.

³⁶⁹ Statement of Claim (7 November 2017), ¶ 533.

³⁷⁰ Statement of Claim (7 November 2017), ¶ 538.

³⁷¹ Statement of Claim (7 November 2017), ¶ 545.

³⁷² Statement of Claim (7 November 2017), ¶ 555.

³⁷³ The words “one of the agreements” were included by the remaining arbitrators (replacing “the agreement”) to clarify that the draft agreement originally submitted by Telmex on 26 August 2013 was not the only agreement referred to in said Resolution.

characterization of Telmex as a preponderant agent and the subsequent limitation on the interconnection rates applicable by Telmex.

333. The sequence of events and submissions resulting in Decree 77 is stated in the IFT's Legal Unit request for Confirmation of Criteria as follows:

By letter received by this Institute on December 10, 2014, Telmex/Telnor exhibited each of the interconnection agreements to be executed between Telmex, Telnor and Tele Fácil, with the purpose for Tele Fácil to execute the interconnection agreements referred to in the Institute. It should be noted that these agreements present changes with respect to the main body and exhibits of the proposed agreements that were presented by Telmex/Telnor in the disagreement procedure that resulted in the Resolution.

In its case, Tele Fácil submitted in writing before the Plenary session of this Institute on December 19, 2014, documentation arguing that on December 9, 2014 Telmex/Telnor convened a meeting to be held on the same day for the execution of the interconnection agreements, not recognizing the terms and conditions of the Resolution. Based on the foregoing, Tele Fácil reported that on December 16, 2014, it presented to Telmex/Telnor a letter with the local interconnection agreement and appendices contained in the file of the proceedings of disagreement.

By application recorded on January 28, 2015, Tele Fácil presented to this Compliance Unit and against Telmex/Telnor, a complaint for failure to comply with the Resolution, claiming that interconnection has not been implemented and requesting that the actions necessary to ensure that Telmex/Telnor comply with the Resolution, and that they proceed with the immediate execution of the respective agreements.³⁷⁴

334. In its request for confirmation of criteria of 10 December 2014, Telmex referred to Tele Fácil's delay in reverting on the draft agreement presented by Telmex on 26 August 2013; to the amendments in the law after the draft was sent, to the impossibility of maintaining the original rates considering the changes in the law; and concluded that Telmex:

[...] expressly stated that they did not agree with the rates contained in the agreement, as had been told to Tele Fácil's personnel in the

³⁷⁴ C-040, Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the IFT (10 February 2015).

*last meeting held in Telmex and Telnor's offices, which was dismissed with further reasoning by the IFT and without considering the new legal framework that is widely known by the IFT, which makes the resolution that was issued for the interconnection disagreement initiated by Tele Fácil to be contrary to law.*³⁷⁵

335. Telmex requested the IFT to confirm Telmex's criteria:

[...] in the sense that the agreement that they must execute with Tele Fácil must reflect the terms and conditions contained in the currently effective legal framework.

*The above, in the understanding that the IFT may not partially resolve, since the terms and conditions of the draft agreement sent by my principals in 2013 are contrary to the currently effective legal framework because the interconnection agreement that the parties should execute must contain the interconnection rates that Telmex and Telnor must pay for termination of their traffic in Tele Fácil, as well as the origination and transit rate that Tele Fácil must pay Telmex and Telnor for these concepts for the term of January 1 to December 31, 2015.*³⁷⁶

336. Tele Fácil, in turn, in its submission of 25 January 2015 rejected Telmex's assertion that there was no agreement on the rates, stressed that the parties agreed on all the terms and conditions of the interconnection agreement, except for the indirect interconnection and portability charges, and after quoting Resolution 381 concluded that:

[...] there was no dispute concerning the interconnection tariffs and that such terms and conditions should be part of the interconnection agreement that the Institute has ordered the execution of in the Interconnection Resolution.

Consequently, considering that the above-mentioned Interconnection Resolution was notified to Tele Fácil on December 3, 2014 and to Telmex/Telnor on December 4, 2014, we can see that the legal deadline of 10 (ten) working days has elapsed without, on

³⁷⁵ C-041, Confirmation of Criteria submitted by Telmex to the IFT (18 February 2015), p. 7.

³⁷⁶ C-041, Confirmation of Criteria submitted by Telmex to the IFT (18 February 2015), p. 8.

