UNOFFICIAL COURTESY TRANSLATION

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Telefonica v. United Mexican States
(ICSID Case No. ARB(AF)/12/4)

PROCEDURAL ORDER No. 1

Dr. Eduardo Zuleta Jaramillo, President of the Tribunal
Dr. Horacio Grigera Naón, Arbtirator
Lic. Ricardo Ramírez Hernández, Arbitrator

Secretary of the Tribunal
Sra. Natalí Sequeira

Date of dispatch to the Parties: 8 July 2013

[TABLE OF CONTENTS OMITTED]

I. Introduction

1. On 9 March 2012, Telefonica S.A. ("Claimant" or "Telefonica") submitted a "Request for commencement of arbitration and approval to the Additional Facility" with its respective Annexes ("Request for Arbitration") to the Secretary General of the International Centre for Settlement of Investment Disputes in regard to a dispute with the United Mexican States ("Respondent" or "United Mexican States"). This request was supplemented by letters dated 27 March, 16 May and 8 June 2012.

2. On 21 June 2012, ICSID's Secretary General, pursuant to Article 4 of the Additional Facility Rules, approved access to the Additional Facility and registered the dispute assigning it the Case Reference Number ARB(AF)/12/4.

3. Pursuant to Article 5(c) of the Arbitration Rules (Additional Facility), the Parties were invited, through the Notice of Registration, to communicate to ICSID their agreed upon terms with respect to the number of arbitrators and method of appointment.

4. The Secretary General observed that the Agreement for the Promotion and Reciprocal Protection of Investments signed by the Kingdom of Spain and the United Mexican States ("APPRI") contained provisions in regard to the method of appointment of the Tribunal in its Article XIII. Therefore, as established in Article 5(e) of the Arbitration Rules (Additional Facility), invited the Parties to proceed, as soon as possible, to constitute the Arbitral tribunal in accordance with what the APPRI prescribed.

5. According to a communication by the Respondent dated 14 November 2012 and a communication by the Claimant dated 15 November 2012, the Parties informed ICSID about the agreement reached in relation to the method of constitution of the Arbitral Tribunal and the appointment of the arbitrators. According to said agreement, the Parties informed ICSID that the Tribunal would be integrated by Licenciado Ricardo Ramírez Hernández, national of the United Mexican States, Dr. Horacio Grigera Naón, national of the Republic of Argentina and Dr. Eduardo Zuleta, national of the Republic of Colombia, who would serve as the President of the Tribunal.

6. On 15 April 2013, the Parties informed the Tribunal about the agreement reached by them in relation to the issues expressed in the draft Procedural Order No. 1.[1] On the same date, the Parties informed the Tribunal that the only issue over which an agreement could not be reached was on confidentiality and/or publication of the proceedings.

7. The Tribunal received Claimant's additional comments on the issue of confidentiality on 15 April and 26 April 2013. It received additional comments by the Respondent on the same issue on 18 April and 26 April 2013.

[1] Said draft was provided by the Tribunal on 21 December 2012, for discussion during the First Session scheduled for 14 May 2013.

8. On 30 April 2013, the Tribunal confirmed reception of the pleadings related to the issue of confidentiality to the Parties and informed them that it would make its decision based on the pleadings it had received and without the need for a hearing. Likewise, the Arbitral Tribunal invited the Parties to refrain from disclosing or provide information about this arbitration proceeding until the Tribunal settled the Parties dispute on the issue of confidentiality.

9. On 2 May 2013, the Respondent made additional comments to the Tribunal's 30 April 2013 decision. The Claimant submitted its observations to said comments on 3 May 2013, and the Respondent replied on 4 May 2013.

10. Through a communication dated 7 May 2013, the Tribunal informed the Parties that:

> *"The Arbitral Tribunal has received the Parties' communications related to the issue of confidentiality, the only issue from the Procedural Order pending agreement.*
>
> *After reviewing the communications, the Tribunal considers that there are certain points that need to be further clarified in regard to the above mentioned issue and that it must give the parties the opportunity to explain their position to the Tribunal and respond to questions that the Tribunal may have on the parties' positions.*
>
> *In view of the foregoing, the agenda for the telephone conference programmed for Tuesday 14 May 2013, at 10:00 a.m. Washington time, will be the following:*
>
> 1. *Presentation of the attendees and the Members of the Tribunal.*
> 2. *Confirmation of the points of agreement of the Procedural Order*
> 3. *Position of the Parties:*
>   a) *Presentation of the Claimant's position on the issue of confidentiality for a maximum of 30 minutes.*
>   b) *Presentation by the Respondent on the issue of confidentiality for a maximum of 30 minutes.*
>   c) *Reply by the Claimant for a maximum of 10 minutes.*
>   d) *Rejoinder by the Respondent for a maximum of 10 minutes.*
> 4. *Tribunal's questions*
> 5. *Other [issues]"*

11. Pursuant to the agreement by the Parties and the Tribunal, the First Session was held on 14 May 2013 through a telephone conference.

12. During the First Session, the Parties ratified the procedural agreements they had reached and reiterated that their only disagreement was in regard to the issue of confidentiality. In the present Procedural Order the Tribunal will address, first, the agreed upon aspects by the Parties and under the item "Other Issues" it will then address the dispute related to the issue of confidentiality and set the procedural rules on the matter.

II. Procedural issues agreed by the Parties

1. Pursuant to Articles 21 and 28 of ICSID's Arbitration Rules (Additional Facility), this first Procedural Order establishes the procedural rules that have been agreed by the Claimant and Respondent and that the Arbitral Tribunal has determined shall apply to this arbitration proceeding as well as those that the Tribunal determined shall apply to those issues where an agreement could not be reached.

