(COURTESY TRANSLATION)

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

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

v.

THE UNITED MEXICAN STATES
(RESPONDENT)

ICSID CASE No. UNCT/17/1

Rejoinder

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GLOSSARY

Rates Resolution 2015	Resolution through which the *Pleno* of the Federal Telecommunications Institute determines the interconnection rates resulting from the methodology for the calculation of interconnection costs that will be used to resolve the interconnection disagreements that arise with respect to the conditions applicable for the year 2015. Official Gazette of the Federation. December 29, 2014.
Amparo 1381/2015	*Amparo* proceeding 1381/2015 initiated by Tele Fácil México, S.A. de C.V. before the First District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications; May 7, 2015.
Amparo 1694/2015	*Amparo* proceeding 1694/2015 initiated by Tele Fácil México, S.A. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications; November 11, 2015.
Amparo 351/2014	*Amparo* proceeding 351/2014 submitted by Tele Fácil México, S.A. de C.V. before the Second District Judge in Administrative Matters Specialized in Economic Competition, Broadcasting and Telecommunications; December25, 2014.
Appeal 35/2016	Appeal of *Amparo* 1381/2015 initiated by Tele Fácil México, S.A. de C.V., February 12, 2016.
Appeal 62/2016	Appeal of *Amparo* 351/2014 initiated by Tele Fácil México, S.A. de C.V., March 11, 2016.
Appeal 48/2016	Appeal of *Amparo* 1694/2015 issued by the Second District Court on March 15, 2016.
Claimants	Joshua Dean Nelson, in his own name and on behalf of Tele Fácil México, S.A. de C.V., and Jorge Luis Blanco.
COFETEL	Federal Telecommunications Commission.

Constitution	Political Constitution of the United Mexican States.
Decree 77	Resolution through by means of which the *Pleno* of the Federal Telecommunications Institute determines the conditions of interconnection not agreed between Tele Fácil México, S.A. de C.V. and Teléfonos de México, S.A.B. de C.V., and Teléfonos del Noroeste, S.A. de C.V. and Tele Fácil México, S.A. de C.V.; P/IFT/EXT/080415/77, of April 8, 2015.
DOF	Federal Official Gazette.
Double transit	Indirect interconnection through more than one intermediary.
First Collegiate Court	First Collegiate Court on the Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, situated in Mexico City and with jurisdiction throughout the Republic.
First Complaint	Claim filed by Tele Fácil on January 28, 2015 against Telmex, for breach of Resolution 381.
First District Judge	First District Judge on the Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, situated in Mexico City and with jurisdiction throughout the Republic.
First Proposal	Draft Agreement Telmex sent to Tele Fácil on August 26, 2013.
FTL	Federal Telecommunications Law.
FLTB	Federal Telecommunications and Broadcasting Law.
Fundamental Technical Numbering Plan or PFN	Fundamental Technical Numbering Plan, published in the DOF on November 12, 2014 (CL-147).
General Directorate of Regulation	General Directorate of Interconnection Regulation and Resale of Telecommunications Services of the Regulatory Policy Unit of the IFT.
IFT	Federal Telecommunications Institute.

Legal Affairs Unit or UAJ	Legal Affairs Unit of the Federal Telecommunications Institute.
Non-discrimination Treatment	Terms and conditions for interconnection that one operator offers to another on the occasion of an agreement or a resolution of the Institute that must be granted to any other that requests same, from the date of the application, according to Article 125 of the FLTB.
Number Portability Rules	Number Portability Rules, published in the DOF on November 12, 2014.
Original Concession or "Concession"	Concession to install, operate and exploit a public network granted by the Federal Government through the Secretariat of Communications and Transportation, granted to Tele Fácil México, S.A. de C.V. on May 17, 2013.
PEA or PEAT	Preponderant Economic Agent in the Telecommunications sector, as determined by the *Pleno* of the IFT from March 6, 2014, which is composed of América Móvil, S.A.B. de C.V., Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A. de C.V., Radio Móvil Dipsa, S.A.B. de C.V., Grupo Carso, S.A.B. de C.V. and Grupo Financiero Inbursa, S.A.B. de C.V.
PJF or Poder Judicial	Federal Judicial Branch.
Regulated Rates	Interconnection rates published by the IFT in the Official Gazette of the Federation in the last quarter of each year, in accordance with the provisions of article 137 of the FLTB.
Resolution 127	Resolution by means of which the *Pleno* of the Federal Telecommunications Institute determines the condition of interconnection not agreed between Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A. de C.V. and Tele Fácil México, S.A. de C.V., applicable from January 1st to December 31, 2015, P/IFT/EXT/071015/127, of October 7, 2015.

Resolution 381	Resolution by means of which the *Pleno* of the Federal Telecommunications Institute determines the conditions of interconnectionnot agreed 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., P/IFT/261114/381, of November 26, 2014.
Resolution PEA	Resolution by means of which the *Pleno* of the Federal Telecommunications Institute determines the economic interest group to which América Móvil, S.A.B. de C.V., Teléfonos de México S.A.B de C.V., Teléfonos del Noroeste S.A. de C.V., Radio Móvil Dipsa S.A.B. de C.V., Grupo Carso S.A.B. de C.V., and Grupo Financiero Inbursa, S.A.B. de C.V. are part as a Preponderant Economic Agent in the Telecommunications Sector, and imposes the necessary measures to foster free participation and free competition; P/IFT/EXT/060314/76, of March 6, 2014.
SCT	Secretariat of Communications and Transport.
Second Collegiate Court	Second Collegiate Court in Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, situated in Mexico City and with jurisdiction throughout the Republic.
Second District Judge	Second District Judge on the Administrative Matters, specialized in Economic Competition, Broadcasting and Telecommunications, situated in Mexico City, and with jurisdiction throughout the Republic.
Second Complaint	Claim filed by Tele Fácil on August 5, 2015, against Telmex for breach of Decision 77, pursuing Resolution 381.
Second Proposal	Draft Agreement Telmex attached to its letter in response to the notification from IFT regarding the dispute filed by Tele Fácil before it on May 26, 2014.
Single Concession	Single concession title for commercial use granted by the Federal Telecommunications Institute to provide public telecommunications and broadcasting services in favor of Tele Fácil México, S.A. de C.V., January, 2017.

Signaling Plan	Fundamental Technical Signaling Plan, published in the DOF on November 12, 2014 (CL-147).
Third Proposal	Draft Agreement attached to letters sent by Telmex to Tele Fácil and the IFT on December 10, 2014.
Zero Rate	Inability of the Preponderant Economic Agents to charge other concessionaires for the traffic that ends in their networks, according to Article 131 of the FLTB.

I. Introduction

1. The Respondent expressly incorporates the Preface and Introduction in the Statement of Defense to this Rejoinder. Specifically, the Respondent reiterates its stipulation that any apparent failure to contest a particular factual allegation or submission on a point of law should not be taken as an admission of such factual allegation or agreement with such legal submission. For the purposes of the record, any such factual allegations are denied, and any such legal submissions are contested.

2. There is no fundamental change in Mexico's defense against this claim. The purpose of this Rejoinder is to again logically and concisely address the main elements of the defense in order to answer Claimants often strained arguments in response, many of which purport to knock down arguments that the Respondent has not made.

3. Absent from the Reply is the repeated usage of ominous adjectives and adverbs - such as arbitrary, discriminatory, unfair, egregious and abusive – that formed the substance of the Statement of Claim.[1] Now, the focus is on the allegation that "the IFT acted duplicitously and mendaciously between December 2014 and April 8, 2015 (the date of Decree 77) with respect to Tele Fácil and its representatives".[2]

4. This contention is founded on the wholly illogical and improbable idea that IFT would secretly engage in illegal acts calculated to prefer the financial interests of Telmex over the interests of a new entrant in the market, given the extraordinary effort by the Mexican Congress and the telecom regulator (both COFETEL and IFT) to reduce Telmex's ability to engage-competitive behavior through its dominance in the market. These efforts are ably described by the Claimants in a 16-page section of the Statement of Claim which begins with the observation that "the history of the Mexican telecommunications sector is replete with the efforts of the Mexican government and regulators to slowly peel away Telmex's preferential status so as to introduce real competition into the marketplace".[3]

5. Now, in the Reply, a 37-page section is dedicated to allegations that the Respondent has engaged in "flouting the Tribunal's orders, destroying evidence, and engaging in witness tampering to hide the truth about the origins and purpose of Decree 77".[4] Even a cursory review of these allegations reveals that they are based entirely on imaginative conjecture. The Respondent is accused suppressing production of documents that the Claimants or their counsel think ought to exist, but do not in fact exist and never did exist, and the bare contention, based on "information on belief", that an unidentified witness has been dissuaded from testifying for the Claimants upon receiving threats or warnings from unidentified persons associated with IFT and SCT. These

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1 Reply, ¶ 254.

2 Reply, ¶ 20. The original text indicates: "*the IFT acted duplicitously and mendaciously between December 2014 and April 8, 2015 (the date of Decree 77) with respect to Tele Fácil and its representatives*".

3 Statement of Claim, ¶¶ 110 *et seq*. The original text indicates: "*the history of the Mexican telecommunications sector since [Telmex's privatization in 1990] is replete with the efforts of the Mexican government and regulators to slowly peel away Telmex's preferential status so as to introduce real competition into the Marketplace".*

4 Reply, Section D, ¶¶ 84 ss. The original text indicates: "*flouting the Tribunal's orders, destroying evidence, and engaging in witness tampering to hide the truth about the origins and purpose of Decree 77*".

unsupported allegations are not evidence and cannot form the basis of any finding of fact or even an adverse inference as to alleged motives of IFT's officers or commissioners.

6. The Claimants seek to establish that there has been nefarious conduct or other acts amounting to bad faith on the part of IFT and the domestic courts that reviewed IFT's resolutions because their claim suffers serious flaws, both in the factual underpinnings of the claim and in the legal submissions that the Claimants rely on.

7. The following underlying facts are fatal to the claim:

- A binding agreement in accordance with Mexican law - i.e., a contract - never existed between Tele Fácil and Telmex which established the rate that Telmex would pay Tele Fácil or vice versa;
- Even if such agreement would have existed, Resolution 381 did not determine the interconnection rate between Telmex and Tele Fácil and, therefore, it did not determine a rate to be included in the interconnection agreement to be signed by the operators to comply with the resolution;
- Decree 77 was a clarification on the scope of Resolution 381, issue after hearing both parties' positions, and which reiterates that Resolution 381 did not determine the interconnection rate between Tele Fácil and Telmex;
- Resolution 127 was issued in accordance with the legal mandate of the IFT and the procedure established by law. Both parties were granted due process of law and the matter was resolved based on rational and transparent affirmations;
- The resolutions issued by the national courts in the *amparos* 351/2014, 1381/2015 and 1694/2015, filed against Resolution 381 and Decree 77, and Resolution 127, respectively, as well as the *amparo* appeals 62/2016, 35/2016 and 48/2016 were reasonable, coherent, and duly founded and motivated.
- The Respondent never obstructed the operation of the company, or the subscription of an interconnection agreement with Telmex or with any other operator, or interconnection (direct or indirect) with Telmex or any other operator.

8. The following matters on investment law under the NAFTA are also fatal to the claim:

- There can be no claim of expropriation in the circumstances of this case. Resolution 381 does not qualify as an "investment" under NAFTA Article 1139 and even if it did, it would be an asset of Tele Fácil, not the Claimants, and thus would not be protected as an "investment of an investor of another party". They would have to establish that the measures complained of resulted in the near destruction or sterilization of Tele Facil's business, thereby destroying the value of their interest(s) in TeleFacil.
- The Claimants cannot establish that any of the impugned measures individually or collectively "destroyed Tele Facil's business" of "destroyed the Claimants' investment" as they have alleged. Tele Fácil remained fully possessed of its concession, the switching equipment that it apparently purchased and the business relationships that it claims to have cultivated. It strains credulity to contend that Tele Fácil could not have provided any of the telecommunications services covered by its concession if it could not benefit from the 'old' Telmex interconnection rate for a period of two to three years while all

other operators were limited to charging each other – including Telmex – the 'new' cost-based interconnection rate.

- Indeed, it is evident that at least two of the business lines that the Claimants assert that Tele Fácil would have offered - i.e., International Calls Completion and Retail Services - did not depend on the termination rate that Tele Fácil would charge Telmex, and that a third business line - i.e., the so-called *Competitive Tandem Services* - was invented *ex post* to increase the amount of the damages claimed in this proceeding.

- The claim based on the alleged violation of article 1105(1) can only proceed on the basis of alleged denial of justice at international law. This applies equally to IFT's measures (Resolution 381, Decree 77 and Resolution 127), all of which were implemented in IFT's capacity as an *adjudicator* of interconnection disputes between Tele Fácil and Telmex and the decisions of the Specialized Courts that reviewed the challenges filed against the IFT's resolutions. On any objective review of these decisions – and their common finding that Resolution 381 did not decide rates – the Claimants cannot come anywhere close to establishing that any of the IFT resolutions or court decisions were "notoriously unjust" or "egregious" or amounted to administration of justice "which offends a sense of judicial propriety".

- It is also evident that Tele Fácil did not exercise the available domestic legal remedies to their ultimate consequences; which is a strictly necessary requisite to prove a claim for denial of justice under article 1105(1). The Claimants desisted from their *amparo* appeals filed before the Specialized Courts against Sentence 351/2014 (i.e., Amparo Appeal 62/2016) and Sentence 1694/2015 (i.e., Amparo Appeal 48/2016), and did not file in due time the *amparo* appeal against Sentence 1381/2015 (i.e., Amparo Appeal 35/2016), which determined the lawfulness of Decree 77.

- The argument that the Claimants were "denied access" in their efforts to challenge Decree 77 is specious. Their Mexican legal counsel, who has not provided a witness statement, apparently appeared at the court registry at around midnight on the final day for filing the appeal. According to court records, she arrived after midnight and could not be admitted, and was unable to file it that day. She did not file it either on the next day, within the first business hour, before the First District Court, in accordance with the procedure established by jurisprudence criteria. There is no explanation as to why this late filing occurred, but it ill-behooves the Claimants to contend that it is somehow the fault of the Mexican State for which liability under Article 1105(1) can attach.

9. The damages claim continues to suffer the identified defects in the Statement of Defense, particularly:

- Tele Fácil does not have a proven history of profitable operations to support their projected results, which in turn are the foundation for the quantification of the damages. Those are, therefore, speculative and not reliable.

- There is no causal link between the claimed measures and the damages attributable to two of Tele Fácil's business lines. Actually, the "Completion of International Calls" that, according to Tele Fácil's experts, represented about 66% of the lost revenue, was not dependent of the completion rate that Tele Fácil would charge Telmex. Also, no impediment existed to the indirect interconnection between Tele Fácil and Telmex to

provide such services. Retail Services, on the other hand, did not depend on the rate or the interconnection mode.

- One business line - i.e. *Competitive Tandem Services* - was apparently developed ex post to artificially increase the amount of damages for these proceedings. The Claimants have not answered the observation on the Statement of Defense and have not provided any evidence whatsoever that they intended to do this business prior to the filing of this claim.[5] Even if this was a legitimate claim (*quad non*) significant doubts persist about its operation and lawfulness.
- Dr. Dippon's and Dr. Mariscal's damage estimations are based on misleading assumptions related to the application of the principle of non-discrimination (i.e., they erroneously assume that it is not applicable to the PEA) and the impossibility to execute double transit. By correctly applying the principle of non-discrimination and acknowledging the implicit restrictions of the impossibility to execute double transit, the damages would be considerably reduced, even keeping the remaining assumptions and parameters used for the estimate of the Claimants' damages constant.
- The Respondent's experts, Analysys Mason and Lear, have identified a series of issues with certain assumptions, parameters and models used by Dr. Dippon and Dr. Mariscal to estimate the damages, which lead to an overestimation of such damages.