*such date, the Resolution terms and conditions being complied with.*³⁷⁷

337. In the relevant part of its submission regarding the alleged agreement on the rates, Tele Fácil requested the IFT to conduct a verification visit to Telmex to confirm that interconnection with Tele Fácil's network had not been implemented in accordance with the indirect interconnection requested to NEXTEL and the method decided by the *Pleno*; and to undertake the actions necessary for Telmex to comply with Resolution 381, that is to say:

*[to] immediately sign the agreements that my client hereby provides once again, duly signed and the terms of which are in accordance with the Interconnection Resolution (Annex 15) and to implement the indirect interconnection under the terms requested by Tele Fácil (Annex 11).*³⁷⁸

338. From the evidence on the record it is clear to the Tribunal that Tele Fácil and Telmex had a dispute as to whether there was an agreement on the interconnection rates. Tele Fácil held that both parties had reached an agreement contained in the draft interconnection agreement submitted by Telmex to Tele Fácil in 2013. According to Tele Fácil, the existence of such agreement was confirmed by Resolution 381 and therefore, the IFT should order Telmex to sign it. Telmex's position was that no such agreement existed because as a result of the changes in the law, the declaration of Telmex as a preponderant agent and the new provisions on interconnection rates, it would be illegal for Telmex to charge the rates contained in the draft agreement.

339. The Compliance Unit's question before the *Pleno* of the IFT was whether it had the authority to decide such dispute and particularly, whether it could order Telmex to sign the draft agreement submitted by Tele Fácil – initially in 2014 and again with the January 2015 submission – which Tele Fácil claimed was the valid and binding agreement between the parties and whether Resolution 381 could be interpreted as an order for Telmex to sign

³⁷⁷ **C-038**, Notice of Breach by Telmex to Interconnection Resolution submitted by Tele Fácil before the Compliance Unit of the IFT (28 January 2015), p. 5.

³⁷⁸ **C-038**, Notice of Breach by Telmex to Interconnection Resolution submitted by Tele Fácil before the Compliance Unit of the IFT (28 January 2015), p. 8.

such draft. This was not a dispute on the rates but on whether Telmex and Tele Fácil had an agreement on the rates and if so, whether the IFT had the authority to decide that there was an agreement and order Telmex to sign such agreement.

340. The text of the criteria on which confirmation is being sought by the Compliance Unit provides as follows:

In accordance with the provisions of articles 52 and 53, section VI of the Organic Statute of this Institute, I submit this to see if the Compliance Unit, based on the complaint of Tele Fácil, can require Telmex/Telnor compliance with the Resolution, in the terms requested by the complainant, that is, to require said concessionaires both to comply with the interconnection of their networks and to execute the respective interconnection agreement, within the terms contained in the Resolution.

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.³⁷⁹

341. Decree 77, issued in response to the request for Confirmation Criteria, rejects both Tele Fácil's request to order Telmex to sign the 2013 draft agreement and Telmex's request to declare that the rates contained in said draft were contrary to the legal provisions in effect as regards interconnection rates. The reasoning of the IFT in Decree 77 is simple and straightforward: the FTBL grants the IFT the authority to decide on disputes on interconnection rates submitted to it; the only disputes submitted were indirect interconnection and portability charges; the IFT cannot decide non-disputed terms and therefore the IFT cannot decide which interconnection agreement the parties must sign nor whether the parties had a valid agreement on the interconnection rates.

³⁷⁹ **C-040**, Confirmation of Criteria submitted by the Compliance Unit to the Legal Unit of the IFT (10 February 2015), pp. 2-3.

342. The IFT concludes by indicating in Decree 77 that the First operative part of Resolution 381:

[...] is an order issued by the authority that must be complied with by Tele Fácil and Telmex/Telnor, in the understanding that said document must invariably consider the indirect interconnection and omit any reference to portability costs, the only points over which the Plenary of the IFT referred to and regarding which it has the power to obligate the parties involved.

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.³⁸⁰

343. The evidence of the record does not support Claimant's conspiracy theory to favor Telmex or a plot to deprive Tele Fácil from the rights that it allegedly had under Resolution 381. As already concluded by the Tribunal, Tele Fácil opted for an interpretation of Resolution 381 that would result in the IFT exceeding its powers. Under this interpretation, Tele Fácil requested the IFT to enforce Resolution 381 as if it had recognized that there was a valid agreement on the rates and that Resolution 381 had ordered Telmex to execute the 2013 draft agreement submitted by Tele Fácil to the IFT within the disagreement proceedings. Telmex in turn had a different interpretation and requested confirmation that there was no agreement on the rates and that the rates purportedly agreed with Tele Fácil were illegal. The IFT clarified Resolution 381 thorough Decree 77 by indicating that the IFT had only decided on the disputes submitted to it – indirect interconnection and portability – and that the other terms with respect to which no dispute was submitted were for the parties to agree.
344. The Tribunal finds no arbitrariness in the request for Confirmation Criteria or in Decree 77. A legitimate doubt arose as to the interpretation of Resolution 381 given the specific