1. Applicable Arbitration Law and Regulations

1.1 This proceeding will be governed by the provisions set out in the current Agreement for the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain, that is, the one dated 4 April 2008 (APPRI) and the applicable rules and principles of international law.

1.2 Likewise, the proceeding will be governed by ICISID's Additional Facility Rules in force since 10 April 2006.

2. Constitution of the Tribunal and Declarations by its Members

2.1 The Tribunal was constituted on 6 December 2012 in accordance with the APPRI and Article 13(1) of the Arbitration Rules (Additional Facility). The Parties confirm that the Tribunal has been duly constituted and that neither of them has any objections with respect to any of its Members.

2.2 The Members of the Tribunal timely presented their signed declarations in accordance with Article 13(2) of the Arbitration Rules (Additional Facility). The Secretariat provided copies of said declaration to the Parties on 6 December 2012.

3. Fees and Expenses of the Members of the Tribunal

3.1 The fees and expenses of each arbitrator shall be determined and paid in accordance with the current version of ICSID's Schedule of Fees and the Memorandum on the Fees and Expenses of ICSID Arbitrators current on the date in which the fees are earned.

3.2 The Members of the tribunal shall submit their fees and expense claims to the ICSID Secretariat every three months.

3.3 Each Member of the Tribunal will receive a fee equivalent to 25% of the time reserved for the hearing that was not used due to postponement or cancellation by request of one or both Parties with less than 30-days' notice.

3.4 If the request to postpone or cancel the hearing is made by only one of the Parties, the requesting party shall pay to each Member of the Tribunal the amount equivalent to 25% of the time reserved for the hearing that was not used by virtue of the request.

4. Attendance and quorum

4.1 The presence of the three Members of the Tribunal will be required to constitute a quorum in each and every session of the Tribunal.

4.2 The Tribunal may meet by teleconference.

5. Tribunal's decisions

5.1 The Tribunal will adopt its decisions by majority of its Members. Abstentions will be counted as negative votes.

5.2 The Tribunal may issue its decisions through any means of communication after consultation with all of its Members. Article 24 of the Arbitration Rules (Additional Facility) shall apply to decisions made through correspondence. However, in the case of urgent matters and in exceptional circumstances, the President may issue procedural orders without consulting with the rest of the Members, in which case said orders will be subject to possible reconsideration by the Tribunal.

6. Delegation of power to set deadlines

6.1 The President will have the power to set and extend the established deadlines to complete the different stages of the proceeding.

6.2 While exercising this power, the President shall consult with all Members of the Tribunal. In the case of urgent matters, the President may set or extend deadlines without consulting the rest of the Members, which decisions will be subject to possible reconsideration by the Tribunal.

7. Representatives of the Parties

7.1 Each Party will be represented by the persons listed below. The Parties may appoint other representatives and shall promptly notify the ICSID Secretariat.

Representing the Claimant

Sr. Luis Rubio Barnetche
Email: rubiol@gtlaw.com
Tel.: +52 55 5029.0020

Sr. Matías Bietti
Email: biettim@gtlaw.com
Tel.: +52 55 5029.0077

Sr. Joselino Morales López
Email: moralesjo@gtlaw.com
Tel.: +52 55 5029.0033

Sr. Eugenio Fernando Ballesteros Cameroni
Email: ballesterosf@gtlaw.com
Tel: +52 55 5029.0039

Sr. Jaime Deschamps González
Email: jdeschamps@dya.mx
Tel.: +52 55 6273.6609

Address: Avenida Paseo de la Reforma No. 265 PH-1, Colonia Cuauhtémoc, Delegación Cuauhtémoc, 06500 México City

The foregoing representatives may intervene in the proceeding jointly or separately.

Representing the Respondent

Sr. Carlos Véjar Borrego
Director General de Consultoría Jurídica de Comercio Internacional
Secretaría de Economía
Alfonso Reyes No. 30, piso 17
Col. Condesa, Delegación Cuauhtémoc
C.P. 06140
México City
Email: carlos.vejar@economia.gob.mx
Tel: +52 55 57 29 91 34,

+52 55 57 29 91 16
+52 55 57 29 94 38

The following persons are also authorized to act and assist in the proceeding:

Sr. Aristeo López Sánchez
Email: aristeo.lopez@economia.gob.mx

Sra. Cindy Rayo Zapata
Email: cindy.rayo@economia.gob.mx

Sr. J. Cameron Mowatt
Sr. Alejandro Barragán
Sr. Stephen E. Becker

8. Distribution of costs and advance payments to the Centre

8.1 The distribution of costs and payments to the Centre will be determined in accordance with Rule 14 of the Administrative and Financial Regulations. Without prejudice to the Tribunal's final decision on costs in the arbitral award, the Parties shall share equally in the expenses incurred in the proceeding in accordance with Article 58 of the Arbitration Rules (Additional Facility).

8.2 By letters dated 13 and 20 December 2012, the Centre requested each party an advance payment of 150,000 USD to cover the initial costs of the proceedings. The Centre received payment from the Claimant on 15 January 2013. On 15 April 2013 the Centre informed the Parties that as of that date it had not yet received the first payment owed by the Respondent, and pursuant to Rule 14(3)(d) of ICSID's Administrative and Financial regulations, it requested asked the Parties to cover the outstanding amount of 150,000 USD. By letter dated 3 May 2013, the Respondent informed the Centre that the payment was being processed and that it expected it to be ready towards the end of the month. The Respondent has informed the Centre that it has initiated the procedures to make the corresponding payment.

9. Place of arbitration

9.1 The place of arbitration is Washington D.C. The Tribunal may hold hearings in any place it deems appropriate after consultation with the Parties. The Tribunal may deliberate in any place it deems appropriate.