10. All these aspects of Mexico's legal defense will be detailed in the following sections.

[5] Statement of Defense, ¶¶ 363 and 370.

II. Facts

A. Introduction

11. In this section, the Respondent will focus on identifying and summarizing the non-disputed facts, those facts in which differences between the parties persist and the evidence on which the diverse positions are based.

12. The Respondent emphasizes that the Claimants have submitted a 291-page Reply which is almost as long as the Statement of Claim. Mexico deems that the purpose of the second round of documents is to focus on the most relevant aspects of the case, and this just what this Rejoinder intends to do. Therefore, the lack of answers to any of the factual arguments in the Reply shall not be interpreted as an admission by the Respondent. Any factual argument from the Claimants that is not specifically addressed in this document is denied.

13. This factual section will address mainly with the following matters: (i) the alleged rate agreement with Telmex; (ii) Resolution 381 and its proper interpretation; (iii) the facts that lead to Decree 77 and Resolution 127 and (iv) the Specialized Courts' performance.

B. The alleged rate agreement with Telmex

14. The arguments of the Claimants are based on the hypothesis that a rate agreement between Telmex and Tele Fácil existed, which should be incorporated to the interconnection agreement they needed to conclude to comply with Resolution 381. The alleged agreement would have been materialized on July 2014 with the alleged acceptance of Tele Fácil toa proposal that Telmex had delivered eleven months before.

15. There are several facts and circumstances that cast doubt on this fact, which is fundamental for the Claimants' claim. However, before addressing this discussion, it is convenient to record some non-disputed facts between the parties:

- On August 7, 2013, Tele Fácil requested from Telmex to begin negotiations to execute an interconnection agreement.[6]
- On August 26, 2013, Telmex answered Tele Fácil's communication and delivered an interconnection framework agreement (the "Proposal") which, among other things, established a reciprocal interconnection rate equivalent to USD$0.00975 per minute.[7]
- When Telmex delivered the Proposal to Tele Fácil, in August 2013, Telmex had not been declared Preponderant Economic Agent (PEA) and was not subject to special rules. Particularly, Telmex was free to negotiate the rate it would charge to third party operators to complete traffic in its network.[8]

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6 Statement of Claim, ¶¶ 7 and 84; Statement of Defense, ¶ 43; Exhibit C-058.

7 Statement of Claim, ¶ 85; Statement of Defense, ¶ 45; Exhibit C-021, pp. 44 and 45.

8 As explained by Mr. Díaz in his first statement, prior to the 2013 Constitutional Amendment and the coming into force of the LFTR, the interconnection agreements between the main concessionaires (including Telmex) had been executed years before. Such agreements included "compensation agreements" or "*bill & keep*" according

- The 60-day term stipulated by the Federal Telecommunications Law (LFT) went by without any operator submitting a disagreement to the IFT for its resolution.
- On March 6, 2014, Telmex was declared PEA (PEA Declaration) and twenty days later became subject to asymmetric regulations. Specifically, the interconnection rate it could charge to other operators was set at approximately USD $0.00172, same that was later reduced to zero, after the publishing of the new LFTR.[9]
- On July 8, 2014, Tele Fácil delivered to Telmex a communication in which it proposed amendments to the Proposal.[10] The communication also indicated that Telmex should answer within 5 business days.[11]
- On July 11, 2014, this is, two days before the expiration term it had granted Telmex to respond, Tele Fácil submitted the Interconnection Disagreement before the IFT for resolution of the two matters that, in its own words, had been unable to agree upon with Telmex: number portability charges and the possibility to establish indirect interconnection.[12]
- On July 14, 2014, the LFTR is published in the DOF.[13]

16. As will be detailed in the following sections, these non-challenged facts prove that: (i) there was never an agreement between Tele Fácil and Telmex on the subject of rates, and (ii) the submission of the dispute before the IFT was an opportunistic act by which Tele Fácil intended to bind Telmex to the payment of the allegedly agreed rate, knowing that such rate could not be applied reciprocally - as originally proposed - as a consequence of its Declaration as PEA and the asymmetric regulations applicable to the PEA.

1. Telmex's offer had expired by the time when Tele Fácil allegedly accepted it

17. Assisted by its legal expert, Mexico argued in its Statement of Claim (*inter alia*) that Telmex's proposal had already expired by the time Tele Fácil allegedly accepted it and, therefore,

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to which the concessionaires would not pay for interconnection when the difference between outgoing and incoming traffic did not exceed a certain threshold. In fact, most traffic between the concessionaires was carried under the *bill & keep* mode. This practice came to an end with the determination of asymmetric rates applicable to those concessionaires deemed as PEA. First Statement by Sóstenes Díaz, ¶¶ 51 and 52.

9 Statement of Claim, ¶ 135; Statement of Defense, ¶ 49; Exhibit CL-010.

10 Exhibit C-003, Mr. Sacasa's First Statement, ¶ 52.

11 R-002; C-024. The notice dated July 8, 2014 (Exhibit R-002) indicated a term of 5 business days for Telmex to answer such notice; otherwise, it would submit an interconnection disagreement before the IFT. Tele Fácil decided not to wait, and 3 days later would submit its Interconnection Disagreement.

12 Statement of Claim, ¶ 88; Statement of Defense, ¶¶ 53 and 65. Exhibit C-025, pp. 3 and 6.

13 The LFTR would come into force 30 days after its publishing, this is, on August 13, 2014. Statement of Defense, ¶ 29.

no binding agreement existed on the subject of rates between Telmex and Tele Fácil, as stated by the Claimants.[14]

18. The Respondent's expert explained that offers do not have an indefinite validity and that, in terms of the Federal Civil Code (CCF), when the term is not specified, "the author of the offer will be bound for three days, and the necessary time for the usual delivery and return of the communications means used to inform the other party about such offer".[15]

19. The expert also explained that, even if the 60 day term established by article 42 of the LFT were considered as an exception to the rule stipulated in the CCF, "anyway, Telmex would have been unbound from its offer upon the term expiration indicated in article 42 of the LFT".[16]

20. The Claimants seek to refute this argument claiming that Mr. Buj is unaware that Telmex renewed its offer on June 27, 2014, during a meeting between Mr. Gallaga, on behalf of Telmex, and Mr. Bello and Mr. Sacasa, on Tele Fácil's behalf.[17] The Claimants support their allegation on witness statements by both Tele Fácil representatives.

21. Mr. Sacasa places such meeting with Mr. Gallaga "sometime after" March 6, 2014:

> 49. I attended to approximately three different meetings with Telmex during this period of time to try to complete the interconnection agreement, but without success. Then, Tele Fácil held a final meeting with Mr. Gallaga. This meeting took place sometime after Telmex was declared preponderant economic agent on March 6, 2014.
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> 50. In that meeting, Mr. Bello asked Mr. Gallaga whether in light of the determination as preponderant economic agent, Telmex's position in its standard contract that was offered changed. Mr. Gallaga replied that it absolutely had not changed, since Telmex was challenging all of the IFT's determinations regarding its preponderant status.[18] [Emphasis added]

22. This, in contrast with Mr. Bello's first statement, indicating that it was until June 2014, when Tele Fácil was about to finish the installation of its equipment, that Tele Fácil approached Telmex to see if the Proposal delivered 10 months before was still valid.

> 58. On June 2014, Tele Fácil was nearing the completion of the installation of its equipment, so Mr. Sacasa and I went back again to Telmex to meet with Mr. Gallaga

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14 Statement of Claim, ¶¶ 67-69; Statement of Defense, ¶¶ 84-89; Mr. Rodrigo Buj's First Expert Report, ¶¶ 30-33.

15 Mr. Buj's First Expert Report, ¶ 27(c). It shall be noted that some discussion has occurred between Mr. Soria (the Claimants' expert) and Mr. Buj (the Respondent's expert) about the supplementary application of civil law relating to the LFT and the current LFTR. As explained by Mr. Buj in his second report, supplementary application of civil law is demonstrated since the LFT and the LFTR so establish, and Resolution 381 itself expressly acknowledges such supplementary application of civil law. Therefore, civil law is of supplementary application on concessionaires' interconnection contractual obligations. See Mr. Rodrigo Buj's Second Expert Report, ¶¶ 20-22;

16 Mr. Rodrigo Buj's First Expert Report, ¶ 31.

17 Reply, ¶¶ 66 and 67.

18 Exhibit C-003, Mr. Miguel Sacasa's First Statement, ¶¶ 49-50.

> and confirm whether Telmex's offer was still standing or if there had been any changes. Mr. Gallaga stated that the new rules were not at all relevant to Telmex's offer and that Tele Fácil had to execute the contract with Telmex as originally offered.[19] [Emphasis added]

23. The date of the meeting during which the offer would allegedly be renewed is a relevant fact because if it took place sometime after March 6, 2014, as asserted by Mr. Sacasa, both, the 3-day term stipulated by the CCF and the 60-day term indicated in article 42 of the LFT would have expired by the time Tele Fácil allegedly accepted the Proposal (July 8, 2014).

24. If the meeting took place on June 27, 2014, what should be determined is if in fact the offer was renewed during such meeting, if the 3-day term of the CCF or the 60-day term of the LFT is applicable, and if it was valid to "accept" the offer prior to the 5-day term that Tele Fácil had granted Telmex to respond to its observations.

25. In their Reply, the Claimants sought to prove that such meeting was held on June 27, 2014, based on invoices delivered to Tele Fácil by Mr. Bello's firm.[20] However, it is surprising that the relevant entry (*time entry*) of the services provided by BGBG to Tele Fácil does not refer to the alleged ratification of the Proposal but to a: "*Meeting with Telmex to discuss the subject of indirect interconnection*".[21]

26. What is even more surprising is that the Claimants did not submit a single document dated at that time supporting Mr. Bello's statement. For example, there is no formal ratification in writing of Telmex's Proposal; there is no formal acceptance of the Proposal in writing by Tele Fácil; there are no communications between Tele Fácil and Telmex related to the alleged ratification, and no internal documents exist -e.g., notes, memoranda or communications between Tele Fácil's managers or their advisers- where this important event is discussed.

27. It should also be noted that the Respondent included various requests for documents related to negotiations with Telmex in its First Request for Documents, and the Claimants consistently indicated that the only documents that pertained to those requests were exhibits C-021, (*i.e.,* Telmex's Proposal dated August 2013), C-024 (*i.e.,* Tele Fácil's comments to Telmex's Proposal, dated July 8, 2014) and C-058 (*i.e.*, a communication from Tele Fácil to Telmex dated August 6, 2013):

- Request 6 - Proposals and counter proposals exchanged by Tele Fácil and Telmex between August 1, 2013 and July 11, 2014 regarding any of the terms for interconnection between the two operators.

  The request was granted; however, the Claimants indicated that the only documents pertinent to the request were exhibits C-021 and C-024.[22]

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19 Exhibit C-004, Mr. Bello's First Statement, ¶ 58.

20 Reply, ¶¶ 69-71.

21 Annex C-131, p. 2.

22 Procedural Order 5, dated February 13, 2018, p. 23.

- Request 7 - Records of communications between Tele Fácil (or any person or entity acting on its behalf) and Telmex (or any person or entity acting on its behalf) between August 1, 2013 and July 11, 2014, regarding: (a) interconnection with Telmex; (b) the Telmex Offer or any other proposal on the terms for interconnection; or (c) the PEA Declaration and/or the PEA Rate Decision.

  The request was also granted; but the Claimants indicated that the only documents pertinent to the request were exhibits C-021, C-024 and C-058.[23]

- Request 8 - Minutes, notes, memoranda and records of communications discussing memorializing meetings between Telmex and Tele Fácil between August 1, 2013 and July 11, 2014, regarding terms for interconnection.

  The request was granted, but the Claimants maintained that the only document pertinent to this request was exhibit C-058.[24]

- Request 9 - Internal documents and records of communications between Tele Fácil's senior management, directors, shareholders and/or external advisors, discussing: (a) the PEA Declaration; and/or (b) the PEA rate decision, and/or; (c) the impact of the PEA Declaration and/or the PEA Rate Decision on: the negotiations with Telmex, the Telmex Offer (or any aspect thereof) or any other proposed terms for interconnection.

  The request was granted, but the Claimants did not provide any document, aside from an internal communication dated May 9, 2014 (exhibit R-001), which in no way corroborates the assertions of the Claimants.[25]

28. In its Second Documents Request, the Respondent tried to obtain additional information on the alleged renewal of the Proposal, and included the following requests:

- Request 1 - Internal documents and Internal Records of Communications discussing Telmex's alleged renewal of its original offer during the meetings held on May 6 and June 27 2014 between Tele Fácil and Telmex.

  The request was granted and the Claimants ratified that the only documents pertinent to the request were Claimant0001472, Claimant0001479, Claimant0001480, Claimant0001482, Claimant0001488, Claimant0001490.[26]

- Request 2 - Records of communications between Tele Fácil (or any person or entity acting on its behalf) and Telmex (or any person acting on its behalf) discussing Telmex's

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23 *Id.*, p. 24.

24 *Id.*, p. 25.

25 *Id.*, p. 25-27. *See* the list of delivered documents prepared by the Claimants, arising from the Claimants' first request for documents, Exhibit R-084.

26 *See* Exhibit R-001 and Exhibit R-063 (exhibit which includes a copy of the exchanged emails as Claimant0001479 to Claimant0001493).

renewal of its original offer during the meetings held on May 6, 2014 and June 27, 2014 between Tele Fácil and Telmex.

The request was granted and the Claimants ratified that the only documents pertinent to the request were Claimant0001479, Claimant1480, Claimant0001482, Claimant0001486, Claimant0001488, Claimant0001490 and Claimant1493.[27]

29. None of the documents identified in the preceding items refer or mention the alleged ratification or renewal of the offer on June 27, 2014. The documents identified as Claimant0001479, Claimant0001480, Claimant1482, Claimant0001486, Claimant0001488, Claimant0001490 and Claimant0001493 are an exchange of emails between Mr. Sacasa and Mr. Gallaga to organize a meeting on June 2014, and do not corroborate in any way Mr. Bello's assertion about the alleged ratification of the Proposal.[28]

30. The absence of contemporary documentary evidence about the alleged ratification of the Proposal and its acceptance confirms that this never happened.

2. The PEA Declaration prevented the implementation of the Proposal the terms originally proposed

31. The Respondent referred to this point in paragraphs 45 to 50 of its Statement of Defense, which are fully ratified herein. Those paragraphs explain that Clause 4 of the Proposal established that interconnection rates applicable to Telmex and Tele Fácil would be those specified in Annex C "Prices and Rates", and would be reciprocal.[29]

32. It was also explained that:

> 50. Together, the PEA Declaration and asymmetrical regulations imposed on Telmex, made many aspects of the First Telmex Proposal impracticable. Most notably, it made impossible for Telmex to charge Tele Fácil the USD $0.00975 reciprocal rate specified in Clause 4 and Annex D of the First Telmex Proposal, which perhaps explains Mr. Bello's statement regarding the need to go "*back again to Telmex to meet with Mr. Gallaga and confirm whether Telmex's offer was still standing*."

33. The Claimants do not challenge the preceding. In fact, their main argument is based on the idea that the alleged rate agreement, which they would have consummated with the alleged acceptance of the Proposal, would only apply to Telmex. So, Tele Fácil would receive the rate stipulated in the Proposal (USD $0.00975) and, instead of paying this same rate to Telmex, it would only have to pay the PEA rate (initially USD $0.00172 and later reduced to zero).