³⁸⁰ C-051, Decree 77 (8 April 2015), p. 12.

and limited powers and authorities of the IFT.³⁸¹ The doubt arose as a result of Tele Fácil's request for the IFT to order Telmex to sign a specific interconnection agreement that Telmex disavowed. Decree 77 was issued within two months following the request for confirmation criteria and confirmed what was clear in the FTBL: that the IFT could not, without exceeding its powers, decide on disputes that were not proven and order Telmex to sign a specific interconnection agreement. It could only order Telmex and Tele Fácil to sign an agreement providing for indirect interconnection and not providing for portability. The other terms and conditions could not be the subject matter of a decision.

345. The conspiracy theories submitted by Claimant and based on allegations such as (i) the instructions purportedly given in mid-January 2015 by the IFT's Chairman, Mr. Gabriel Contreras to Mr. Sanchez Henkel, head of the IFT's Compliance Unit, not to enforce Resolution 381, (ii) that Decree 77 only considered the Compliance Unit's arguments, and (iii) that Telmex contacted the IFT before filing its own confirmation criteria at the time the Compliance Unit filed its request, are mere speculations and the evidence submitted in no way supports the serious accusation that the IFT and Telmex colluded to avoid enforcement of Resolution 381.
346. The IFT acted within its powers and authority in interpreting Resolution 381 and decided through Decree 77 the scope and extent of Resolution 381 given the doubts raised as a result of the different interpretations of Tele Fácil and Telmex. The decision itself simply

³⁸¹ The two remaining arbitrators consider that, in addition to the confusion arising because of the powers of IFT, it was also unclear which agreement had to be signed by the parties: (i) Resolution 381 refers to the 2nd version of the agreement (which has no rate); (ii) Tele Fácil alleges that it should have been comprised by the body of the 2nd version of the agreement and the rates/annexes from the 1st version. Mr. Canchola (who wrote the request for confirmation criteria) provides good testimony on this issue at page 539 of the transcript:

[...] And I should clarify here that, in an incredible act that I never had seen in my time at IFT or at COFETEL, I'd never seen a petition such as this situation in which there was apparently a meeting of the minds that did not exist as such. I had never seen that in all my time at the Institute, neither when I was in litigation or in supervision, where on the one hand one says there is an agreement, and the other says not all the conditions are there, so that for me was a problem because in order to be able to enforce the Agreement in the interconnection, I needed to know what the Agreement was. And given that distinct position of each of the two parties, in the use of my authority, I asked the legal office to render an interpretation for us, which could then be submitted to the Plenary."
Tr. Day 2 539:1-16.

stresses both the limitations of the powers of the IFT and the fact that no dispute on the rates was ever submitted to the IFT.

347. Claimant alleges that the decision contained in Decree 77 will generate a “never ending story”³⁸² that will allow one of the parties to stretch negotiations with the intention of preventing other carriers from entering and competing in the market. The Tribunal disagrees. Under FTL Article 42, the IFT can only rule on disputed terms submitted to it. This means that the IFT has no authority to alter the terms on which the parties have already reached an agreement or to decide on terms not agreed upon, but not submitted to the IFT.³⁸³ Terms that are not submitted to the IFT, under Article 42, are not necessarily agreed terms.
348. Finally, the fact that Decree 77 was not a unanimous decision has no relevance whatsoever for the purposes of showing arbitrariness. It is undisputed that under Mexican law, a majority decision of the IFT’s *Pleno* is as valid and binding as a unanimous one.
349. The Tribunal concludes that Claimant’s alleged violations of the obligations of fair and equitable treatment to Tele Fácil refer to measures affecting Resolution 381, which granted no rights to Tele Fácil, that there is no evidence supporting that either the request for confirmation criteria or Decree 77 were arbitrary.

(ii) Grossly unfair, unjust or idiosyncratic

350. The IFT acted within its powers and authority under Mexican law and nothing in the record suggests that its actions were grossly unfair, unjust or idiosyncratic.