10. Language of the proceedings

10.1 The language of this proceeding will be Spanish. The Parties reserve the right to request the use of English during the hearing, in which case, the Party making the request will absorb the costs incurred by reason of interpretation, simultaneous translation and other similar services.

10.2 The ICSID Secretariat will make all the necessary arrangements for the interpretation services and will charge the account of the party requesting interpretation, simultaneous translation and similar services pursuant to the terms set out in item 10.1 above. The foregoing without prejudice of the Tribunal's final decision on costs. The Parties shall inform the Secretariat about the need for interpretation services at least eight weeks in advance of the hearing.

11. Means of communication and copies of the instruments

11.1 The Centre will be the channel for all written communication between the Parties and the Tribunal. The Parties shall transmit their written communications by email to the other party and the ICSID Secretariat, who will then transmit it to the Tribunal. The communications that are to be sent simultaneously pursuant to an order by the Tribunal shall be sent to the ICSID Secretariat only. The exchange of communications between the parties that are not intended for the Tribunal must not be sent to the ICSID Secretariat.

11.2 The Parties shall:

11.2.1 send an email to the ICSID Secretariat and their counterpart attaching an electronic version (without exhibits or authorities) of the pleadings, witness statements and expert reports on their respective due date;

11.2.2 within the two following working dates, they shall send by courier:

11.2.2.1 One (1) unbound size A4 printed copy of the complete presentation for ICSID's file, including the pleadings, witness statements, expert reports and annexes (without legal authorities);

11.2.2.2 Five (5) USB memory devices, CD-Roms or DVDs containing a complete copy of the presentation (pleadings, witness statements, expert reports, annexes and authorities);

11.2.2.3 At the same time they shall courier to their counterpart:

11.2.2.4 One (1) USB device, CD-Rom or DVD with a complete copy of the presentation (pleadings, witness statements, expert reports, annexes and authorities);

11.3 ICSID Secretariat's contact information for deliveries over email, post, and international courier is the following:

Natalí Sequeira

ICSID

MSN U3-301
3301 Pennsy Dr.
Landover, MD 20785-1606
EUA
Tel.: + 1 (202) 458-8575
Fax: + 1 (202) 522-2615
Email: nsequeira@worldbank.org

11.4 For local deliveries the contact information is the following:

Natalí Sequeira
1800 G Street, NW ("U Building")
3rd Floor
Washington, D.C. 20006
EUA
Tel.: + 1 (202) 458-8575

11.5 The Tribunal may request, at any given time, printed copies of any document submitted electronically.

11.6 Only electronic versions are required in the case of authorities.

11.7 Electronic versions of the pleadings and, whenever possible annexes, should be searchable (OCRd in PDF or Word format)

11.8 The pleadings must be accompanied by an exhibit list (including witness statements, expert reports, annexes and legal authorities). Said list will be updated every time a new pleading is submitted. The exhibits listed therein shall be classified in accordance with the corresponding pleading.

11.9 The official date of reception of a pleading or communication shall be the date in which its electronic version is sent to the Centre.

11.10 A presentation will be deemed to have been made on time if it is sent no later than midnight on the due date.

11.11 The decisions by the Tribunal will be dispatched to the Parties through the Secretariat.

12. Written and oral submissions

12.1 The proceeding will comprise a written stage followed by an oral stage.

13. Schedule for written submissions

13.1 The Parties have agreed a procedural schedule attached to this Order as Annex A

14. Production of documents

14.1 The Parties have agreed to the application of Rule 3 (Documents) of the "IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration" approved on 29 May 2010 by the IBA Council.

14.2 The procedure for the production of documents will be as follows:

14.2.1 The Respondent will have an opportunity to request the production of documents following the presentation of the memorial on the date indicated in Annex A.

14.2.2 Likewise, the Claimant will have an opportunity to request the production of additional documents following the presentation of the counter-memorial on the date indicated in Annex A.

14.2.3 The Parties may, on an exceptional basis and only insofar as the Reply and Rejoinder contain new arguments, request the production of a reasonable amount of additional documents following the presentation of the reply and rejoinder on the dates specified in Annex A.

14.2.4 If the party to which the request is directed has no objections with respect to the requested documents or category of documents under its custody or control, these shall be provided to the requesting party within 30 days of the date of the request.

14.2.5 If the party receiving the request has objections to some of the requested documents or document categories it must notify its objection by the date indicated in Annex A.

14.2.6 If the Parties cannot resolve the objection amongst themselves, any one of them may request the Tribunal to resolve. For this to occur, the Party requesting a decision on the objections shall submit them to the Tribunal together with its reply on the date indicated in Annex A

14.2.7 The Tribunal will endeavour to issue a decision (either agreeing to the objections or ordering the production of the requested documents) on the date indicated in Annex A.

14.2.8 The documents to be produced by order of the Tribunal shall be provided to the requesting party on the date reasonably determined by the Tribunal.

14.2.9 Document requests and objections will be established using a Redfern schedule with the following columns:

a) Requested documents: identifying the specific documents or specific categories of documents requested which production the other party objects;

b) Justification: with detailed information (with references to the relevant pleading when appropriate) as to why the documents or categories of documents are relevant or significant;

c) Objections of the counterpart

d) Reply to the objections; and

e) Decision: left blank for the Tribunal

Below is an example of the Redfern schedule

1	2	3	4	5	6	7
No.	**Requesting Party**	**Requested documents or category of documents**	**Justification**	**Objections**	**Reply to Objections**	**Tribunal's Decision**

14.3 The Redfern schedule will be exchanged in Word format.

14.4 All documents shall be provided in electronic format.

14.5 No copy of the correspondence or the documents produced by the partiers shall be sent to either the Tribunal or the ICSID Secretariat except as provided in section 14.2.6 of this Procedural Order. The documents provided by the Parties pursuant to a request for production of documents will become part of the record only if one of the Parties decides to include them as exhibits to their pleadings, witness statements or expert reports or pursuant to an authorization by the Tribunal after the exchange of pleadings has taken place.