34. The impact of the PEA Declaration and its implications for the negotiations between Telmex and Tele Fácil may not be set aside. A mail from Mr. Bello to Mr. Sacasa, dated March 8, 2014, records this as a relevant event with future implications:

> Miguel:

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27 Exhibit R-063.

28 *Id*.

29 Statement of Defense, ¶ 45.

> Today, early morning the IFT published many things on its website: the concessionaire registry (which is very good), the tender basis for television networks and the preponderant resolutions of Telmex, Telcel and televisa.
>
> These rules change drastically our situation and I think that, before moving forward with interconnection agreement negotiations and other regulatory things, we need to analyze them deeply. They can make the road to interconnection much easier.[30] [Emphasis added]

35. If the PEA Declaration changed "drastically" Tele Fácil's scope, one may only imagine how much it changed Telmex's scope. If the Claimants hypothesis is correct, a question arises: what may have motivated Telmex to renew a reciprocal rates offer, knowing that the PEA Declaration and the new regulations applicable to the PEA would prevent it from collecting?

36. However, there is not an appropriate answer to this question; the Claimants expect this Tribunal to determine, only based on Mr. Bello's statement, that Telmex did renew the Proposal on June 27, 2014, ignoring that the alleged prices and rates verbally "agreed upon" would not be applicable under the new regulations.

3. Lack of formality on the alleged ratification of the Proposal and its acceptance

37. Concessionaires usually notify their offers and positions though notary public, so that, in case an agreement is not reached, they may prove to the IFT that they have attempted to negotiate unsuccessfully during the 60-day term stipulated by law, justifying this way the intervention of the IFT to resolve on the terms and conditions not agreed upon.[31]

38. This was the procedure followed by Telmex to deliver the Proposal in August 2013, as evidenced by an electronic mail sent by a member of the BGBG firm to Mr. Sacasa on August 26, 2013, indicating:

> Just to let you know that we just received Telmex's standard interconnection agreement. The curious thing about this matter is that the agreement was delivered by notary public at our office (although they said that they use to handle negotiations in a more informal way), nevertheless, once I scan the entire agreement (including the agreement and annexes A to L) I will send it to you via email in order to start the revision of it."[32] [Emphasis added]

39. It would be reasonable to suppose that Telmex would have followed a similar procedure for the alleged ratification of the Proposal, above all considering that more than 10 months had already gone by since it was notified to Tele Fácil, and the regulatory environment had experienced significant changes.

40. However, according to the Claimants, Telmex did not apply such practice and verbally ratified the Proposal during a meeting with Tele Fácil's representatives on June 2014. There was

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30 Exhibit R-064.

31 Exhibit R-001, p. 2, "[...] so that once the instruments have been agreed upon, we notify the operators through a Notary Public that we have opted for the indirect interconnection mode".

32 Exhibit R-065.

not even an electronic mail email between Telmex and Tele Fácil to confirm what was negotiated during the meeting.

41. Once more, in the absence of a reasonable explanation for this unusual situation and of contemporary documentary evidence to the time of the ratification of the Proposal, the only possible conclusion is that such ratification never occurred.

42. It shall also be noted that there was no formal acceptance of the Proposal by Tele Fácil.[33] It seems like this alleged acceptance (partial) of the Proposal should be inferred from the fact that Tele Fácil submitted its Interconnection Disagreement where it objected two of its clauses.

43. It is simply not credible that Telmex verbally ratified the Proposal, that Tele Fácil accepted it implicitly and partially upon submitting a disagreement before the IFT, and that this gave rise to an agreement granting rate rights to Tele Fácil.[34]

4. The IFT did not validate Telmex's offer

44. The Claimants argue that many of these arguments have already been reviewed and dismissed by the IFT as part of Resolution 381.[35] The Claimants ignore the context surrounding the IFT's resolution on the alleged agreement, confusing the nature of the decision and also ignoring a basic fact: the IFT holds no authority to determine whether a binding agreement between two operators exists. [36]

45. In fact, the Claimants have not been able to refer to any stipulation in the LFT (applicable to Tele Fácil's Interconnection Disagreement) or any other regulation conferring such authority upon the IFT. And they have not been able to identify it for the simple reason that it does not exist. These faculties are granted to national civil courts. If Tele Fácil deemed that the alleged partial acceptance of the Proposal bound Telmex and generated rights in favor of the company, it should have sought to enforce such rights before such courts, instead of insisting that Resolution 381 ordered the formalization of the agreement it allegedly held with Telmex.[37]

46. In case the IFT resolved on conditions which were not part of an interconnection disagreement procedure, it would be simply exceeding its legal capacities.[38]

47. As will be explained in the following section, the IFT's authority is limited to determine the conditions not agreed upon between two or more operators. The Respondent insists that the IFT's resolution on the alleged agreement shall be analyzed within this context.

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33 Statement of Defense, ¶ 46.

34 *Id.*, ¶¶ 83-84.

35 Reply, ¶¶ 77-80.

36 Mr. Buj's Second Expert Report, ¶¶ 173-174 and 190.

37 See Mr. Buj's Second Expert Report, ¶¶ 186-193.

38 Mr. Díaz's Second Statement, ¶ 10.

C. Resolution 381 did not grant any rate rights to Tele Fácil

48. The Respondent reaffirms its statements in paragraphs 65 top 80 of its Statement of Defense, where it is explained that article 42 of the LFT established the operators' obligation to interconnect their networks and also grants them a 60-days term to try to agree upon the terms of interconnection. Upon the expiration of such term, if an agreement has not been reached, any one of them may request the intervention of the IFT to resolve on the terms and conditions not agreed upon.[39]

49. The IFT has no authority to impose conditions in the absence of a disagreement or to determine if a binding agreement exists between operators. Its authority is circumscribed to the determination of terms and conditions not agreed upon, at a party's request.[40] The Claimants' expert seems to agree with this:

> 45. Under both laws, the FTL and the FTBL, the regulator's intervention is strictly limited to the terms and conditions subject to disagreement among the parties. This means that the fees can only be determined by the regulator if they were not agreed by the concessionaires in the sixty-day term for negotiation. In order to avoid abuse of discretion by the IFT when resolving these kind of disagreements, whenever they involved fees, the new FTBL, enacted on August 13, 2014, expressly ordered the IFT to calculate fees under dispute, based on a previously issued costs methodology , which should consider specific criteria also detailed in the FTBL. The law also mandates that the IFT shall annually publish such methodology, along with the resulting fees known as "reference fees". [41][Emphasis added]

50. However, the Claimants allege that: " the Respondent is taking the notarial position that, in an interconnection procedure, an order from the IFT is not binding, except in reference to the terms in disagreement being discussed before the IFT".[42] What is relevant is that the Claimants' own expert supports the Respondent's position.

51. Regarding the facts that forced the IFT to resolve if the rates were included in the disagreement, the parties seem to agree that:

- On July 11, 2014, Tele Fácil requested the intervention of the IFT to resolve on the terms and conditions not agreed upon with Telmex, identified as: indirect interconnection and number portability charges.[43]
- On August 12, 2014, the IFT notified Telmex on the Interconnection Disagreement and granted 10 days to submit a response.[44]

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39 Statement of Defense, ¶ 66; First Statement by Mr. Sóstenes Díaz, ¶¶ 37 and 42.

40 First Statement by Mr. Sóstenes Díaz, ¶ 35; Mr. Sóstenes Díaz's Second Statement, ¶ 10.

41 Exhibit C-111, Mr. Soria's Second Statement, ¶ 45.

42 Reply, ¶ 10.

43 Statement of Claim, ¶ 88; Reply, ¶ 4; Statement of Defense, ¶¶ 68-71. C-025.

44 Statement of Defense, ¶ 74; Exhibit C-029, p. 4.

- On August 26, 2014, Telmex submitted a response document in which it argues that no disagreement existed relating to indirect interconnection and the elimination of portability charges, but disagreement existed on interconnection rates.[45]
- On September 24, 2014, Tele Fácil answered that there was no disagreement on rates and that the only thing that the IFT needed to resolve was on the two terms originally stated.[46]

52. Since "*the intervention of the regulator is strictly limited to the terms and conditions subject to disagreement*", as stated by Dr. Soria, the IFT started by determining, as a preliminary matter, if the disagreement was on indirect interconnection and portability, as maintained by Tele Fácil, or if it was on interconnection rates, as maintained by Telmex.[47] This matter was analyzed in Recital Fifth, Subsection C of Resolution 381.

53. All the parts of Resolution 381 quoted by the Claimants to support their argument about the existence of a binding agreement on the subject of rates between Telmex and Tele Fácil are taken from that section. The Respondent respectfully requests the Tribunal not to ignore this context. The IFT did not make any decision on rates. It decided that it could not resolve on those because the assumptions established in article 42 of the LFT to justify its intervention were not materialized since no evidence existed that Tele Fácil and Telmex had attempted to negotiate the rates for at least 60-days without reaching an agreement.[48] The relevant portion of Resolution 381 is copied below, which was quoted in the Statement of Defense:

> For further confirmation, no document whatsoever in the record under process accredits that Telmex and Telnor manifested disagreement on interconnection rates during the time when the parties maintained negotiations to subscribe the corresponding interconnection agreement.
>
> This is, Telmex and Telnor's petition that the Institute resolves on interconnection rates not agreed upon with Tele Fácil do not accredit the regulating hypothesis established in article 42 of the LFT, since the review of the documents in the record under process do not evidence that Telmex and Telnor have formally expressed to Tele Fácil their disagreement relating to interconnection rates or a request to formally start negotiations on such interconnection rates, and that the 60 (sixty) days established in article 42 of the LFT for such concessionaires to agree upon those rates have actually passed, so the request from Telmex and Telnor is not valid. […][49] [Emphasis added]

54. The preceding explains: (i) that the resolutions section of Resolution 381 does not refer to rates, and (ii) that during the *Pleno*'s meeting in which Resolution 381 was voted no mention whatsoever was made about the rate to be included in the interconnection agreement.

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45 Statement of Claim, ¶ 89; Statement of Defense, ¶¶ 74-75. Exhibit C-027 and Exhibit R-007.

46 Statement of Claim, ¶ 92; Exhibit R-066.

47 Statement of Defense, ¶¶ 76.

48 *Id.*, ¶¶ 73-80.

49 Exhibit C-029, p. 15. (Spanish version).

55. As may be noted, when the Commissioner President gave the floor to the Head of the Regulatory Policy Unit to present the Project of Resolution 381, Ing. Luis Felipe Lucatero, only, indicated:

> Ing. Luis Felipe Lucatero Govea: Thank you very much. On this matter, the conditions not agreed upon between the parties were the provision of indirect interconnection services, on the one hand. And, on the other, portability. Relating to this, interconnection conditions were resolved in the following terms:
>
> Tele Fácil, Telmex and Telnor; expressed their will to execute a framework agreement for the provision of local interconnection services, including indirect interconnection services and the amendments required by Tele Fácil, to the definitions applicable to such service.
>
> Then, relating to the portability subject, Telmex and Telnor accepted to suppress from the agreement the portability clause as requested by Tele Fácil. Consequently, as an agreement existed between Tele Fácil and Telmex to formalize the framework agreement for the provision of local interconnection services, its subscription is ordered, as well as the interconnection of the public telecommunications networks of those concessionaires, within a term of 10-business days following notification of the Resolution. Lastly, such concessionaires, jointly or separately, shall deliver the interconnection agreement for its registration in the Public Telecommunications Registry, within 30 business days from its execution.
>
> This basically summarizes the project and we submit it for your consideration. Thank you.[50]
>
> [Emphasis added]

56. Finally, the IFT rejected Telmex's position and proceeded to resolve exclusively on the terms stated by Tele Fácil.[51]

57. It may be concluded that the Claimants make an out-of-context interpretation of certain portions of Resolution 381 with which they intend to convince the Tribunal that such Resolution granted them the right to execute an interconnection agreement with Telmex which contemplated a rate of US$0.00975, same that only Tele Fácil would be entitled to collect.

D. Facts occurred after the issuance of Resolution 381

58. The Statement of Defense lists the facts arising in the criteria confirmation and Decree 77, including: the unsuccessful attempts of the operators to subscribe the interconnection agreement; the diverse communications submitted by the operators to the IFT; and the actions taken by the IFT arising from said communications which resulted in the referred resolutions. These facts are detailed in paragraphs 90 to 101 of the Statement of Defense, same that are fully ratified herein.

59. A non-disputed fact is that Telmex and Tele Fácil tried to subscribe the interconnection agreement ordered by Resolution 381 in various occasions, but were unable to do so because they had different interpretations about the Resolution's determinations. For Tele Fácil, the agreement should incorporate, besides those matters resolved in Resolution 381, the terms and conditions of

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50 Exhibit C-030, p. 9.

51 Mr. Buj delves into this matter in paragraphs 160 and 166 of his second expert report.

the Second Proposal, including the reciprocal interconnection rate at USD $0.00975 established in the Proposal.[52] Telmex, in turn, insisted that the agreement could not be signed in its original terms because they contravene the new regulations framework applicable to the PEA.[53]

1. Telmex and Tele Fácil submissions

60. Telmex and Tele Fácil submitted several communications before the IFT in which they accused the reluctance of their counterparty to subscribe the agreement and requested the intervention of the IFT for a final resolution. Such communications were channeled to the General Supervision Division, which is part of the Compliance Unit.

61. Based on the documents that conform the docket, the Tribunal may verify that:

- On December 10, 2014, Telmex submitted a communication addressed to *Pleno* of the IFT in which it informed that on December 9, 2014 they had met with Tele Fácil to execute the corresponding interconnection agreements, and attached two copies of its Third Proposal (approximately 200 pages).[54]
- On December 19, 2014, Tele Fácil submitted a document addressed to the *Pleno* of the IFT through which it informed the IFT about the meeting held on December 9, 2014 between the concessionaires for the execution of the interconnection agreement, and the exchange of different versions of agreements for signature by the counterparty.[55] The document was accompanied with six addenda (hundreds of pages) and, regardless that it was not precisely a claim, the Claimants have called it the "First Execution Request".[56]
- On January 9, 2015, Telmex submitted before the IFT copy of a communication notified to Tele Fácil by which it requested the formal start of negotiations to execute an interconnection agreement.[57] Telmex also indicated that they could not offer the same

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52 Tele Fácil intended to execute a "hybrid agreement" with Telmex, composed of the Annexes of the First Proposal and the contents of the agreement offered by Telmex on August 26, 2014, during the Interconnection Disagreement procedure initiated by Tele Fácil. *See* Mr. Buj's First Expert Report, ¶ 35; C-021 (Proposal), Mr. Buj's Second Expert Report, ¶¶ 52-54, and Exhibit R-007 (Second Proposal).

53 Exhibit C-037; Exhibit C-041, pp. 9 and 10.

54 Statement of Defense, ¶ 93-95. R-008. *See* Exhibits R-008, R-009, C-031 and C-094; Mr. Canchola's Statement, ¶ 11.

55 *See* Exhibit C-035.

56 Statement of Claim, ¶192, fn. 310. Part of the annexes of the First Execution Request are included in this arbitration's docket: notice from Telmex addressed to Tele Fácil, executed by notary public on December 9, 2014 (**C-031**); ii) notice from Telmex addressed to Tele Fácil, executed by notary public on December 10, 2014 (**R-008**); iii) two original hardcopies of an interconnection agreement attached to the communication of December 10, 2014 (**R-008**); iv) notice from Tele Fácil addressed to Telmex, executed by notary public dated December 16, 2014, with a project of agreement **C-033**); v) another notice from Tele Fácil addressed to Telmex, executed by notary public (**C-034**), and vi) notice from Tele Fácil addressed to Telmex, executed by notary public dated December 18, 2014, accompanied by two hardcopies of an interconnection agreement. Mr. Canchola's Statement, ¶¶ 12 and 39.