(iii) Discrimination

351. The Parties invoke the standard of the tribunal in *Waste Management* according to which “the minimum standard of treatment of fair and equitable treatment is infringed by conduct

³⁸² For the sake of clarity, the remaining arbitrators consider useful to add that recourse to civil courts prevents the “never-ending story” from occurring. In the opinion of such arbitrators, recourse to such courts reinforces that the IFT is not the competent authority for determining the existence of an agreement.

³⁸³ See *i.e.*, ¶¶ 246, 255, 262 above.

attributable to the State and harmful to the claimant if the conduct [...] is discriminatory and exposes the claimant to sectional or racial prejudice.”³⁸⁴ Subsequent NAFTA tribunals have found, under this standard, that discrimination exists if the State willfully targets the investor.³⁸⁵

352. To identify whether the State willfully targeted the investor, Tribunals have looked into whether there is a legitimate justification for such targeting. In *Cargill*, for example, respondent alleged that claimant’s targeting was based on “legitimate countermeasures under international law.”³⁸⁶
353. Claimant did not even make a *prima facie* case that the request for confirmation criteria or Decree 77 were discriminatory. Claimant’s simply stated that Decree 77 singled out his investment (*i.e.*, Tele Fácil) supposedly because the IFT treated the company in an unprecedented manner.
354. However, Claimant was unable to point at a case in which an investor or an investment had been treated differently in like or comparable circumstances or that there was a precedent in the treatment of an investment of an investor that was disregarded by the IFT. Claimant cited a number of cases in an attempt to show a difference in treatment. However, none of such cases evidences that the telecommunication carriers involved had been in the same position of Tele Fácil. Claimant itself admitted that this case was unique.
355. The uniqueness of this case lies in that, as admitted by Claimant and sustained by the IFT, generally the parties to an interconnection agreement submit to the IFT only the disputed terms of the interconnection agreement after having agreed on all other terms. In this case, however, Tele Fácil submitted to the IFT a dispute on indirect interconnection and portability charges, without carrying out a real negotiation before with Telmex. As the IFT

³⁸⁴ **CL-071**, *Waste Management v. Mexico* (30 April 2004), ¶ 98.

³⁸⁵ **CL-026**, *Cargill v. Mexico* (18 September 2009), ¶¶ 2, 300, 550; **CL-130**, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL (Award, 16 March 2017) (van den Berg, Born, Bethlehem), ¶ 440 (“Claimant does not allege that the promise utility doctrine discriminates against foreign patent holders on its face, or that Canadian courts have shown any intent to discriminate against foreign patent holders”).

³⁸⁶ **CL-026**, *Cargill v. Mexico* (18 September 2009), ¶¶ 379, 382.

explained, the dispute resolution proceedings under Article 42 were initiated without the parties having agreed on all the interconnection terms.

356. This case was unique and therefore there was no precedent. The uniqueness of the case was the result of Tele Fácil having submitted a dispute on only two issues (indirect interconnection and portability) when it knew or should have known either that there was no agreement on the other terms and conditions of the interconnection agreement or that there was a substantial risk of Telmex challenging the existence of such agreement. After unjustifiably delaying for around 10 months a response to Telmex’s proposed draft interconnection agreement, immediately after the amendments in the law affecting the ability of Telmex to charge the rates contained in the draft, Tele Fácil rushed to provide comments on the draft and without waiting for a response to such comments, it submitted the dispute to the IFT. If the IFT assumed that all the other terms and conditions had been agreed upon, as it had been generally the case, this was the result of Tele Fácil’s own acts and assumption of the risk that it had a valid and finalized agreement with Telmex, except for the two issues submitted to the IFT. The unprecedented situation was created by Tele Fácil’s conduct and the risks it decided to assume to bet for a business opportunity.
357. Claimant therefore did not prove that either the request for confirmation criteria or Decree 77 were discriminatory, much less that Tele Fácil was treated unfairly or inequitably with respect to measures other than the ones affecting a resolution – Resolution 381 – under which he has no rights.

(iv) Due process

358. Lack of due process may occur in the context of judicial and administrative proceedings.³⁸⁷ However, the standard is different in each scenario. The lack of due process has to lead: (i)

³⁸⁷ **CL-071**, *Waste Management v. Mexico* (30 April 2004), ¶ 98 (stating that “the minimum standard of treatment of fair and equitable treatment is infringed by conduct [...] involv[ing] 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*.”). (Emphasis added).