14.6 Non-compliance by a Party with the obligation to provide documents pursuant to an order by the Tribunal may give rise to adverse inferences by the Tribunal concerning the documents that were not produced.

15. Evidence: Witnesses and Experts, Witness Statements and Expert reports, Supporting Documentation

15.1 Without prejudice to the Tribunal's attributions:

15.1.1 The Parties shall include all the evidence they wish to offer in support of their positions. In particular, the Parties shall include with their pleadings, the witness statements, expert reports and other evidence.

15.1.2 Certified copies of the documents will not be required unless the authenticity of the copies is called into question and the Tribunal deems it necessary that they be certified.

15.1.3 Each party shall number their exhibits sequentially (C-001 and R-001 for documentary evidence and CLA-001 or RLA-001 for legal authorities) and will number the paragraphs of each of their pleadings.

15.1.4 The Parties shall only include, with each of their responsive pleadings [reply and rejoinder], the evidence necessary to respond to or refute the arguments presented by their counterpart in their previous pleading.

15.1.5 The Tribunal will not admit any evidence that was not submitted together with the pleadings, unless it determines that there are exceptional circumstances that warrant admission. If a party considers that such exceptional circumstances exist, it may request the Tribunal's authorization to introduce the evidence. The requesting party cannot introduce such evidence without express authorization of the Tribunal.

15.1.6 Witness statements and expert reports shall be signed by the corresponding witness or expert.

15.1.7 Prior to the hearing and within the deadlines set by the Tribunal, the Tribunal or any of the Parties may request the other party to present any of their witnesses or experts, whose statements or reports have been entered into the record, for cross-examination at the hearing.

15.1.8 The Parties may call their own witnesses or experts for a brief direct examination during the hearing, even if their appearance has not been requested by the other party or by the Tribunal. Direct examination will be limited to the content of the witness statement or expert report. The Tribunal shall decide whether or not it will authorize the appearance and examination of said witness or expert.

15.1.9 The Tribunal may disallow a witness statement or an expert report if the witness or expert fails to appear at the hearing without proper justification.

15.1.10 The Parties shall interrogate witnesses and experts under the control of the President of the Tribunal. Any Member of the Tribunal may formulate questions at any moment during the examination [of a witness or expert].

15.1.11 Witness statements and expert reports will be considered direct examination. However, the party presenting the witness may perform a brief direct examination. Cross-examination by the other party will be limited to the content of the witness statement or expert report and other issues relevant to the case that are within the witness's or expert's knowledge and were not addressed in its witness statement or expert report. The re-direct examination will be limited to issues raised in the other party's cross-examination.

15.1.12 Witness will not be allowed to be present at the hearing before rendering their testimony. Experts may be present at any time.

15.1.13 Participation of third parties, either persons or entities that are not part to the dispute, will not be allowed to participate, not even in writing.

16. Hearings (including preliminary hearings)

16.1 The hearing will be held on the dates indicated in Annex A

16.2 If the Tribunal believes it is necessary to hold a preliminary hearing with the Parties, it may be held by telephone conference.

17. Transcripts and recordings of the hearing

17.1 The Tribunal's sessions with the Parties will be recorded (including the first session of the Tribunal) unless the Parties and the Tribunal agree that this service is not necessary for a particular session.

17.2 The Secretary of the Tribunal will prepare summary minutes of the Tribunal's sessions with the Parties.

17.3 Real-time transcripts of the hearings will be prepared using Live Note or similar software and electronic copies of the transcripts will be distributed at the end of each day during the hearing. The ICSID will make the necessary arrangements to provide transcript services in real time.

17.4 Within the term set by the Tribunal, the Parties will submit a joint correction proposal of the hearing transcripts. If the Parties fail to reach an agreement, each party will submit its own proposal and the Tribunal will then make a decision. The approved corrections will be integrated to the revised transcript, but it will not be necessary to prepare a final transcript incorporating the corrections.

18. Publication

18.1 The Award shall be public.

18.2 The Parties consent to the publication of the Award by the Secretariat in accordance with Article 53(3) once it is issued.

19. Other issues

19.1 The Tribunal will now turn to the dispute between the Parties in relation to the issue of confidentiality. In the preparation of the present Procedural Order, the Arbitral tribunal took into account, analyzed and assessed all the arguments submitted by the Parties. The fact that an argument made by a Party is not included in the summary that follows does not mean that the Tribunal has not consider it.

III. Decision on the issue of confidentiality

17. Claimant's Position[2]

[1] 1. The Claimant submits the following confidentiality clause to the Tribunal's consideration:

"The Parties involved in the present arbitral proceeding recognize that the information submitted prior to this date and that which will be submitted in the future is confidential and therefore must be treated as such.