57 Exhibit C-037.

terms and conditions as in 2013 since such terms were contrary to the Constitutional Amendment and the new LFTR. Finally, Telmex requested certain technical information to implement the interconnection.[58]

- On January 28, 2015, Tele Fácil submitted a claim addressed to the Compliance Unit of the IFT (First Complaint), accompanied by 14 annexes (thousands of pages).[59] In it, Tele Fácil listed again the communications exchanges between Telmex and Tele Fácil and requested a verification visit to Telmex and, if applicable, impose a sanction to it.[60] As in other occasions, Tele Fácil again argued that the agreement to be executed with Telmex should be composed of the main body of the Second Proposal along with the annex of the Proposal.[61]

- On January 30, 2015, Tele Fácil submitted another document before the IFT "further" to the First Complaint, accompanied by two certified copies of interconnection agreement signed by Tele Fácil, as annex 15 to the First Complaint (hundreds of pages).[62]

62. Given the circumstances prevailing at early 2015, when Tele Fácil and Telmex accused each other of being reluctant to sign the interconnection agreement version offered by each one of the concessionaires, and given the different positions of both operators on the terms that the agreement should include and what had been ordered by Resolution 381, it was perfectly reasonable that the General Supervision Division requested, on February 10, 2015, a confirmation criteria on the scope of the resolution.[63]

2. Confirmation criteria requested by the General Supervision Director and Telmex

63. The Respondent reaffirms its statements in paragraphs 102 to 106 of the Statement of Defense on the reasons that motivated the confirmation criteria, subject which is also addressed in paragraphs 33 to 37 of Mr. Gorra's first witness statement, and paragraphs 41 to 46 of Mr. Canchola's witness statement.

64. Arising from the First Complaint and the several communications submitted by Telmex and Tele Fácil, on February 10, 2015 the General Supervision Division requested from the UAJ a confirmation criteria to ensure certainty on Telmex and Tele Fácil's obligations by virtue of

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58 *Id.*

59 *See* Exhibit C-038. Some of the exhibits of the First Complaint are already included in the docket: **C-021** (annexes 1 y 2); **R-002** and **C-024** (annex 3); **C-025** (annex 4); **R-007** (annex 5); **C-029** (annex 6); **R-008** and **C-031** (annex 8); **C-033** (annex 10); **C-034** (annexes 11 y 12); **C-035** (annex 13) and **C-037** (annex 14).

60 Exhibit C-038 pp. 8-10.

61 Exhibit C-038, p. 6. Mr. Canchola's Statement, ¶ 39.

62 Exhibit R-067.

63 Exhibit C-040. The Respondent requests to record that in ¶ 104 of the Statement of Defense an *erratum* is present, which should be read February 10, 2015.

Resolution 381.[64] The latter is reflected in the resolution dated May 4, 2015 which would deem Tele Fácil's First Complaint as closed ("First Complaint Resolution").

> III. Arising from the claim submitted by Tele Fácil, by *oficio* IFT/225/UC/DG-SUV/706/2015, dated February 10, 2015, the General Supervision Division requested from the Legal Affairs Unit a confirmation criteria [...] [Emphasis added][65]

65. The General Supervision Division deemed that Telmex and Tele Fácil had opposite positions on the scope and interpretation of Resolution 381, and that this should be resolved. Hence, under the scope of its faculties, it requested a confirmation criteria to the UAJ.[66]

66. The Respondent also explained in its Statement of Defense that Telmex requested a confirmation criteria to the IFT, independent to the one requested by the Compliance Unit to the Legal Affairs Unit of the IFT.[67] Telmex's confirmation criteria request was submitted on February 18, 2015, identified in this case as Exhibit C-041.

67. Telmex's objective was to determine whether the terms and conditions of the agreement to be signed with Tele Fácil should be in accordance with the new legal framework, established in the LFTR and the PEA Declaration.[68] As an example, Telmex mentioned that the Proposal contemplated a compensation agreement (*bill & keep*), which would be modified by the new regulatory framework applicable to Telmex.[69]

68. A review of both confirmation criteria requests enables an easy identification of their differences:

- The confirmation criteria of the General Supervision Division (which is part of the Compliance Unit), aimed to confirm if the IFT may request the concessionaires to interconnect their networks and sign the corresponding agreement, as well as to clearly determine which clauses should be included in the agreement, in accordance with Resolution 381.[70]
- Telmex's confirmation criteria request aimed to clarify if the agreement to be signed with Tele Fácil should reflect terms and conditions in accordance with the new regulatory framework and the new status of Telmex as PEA.[71]

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64 Exhibit C-040. The Respondent requests to record that in ¶ 104 of the Statement of Defense an *erratum* is present, which should read February 10, 2015.

65 Exhibit R-069, p. 4.

66 Mr. Luis Canchola's Statement, ¶ 40.

67 Statement of Defense, ¶ 107.

68 Mr. Luis Canchola's Statement, ¶¶ 41 -45.

69 Exhibit C-041, p. 10.

70 Mr. Luis Canchola's Statement, ¶ 42; Exhibit C-040, pp. 3 and 4.

71 *Id.*, ¶ 42; Exhibit C-041, pp. 9 and 10.

69. The Claimants have frequently qualified the IFT's resolutions as "unprecedented" in an attempt to prove that the Respondent treated them in an inequitable manner.[72] What they repeatedly ignore is that the circumstances in which the dispute between Telmex and Tele Fácil took place were also unprecedented. As explained in the first round of statements, the interconnection disagreement between these two operators was simultaneous to the time when the Mexican authorities implemented the provisions of the 2013 Constitutional Amendment and the newly enacted LFTR.[73]

70. Besides, everything indicates that the Claimants understand, and they are aware of, the nature of the confirmation criteria:

> [...] Moreover, the IFT's confirmations of criteria are non-binding advisory opinions that have no precedential value.
>
> […]
>
> [...] A confirmation of criteria is thus intended to provide guidance only to the party asking the questions. As a result, the decision is necessarily an "advisory" opinion that does not constitute a precedent for the IFT.[74]

71. Therefore, Claimants' arguments lack any kind of logic in the sense that Decision 77 modified Resolution 381. As explained in the Statement of Defense, the nature of a confirmation criteria is different from a procedure followed in the form of a judicial proceeding. It consists of a consultation to a technical area of the IFT or to the *Pleno*, to determine the subject and/or scope of a law or provision.[75]

72. After receiving the confirmations criteria, and to resolve the problems identified in the different documents that the operators submitted to the Institute, the IFT resolved to issue Decree 77. Four aspects are proven:

- Legal basis existed to allow the General Supervision Division to request confirmation criteria to the UAJ and, therefore, it is not correct to deem it as "illegal" or "unprecedented".[76]
- The reason why the General Supervision Division requested a confirmation criteria is due to the difference between the positions of Tele Fácil and Telmex, and the considerable number of additional documents attached to Telmex's and Tele Fácil's communications.[77]
- The Claimants have not been able to prove the alleged conspiracy between Telmex and the IFT to avoid execution of Resolution 381.

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72 Statement of Claim, ¶¶ 198, 340, 381, 514 and 517.

73 Statement of Defense, ¶¶ 5 and 313.

74 Reply, ¶ 460, 494.

75 Statement of Defense, ¶ 121 and 122.

76 Reply, ¶ 198. *See* Mr. David Gorra's First Statement, ¶¶ 14 -17; *See* Mr. Luis Canchola's Statement, ¶ 46.

77 Exhibit R-068, p. 11.

- Telmex's confirmation criteria is substantially different from the confirmation criteria of the General Supervision Division. Also, the fact that Telmex submitted a request for confirmation criteria 8 days after the General Supervision Division submitted its own, only proves that Telmex was also seeking a higher degree of certainty on the type of agreement that it should sign with Tele Fácil.
- Based on all this, the assertions of the Claimants related to a conspiracy to obstruct the compliance of Resolution 381 are ineffective. What is effectively proven is that the General Supervision Division took the most reasonable option, within its authority, to determine the scope and interpretation or Resolution 381.

3. Decree 77

73. Both the request for confirmation criteria submitted by the General Supervision Division and the one submitted by Telmex were channeled to the UAJ, who, in turn, prepared the project of resolution to be submitted before IFT's *Pleno*.

74. Such project considered Telmex's communications dated December 10, 2014 and January 9, 2015; Tele Fácil's communications dated December 19 (First Execution Request), January 28, 2015 (First Complaint) and February 26, 2015; the General Supervision Division's confirmation criteria, dated February 10, 2015, and Telmex's confirmation criteria dated February 18, 2015.[78]

75. Decree 77 reaffirmed that Resolution 381 ruled solely on the matters not agreed upon between the parties. It also clarified that it may not impose terms and conditions which were not submitted to its consideration and granted a new 10-day term for Tele Fácil and Telmex to interconnect their networks and signed the corresponding interconnection agreement.[79]

76. The Claimants now submit a new argument based on the differences between the drafts of Decree 77 and its final version, seeking to prove that the IFT issued Decree 77 with the only end of damaging Tele Fácil and benefitting Telmex. For the Tribunal's convenience, a brief recount of the drafts of Decree 77 is given below:

- On March 6, 2015, the head of the UAJ submitted to the Technical Secretariat of the *Pleno* the First Project of Decree 77 to be included in the agenda of the *Pleno*'s meeting. Such meeting would be held on Friday, March 13, 2015.

  In the notes accompanying the Project of Decree 77, the head of the UAJ indicated that the reason why such project had been proposed to the Pleno was that the operators had submitted various documents before the IFT in connection with the content of Resolution 381, Tele Fácil's First Complaint and, also, two criteria confirmation requests had been submitted on February 10 and 18, 2015, respectively.[80]

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78 Tele Fácil's document dated February 26, 2015 was also considered at the time of issuance of Decree 77. Exhibit C-107; C-051, p. 5.

79 Exhibit R-068, p. 12.

80 Exhibit C-116, pp. 18-20.

- The *Pleno*'s meeting was held on March 13, 2015. As has been indicated, the UAJ requested that the First Project of Decree 77 be removed from the agenda due to some comments received from some of the commissioners.[81]
- On April 7, 2015, the UAJ submitted to the Technical Secretariat of the *Pleno* the Second Project of Decree 77 to be discussed and voted during the meeting to be held the following day. The Second Project of Decree 77 was also accompanied by some notes indicating that such project was aimed for addressing the various documents submitted by Telmex and Tele Fácil, and Tele Fácil's First Complaint.[82]
- On April 8, 2015 the Second Project of Decree 77 was discussed, voted and generally approved.

77. In his second witness statement, Mr. Gorra explains that, contrary to Claimants' assertions, a third draft of the Decision never existed.[83] Likewise, Mr. Gorra explains that the differences between the First Project of Decree 77 and its Second Project are mainly changes in form and do not offer any support to the conclusions of the Claimants.[84]

78. Also, Mr. Gorra correctly indicates that upon an analysis of all the amendments and wording changes between both drafts (and not in an isolated manner, as the Claimants do), it is clear that the substance of both documents is fundamentally the same.[85]

79. The four main arguments of the Claimants based on the changes to the drafts are listed below:[86]

- The Claimants argue that the Second Project of Decree 77 benefitted Telmex by excluding the "language" that gave Tele Fácil the possibility to apply the rate acknowledged in Resolution 381.[87] This is false; both projects clarified that Resolution 381 never determined interconnection rates. Also, a simple reading of Decree 77 reveals

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81 Statement of Defense, ¶ 124.

82 Exhibit C-050, pp. 3-5.

83 Mr. David Gorra's Second Statement, ¶¶ 5 and 15.

84 *Id.*, ¶¶ 19-30 and Annex A.

85 *Id.*, ¶ 18.

86 Reply, ¶¶ 145-150.

87 *Id.*, ¶ 146.

that the allegedly eliminated extract[88] is included in page 10 of Decree 77, with a few wording changes.[89]

- On the alleged additional text of Decree 77, identified in paragraph 147 of the Reply[90], the first Project of Decision 77 established a wording in the same terms on indicating: "*leaving unharmed the rights of the parties so that such subscription may be enforced by the means and form that they may deem convenient, since it is not a part of the disagreements resolved by the interconnection resolution*".[91] Therefore, no substantial difference exists between the two drafts.

- The Claimants' third argument states that the Second Project of Decree 77 forced Tele Fácil to sign an interconnection agreement devoid of an interconnection rate.[92] Both documents imposed on Telmex and Tele Fácil the obligation to interconnect their networks and sign an interconnection agreement. In fact, the Second Project of Decree 77 clarified that the concessionaires should interconnect their networks and sign an interconnection agreement which included the possibility of indirect interconnection and eliminated any clause providing for portability charges.[93] None of the drafts indicated that the interconnection agreement to be subscribed should establish a rate of USD $0.00975.

- Claimants' fourth argument refers to certain modifications on the order and wording of the resolute points of Decree 77. The Claimants have argued that these changes constitute "an effort to ensure that Tele Fácil did not have any way to attempt to enforce the agreed rate through the courts".[94] This is simply false; its purpose was to structure the resolute points in a more orderly manner.

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88 Exhibit C-116, pp. 9 and 10. "Relating to the terms of the interconnection agreement to be subscribed by the parties, taking in to account that the Pleno of the IFT did not pronounce on the project of agreement in the record, since it was not subject of the disagreement, the rights of the parties relating to the aspects that did not compose the disagreement remain untouched, to be enforced by the means and form that they may deem convenient." *See* Reply, p 66.

89 Exhibit C-051, p. 13. "Relating to the remaining terms and conditions of the interconnection agreement to be subscribed by the parties, considering that this collegiate body did not pronounce on the stipulations included in the project of agreement in the record, since it is not subject of the disagreement, and, therefore, not subject to its competence, it is clarified that the rights of the parties relating to those aspects that were not subject of the Resolution of Interconnection remain untouched".

90 Reply, ¶ 147 and red text on page 67. "[...] that this collegiate body did not pronounce on the stipulations included in the project of agreement in the record, since it is not subject of the disagreement and, therefore, not subject to its competence, it is clarified that the rights of the parties relating to those aspects that were not subject of the Resolution of Interconnection remain untouched.".

91 Exhibit C-116, p. 14. Mr. David Gorra's Second Statement, ¶¶ 27 -30.

92 Reply, ¶ 148.

93 *Id.*, ¶ 148.

94 *Id.*, ¶ 149.

80. As any working document, the First Project of Decree 77 received amendments before becoming Decree 77. However, this does not mean that several versions of the document exist within the IFT with different conclusions, or that additional changes were made on the document "*during the critical weeks -between the months of March and April 2015- in which Tele Fácil was desperately seeking the application of Resolution 381 to be able to start its commercial operations*".[95]

81. The Claimants and their expert, Mr. Soria, incorrectly interpret some extracts from Mr. Gorra's first witness statement. The Claimants question the fact that the comments of commissioners Labardini, Estavillo and Estrada on the First Project of Decree 77 were not addressed.[96] On doing so, they seem to forget that the *Pleno* of the IFT is a collegiate body who decides by a majority of votes. The UAJ analyzed and considered all the comments received from the Commissioners and, based on them, prepared what it considered the best possible version based on the opinion of a majority, which was submitted as Second Project of Decree 77.[97]

82. Besides, the drafts of Decree 77 do not constitute legal acts and, therefore, may not have caused any damage to Tele Fácil. Regarding this, Mr. Buj indicates in his Second Expert Report that, in terms of Mexican law, "resolution projects lack any legal value since they are mere internal working documents", which may be freely modified by the authorities.[98] Mr. Buj also explains that resolution projects acquire a final status upon their approval in a *Pleno*'s meeting.[99] In other words, the commissioners' deliberative process is not subject to scrutiny, but only the final resolution.[100]

83. Lastly, it shall be noted that Tele Fácil required the execution of Decree 77 in its Second Complaint and, therefore, now it cannot expose the decree as something anomalous with which it did not agree.[101] The fact that Tele Fácil submitted before the IFT a claim against Telmex for not complying with Decree 77 affects the credibility of Claimants' argument and explains the reason why they do not make any reference to the Second Complaint in their Reply.