“to an outcome which offends judicial propriety [...] in judicial proceedings” or “to [...] a complete lack of transparency and candour in an administrative process.”³⁸⁸

359. In the field of administrative proceedings, the standard is a “a complete lack of transparency and candour in an administrative process.”³⁸⁹ On this point, few decisions have been on the point. The *Metalclad* tribunal although did not expressly examine a lack of due process claim, considered that Mexico had breached its fair and equitable treatment obligation in accordance with NAFTA because it failed to ensure a “transparent and predictable framework” to the investor regarding a rule applicable to the requirement or not of a municipal construction permit.³⁹⁰
360. According to the *Metalclad* tribunal, “transparency” is “prominent” under NAFTA. Thus, if State authorities “become aware of any scope for misunderstanding or confusion [in connection with all legal requirements for the purposes of initiating, completing and successfully operating an investment] it is their duty to ensure that the correct position is promptly determined and clearly stated”.³⁹¹ In the *Metalclad* tribunal’s finding, it was central the fact that for a long time the investor relied on federal government officials’ reiterative representations that a municipal construction permit was unnecessary to build a hazardous waste landfill but later the municipality required such permit and did not grant it on grounds unrelated to the physical construction.³⁹²
361. The *TECO v. Guatemala* tribunal, in applying a similar minimum standard of treatment provision in CAFTA-DR, stated that “[i]n assessing whether there has been [...] 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.”³⁹³ For this Tribunal, the holding in

³⁸⁸ **CL-071**, *Waste Management v. Mexico* (30 April 2004), ¶ 98.

³⁸⁹ See ¶ 321 above.

³⁹⁰ **CL-053**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award, 30 August 2000) (Lauterpacht, Civiletti, Siqueiros) (“*Metalclad v. Mexico*”), ¶ 99.

³⁹¹ **CL-053**, *Metalclad v. Mexico* (30 August 2000), ¶ 76.

³⁹² **CL-053**, *Metalclad v. Mexico* (30 August 2000), ¶¶ 79-101.

³⁹³ **CL-066**, *TECO v. Guatemala* (19 December 2013), ¶ 457.

TECO is relevant insofar as a lack of due process can be established only if the administration has *entirely* disregarded the procedural rules that it must follow within a particular process.

362. Claimant alleges that the IFT Compliance Unit's request "was conducted for months in secrecy, without involving Tele Fácil or affording the company any due process."³⁹⁴ Claimant further alleges that "[a]pplying 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."³⁹⁵
363. As stated previously, in administrative proceedings Claimant must prove a complete lack of transparency and candour to establish a breach of Respondent's fair and equitable obligation for lack of due process.
364. Claimant's case draws from the basis that there was a dispute pending before the IFT and therefore the IFT had to apply the disagreement proceedings set forth in FTL Article 42 instead of the confirmation of criteria. According to Claimant there was a "direct conflict between two providers' interests."³⁹⁶ That is contradictory not only with the findings of the Tribunal in this case but also with Claimant's own narrative. There was no dispute on the rates. The conflict between Tele Fácil and Telmex was a conflict as to whether they had entered into a valid and binding agreement on the rates. The IFT did not have the power or the authority to decide such conflict and therefore Resolution 381 could not be interpreted as deciding on rates or as accepting that all the terms and conditions in the draft agreement submitted by Tele Fácil had been agreed upon. The IFT could only decide on the issues submitted by Tele Fácil: indirect interconnection and portability charges.
365. The disputes on the rates before the IFT were: the one initially submitted by Telmex and dismissed by the IFT in Resolution 381 on grounds of admissibility and the one submitted by Telmex and resolved by the IFT with Resolution 127. Consequently, Claimant cannot

³⁹⁴ Statement of Claim (7 November 2017), ¶ 507.

³⁹⁵ Statement of Claim (7 November 2017), ¶ 511.

³⁹⁶ Statement of Claim (7 November 2017), ¶ 510.

validly allege a violation of due process merely because he considers that the IFT should have followed disagreement proceedings to resolve a dispute that Claimant himself alleges that at the time did not exist, instead of the corresponding proceedings for interpreting a resolution (*i.e.*, Resolution 381). The confirmation criteria proceedings were carried out under the applicable rules. In fact, Claimant does not question that the IFT properly followed such applicable rules and the legal experts explained that these rules do not provide, as do the rules governing the disagreement proceedings, for a specific opportunity to be heard. In any event, the record also evidences that Tele Fácil did have the opportunity to present its case to the IFT's *Pleno* session of 5 March 2015, before Decree 77 was issued.³⁹⁷

366. The Tribunal therefore finds, first, that Claimant is not claiming a violation of the fair and equitable treatment obligation in connection with investments other than the ones allegedly arising from Resolution 381 and second, that in the request for confirmation criteria the IFT did not violate Tele Fácil's right to due process.