[1.1] *The Parties agree that the information be kept in absolute confidentiality. The Parties agree that the only document that shall and will be published is the arbitral award to be issued by the Arbitral Tribunal.*

[1.2] *The information contained in the record of ICSID Case No. ARB(AF)/12/4 shall only be used for the purpose of conducting the present arbitration and may [only] be disclosed to the parties participating in it and their representatives and [their] employees working directly in the proceedings; the Arbitral Tribunal and the people working for the Arbitral Tribunal; the ICSID and ICSID's personnel; witnesses, experts, counsel, [and] consultants retained by the parties for this arbitration, with the understanding that the information provided to them will only be that which is necessary to perform their functions.*

[1.3] *Information will be understood to include without limitation: the request for arbitration, memorial, counter memorial, reply and rejoinder and, in general, any communication, memorial, minutes, annexes, evidence or documents recorded in writing or through other means, in written or non-written form, including [sound] recordings, video recordings, or otherwise recorded through other means that exist today or may exist in the future, that have been submitted in this proceeding or that will be submitted in the future during its course.*

[1.4] *Without prejudice to the foregoing, the parties may make public comments related to the present proceeding, provided that those comments are general and appropriate for the parties to which they are directed (including without limitation, shareholders, subsidiaries and affiliates and their respective managers, consultants, auditors as well as stock markets and financial and market analysts, or as the case may be, the media). In no case does the foregoing*

[2] The summary of the Claimant's position, as expressed in the paragraphs *infra* were taken from the submissions of the same –in particular its submission dated 15 April 2013 and 26 April 2013– as well as the oral submissions presented during the First Session held on 14 May 2013.

> *authorize the parties to provide documents submitted or interchanged between the parties during the arbitral proceeding. Likewise, they may make general update reports in relation to the procedural state of the arbitration, including [those intended] for the Claimant Investor and its auditors. "*[3]

[2] 2. The Claimant supports its request for the inclusion of the above transcribed clause by pointing out, among other things, that "*the information that has been submitted and will continue to be submitted during the Proceedings is confidential information.*"[4]

[3] 3. In addition, the Claimant argues that, in the present case, it is very difficult to separate public information from confidential information. Indeed, according to the Claimant, within the information that has been submitted during the arbitration and that will be submitted [in the future] there are figures related to the market of mobile telephony in the United Mexican States and other countries, *including* information of Telefonica and other competitors that has been obtained from several sources that are not necessarily public, that is, much of the information is the result of the analysis of Telefonica's information and market information that Telefonica has obtained or generated.

[4] 4. By way of illustration, the Claimant points out that among the information that will be presented in this arbitral proceeding there is information as sensitive as the following: "*… information related to costs, revenues and profitability of Telefonica's investment in Mexico, its network topology and use of technologies and spectrum, as well as estimates [prepared] by Telefonica and/or third parties in regard to those and/or other similar items of Telefonica's Mexican concessionaires' competitors, accounting statements, financial statements, market share, market projections, amongst many other [information] of a similar nature.*"[5]

[5] 5. The Claimant also asserts that if Telefonica's competitors gain access to its confidential information, [Telefonica] would be put in a state of defenselessness. The foregoing, because Telefonica would have no control over its confidential information, which would put it at a competitive disadvantage *vis-à-vis* its competitors.

[6] 6. The Claimant adds that the [use of] confidential information of the proceeding, "*… out of context or used in an advantageous manner by third parties foreign to the dispute…*"[6] may cause damage to both Telefonica and the Respondent.

[7] 7. In line with the foregoing, the Claimant invokes the following provisions in support of its position: (i) Article XVI of the APPRI, which establishes that the only transparency obligation by the contracting parties is the publication of the award; and (ii) Rule 22(2) of ICSID's Administrative and Financial Regulations which establishes that the Secretary General may publish the awards, minutes and other records of proceedings only if both parties to a proceeding agree to it. In line with the foregoing, the Claimant asserts that

[3] Claimant's submission dated 15 April 2013.
[4] Claimant's submission dated 26 April 2013.
[5] *Ibidem.*
[6] *Ibidem*.

absent an agreement between the Parties, the only document that can be published is the final award.

[8] 8. On the other hand, the Claimant maintains that other ICSID arbitral tribunals, when resolving disputes on confidentiality of information, have ruled that arbitrators must endeavour [to ensure] the orderly development of the proceedings and respect the Parties' equal rights, avoiding the exacerbation of the dispute. In particular, the Claimant makes reference to the cases *Beccara et al v. Republic of Argentina* and *Biwater Gauff (Tanzania) Ltd. v. Tanzania*.

[9] 9. With respect to the request by the Respondent, to which this Procedural Order will refer further below, the Claimant alleges that it is unfounded and unviable because the Respondent's position is based on: (i) the Note of Interpretation issued by the Free Trade Commission of the North American Free Trade Agreement ("NAFTA's Note of Interpretation") that is not applicable to the present proceeding; and (ii) that the Federal Transparency Law and Access to Public Governmental Information of the United Mexican States ("Federal Transparency Law") is likewise not applicable to the present proceeding and moreover, refers to information received by the United Mexican States as an authority and not as part of an arbitral proceeding.

[10] 10. Lastly, the Claimant maintains that the Respondent's proposal would turn the proceedings into a complex procedure and [would place] an additional procedural burden on both Parties, which would violate the principle of procedural economy that should prevail. Moreover, it argues that the Respondent seeks that *"… an omission in regard to the presentation of a public version within 30 days, would automatically lead to the understanding that the communication or decision, as the case may be, is public, which… may cause damages to the parties."*[7]

2. Respondent's position[8]

[11] 1. The Respondent submits to the Tribunal's consideration the following clause related to the confidentiality issue:

> *1. Written communications submitted by the parties to the Tribunal during the proceeding, as well as orders related to procedure shall be public, except for the protected information that they might contain consisting in:*
>
> *a) Confidential business information that:*
>
> *i. Describes commercial secrets*

[7] *Op. Cit.,* Claimant's submission dated 26 April 2013.