84. In short, the Claimants seek to distract and confuse the Tribunal with the drafts of Decree 77. The First Project of Decree 77 and the Second Project of Decree 77 do not constitute acts of the IFT or hold any legal validity. They are simple drafts of the same document that was later voted by the *Pleno* in its meeting dated April 8, 2015.[102] As indicated by Mr. Gorra, the seven Commissioners who approved the Second Project of Decree 77 publicly stated their positions

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95 *Id.*, ¶ 145.

96 *Id.* ¶ 143; Mr. Gerardo Soria's Second Report, C-111, ¶ 110.

97 Mr. David Gorra's Second Statement, ¶¶ 16 -18.

98 Mr. Buj's Second Expert Report, ¶ 198;

99 *Id.*, ¶ 199.

100 In fact, Mr. Buj explains that the Specialized Courts have already resolved that resolution projects are simple proposals subject to amendments and even to substitution by a new project and, therefore, may not include the final considerations. Mr. Buj's Second Expert Report, ¶¶ 199-201.

101 Exhibit R-069, pp. 6-7.

102 Mr. David Gorra's Second Statement, ¶ 29.

during the *Pleno*'s meeting upon casting of their vote, so it is illogical to think that someone sustained an argument contrary to the one recorded in the stenographic version of the meeting and its audio recording; the Commissioners themselves verbally expressed their opinions [103]

85. Based on these changes of wording and structure, the Claimants seek to create a conspiracy theory developed within the IFT against Tele Fácil, which never existed.[104]

4. No conspiracy was performed against Tele Fácil

86. In their Reply, the Claimants have let loose their imagination and, without producing any evidence, suggest the existence of a conspiracy against Tele Fácil developed by the IFT and Telmex. The serious accusations of the Claimants include, among other things: a wrongful influence by the President of the IFT over the Compliance Unit, the deliberate destruction of evidence and witness tampering.

87. The Respondent respectfully requests this Tribunal not to ignore that the Claimants do not submit any evidence to support all these accusations. The accusations are simple speculations based on: the alleged coincidence of dates of the requests for confirmation criteria by the General Supervision Division and Telmex, respectively; the alleged acceptance by Telmex of the contents of Resolution 381; the fact that Tele Fácil did not request any confirmation criteria, and a long *etcetera*.[105]

88. The Claimants assert that the Respondent has not been able to credibly justify the request for confirmation criteria *sua sponte* of Mr. Sánchez Henkel[106], concluding with a singular *non-sequitur*: that the only reasonable interpretation of the facts is that Commissioner Contreras ordered Mr. Sánchez Henkel to consult with the UAJ if Resolution 381 may be partially implemented.[107] These unfounded assertions are analyzed below.

a. Commissioner Contreras never instructed Mr. Sánchez Henkel to ignore Resolution 381

89. The Claimants assert that "at mid-January 2015", the Commissioner President of the IFT summoned a meeting where he instructed Mr. Gerardo Sánchez Henkel, at the time head of the Compliance Unit, to obstruct the execution of Resolution 381 by a request for a confirmation criteria addressed to the UAJ.[108]

90. The Claimants do not provide any evidence that such meeting ever took place or about the instructions that Mr. Sánchez Henkel would have allegedly received from the President of the IFT.

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103 Mr. Gorra's Second Statement, ¶ 35.

104 Reply, ¶ 102, 139.

105 Reply, ¶¶ 284-288.

106 Reply, ¶ 289.

107 Reply, ¶¶ 285 and 297.

108 Statement of Claim, ¶¶ 192 and 313; Reply, ¶ 297.

Their serious accusations are based on "information and beliefs" and, notwithstanding, they now complain that the Respondent did not submit a statement by Commissioner Contreras denying such malicious falsity.[109]

91. To be clear, the Respondent has no obligation to refute unproven facts. It is the Claimants who carry the burden of proof for their accusations, and they have not delivered any proof. Without prejudice of the preceding, the Respondent offers the statement by Mr. Peláez, who was at the time the Executive Coordinator of the IFT and accompanied Commissioner Contreras to practically every meeting held with the heads of the different areas of the IFT.[110] It also offers Mr. Canchola's statement, who to this date is the General Supervision Director and, due to his responsibilities, would have been in charge of supervising Resolution 381's compliance.[111]

92. Mr. Peláez declares not being aware that such meeting ever took place and states that he never witnessed that Commissioner Contreras instructed any official of the IFT to ignore or fail to enforce a resolution.[112] In the same sense, Mr. Canchola indicates that he never received any instruction whatsoever to ignore compliance of Resolution 381, also indicating that he is not aware of the meeting in which Mr. Sánchez Henkel would have allegedly been instructed to do so.[113]

93. The Claimants also accuse a wrongful influence by Telmex in the process that lead to Decree 77 and, in their Reply, complain about the Respondent's "weak" denial.[114] Same as the alleged instructions from the Commissioner President, the alleged influence by Telmex is no more than an argument that lacks any factual or evidentiary support.

b. The IFT did not destroy any evidence

94. The Claimants have dedicated a considerable part of their Reply to argue that the Respondent deliberately destroyed relevant evidence for this claim.

95. Particularly, they argue that the Respondent "has not complied with its transparency obligations since it has withheld or destroyed evidence related to the discussions of the *Pleno* on March 13, 2015, in relation to the initial draft of Decree 77".[115] They also assert that the Respondent destroyed documents related to the issuance of Resolution 381 and the issuance of Decree 77, mainly electronic emails.[116]

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109 Reply, ¶¶ 279 and 280.

110 Mr. Luis Fernando Peláez's Statement, ¶¶ 2, 3 and 8.

111 Mr. Luis Gerardo Canchola's Statement, ¶¶ 5, 15-16.

112 Mr. Luis Fernando Peláez's Statement, ¶¶ 10 -12.

113 Mr. Luis Gerardo Canchola's Statement, ¶¶ 27, 29 and 35.

114 Reply, ¶ 283.

115 Reply, ¶ 128.

116 The Claimants refer to requests for documents 3, 6, 7, 7 bis, 9, 10 and 11 of their first request for documents. Reply, ¶ 105; *See* Procedural Order 4, p. 3.

96. The Claimants do not produce any proof for their claims. Their assertions are based on the response from Mexico to their requests for documents, particularly:

- that initially the Respondent indicated that no drafts existed in addition to the First Project of Decree 77, when in fact another one existed (i.e., the Second Project of Decree 77);[117]
- that the IFT was bound to keep electronic mails and notwithstanding such obligation it did not provide a single one in response to requests 3, 6, 7, 7 bis, 9, 10 and 11;[118]
- that the initial search did not include the offices of the commissioners and based on that the searches for previous documents were not performed in good faith;[119]
- that at least 20 persons from the IFT participated in the Tele Fácil and Telmex affair, and that, based on practice, it is probable that they played a relevant role in the process of issuance of Decree 77.[120]

97. The Respondent admitted some involuntary mistakes made upon responding to the Claimants' requests for documents. One of them was to assert that no other drafts existed besides the First Project of Decree 77. It also apologized for a misunderstanding that caused that the initial search did not include the offices of the Commissioners. However, these errors were corrected at the time with a secondary search for documents in the IFT's files and in the offices of the Commissioners.

98. The Respondent categorically denies that such errors may support the conclusions promoted by the Claimants. The Respondent has complied with all the Tribunal's orders stated in Procedural Orders 3, 4 and 6, and never intended to hide evidence.

99. On the other hand, it shall be noted that the IFT has created its own regulations for archive control and query, as well as to promote the organization, safekeeping and expedite location of its files (*i.e.*, the Guidelines, the Notice and the CADIDO).[121] Based on these instruments, three classification categories exist for physical and digital documents: "Archive Document", "Immediate Administrative Verification Document" and "Information Support Document". Under a false premise, the Claimants argue that the electronic mail messages related to Decree 77 fall into the document category so-called "Immediate Administrative Verification Document".[122]

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117 *See* Procedural Order 4, dated January 2, 2018, p. 5; R-070, p. 3.

118 Reply, ¶ 105. R-071.

119 Reply, ¶¶ 135 and 136.

120 Reply, ¶ 124.

121 In their Reply, the Claimants have argued that the IFT shall be subject to the stipulations of the Federal Law of Transparency and Access to Public Information and the IFAI's recommendations (¶¶ 109 y 116; CL-105). It is, however, the Federal Archives Law that establishes the obligations on the safeguard of information with documentary value. Based on it, the IFT has issued the Guidelines, the Notice and the CADIDO. *See* David Gorra's Second Statement, ¶ 39, fn. 26.

122 Reply, ¶¶ 113, item ii) and 114.

100. The truth is that electronic mails are simply temporary files which are not integrated into folders, files or records, so they are cleared, in conformity with the Notice, for an efficient use of the storage capacities assigned to each public officer of the IFT.[123] In other words, electronic mails and digital files related to Decree 77 would not be deemed as "Immediate Administrative Verification Documents" simple because they were not created as a process during an administrative procedure.[124]

101. The assertion that document classification and the retention time of each record is done in accordance with a "Document Disposal Catalogue" is true.[125] In the case of the IFT, the Document Disposal Catalogue exists and is known as the CADIDO.[126] Neither the guidelines, nor the CADIDO, refer to the safekeeping of or a specific manner to clear electronic mail messages to be followed by the officials of the IFT. However, the Notice does. This instrument stipulates that, periodically, each official of the IFT shall delete or store institutional electronic mail so that it does not exceed the storage capacity of the inbox, keeping only the information that will be needed later on.[127]

102. Therefore, in accordance with the regulations of the IFT, electronic mail messages are temporary files and, for this reason, they are cleared periodically in conformity with the Notice for an efficient use of the storage capacities assigned to each public officer.[128]

103. Documentation lacking any documentary value would not correspond to any of the classification categories and, therefore, IFT's officials had no obligation to create a security copy or backup.[129] This was clarified in the Respondent's communication dated November 15, 2017:

> "Based on this, if there have not been produced *"memoranda, internal communications, notes, emails, recordings and transcripts of meetings, and any other information"*, it is because there are no such files or such files have been clean due to a lack of documentary value, and avoid excessive documentation accumulation. In other words, the IFT is only

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123 Notice issued by the Administration Unit of the Federal Telecommunications Institute by which the "Policies for the use of Information Technology and Communications Resources of the Federal Telecommunications Institute", dated October 1st, 2015 ("Notice"). Exhibit CL-103; David Gorra's Second Statement, ¶ 41.

124 See articles 9 and 10 of the Resolution by which the Governing Board of the Federal Telecommunications Institute issues the Guidelines on the subject of organization and safekeeping of the files of the Federal Telecommunications Institute (Guidelines), published on August 3, 2015 in the DOF. Exhibit CL-102.

125 Reply, ¶ 115.

Article 11. Immediate Administrative Verification and Information Support documents may be integrated to folders, files or any other type of storage, but not as Records. These documents will not be transferred to the concentration Archive either; their elimination will be performed in the temporary Archive and will be subject to compliance with safekeeping established in the corresponding section of the Document Disposal Catalogue. [Emphasis added], article 11 of the Guidelines. Exhibit CL-102.

126 Document Disposal Catalogue of the IFT, dated November 2017. Exhibit R-083.

127 Mr. Gorra's Second Statement, ¶ 41; *See* articles 4 section X, and 15 of the Notice. Exhibit C-103.

128 As its name implies, the Notice was issued by the IFT for "the Use of Information Technology and Communications Resources of the IFT". Exhibit CL-103. Mr. David Gorra's Second Statement, ¶ 41.

129 David Gorra's Second Statement, ¶¶ 40-42.

> able to provide the information that it has at its disposal, hence, those files with documentary value. Contrary to what the Claimants infer, the IFT has not withheld any information or documentation. On the contrary, the IFT has provided the documentation it has and is able to produce".[130]

104. All documents in record of Decree 77 and that corresponded to any of the requests of the Claimants were provided at the time, in compliance with the Tribunal's instructions.

c. The IFT did not favor Telmex

105. In Claimants words, the purpose of the alleged conspiracy was to favor Telmex, the same operator who a few months before was declared PEA and became subject to asymmetric regulation.[131] It shall be noted what Telmex stated in its annual report, one year after being declared PEA.

> This legal framework has had a substantial impact on our business and operations in Mexico. The long-term effects will depend on further regulations and other actions by the IFT, how we and our competitors adapt, how customers behave in response and how the telecommunications and media markets develop. [Emphasis added].[132]

106. It shall also be noted that asymmetric regulation imposed on Telmex in 2014 was not limited to the elimination of charges for interconnection. It was an ample set of measures aimed at the reduction of the preponderant operator's influence in the market. In its annual report for 2015, América Móvil (economic group to which Telmex belongs) summarized the contents of this asymmetric regulation in the following terms:

> Asymmetric Regulation of the Preponderant Economic Agent
>
> Based on the IFT's determination that we, our Mexican operating subsidiaries (Telmex, Telnor and Telcel) and certain affiliates constitute a preponderant economic agent in the telecommunications sector, we are subject to extensive specific asymmetric measures. We summarize what we believe are the most important measures below.
>
> > *Interconnection.* The 2014 legislation eliminated termination rates for the preponderant economic agent as of August 13, 2014, such that Telcel, Telmex and Telnor may not charge other operators for the termination services they provide in their networks, while continuing to pay such operators for their interconnection services.
> >
> > *Sharing of Infrastructure and Services.* We must provide other carriers access to (i) passive infrastructure, including towers, sites, ducts and rights of way; (ii) elements of our network that allow other carriers and MVNOs to offer those services we provide to our fixed-line and mobile customers; (iii) our dedicated circuits and (iv) domestic roaming services, in each case, pursuant to IFT pre-approved reference terms (ofertas públicas de referencia). We negotiate access rates with other carriers and, if we cannot reach agreement,

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130 Exhibit R-072.

131 Reply, ¶¶ 35, 288.

132 America Móvil's Annual Report 2015, p. 105 (English version). Exhibit R-073.

rates may be determined by the IFT using, as applicable, a long-run average incremental costs methodology or a "retail minus" methodology.

Local Loop Unbundling. We must offer other operators access to elements of our local network separately. In December 2015, the IFT notified Telmex of a resolution authorizing the modified terms and conditions of Telmex's proposed Reference Terms for Local Loop Unbundling (Oferta de Desagregacio´n Efectiva de la Red Local). Telmex has challenged this resolution and a decision is pending.

Elimination of Customer's Domestic Roaming Fees. As of April 2014, we may no longer charge our customers roaming fees within Mexico.

Certain Obligations on the Provision of Retail Services. Certain rates for the provision of telecommunications services to our customers are subject to the IFT's prior authorization, in the case of fixed-line and wireless services, and to rate controls, in the case of fixed-line services only, using methodologies related to maximum prices and replicability tests that are currently under analysis by us and the IFT. We are also subject to various obligations relating to the sale of services and products, including the obligation to offer individually all services that we previously offered under a bundle scheme, the limitations on exclusivity and the obligation to unlock handsets and tablets.