367. As regards Decree 77, Claimant complains that it "compounded the IFT's complete denial of due process to Tele Fácil."³⁹⁸ Claimant alleges that through Decree 77, the IFT's *Pleno* erred in three ways: (i) condoning and perpetuating all of the process errors committed by the Legal Unit;³⁹⁹ (ii) disingenuously representing that Tele Fácil's views had been taken into consideration;⁴⁰⁰ (iv) not accounting for Tele Fácil's views.⁴⁰¹ None of these premises are correct.

368. First, as stated previously, the confirmation criteria proceedings were conducted in accordance with the applicable law.⁴⁰² Neither the Compliance Unit nor the Legal Unit or the *Pleno* erred in applying the corresponding rules. The rules that Claimant claims as

³⁹⁷ C-043, Transcript of Audio Recording of Plenary Meeting No. 2015-03-05-1239-SP- 18 with Tele Fácil (5 March 2015).

³⁹⁸ Statement of Claim (7 November 2017), ¶ 564.

³⁹⁹ Statement of Claim (7 November 2017), ¶ 565.

⁴⁰⁰ Statement of Claim (7 November 2017), ¶ 572.

⁴⁰¹ Statement of Claim (7 November 2017), ¶ 576.

⁴⁰² See ¶ 365 above.

applicable correspond to the ones that the IFT must follow to decide a dispute, which was not the case.

369. Second, in Decree 77, the *Pleno* did not represent that Tele Fácil's views had been taken into consideration. Claimant's allegation is based on the following text 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.*⁴⁰³

370. Nothing in this passage supports Claimant's claim. It merely states that the *Pleno* reviewed the text of Resolution 381 in order to determine its scope and extent. There is no representation regarding Tele Fácil.

371. Third and last, Claimant complains that Tele Fácil views were not considered. The claim is not supported by the evidence. Tele Fácil requested enforcement of Resolution 381 and explained its interpretation as to the scope and extent of the resolution starting from the premise that there was an agreement on the rates. Telmex had a completely different interpretation, considered that there was no such agreement and requested the IFT to decide that the alleged agreement on the rates claimed by Tele Fácil was illegal. In Decree 77, the IFT summarizes the issues at stake, the requests from both parties and decides, correctly, that it only has authority to decide on disputed terms and conditions that the network carriers submit for its decision but not on disputed issues not submitted to the IFT nor on whether the parties have agreed or not on certain terms and conditions.

372. The Tribunal finds that there is no allegation of the violation of due process to Tele Fácil in connection with rights other than the ones allegedly conferred by Resolution 381 and that, in any event, due process was not violated in the issuance of Decree 77.

373. Moreover, Claimant contends that "Resolution 127 is a direct consequence of the IFT's arbitrary, secretive and discriminatory scheme to save Telmex from its deal with Tele Fácil.

⁴⁰³ Statement of Claim (7 November 2017), ¶ 572 (citing Decree 77).

Therefore, derivatively, it also breaches Article 1105.”⁴⁰⁴ However, having concluded that neither the request for confirmation criteria nor Decree 77 breached NAFTA Article 1105, Resolution 127 cannot “derivatively” breach NAFTA Article 1105.

c. The decisions of the Mexican courts

374. Under the denial of justice claim, Claimant challenges two decisions of the Mexican courts. *The first decision* is the one issued by the First District Court for Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications on 22 January 2016, which denied Tele Fácil’s *amparo* action challenging the constitutionality of Decree 77.⁴⁰⁵ *The second decision* is the Circuit Court’s decision of 21 April 2016 that dismissed Tele Fácil’s appeal, with prejudice, and without addressing the substance of Tele Fácil’s claim⁴⁰⁶.
375. Again, both decisions allegedly affect the rights that Claimant considers were conferred by Resolution 381 and the Tribunal has already concluded that Tele Fácil had no such rights under Mexican law. In any event, the Tribunal finds no denial of justice for the reasons explained below.
376. As regards the First District Court’s Decision of 22 January 2016 that decided on the *amparo* against Decree 77, the Tribunal finds that the criticisms of Claimant to this decision are not sufficient to establish a breach of NAFTA Article 1105. Claimant disagrees with the reasoning of the Court and with the fact that the Court dismissed Tele Fácil’s arguments and criticizes, with no evidence or support, what it perceives as a lack of preparation of the Mexican courts to deal with telecommunications matters. But a mere disagreement with the reasoning does not amount to a lack of reasoning nor does it allow this Tribunal to consider that the Court administered justice in a seriously inadequate way or that it clearly and maliciously misapplied the law.