[8] The summary of the Respondent's position expressed in the subsequent paragraphs was taken from the submissions presented by the same –in particular its submission dated 18 April 2013 and 26 April 2013– and the oral submissions made during the First Session held on 14 May 2013.

ii. Describes financial, commercial, scientific or technical information that is confidential and has been consistently treated as such by the party to which it relates and includes information on prices, costs, strategic planning, marketing, data on market share or accounting and financial records that have not been disclosed to the public; and

b) Privileged information that is protected from disclosure by a legal provision.

[12] 17. *Neither the parties nor the tribunal may disclose to the public documents containing information that any of the parties has clearly identified as protected information. To this end, the following procedure will be followed:*

a) Any of the parties submitting a communication to the tribunal that contains protected information shall identify it and present, within 30 days, a public version redacting the protected information. If the term expires and a public version is not submitted, the communication will be considered public;

b) In the case of decisions by the tribunal, the parties will identify the information that they consider confidential and will seek an agreement on the information that shall be eliminated from the public version that will be submitted to the tribunal within 30 days of the date of the decision. If said term expires without the submission of a public version by any of the parties, the tribunal's decision will be considered public; and

c) Any disagreement between the parties on the confidentiality of the information identified as such that has been redacted from the public version will be decided by the Tribunal. If the Tribunal determines that the information has not been properly classified, the party that submitted the document shall present a new public version supressing or including, as the case may be, the information erroneously classified in accordance with the instructions of the Tribunal."[9]

[13] 2. The Respondent supports the foregoing request by pointing out, among other things, that neither the APPRI nor the Rules of Arbitration (Additional Facility) impose a duty of confidentiality on the Parties, except in regards to the hearing. Indeed, According to the

[9] Submission dated 18 April 2013

Respondent, the fact that the APPRI only refers to the publication of the award does not mean that the rest of the information should be considered confidential. On the contrary, absent a provision in this respect in the APPRI would lead to the conclusion that the Respondent never assumed a duty of confidentiality like the one proposed by the Claimant.

[14] 3. Moreover, the Respondent supports its request by stating that in other investor-State cases, the United Mexican States has maintained the practice of disclosing, inasmuch as possible, the documents related to arbitral proceedings on the basis of the NAFTA's Note of Interpretation.

[15] 4. The Respondent considers that NAFTA's Note of Interpretation applies to this proceeding "by analogy" and, therefore, that "… nothing precludes, in this arbitral proceeding, the publication of the documents submitted before this arbitral tribunal, as well as the decisions issued by it, provided that the confidential information that those documents may contain is eliminated."[10]

[16] 5. On the other hand, the Respondent makes reference to the Federal Transparency Law, currently in force in the United Mexican States, in order to point out that pursuant to that law "*… [Mexico] considers it is necessary for it to have information that could be made available to the public requesting access to information about the proceeding under the referred transparency law.*"[11]

[17] 6. In addition, the Respondent argues that the publication of documents in this case in particular, is especially important because the issue about interconnection rates authorized by COFETEL and the SCT, as well as the present arbitration, have been regularly mentioned in the media. According to the Respondent, Telefonica has contributed to the publicity of the case through press statements made by its representatives. As a consequence, the Respondent asserts that *"… having clear rules on document disclosure in the present proceeding is not only consistent with the Respondent's practice but also with Telefonica's position.*"[12]

[18] 7. Lastly, the Respondent supports its position by making reference to the existence of a noticeable trend towards transparency in investor-State arbitration proceedings.

17. Tribunal's considerations

[19] 1. Having reviewed and analyzed all the arguments presented by the Parties, the Tribunal considers that neither the confidentiality clause proposed the Claimant by means of its 15 April 2013 submission, nor the confidentiality clause proposed by the Respondent by means of its 18 April 2013 submission are appropriate.

[10] *Op. Cit*. Respondent's submission dated 18 April 2013.
[11] *Ibidem*. Likewise, See Respondent's submission dated 26 April 2013.
[12] *Ibidem.*

17.1 Confidentiality Standard under the APPRI and ICSID Arbitration Proceedings

[20] 1. The Tribunal considers, for the reasons expressed below, that neither the APPRI nor the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") nor the Arbitration Rules (Additional Facility) have general rules on the publicity or confidentiality that shall be observed by the Parties in the present proceeding. In addition, the Tribunal underscores that the Parties have not reached an agreement in regard to the confidentiality of the information in the present proceeding, nor have they consented to the application of treaties or rules other than those mentioned above.

[21] 2. In this order of ideas, the Tribunal would refer first to the APPRI and, in particular, to Article XVI(4) according to which "*[t]he final award shall be public.*" In the Claimant's view, this article must be interpreted to mean that the Parties only consented to the publication of the award (and therefore, the rest of the information in the proceeding must be [kept] confidential).[13] The Respondent, on the other hand, argues that the APPRI's reference to the publication of the award should not be interpreted as to mean that any other information must be confidential.[14] The Tribunal believes that on this point the Respondent is correct. In the Tribunal's view, the APPRI does not establish a general confidentiality obligation that must be followed by the Parties, other than with respect to the award.

[22] 3. Secondly, the Tribunal takes up the Respondent's argument that its position is based on a practice "*originating in the adopted note of interpretation*"[15] of a NAFTA entity, which in its view, can be applied to the present case by analogy. The Tribunal does not share the Respondent's view and considers that NAFTA's Note of Interpretation is not applicable to the present proceeding for two reasons. First, Article XV of the APPRI states that "*any tribunal established in accordance with this Section shall decide the disputes submitted to its consideration in accordance with the provisions set out in this Agreement and applicable rules and principles of international law.*" The Tribunal, therefore, must base its decisions in the provisions set out in the APPRI, the ICSID Convention, the Arbitration Rules (Additional Facility) and applicable rules and principles of international law. In this sense, it is clear that the NAFTA is not applicable "*by analogy*" to the present proceeding. Since the NAFTA is not applicable, neither can the Interpretative Note be applicable in this case. Second, the Tribunal underscores that the Kingdom of Spain is not a Party to the NAFTA. Under the Vienna Convention on the Law of Treaties, in particular Articles 2(g) and 2(h), 26 and 34, an international treaty, such as the NAFTA, cannot create rights or obligations *vis-à-vis* a third State without its consent. The Tribunal therefore concludes that the NAFTA cannot be applied to the present proceeding to set the rules governing the Parties with respect of confidentiality.