Content. We are subject to specific limitations on acquisitions of exclusive transmission rights to "relevant" content (contenidos audiovisuales relevantes), as determined from time to time by the IFT, including but not limited to the national soccer play-offs (liguilla), the FIFA world cup soccer finals and any other event where large audiences are expected at a national or regional level.

Reporting of Service Obligations. We are subject to obligations related to reporting of service, including the publication of reference terms for wholesale and interconnection services that are subject to asymmetric regulation.[133] [Emphasis added]

107. In this context, the argument that the IFT or the Mexican Government sought to favor Telmex with Decree 77 and used all kinds of legal and illegal acts to achieve it, is simply unsustainable. The IFT's actions were performed in good faith and were reasonable considering the case's circumstances.

108. If the Claimants' assertions were true, there would be no explanation to the fact that Telmex challenged Decree 77 by means of *amparo* proceedings.[134] It would obviously not have done so if the objective of such Decree would have been to favor it and/or it would have been the result of a collusion between IFT officials and Telmex (as the Claimants seem to suggest).

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133 America Móvil's Annual Report 2015, pp. 106-07 (English version). Exhibit R-073.

134 Statement of Claim, ¶ 250; Exhibit C-054, p. 17.

d. The alleged witness tampering in charge of the Claimants has not been proved

109. The Claimants have again accused the Respondent of tampering with one of the witnesses through threats.[135] To this date, the Claimants have not identified such witness or the author of the threats, and have not delivered any evidence whatsoever relating to those assertions. This serious accusation relies on simple assertions by Claimants' lawyers during this arbitration. The Tribunal is requested to dismiss them because the Claimants have not complied with the burden of proof.

5. Tele Fácil was duly heard by the IFT

110. The Claimants assert again that "they were never granted a significant opportunity to be heard before the IFT revoked their valuable interconnection rights".[136] This claim is simply false.

111. As the Claimants themselves indicate, the nature of the confirmation criteria is not contentious, but consists simply of the issuance of advisory opinions.[137] In fact, the Respondent has explained in detail in its Statement of Claim which was the object and basis of Decree 77 and the motives for its issuance.[138]

112. The confirmation criteria procedure does not constitute an administrative procedure followed in form of a judicial procedure. However, even when a written submission is not contemplated, article 30 of the LFTR provides for the possibility that private parties meet with the Commissioners to discuss on matters within their competence.[139] Tele Fácil exercised such right in multiple occasions. Besides, it submitted various communications before the IFT, which were analyzed and addressed by the several technical areas of the IFT, and considered at the time of issuance of Decree 77;

- On December 19, 2014, Tele Fácil submitted its First Execution Request.[140]
- On January 12, 2015, Tele Fácil allegedly meets with Mr. Sánchez Henkel, at the time head of the Compliance Unit.[141]
- On January 28, 2015, Tele Fácil submitted its First Complaint.[142]

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135 Reply, ¶ 168.

136 Reply, ¶ 324.

137 Reply Document, ¶ 460. Unlike an interconnection disagreement, the confirmation criteria is a procedure by which some government entity or a private party requests an interpretation on a legal or administrative provision, or a resolution on the subject of telecommunications or broadcasting. *See* Mr. Gorra's first witness statement, ¶ 19; Statement of Claim, ¶ 122;

138 Statement of Claim, ¶¶121–122, 134 and 283 to 286.

139 Article 30 of the LFTR, CL-04.

140 Exhibit C-035.

141 Statement of Claim, ¶¶ 194-195,488.

142 Exhibit C-038.

- On January 30, 2015, Tele Fácil submitted a communication before the IFT as a follow-up to its First Complaint.[143]
- On February 5, 2015, Tele Fácil meets with Mr. Gerardo Canchola, General Supervision Director.[144]
- On February 13, 2015, Tele Fácil submitted a communication before the IFT as follow-up to its First Complaint.[145]
- On February 13, 2015, Tele Fácil also submitted a communication before the IFT, addressed to the Commissioner President of the IFT, informing about the Telmex's default in interconnecting its network to Tele Fácil's.[146]
- On February 26, 2015, Tele Fácil submits a document as follow-up on its First Complaint.[147]
- On March 5, 2015, Tele Fácil meets with practically the full *Pleno* of the IFT, with the heads of the IFT's technical areas and other IFT officials.[148]
- On March 23, 2015, Tele Fácil submitted a document before the IFT as a follow-up to the meeting with the *Pleno* of the IFT.[149]
- On August 5, 2015, Tele Fácil submits its Second Complaint against Telmex for breaching Decree 77.[150]

113. The meeting held on March 5, 2015 is also a good example of the opportunities granted to Tele Fácil to deliver its arguments. During said meeting, held in accordance with article 30 of the LFTR, Mr. Bello and Mr. Sacasa were able to state their concerns directly to the heads of the technical areas of the IFT and to five commissioners of the *Pleno* of the IFT.[151] Far from evidencing an unfair and unequitable treatment to Tele Fácil, the evidence proves that Tele Fácil was duly heard, received a treatment in terms of law by the IFT and was satisfied with the results of the meeting.[152]

Josh and Jorge:

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143 Exhibit R-067. R-068, p. 4.

144 Exhibit C-003, Mr. Sacasa's First Statement, ¶ 99. Mr. Luis Gerardo Canchola's Statement, ¶¶ 30-32.

145 Exhibit R-074. R-068, p. 6.

146 Exhibit R-075. R-068, p. 6.

147 Exhibit C-107.

148 Exhibit C-043.

149 Exhibit C-049.

150 Exhibit R-014.

151 Exhibit C-043.

152 Reply, ¶ 329.

> We just returned from the meeting with the IFT's Plenum, and I believe that we overtook everything and it went excellently. There were 5 of the 7 commissioners (the other 2 who did not attend to the meeting are in commission in Barcelona), and all the substantive areas involve in the matter, together with their advisors.[153]

114. The communication exchanged within Tele Fácil is quite clear related to Mr. Sacasa's positive view about the meeting with the *Pleno*. The truth is that Tele Fácil was duly heard by the IFT. All documents from Tele Fácil were channeled to the corresponding technical areas, and received the best possible treatment for the resolution of Decree 77 and at the time of resolving Tele Fácil's First and Second Complaints.

6. Tele Fácil was reluctant to interconnect its network with the one of Telmex

115. The Respondent reaffirms its statements in paragraphs 138-147 of its Statement of Defense and observes that the Claimants have not responded to those arguments.

116. The Claimants do not explain their decision to default their obligation to physically interconnect their network with Telmex's and Nextel's within 10 days following notice of Decree 77. The Respondent has proved that:

- On April 16, 2015, Telmex informed Tele Fácil about its intent to interconnect its network with the one of Tele Fácil.[154]
- On that same date, Telmex requested Nextel the transit service to perform the indirect interconnection requested by Tele Fácil, and Nextel provided the necessary information.[155]
- On April 17, 2015, Telmex and Nextel performed the tests in the city of Guadalajara. Tele Fácil decided not to participate.[156]
- On April 20, 2015, interconnection tests were performed in the city of Monterrey, Nuevo León. Tele Fácil decided not to participate.[157]
- On April 21, 2015, Telmex and Nextel performed interconnection tests in Mexico City and Huixquilucan, State of Mexico. Tele Fácil decided not to participate.[158]
- On April 23, 2015, Telmex delivered a communication to Tele Fácil by which it informed the latter: the results of the interconnection tests; that it was ready to carry, via Nextel,

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153 Exhibit R-013, p. 1.

154 Statement of Defense, ¶ 139; Exhibit R-015, pp. 6 and 7.

155 Statement of Defense, ¶ 139; Exhibit R-016.

156 Statement of Defense, ¶ 141; Exhibit R-019 pp. 6 and 7 and Exhibit R-020 p. 4.

157 Statement of Defense, ¶ 142; Exhibit R-021, p. 5.

158 Statement of Defense, ¶ 143; Exhibit R-022, p. 2.

calls traffic between Telmex's and Tele Fácil's networks, and reaffirmed Telmex's will to continue with the negotiation of the interconnection agreement.[159]

117. The Respondent reaffirms is position that these facts prove that Tele Fácil never had the intention to start operations according to its original business plan which, obviously, was not based on obtaining extraordinary profits from the interconnection with Telmex.

E. The actions of the Specialized Courts did not breach NAFTA's provisions

118. In their Reply, the Claimants insist that Specialized Courts denied access to justice to Tele Fácil, by not providing a "significant forum" to resolve the *amparos* filed against Decree 77 and Resolution 127.[160]

119. According to the Claimants, the Specialized Courts: (i) did not analyze deeply enough the *amparos* filed by Tele Fácil and simply "abdicated" in favor of the IFT's resolution[161]; (ii) unfairly dismissed a writ of review filed by Tele Fácil;[162] (iii) lack experience and were incompetent and protectionist on their resolutions[163], and (iv) Sentence 351/2014 and Sentence 62/2016, which solved the *amparo* and *amparo appeal*, respectively, filed by Telmex against Resolution 381, as well as Decision 77, were notoriously deficient on incorrectly applying the *res judicata* doctrine.[164]

120. Mexico will answer these arguments in the following sections.

1. Creation of Specialized Courts

121. Prior to the 2013 Constitutional Amendment, district courts and circuit collegiate courts on administrative matters were competent to resolve *amparos* filed by telecommunications concessionaires. At the same time, the concessionaires had the possibility to file contentious-administrative and ordinary administrative trials, and request injunctions of the claimed act. The latter promoted abuse and obstructed the resolution of controversies between the concessionaires and the implementation of regulations.[165]

122. The 2013 Constitutional Amendment aimed at putting an end to these issues by ordering (*inter alia*) the creation of federal specialized courts and tribunals who could only hear matters related to economic competition, telecommunications and broadcasting, and eliminating the

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159 Statement of Defense, ¶ 144; Exhibit R-023, p. 48.

160 Incorrectly, the Claimants indicate that Mr. Nelson paid the costs in fares to the firm BGBG for the filing of three *amparos* (one as an interested third party and two as claimants). The truth is that Tele Fácil paid for such legal services. Reply, ¶ 340 and 341. "*For legal fees in connection with the abovementioned amparo actions, Tele Fácil paid*" [...], *See* Exhibit C-108, ¶ 4 and pages 5 to 9 (English version).

161 Statement of Defense, ¶ 223, 231,340.

162 *Id.* ¶¶ 349 y 358.

163 *Id.*, ¶ 355.

164 *Id.*, ¶¶ 389, 390 and 395.

165 Exhibit CL-011, pp. 22 and 24.

possibility to request injunctions.[166] Hence, since the 2013 Constitutional Amendment, two district courts and two collegiate courts on administrative matters, specialized in economic competition, broadcasting and telecommunications ("Specialized Courts") were created and took office on August 10, 2013.[167]

123. The accusations of the Claimants relating to the lack of experience and incompetence of the Specialized Courts are unfounded. Judges and magistrates composing the Specialized Courts are jurists widely recognized for their technical abilities and professionalism.[168] In fact, one of the requisites to be considered for a specialized judge or magistrate position consists of having at least 10 years' experience on the subject and specialization studies or certifications.[169] Besides, the specialized judges and magistrates shall constantly take specialized training courses on competition, telecommunications and broadcasting.[170]

124. The Claimants' statements on the lack of experience and capacity of the Specialized Courts are not based in any objective fact, but in a subjective evaluation of the resolutions (*i.e.*, the sentences on the constitutional reliefs filed by Tele Fácil) with which they obviously disagree.

2. Tele Fácil had a wide access to justice

125. The Claimants' assertions that they had no access to justice are unsubstantiated. Tele Fácil had a wide access to justice, as irrefutably evidenced by the chronological recount of the constitutional relief trials and writs of review relating to the measures subject of this controversy:

- On December 26, 2014, Telmex filed an *amparo* against Resolution 381 and Decree 77 (Amparo 351/2014). Tele Fácil took part in this proceeding as an interested third party.[171]
- On May 7, 2015, Tele Fácil filed an *amparo* against Decree 77 (Amparo 1381/2015).[172]
- On May 11, 2015, Telmex supplemented the Amparo 351/2014 to challenge as well Decree 77.[173]
- On November 11, 2015, Tele Fácil filed an *amparo* against Resolution 127 (Amparo 1694/2015).[174]

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166 Statement of Defense, ¶¶ 26 and 170;

167 *See* General Resolution 22/2013 of the Federal Judiciary Council, published in the DOF on August 9, 2013. Exhibit R-076.

168 Exhibit R-077.

169 Exhibit R-078, p. 94.

170 Exhibit R-078, p. 94.

171 Exhibit C-036 p. 4 and 5; Exhibit C-054, p. 17. Statement of Claim, ¶ 249;

172 See Exhibits R-033 and C-053; Statement of Claim, ¶ 613; Statement of Defense, ¶ 188; Reply, ¶ 346.

173 Exhibit C-054 p. 17; Statement of Claim, ¶ 250; Statement of Defense, ¶ 177.

174 Exhibit C-062 p. 5; Statement of Claim, ¶ 278; Statement of Defense, ¶ 207.

- On January 22, 2016, the First District Court resolved the Amparo 1381/2015 through the Sentence 1381/2015.[175]
- On February 12, 2016, Tele Fácil filed an *amparo* appeal against Sentence 1381/2015, which was recorded as Appeal 35/2016.[176]
- On February 26, 2016, Tele Fácil filed an *amparo* complaint appeal ("*queja*") against a court order dated February 12, 2016, issued by the First District Court, which was recorded as Complaint 11/2016.[177]
- On March 11, 2016, the Second District Court resolved the Amparo 351/2014 through Sentence 351/2014.[178]
- On March 15, 2016, the Second District Court resolved the Amparo 1694/2015 by Sentence 1694/2015.[179]
- On April 5, 2016, Tele Fácil filed an *amparo* appealagainst Sentence 351/2014, which was recorded as Appeal 62/2016.[180]
- On April 7, 2016, Tele Fácil filed an *amparo* appeal against Sentence 1694/2015, which was recorded as Appeal 48/2016.[181]
- On April 8, 2016, Telmex also filed an *amparo* appeal against Sentence 351/2014, which was also recorded as Appeal 62/2016.[182]
- On April 21, 2016, the First Collegiate Court solved the Complaint 11/2016.[183]
- On April 21, 2016, the First Collegiate Court also resolved the Appeal 35/2016.[184]
- On July 13, 2016, Tele Fácil submitted a communication before the Second Circuit Court, through which it withdrew from the Appeal 62/2016.[185]

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175 Exhibit C-063; Statement of Claim, ¶ 615; Statement of Defense, ¶ 189; Reply, ¶ 347.

176 Exhibit C-065; Statement of Claim, ¶ 629; Statement of Defense, ¶ 201; Reply, ¶ 378.

177 Exhibit R-035.

178 Exhibit C-069; Statement of Claim, ¶ 251; Statement of Defense, ¶ 178.

179 Exhibit C-070; Statement of Claim, ¶ 279; Statement of Defense, ¶ 209.

180 Exhibit R-030; Statement of Defense, ¶¶ 176, 183 and 294.

181 Exhibit C-074; Statement of Claim, ¶ 280; Statement of Defense, ¶ 214.

182 *See* Exhibit R-031. Statement of Defense, ¶ 183.