⁴⁰⁴ Statement of Claim (7 November 2017), ¶ 597.

⁴⁰⁵ Statement of Claim (7 November 2017), ¶ 615.

⁴⁰⁶ Statement of Claim (7 November 2017), ¶ 629.

377. It is not for this Tribunal to second-guess the decisions made by domestic courts or to act as a court of appeals. Claimant’s allegations do not evidence a serious flaw or malice in the application of the law but simply a disagreement on the reasoning.
378. With respect to the Circuit Court’s decision of 21 April 2016 dismissing Tele Fácil’s appeal, the evidence before this Tribunal overwhelmingly proves that Tele Fácil acted imprudently, assumed risks and disregarded the most basic diligence in the filing of the appeal, and now attempts to avoid the consequences of its own acts.
379. The Parties do not dispute that the ten-day term to file the appeal expired at midnight on 11 February 2016. Mr. Bello, a witness in this proceedings and counsel for Tele Fácil at the time, explained that on 11 February 2016, his colleague Diana Margarita Mayorga Rea, “left at 11:00 pm to submit the appeal to the specialized Court of Appeals” and due to “terrible traffic on the road [she] arrived later than expected at the courthouse, but still on time [...] at 11:58 [pm].”⁴⁰⁷. The same witness subsequently indicated that “the security officer prevented my attorney from entering and asked her to wait until they contacted the person in charge of the Office of Correspondence” who later appeared and told her “that he would not receive any other documents because it was already past midnight.”⁴⁰⁸ Claimant alleges that “[i]n an unprecedented event, the courthouse security guard denied counsel’s access to the court’s filing office.”⁴⁰⁹
380. Had Tele Fácil acted with a minimum degree of diligence in the appeal of a decision related to Decree 77 that allegedly destroyed the value of its investments, it would have not waited until the eleventh hour to file the appeal and there would not have been a debate on the decision of the Circuit Court’s not to admit the appeal for being extemporaneous.⁴¹⁰

⁴⁰⁷ C-004, Bello First Statement (6 November 2017), ¶ 140.

⁴⁰⁸ C-004, Bello First Statement (6 November 2017), ¶ 141.

⁴⁰⁹ Statement of Claim (7 November 2017), ¶ 631.

⁴¹⁰ The remaining arbitrators consider useful to add that counsel for Tele Fácil not only appeared at the court at 11:58 p.m. on the last date of the term for filing, that is, two minutes before the deadline, but also failed to file at 9:00 a.m. the next day as allowed and required by Mexican jurisprudence. In other words, Tele Fácil not only put itself at risk by attempting to file at the eleventh hour, but also through its own mistakes and fault, failed to file the next day after the term expired all of which caused the filing to be extemporaneous.

381. Claimant has two criticisms on the decision not to admit the appeal. *First* that the Chief Justice of the Circuit Court admitted the appeal on 9 March 2016 but, despite this prior decision, on 21 April 2016, “the Circuit Court, sitting as a panel of three judges, dismissed Tele Fácil’s appeal.”⁴¹¹ The second criticism is that the Circuit Court’s dismissal was “without any reasonable justification.”⁴¹²
382. As to the first criticism, it is undisputed that under Mexican law, the decision of 9 March 2016 issued by one judge was not a final decision and therefore could eventually change if the panel of three judges were to disagree with the first decision. Claimant therefore cannot hold to the first and not final decision to claim that there was a denial of justice.
383. The second criticism is based on an examination by Claimant of the reasoning of the Circuit Court to dismiss the appeal and alleges that such facts and norms could have been interpreted differently.⁴¹³ Again, a mere disagreement with the reasoning of the court does not amount to a denial of justice.
384. The Tribunal therefore finds that Tele Fácil was not denied justice.
385. For all the above stated reasons, the Tribunal does not find that Respondent breached its obligation of fair and equitable treatment under NAFTA Article 1105.

VII. COSTS

A. CLAIMANT’S COST SUBMISSIONS

386. In its submission on costs, Claimant argues that Respondent should bear the total arbitration costs incurred by Claimant⁴¹⁴, including legal fees and expenses totaling USD 6,406,160.63, broken down as follows:

⁴¹¹ Statement of Claim (7 November 2017), ¶¶ 633-634.

⁴¹² Statement of Claim (7 November 2017), ¶ 634.