[13] Respondent's submission of 26 April 2013.
[14] Oral argument, First Session held on 14 May 2013.
[15] Respondent's submission of 26 April 2013.

[23] 4. With respect to Mexico's Federal Transparency Law that has been invoked by the Respondent, Mexico does not explain nor provides support as to why this Arbitral Tribunal should apply the Mexican national transparency law that, in addition, states in Article 14(IV) that the documents submitted in the course of judicial and administrative proceedings shall be considered reserved information. In any case, it is clear for the Tribunal that said instrument is not applicable in view of Article XV of the APPRI.

[24] 5. Insofar as the ICSID Convention, the Tribunal shares the position of other ICSID tribunals that neither the Convention nor the Arbitration Rules (Additional Facility) impose a general duty of confidentiality or transparency on the parties to a proceeding.[16]

[25] 6. Indeed, as many ICSID tribunals have analyzed[17], the Convention and the Administrative and Financial Rules, as well as the Arbitration Rules (Additional Facility), only contain limits and specific protections in regard to the issue of publicity and confidentiality of information. By way of illustration, the Tribunal makes reference to the following provisions:

(i) Article 48(5) of the ICSID Convention establishes that "*[t]he Centre shall not publish the award without the consent of the parties*". Likewise, Article 53(3) of the Arbitration Rules (Additional Facility), provides that *"…the Secretariat shall not publish the award without the consent of the parties.*"

(ii) Article 22(2) of ICSID's Administrative and Financial Regulations, according to which "[i]f both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments."

(iii) Article 39(2) of the Arbitration Rules (Additional Facility) which establish that "[u]nless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties… to attend or observe all or

[16] Op. Cit., *Biwater Gauff (Tanzania) Ltd., v. Tanzania*, ICSID Case No. ARB/05/22 and *Giovanna A. Beccara et al v. Argentine Republic*, ICSID Case No. ARB/07/5 (now, *Abaclat et al v. Argentine Republic*). In addition see, Christoph H. Schreuer, Loretta Malintoppi, August Reinisch y Anthony Sinclair, *The ICSID Convention: A commentary. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. Second edition 2009, Cambridge University Press, New York. Article 48(e) paragraph 107 et seq; Benjamin H. Tahyar, *Confidentiality in ICSID Arbitration after Amco Asia Corp. v. Indonesia: Watchword or White Elephant?* Fordham International Law Journal Vol. 10 (1986), p 110; *Amco Asia Corporation et al vc. Indonesia*, Decision on Request for Provisional Measures dated 9 December 1983, 1 ICSID Reports 410 fol., 412.; *Metalclad* y *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, "Decision on hearing of Respondent's objection on competence and jurisdiction" of 5 January 2001, 7 ICSID Rep. 421 (2005), paragraphs 25-26.

[17] Op.Cit., *Biwater Gauff (Tanzania) Ltd., v. Tanzania*, ICSID Case No. ARB/05/22 and *Giovanna A. Beccara et al v. Argentine Republic*, ICSID Case No. ARB/07/5. See in addition, Margrete Stevens, *Confidentiality Revisited*, in News from ICSID Vol. 17 No. 1 (Spring 2000), pp. 1, 8-10; Christina Knahr y August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration - The Biwater Gauff Compromise*, The Law and Practice of International Courts and Tribunals Vol. 6 (2007), pp. 97 y ss.

part of the hearings …. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

(iv) Articles 13 and 23 of the Arbitration Rules (Additional Facility) according to which, respectively, the arbitrators shall undertake to "*keep confidential all information coming to [his] knowledge as a result of [his] participation in [the] proceeding, as well as the contents of any award made by the Tribunal*" and "*[t]he deliberations of the Tribunal shall take place in private and remain secret.*"

[26] 7. In line with the foregoing, the Tribunal points out that the ICSID Convention and the Arbitration Rules (Additional Facility) refer, above anything else, to specific obligations on confidentiality applicable to arbitrators and ICSID. They make no express reference to the parties' rights and obligations, nor do they impose on them a general rule of confidentiality or publicity.

[27] 8. In sum, on one hand and for the reasons previously expressed, neither the APPRI nor the ICSID Convention, nor the Arbitration Rules (Additional Facility) contain general rules on publicity or confidentiality that must be observed by the Parties in the present proceedings. On the other hand, and for the reasons that have been expressed, neither the NAFTA nor its Note of Interpretation nor the Federal Transparency Law is applicable to decide the issue in dispute between the Parties.

[28] 9. Therefore, this Tribunal cannot accept either a confidentiality clause like the one proposed by the Claimant or a publicity clause as the one proposed by the Respondent, since neither is supported by the treaties and procedural rules that the Parties consented to in the present case.

[29] 10. Hence, in the absence of a provision in the APPRI and in the Arbitration Rules (Additional Facility) and the inapplicability of the provisions invoked by the Respondent, the Tribunal considers that Article 35 of the Arbitration Rules (Additional Facility) establishing that "*any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question*" must be applied. In addition, Article 27 of the Arbitration Rules (Additional Facility) which provides that *"[t]he Tribunal shall make the orders required for the conduct of the proceeding*" must also be applied.