183 Exhibit R-035.

184 Exhibit C-075; See Exhibit R-035, p. 43; Statement of Claim, ¶ 268; Statement of Defense, ¶ 205; Reply, ¶ 381.

185 Exhibit R-032; Statement of Defense, ¶ 294.

- On July 13, 2016, Tele Fácil also submitted a communication before the Second Circuit Court, through which it withdrew from the Appeal 48/2016.[186]
- On August 12, 2016, the Second Circuit Court issued Sentence 48/2016, reaffirming Tele Fácil's withdrawal.[187]
- On November 24, 2016, the Second Circuit Court resolved the Appeal 62/2016.[188]

126. As may be noticed, Tele Fácil challenged each and every one of the measures claimed in this proceeding before domestic courts, and lost in the first instance. Later, Tele Fácil challenged the sentences through *amparo* appeals and, according to the available evidence, Tele Fácil withdrew from such appeals or were resolved unfavorably. This Tribunal is not an appeals court for such resolutions.

3. The sentences issued by the Specialized Courts were in accordance with the law and the procedural acts

127. In their Reply, the Claimants mainly complain about:

- the alleged "abdication" by the Specialized Courts or their "deference" for the resolutions of the IFT.[189]
- the inadequate resolution of Tele Fácil's *amparos* by the Specialized Courts, and[190]
- the "superficial" descriptions included in the Statement of Defense to Claiamants' arguments regarding Sentences 1381/2015, 351/2014 and 1694/2015.[191]

128. The truth is that the Claimants have based their arguments due to the form and structure aspects. For example, regarding Sentence 1381/2015, the Claimants indicate that it was insufficiently conclusive and analytic because it included a comparative table between Resolution 381 and Decree 77, and due to its briefness (8 pages).[192]

129. Curiously, , the Reply t neither mentions Sentences 351/2014 or 1694/2015 anymore, nor the apparent affectations allegedly caused to Tele Fácil.[193]

130. Tele Fácil had due access to all existent instances in the Mexican legal system to challenge the IFT's resolutions, in which the Specialized Courts resolved in terms of the law through *amparo*

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186 Exhibit C-076; Statement of Claim, ¶ 281; Statement of Defense, ¶ 215.

187 Exhibit R-036; Statement of Defense, ¶ 215.

188 Exhibit R-031; Statement of Claim, ¶ 283; Statement of Defense, ¶ 187; Reply, ¶ 389.

189 Statement of Claim, ¶ 245; Reply, ¶ 340.

190 Reply, ¶ 349.

191 Reply, ¶ 345.

192 Reply, ¶ 348.

193 Statement of Claim, ¶¶ 256 and 279.

sentences in which the lawfulness of the acts of the IFT was determined.[194] Tele Fácil was even able to be actively involved in the Amparo 351/2014, filed by Telmex.[195]

a. Amparo 1381/2015

131. The Claimants indicate that Sentence 1381/2015 does not include a significant analysis, and criticize it for its concision and for including a comparative table between the text of Resolution 381 and Decision 77.[196]

132. It seems that Claimants forget that upon resolution of Tele Fácil's Amparo 1381/2015, the First District Court considered, *inter alia*, that the IFT did have authority to establish the scope of a resolution issued by the IFT's *Pleno*. The First District Court deemed that both, the Constitution and the LFTR, and the statute of the IFT, in effect allowed the IFT to issue confirmations of criteria to determine the scope of Resolution 381.[197]

133. Also, the First Circuit Court deemed that the confirmation criteria request from the DGS and the official document of the UAJ by which it submitted the Second Project of Decree 77 to the Technical Secretary of the *Pleno* were not acts of authority.[198] This is, they did not have "*the characteristics of unilateralism, imperativeness and enforceability*", and, therefore, did not cause any affectation whatsoever to Tele Fácil.[199] This same rule applies to the projects of Decree77 which are not even legal acts but simple working documents.

134. Also, Sentence 1381/2015 resolved that Decree 77 was issued precisely to address the documents submitted by Tele Fácil and Telmex without modifying Resolution 381.[200] The First District Court detailed that, at the time of issuance of Resolution 381, the IFT did not order to include any other element of the Proposal since they were not part of Tele Fácil's Interconnection Disagreement:

> So, relating to the execution of the corresponding agreement, it became an indication that should have been complied by the parties, invariably considering indirect interconnection and omitting any reference to portability costs, being the only matters on which a pronouncement was made and on which the authority does have capacity to bind the parties.

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194 Mr. Buj's First Expert Report, ¶ 108;

195 Statement of Defense, ¶ 291.

196 Reply, ¶ 346-351.

197 Exhibit C-063, p. 6. "The competent authority founded its faculties on article 28, paragraphs fifteenth and sixteenth of the Constitution; 1st, 2nd, 7th, 15 sections X and LVII, 16 and 17, section I, and second to last paragraph of the Federal Telecommunications and Broadcasting Law, and 1st and 4th, section I, and 6 section XVIII of the Organic Statute of the Federal Telecommunications Institute".

198 Exhibit C-063, p. 5. The First Circuit Court makes reference to Exhibits C-040 and C-050, respectively.

199 ExhibitC-063, p. 5.

200 *Id.*, p. 7.

> Therefore, as the execution of the corresponding agreement was ordered, no resolution was made on any other stipulation included in the project of agreement in the record, because it was not part of the disagreement [...]
>
> […]
>
> This means that the dispute over the rates that the agreement shall reflect is a matter on which the responsible authority may not exert any influence, since it was not subject of the interconnection disagreement. [Emphasis added][201]

135. Not having been challenged, Sentence 1381/2015 became final. This means that the determinations in Sentence 1381/2015 would have the effect of *res judicata* in case that another *amparo* discussed the lawfulness of Decree 77 (which did happen at the time when the Second Circuit Court resolved the Appeal 62/2016), being: (i) that Decree 77 did not modify the contents of Resolution 381; (ii) that Resolution 381 only treated matters relating to number portability charges and indirect interconnection, not including the study of the applicable rate or any other stipulation included in the project of agreement; (iii) that in Resolution 381 interconnection of networks was ordered, without prejudice to the execution of the corresponding agreement; and (iv) that the IFT did not omit to verify and enforce compliance with Resolution 381.[202]

b. Amparo 351/2014

136. Amparo 351/2014 was filed by Telmex against Resolution 381 and Decree 77. However, it was resolved after the Amparo 1381/2015. What is relevant in this case is that the Second District Court (*i.e.*, different from the one that resolved the Amparo 1381/2015) deemed that Resolution 381 did not rule in relation to the interconnection rates indicated in the Proposal, and that Decree 77 did not modify Resolution 381.

137. Sentence 351/2014 resolved that the only thing that IFT had at sight was the Proposal and the Interconnection Disagreement,[203] so that, at the time of issuing Resolution 381, the IFT only resolved on the two elements in controversy: the elimination of number portability charges and the possibility of indirect interconnection between Telmex's and Tele Fácil's networks.[204]

138. It cannot go unnoticed that Claimants' Reply does not include any mention of Sentence 351/2014. In contrast, in their Statement of Claim, the Claimants argued that Sentence 351/2014 "manifestly failed on interpreting the clear language of Resolution 381" and "aggravated this error by not making due analysis of the law".[205]

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201 *Id.*, pp. 16 and 17.

202 Mr. Rodrigo Buj's First Expert Report, ¶¶ 96-109. Mr. Rodrigo Buj's Second Expert Report, ¶ 134.

203 Mr. Rodrigo Buj's First Expert Report, ¶ 91.

204 Mr. Rodrigo Buj's First Expert Report, ¶¶ 91;

205 Statement of Claim, ¶ 256.

139. Nor can it go unnoticed that, in their Statement of Claim, the Claimants qualified Sentence 62/2016, issued in response to the *amparo* appeals filed by Telmex and Tele Fácil against Sentence 351/2014, as "orwellian".[206] If this was the case, why did Tele Fácil withdrew from the Appeal 62/2016?[207] It is clear that the NAFTA does not force to do so, since article 1121 expressly excludes from waiver "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party".[208]

140. As indicated by Mr. Buj in his second expert report, desisting from Appeal 62/2016 was a procedural error done by Tele Fácil, through which it deprived itself from the possibility that the Second Circuit Court could hear its challenge against Sentence 351/2014, independently from Appeal 35/2016.[209]

141. Finally, contrary to Claimants' arguments, the application of the *res judicata* principle by the Second Circuit Court was correct upon resolution of the Appeal 62/2016.[210] Under the Mexican legal system, in case an individual does not challenge a resolution in due time, it is "final", which may cause the effects of *res judicata* in case the same facts and the same subject of controversy are submitted to a claim.[211] This procedural institution seeks to grant legal certainty to the parties of a dispute through the invariability of a sentence whose object is identical to another already resolved.[212]

142. Therefore, at the time of resolving the Appeal 62/2016, the Second Circuit Court concluded that Telmex's complaints were analyzed in Sentence 1381/2015.[213] This situation may not be

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206 Statement of Claim, ¶ 253;

207 Exhibit R-032; Statement of Defense, ¶ 294.

208 NAFTA, article 1121(1)(b) and 1121(2)(b).

209 Mr. Rodrigo Buj's Second Expert Report, ¶¶ 136.

210 Reply, ¶ 390; The Court of Appeals' decision was severely deficient in its selective application of res judicata principles. Telmex had raised an array of claims challenging provisions of the Federal Telecommunications Law, the Fundamental Technical Plan of Interconnection, Resolution 381 and Decree 77". Even when Tele Fácil withdrew from Appeal 62/2016, the Second Circuit Court issued a sentence on November 24, 2016 resolving the *amparo* appeal filed by Telmex against Sentence 351/2014. *See* Exhibit R-031 and Statement of Defense, ¶¶ 183-187.

211 Mr. Buj's Second Expert Report, ¶¶ 134-135.

212 Mr. Buj's Second Expert Report, footnote 50; The subject matter of the Amparo 1381/2015 and the Amparo 351/2014 was the same (*i.e.* Decree 77), and the parties were also the same (*i.e.* Tele Fácil, Telmex and the IFT).

213 Exhibit R-031, p. 86: "It is the opinion of this Circuit Court that the grievances at hand are not effective, for two reasons: first, because on this matter the institution of "*res judicata*" is configured, since it has been already resolved in two diverse judicial decisions that resolution P/IFT/l261114/381 and resolution P/IFT/EXT/080415/77 (which established the scope of the former) were both correct, the *Pleno* of the Federal Telecommunications Institute did not issue any opinion related to interconnection rates that should be applied in the contractual relationship between the plaintiff and the third interested party, since it is not subject matter of the originally submitted disagreement [...]".

understood under any assumption as a violation of Tele Fácil's fundamental rights, in addition that the Claimants, acting on their own free will, withrew from Appeal 62/2016.[214]

c. Amparo 1694/2015

143. The Reply does not mention Amparo 1694/2015, filed by Tele Fácil against Resolution 127. In contrast, this sentence was deemed as "failed" in the Claim.[215]

144. Much less does it mentions the withdrawal of the Appeal 48/2016, filed by Tele Fácil against Sentence 1694/2015. In fact, in Mr. Buj's opinion, Tele Fácil incurred various procedural technical errors at the time of challenging Sentence 1694/2015, so that most certainly a profound analysis by the Second Circuit Court would have been impossible.[216] This will never be verifiable, since Tele Fácil incurred the same procedural error: withdraw from an *amparo* appeal.[217] It shall be reaffirmed that the NAFTA do not force claimants do so in order to submit a claim.

4. The untimeliness of the Appeal 35/2016 filed against Sentence 1381/2015 is attributable to Tele Fácil

145. The Claimants insist that the Appeal 35/2016, filed by Tele Fácil against Sentence 1381/2015, was unjustifiably dismissed, when it is clear that it was dismissed for their lack of diligence. In any legal system, judicial periods exist to submit an appeal against a first instance sentence, and such terms constitute essential formalities of the procedure.

146. The Claimants base their argument in a non-proven fact: that at 11:58 pm of the last day to submit the appeal in question, a BGBG associate appeared at the offices of the Specialized Courts to submit the Appeal 35/2016, which was prevented by a security guard. There is no way to corroborate that this actually happened, since the Claimants have not delivered any evidence whatsoever. Not even a witness statement by Lic. Diana Margarita Mayorga Rea, the BGBG associate that allegedly was unable to file it. In fact, the Attestation of Facts indicates that Lic. Mayorga was arriving to the parking lot of the Specialized Courts' facilities at 11:59 hours.[218]

147. The Respondent requested, in its second documents request, *inter alia*, internal communications about the events of that day. It specifically requested:

> Request 3- Internal documents and Internal Records of Communications, discussing any of the following matters: a) Ms. Mayorga's inability to file the appeal against the Amparo Resolution 1381/2015; b) The time of filing of the appeal on 11 February 2016; c) The legal opinion provided by Tele Fácil's Mexican counsel regarding the failure to

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214 Mr. Buj's Second Expert Report, ¶¶ 110 and 137. Exhibit R-032.

215 Statement of Claim, ¶ 279.

216 Mr. Rodrigo Buj's Second Expert Report, ¶ 152.

217 Exhibit C-076. Statement of Claim, ¶ 281; Statement of Defense, ¶ 215.

218 ExhibitC-066, p. 10.

> submit the appeal against the Amparo Resolution 1381/2015; d) The Minutes of Fact dated 15 February 2016.[219]

148. The Claimants stated not having the responsive documents for this request. The Respondent indicated that it was difficult to accept the response from the Claimants given the importance they placed on the fact that they had been allegedly prevented from submitting the Appeal 35/2016 within the term stipulated by law, and requested the Tribunal to order the Claimants to reaffirm their response. The Claimants did so on August 20 of this year. [220]

149. The Respondent reaffirms that it is not credible that internal documents and/or records of communications between BGBG and Tele Fácil (*i.e.* its client) does not exist where the impossibility to submit the *amparo* appeal within the term established by law is discussed. Mr. Bello's firm should have notified its client that it had been unable to submit the action and it would have certainly needed to explain the reasons why it was prevented to do it and the steps to be taken to solve the situation.

150. Aside from the lack of contemporary evidence to reaffirm their statements, the list of facts delivered by the Claimants have important inconsistencies that the Tribunal shall take into consideration:

- Mr. Bello asserts that Lic. Diana Margarita Mayorga Rea left the offices of BGBG at about 11:00 pm heading to the facilities of the Specialized Courts. However, "that night the traffic was terrible, so Lic. Mayorga arrived later than expected to the court, but still within the term. She arrived at 11:58 pm".[221]
- It is not too credible that there was "a terrible traffic" around midnight and that Lic. Mayorga had spent 58 minutes to reach the facilities of the Specialized Courts.[222] In any case, preparing the Appeal 35/2016 on the term's deadline and submitting it that same day and at the last possible hour would be a totally unacceptable practice in any law firm with a litigation practice.[223]
- The Attestation of Facts dated February 15, 2016, signed by Lic. Mayorga, does not refute the assertions of the PJF employees relating to the bribery attempts.[224] Not even

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219 Procedural Order No. 8, p. 12.

220 Procedural Order No. 8, p. 12.

221 Exhibit C-004 ¶ 140;

222 Exhibit C-004 ¶ 140; Exhibit C-132 ¶¶ 2-4.

223 "on February 11, 2016, the deadline for filing an appeal, my firm prepared the request for appeal and rook step to deliver it to the courthouse." Exhibit C-004, ¶ 140.

224 "[...] some minutes later, at approximately 0:05 of February 12, 2016, her driver returns, appearing again at the aforementioned entrance, who offers some money to be permitted access and the delivery of the documents [...] Lic. Diana Margarita Mayorga Rea appears [...] suggesting that they may somehow come to an arrangement". Exhibit C-066, p. 10.