⁴¹³ *See, i.e.*, Statement of Claim (7 November 2017), ¶¶ 634-635.

⁴¹⁴ Claimant’s Statement of Costs (15 January 2020), p. 1.

Tribunal and ICSID Costs	USD 575,000
Legal Representation – Fees & Expenses	USD 4,776,095.98
Other Assistance – Expert Fees & Expenses	USD 987,339.14
Other Assistance – Translation & Hearing Preparatory Costs	USD 52,705.74
Witness Expenses Related to the Hearing	USD 15,019.77
GRAND TOTAL	USD 6,406,160.63

387. Claimant makes this claim on the basis of Article 38 of the UNCITRAL Rules.

B. RESPONDENT’S COST SUBMISSIONS

388. In its submission on costs, Respondent submits that Claimant should bear all the costs and expenses of these proceedings, including Respondent’s legal fees and expenses totaling USD 2,525,014.36, broken down as follows:⁴¹⁵

Outside Consultants	USD 1,362,517.20
Experts	USD 586,192.38
ICSID Payments	USD 550,000
<i>Per Diem</i> Costs of Mexico’s Representatives	USD 26,304.78
GRAND TOTAL	USD 2,525,014.36

C. THE TRIBUNAL’S DECISION ON COSTS

389. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how

⁴¹⁵ Respondent’s Statement of Costs (15 January 2020), p. 2.

and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

390. Article 40(1) and (2) of the Arbitration Rules provide that:

Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

391. These provisions give the Tribunal discretion to allocate all costs of the arbitration. Article 61(2) of the ICSID Convention establishes that “the Tribunal [...] shall decide how and by whom [the arbitration costs] shall be paid”. Article 40(1) of the Arbitration Rules states that although “the costs of arbitration shall in principle be borne by the unsuccessful party [...] the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case” and Article 40(2), which refers to the reasonable costs for legal representation and assistance of the successful party claimed during the arbitral proceedings — as stated in Article 38(e) — reiterates that the tribunal “taking into account the circumstances of the case” is “free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

392. In the present case, the arbitrators’ fees and expenses and ICSID’s administrative fees and direct expenses, amount to (in USD):

Arbitrators’ fees and expenses	691,058.65
ICSID’s administrative fees	116,000.00

Direct expenses	141,316.38
Total	<u>948,375.03</u>

393. The above costs have been paid out of the advances made by the Parties in equal parts.⁴¹⁶ As a result, each Party's share of the costs of arbitration amounts to USD 474,187.51.
394. Claimant has failed in all his claims before this Tribunal and even though it is true that Respondent failed in its jurisdictional objection, the changes and delays in the jurisdictional objections and the need to submit additional jurisdictional objections resulted from the late information submitted by Mr. Blanco as to his bankruptcy, his subsequent withdrawal from the case and the new position of Mr. Nelson as sole Claimant.
395. Accordingly, the Tribunal, in exercise of its discretion, has decided that Claimant should (a) bear the arbitrators' fees and expenses and ICSID's administrative fees and direct expenses, for a total amount of (USD 948,375.03); (b) bear 80% of the costs of Respondent in the amount of USD 1,580,011.49;⁴¹⁷ and (c) bear his own costs.

VIII. AWARD

396. For the reasons set forth above, the Tribunal decides as follows:
- (1) Denies Respondent's objection to jurisdiction based on NAFTA Article 1117;
 - (2) Denies Claimant's claim of unlawful expropriation based on NAFTA Article 1110;
 - (3) Denies Claimant's claim of unfair and inequitable treatment based on NAFTA Article 1105;

⁴¹⁶ The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

⁴¹⁷ Respondent's costs, excluding the item for costs of the proceeding (USD 550,000), amount to USD 1,975,014.36. 80% of this amount is USD 1,580,011.49.

- (4) Determines Claimant to pay Respondent the amount of USD 2,054,199⁴¹⁸ for arbitration costs.

⁴¹⁸ This amount is the result of adding 80% of Respondent's costs (USD 1,580,011.49) plus the costs of the arbitration that were advanced by Respondent (USD 474,187.51).

Date: 5 June 2020

Place of Arbitration: Toronto, Canada

V.V. Veeder QC
Arbitrator

[*Signed*]

Mariano Gomezperalta Casali
Arbitrator

[*Signed*]

Eduardo Zuleta
President of the Tribunal

In accordance with Article 32.4 of the UNCITRAL Rules, the Award does not contain the signature of arbitrator V.V. Veeder QC because he passed away on 8 March 2020.