[30] 11. The Tribunal takes into consideration that the Claimant has correctly argued that the Tribunal must safeguard the integrity of the proceeding as well as confidential or privileged information provided by the Parties.[18] The Respondent does not refute this argument. Indeed, both Parties agree that a publicity rule cannot compromise the integrity of the proceeding, nor exacerbate the dispute between the Parties, nor complicate the settlement of the dispute by the Tribunal. Moreover, the Parties agree that interest regarding the publicity of information must not affect the need to protect privileged or confidential information provided by the Parties.

[18] In this regard, see Op. Cit., *Biwater Gauff (Tanzania) Ltd., v. Tanzania* and *Giovanna A. Beccara et al v. Argentine Republic* among others.

[31] 12. On the other hand, the Tribunal takes into consideration that the Respondent has maintained a position in favour of transparency of information and, moreover, that it has expressed a concern in regard to the need to be in a position to provide information about this arbitration to the public. In this regard, the Tribunal notes that the Claimant does not deny the fact that transparency in investment arbitration proceedings plays an important role, among other things, because it can serve as a mechanism to promote good government in States, the development of international investment law and confidence in the investment arbitral system.

[32] 13. As a conclusion, the Tribunal deems it necessary to come up with a solution that permits the preservation of the integrity of the proceeding, protect the information that is subject to confidentiality and addresses the Respondent's concern that it must be in a position to provide the public with information about the arbitration proceeding.

4. Tribunal's conclusions in regard to the different categories of documents that will be submitted by the Parties in the course of the proceeding

(i) General discussions about the case

[33] 1. With the exception of the prohibitions established below, the Parties are authorized to participate in public discussions about the general aspects related to this arbitration. However, the general comments about the arbitration that the Parties make in public must not exacerbate the dispute between the Parties, generate undue pressure over one of them or make the resolution of the dispute more difficult. Moreover, the Parties' participation in said public and general discussions cannot be used as an instrument to circumvent the terms of this Procedural Order.

[34] 2. It is the Tribunal's view that this solution reconciles the interests of the Parties and in addition solves the legitimate concern of the Respondent which should have the possibility of providing information about the arbitration to the public.

(ii) Award

[35] 1. Pursuant to Article XVI(4) of the APPRI, the award shall be public.

(iii) Decisions and orders by the Tribunal (other than the Award)

[36] 1. The Tribunal cannot foresee what type of information will be included in the decisions and orders issued during the course of the proceeding and whether said information will be confidential or subject to some sort of privilege or reservation. With that in mind, and in order to protect the integrity of the proceeding and confidential or sensitive information provided by the Parties, the Tribunal considers that disclosure of the Tribunal's orders and decisions will require prior authorization.

(iv) Transcripts or minutes of the hearings

[37] 1. Pursuant to Article 22(2) of ICSID's Administrative and Financial Regulations and Article 39(2) of the Arbitration Rules (Additional Facility), the Tribunal determines that the Parties shall refrain from disclosing to third parties the transcripts or minutes of the hearings held in the course of this proceeding.

(v) Documents provided by the Parties (exhibits, evidence, etc.) and Parties' memorials

[38] 1. For the purposes of this decision the term "Documents" shall be understood as [to include] all the pleadings presented by any of the Parties to the Arbitral Tribunal, in physical or magnetic media, including for descriptive purposes and without limitation, the memorials and their annexes, witness declarations and expert reports and evidence.

[39] 2. In order to preserve the integrity of the proceeding, the Tribunal determines that the Parties shall refrain from disclosing to third parties the Documents provided by the Parties. The Tribunal considers that these Documents are provided by the Parties with the main objective of allowing the Tribunal to resolve the dispute between the same and therefore, they should serve that purpose only. Moreover, the Documents may contain sensitive and confidential information like the kind indicated by the Claimant in its submission of 26 April 2013.

(vi) Correspondence between the Parties and correspondence with the Tribunal

[40] 1. Inasmuch as the correspondence between the Parties and the correspondence with the Tribunal refers, in its majority, to procedural issues, the Tribunal sees no reason whatsoever that would warrant its publication. On the contrary, the confidentiality of said correspondence protects the integrity of the proceeding which the Tribunal must safeguard. In view of the foregoing, the Tribunal determines that the Parties must refrain from disclosing to third parties the correspondence between the Parties and the correspondence with the Tribunal in the course of the present case.

[41] 2. The Parties retain the right to request the Tribunal to lift or modify the restrictions mentioned above in concrete cases and with justification.

17. <u>Decision of the Tribunal</u>

[42] As a consequence of the foregoing, the Tribunal decides that:

(i) The Parties shall refrain from disclosing to third parties:

(a) The transcripts or minutes of the hearings;

(b) The documents provided by the Parties in the proceeding;

(c) The correspondence related to procedure (between the Parties or between the Parties and the Tribunal)

The Parties retain the right to request the Tribunal to lift or modify the foregoing restrictions in concrete cases and with justification.

(ii) Disclosure of the Tribunal's orders and decisions to third parties will require prior authorization of the same, except for the Award or this Procedural Order that establishes the rules on confidentiality.

(iii) The Parties are authorized to participate in public discussions about the general aspects related to this arbitration, provided that such discussions do not make the resolution of the dispute more difficult or become a mechanism for confrontation or an instrument to exacerbate the dispute, exert undue pressure or circumvent the confidentiality rules indicated by the Tribunal in this Procedural Order.

[Signed in the original by:

Dr. Horacio Grigera Naón , Arbitrator, on 4 July 2013

Lic. Ricardo Ramírez Hernández, Arbitrator, on 4 July 2013

Dr. Eduardo Zuleta Jaramillo, President of the Tribunal, on 4 July 2013]