Lic. Bonequi, who allegedly was present at the time of the preparation of the Attestation of Facts, attempted to refute such assertions.[225]

- On February 12, 2016, Lic. Mayorga allegedly appeared again at the facilities of the Specialized Courts with the intent to submit the *amparo* appealagainst Sentence 1381/2015 before the correspondence office, at around 8:45 am. There is no other proof besides the Attestation of Facts.

- Around 9:30 am, Miss Elia Sosa, at the time legal intern at BGBG arrived at the facilities of the Specialized Courts to assist Lic. Mayorga.[226] This is, no partner of the firm BGBG was present on February 12, 2015 to address the alleged impossibility to submit Tele Fácil's *amparo* appeal. According to the Claimants, this complicated procedure was left in the hands of an associate and an intern.

- Later, the Claimants assert, Lic. Mayorga and Miss Sosa waited one hour for Magistrate Mijangos, President of the Second Court, to receive them in his office.[227] No reason or justification exists to do so. In fact, the appropriate action was to submit the Appeal 35/2016 at 9:01 before the correspondence's office of the First District Court. The decision to randomly seek the President of a Collegiate Court was caused by the lack of experience of Lic. Mayorga or the mistaken instructions given remotely by Lic. Bonequi.[228]

- Ms. Mayorga knew about the jurisprudential criteria that established the possibility of filing an *amparo* appeal directly before the First District Court during the first business hour of the day following expiry of the term, since she mentioned it herself at the time of attempting to file the *amparo* appeal before the correspondence office, on February 12, 2016, at approximately 8:40 am:

> Verbally, Ms. Diana Margarita Mayorga Rea states that [...]. On the following day, February 12, 2016, I appeared at approximately 8:40 hours at the Common Clerk's Office, requesting from the person in charge to receive two documents, one consisting on an amparo appeal addressed to the Court First District Court (sic) on the Administrative Subject Specialized in Economic Competition, Broadcasting and Telecommunications, and a second one

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225 "On February 15, 2016 I personally went to the Telecom Courts, with Lic. Mayorga, and was present while the minutes of the facts were prepared". Exhibit C-132, ¶ 12.

226 Exhibit C-133, ¶ 4.

227 Exhibit C-132, ¶ 8. Likewise, Magistrate Mijangos has been recognized as a notable jurist of proved technical capacity and professionalism. Exhibit R-077.

228 Reply, ¶ 375.

"So I left that office waiting for the Magistrate President of any of the Collegiate Courts to arrive" [Emphasis added], Exhibit C-066, p. 10.

It shall be pointed out that Magistrate Mijangos was Magistrate President of the Second Collegiate Court, and not the "Judge President of the Telecommunications Courts". Such position is inexistent in the PJF. Reply, ¶ 379.

> consisting of an amended amparo addressed to the Second District Court on the Administrative Subject Specialized of the Common Clerk, without being able to specify his name, he told me that he could not receive such documentation because it was I was (sic) out of reception hours, to which I argued that jurisprudence of the Court existed that establishes that for amparo appeals was deemed as submitted in due time if it was submitted before the starting hour of the activities of the Court. To which he answered me that he knew the jurisprudence but could not receive the document. So I left that office waiting for the Magistrate President of any of the Collegiate Courts to arrive". [emphasis added].[229]

- Nothing prevented the Claimants from submitting Tele Fácil's *amparo* appeal before the correspondence office of the First District Court between 9:01 and 10:00 am, however, this did not happen but until noon on February 12, 2016. The justification of the Claimants is that they spent an hour "obtaining proof" about the events.[230]
- A logical action would have been to submit the Appeal 35/2016 before the last two minutes of the judicial deadline (*i.e.* 11:58 pm on February 11, 2015) or, otherwise, on February 12, 2016 at 9:01 am before the First District Court, and afterwards obtain proof of the Claimants' arguments.

151. The Claimants have omitted to mention that while Tele Fácil was taking action to justify the untimeliness of the Appeal 35/2016, Tele Fácil filed another constitutional relief in an attempt to challenge the pronouncement of the First District Court on the untimeliness of Appeal 35/2016.

152. On February 25, 2016 it filed the Complaint 11/2016 against the ruling dated February 12, 2016,[231] issued by the First District Court through which it resolved that Sentence 1381/2015 was "final".[232] Complaint 11/2016 was also channeled to the First Collegiate Court.

153. It is true that on March 6, 2016, the First Collegiate Court admitted Tele Fácil's *amparo* appeal.[233] However, its admission was made without prejudice that such court may evaluate if its

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229 Exhibit C-066, pp. 9 and 10.

230 Statement of Claim, ¶ 275.

231 R-035, p. 2. As Mr. Buj explained in his first report, the complaint ("queja") is a type of appeal provided for in article 97 of the Law of Constitutional Relief. It is admitted against various procedural actions, mainly to challenge any ruling that causes damage to the plaintiff. Mr. Buj's First Expert Report, footnote 83.

232 Exhibit R-034; Statement of Claim, ¶ 201.

233 The First Circuit Court was composed by Magistrates Patricio González-Loyola Pérez, Jean-Claude Tron Petit and Oscar Germán Cendejas Gleason, who are outstanding magistrates specialized in the administrative, economic competition and telecommunications matters. See Exhibit R-077 and Exhibit R-078, p. 5.

Particularly, the Claimants' expert's opinion relating to one of the members of the First Circuit Court and his office in general (*i.e.*, her opinion on the First Circuit Court): Magistrate Tron Petit is not an ordinary magistrate. He has been the reporter judge in the most emblematic cases of economic competition and telecommunications. Under his office, it was determined that Coca-Cola had committed monopolistic practices (Big Cola case); *he was the one* who established case law criteria for the lifting the corporate veil to avoid subterfuges and corporate schemes performed by companies who tried to avoid the law; he has provided criteria for the evaluation of the relevant market; *he created* the jurisprudential concept of economic interest group whereby companies can be

filing and admission was untimely. As explained by Mr. Buj, the rulings issued by the President of a circuit collegiate court (*i.e.* procedural decisions) do not cause status, and once the Circuit Collegiate Court makes its analysis on the matter, a resolution may be issued in an opposite sense to the ruling that admitted an appeal (as was the case with Appeal35/2016), without this constituting any irregularity or violation to procedural law.[234] The First Circuit Court was aware at all times that the submission of the *amparo* appeal was untimely, but deemed that some elements to be considered relating to the untimeliness may have been present.

154. On April 21, 2016, the First Circuit Court resolved the Complaint 11/2016 as well as the Appeal 35/2016. Due to procedural times, the First Circuit Court analyzed the Complaint 11/2016 firstly.[235]

155. The First Circuit Court evaluated the Attestation of Facts and considered the two positions. On the one hand, the representatives of Tele Fácil stated that they were unable to submit Appeal 35/2016 on February 11, 2016. On the other hand, PJF employees indicated that Tele Fácil's representative arrived after 12:00 am.

156. Even when two different positions existed about the events of February 11, 2016, the First Circuit Court concluded that Complaint 11/2016 was unfounded.[236] The reason was that, not being able to submit its *amparo* appeal on February 11, 2016, Tele Fácil could: *a)* submit the appeal before the correspondence office of the Specialized Courts between 8:30 am and 9:00 am on February 12, 2016, or, otherwise, *b)* submit the Appeal 35/2016 before the First District Court from 9:01 am.[237] Those two options were feasible based on jurisprudence criteria of the SCJN, which the representative of Tele Fácil knew. [238]

157. Resolving the Appeal 35/2016 during the same session, the First Circuit Court took into account the resolution of Complaint 11/2016. This is the reason why the Appeal 35/2016 was dismissed.[239]

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considered part of a group under certain assumptions to avoid damaging the process of competition for corporate arrangements; ***his office*** drafted the resolution that considered the independent affiliates of Televisa as part of the same economic interest group, confirming that Televisa is preponderant and subject to specific obligations; he has been the driving force for a broad discussion on audience rights and plurality. [...] [Emphasis added] Exhibit R-079.

234 Mr. Buj's Second Expert Report, ¶¶ 131-132.

235 Mr. Buj's First Expert Report, ¶ 120; It is notorious that the Claimants do not mention Complaint 11/2016 in their Statement of Claim, Reply, or in their submitted expert reports. *See* Mr. Buj's Second Expert Report, ¶ 133;

236 Exhibit R-035 pp. 12-13.

237 Exhibit R-035 p. 40; Mr. Buj's First Expert Report, ¶ 119; Mr. Buj's First Expert Report, ¶ 125;

238 Exhibit R-035 pp. 24-26. Exhibit C-066, p. 10.

239 "Having been reaffirmed in the aforementioned complaint action Q.A. 11/2016, the ruling issued on February twelve, two thousand sixteen on the amparo 1381/2015, of the First District Court on the Administrative Subject Specialized in Economic Competition, Broadcasting and Telecommunications, the resolution included there on the executory of the sentence issued in the constitutional hearing became final. [...] Consequently, as the procedural requisites of the amparo appeal were not complied with, it shall be dismissed. Exhibit C-075, p. 14.

158. Therefore, it is not correct to assert that the First Circuit Court dismissed Tele Fácil's actions "without a reasonable justification".[240] The First Circuit Court reaffirmed that Tele Fácil had not acted with "procedural due diligence" and therefore rejected the appeal in question.[241]

159. The Claimants' assertion that they were not entitled to submit the Appeal 35/2016 during the first business hour of February 12, 2016 before the First District Court is unfounded.[242] SCJN jurisprudence referred in the resolutions of Complaint 11/2016 and Appeal 35/2016 are intended to expand the access to justice for the appearing parties, so that they may submit their appeals within the first business hour of the day following the deadline.[243] Therefore, Tele Fácil was enabled to submit the Amparo Review 35/2016 within the first business hour of February 12, 2016.

5. Tele Fácil did not exhaust the judicial remedies referred by Mr. Soria.

160. The Claimants indicate that, even if they would have prevailed in the *amparo* proceedings they filed, the "considerable losses" incurred by them would not have been compensated.[244] This argument contradicts what Mr. Soria states in his second expert report:

> [...] There are also particular clauses wherebt the concessionaires agree to submit their disputes before specific courts and under specific laws.
>
> In the case of the agreement among Tele Fácil and Telmex/Telnor, clause 18.5 of their interconnection agreement provides that modifications to any of the terms or conditions of the agreement could only be valid if both parties expressed their consent in writing. Clause 18.1 provides that any disputeregarding the interpretation and fulfillment of the agreement would be resolved by the Federal Courts located in Mexico City, and specialized in antritrust, telecommunications and broadcasting.[245] [Emphasis added].

161. The Respondent does not agree that an interconnection agreement or contract existed between Telmex and Tele Fácil. If, however, Tele Fácil believed it existed, the question arises, why did it not 'sue' Telmex for breach of the interconnection agreement before the federal courts in Mexico City, in accordance with clause 18.1 of the Proposal?

162. Mr. Buj states in his Second Report that the formalization of the agreement and the existence of an alleged agreement on interconnection rates are disputes for disagreements of a private nature,

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240 Statement of Claim, ¶ 274.

241 "Having not acted with due procedural opportunity to submit the *amparo* appeal, the conclusion is that its filing was untimely [...]". Exhibit R-035, p. 43.

242 Reply, ¶¶ 369 and 370.

243 Mr. Buj's First Expert Report, ¶¶ 107 and 125; Mr. Buj's Second Expert Report, ¶¶ 133 and 136.

244 Reply, ¶¶ 232 and 233.

245 Exhibit C-111 ¶¶ 58-59. Mr. Soria refers to the following stipulation:

"18.1 JURISDICTION. The parties expressly submit anything related to this Agreement to the jurisdiction of the federal courts resident in Mexico City, Federal District expressly waiving any other jurisdiction on which they may rely by reason of their current or future domicile, or for any other cause." Exhibit C-021, p. 39.

over which, in any case, Tele Fácil may have appeared before Mexican judicial authorities for their resolution.[246] This is, Tele Fácil was enabled to appear before the Mexican judicial authorities to request judicial statement that an agreement existed on the rate and enforce the formalization of the interconnection agreement.[247]

163. That Decree 77 itself indicates that "the rights between the parties will be left unharmed" implies that the IFT considered that the concessionaires may appear before the judicial authorities to enforce the formalization of the agreement.[248]

6. The Mexican justice system did not affect Tele Fácil

164. The Claimants claim against the Mexican State the "gross incompetence" of the courts of first instance that heard on the *amparos* related to Tele Fácil.[249] They have also argued systemic fails, causing poor reliability of the Specialized Courts.[250]

165. It is paradoxical that the Claimants qualify such "gross incompetence" when their own acts prevented the Specialized Courts from profoundly reviewing those resolutions. The Tribunal may not ignore that Tele Fácil: (i) withdrew from Appeal 48/2016, filed against Sentence 1694/2015; (ii) withdrew from Appeal 62/2016, filed against Sentence 351/2014, and (iii) filed the Appeal 35/2016 in an untimely manner, due to negligence attributable only to Tele Fácil.

166. The Claimants have sought to link the resolutions of the Specialized Courts (particularly Sentence 1381/2015) with some extracts of the OECD's 2017 report to justify their position that Tele Fácil was denied access to justice.[251] At the same time, the Claimants have requested the Tribunal to disregard the amparo resolutions because, in their words, they are not reliable.[252]

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246 Mr. Buj's Second Report, ¶ 189.

247 Mr. Buj's Second Report, ¶ 187.

248 Mr. Buj's Second Report, ¶ 190.

Relating to this, Tele Fácil was aware of the civil legal means to enforce compliance of obligations of interconnection agreements, since it seems like it planned to "activate" this means to sue other concessionaires, once it executed interconnection agreements with them (which is strange, to say the least). "[...] I also request that you recall that these rates are the ones indicated for billing in the terms of the agreement, but are objected at the time of payment to be adjusted to what we indicate, but taking this objection to the Judicial Authority through a civil trial. Consequently, upon obtaining a legal resolution, the low rates become final, but we expect that, shortly, once the secondary law is approved, the IFETEL will publish the final rates table to be collected between non-preponderant concessionaires, which at that timewill become of mandatory observation, even when we have a civil procedure in place.". Exhibit R-001, p. 3.

249 Reply, ¶ 343.

250 Reply, ¶¶ 404, 407-411.

251 "As a consequence, the Tribunal shall not refer to the resolutions of the judicial power indicated by the Respondent in the context of this arbitration". Reply, ¶¶ 407 and 410.

252 Reply, ¶¶ 407 and 410. Exhibit C-114.

167. However, the Tribunal will be able to verify that the Claimants only take fragments of the OECD's 2017 Report, omitting those sections that applaud the progress attained in the justice system and the creation of Specialized Courts:

> A further critical improvement is the fact that indirect amparo trials against the general rules, acts or omissions of the IFT and COFECE do not entail the suspension of such determinations while the respective judicial resolution is pending [...].
>
> […]
>
> The establishment of specialized judges and courts for the substantiation of indirect *amparo* trials pertaining to the telecommunications and broadcasting sectors, and in general, any conflict arising in relation to the application of the LFTR, is a further breakthrough in the regulatory reform in Mexico.
>
> […]
>
> The creation of specialized courts in highly technical and specialized matters such as telecommunication services, broadcasting, and economic competition is a positive outcome of the reform. [253]

168. The Claimants have been unable to relate the supposed deficiencies of the Mexican justice system (*e.g.*, lack of human resources, internal technical and economic experts, budget restrictions, and the system to appoint, rotate and remove judges and magistrates) with Sentence 351/2014, Sentence 1381/2015, Sentence 1694/2015, Appeal 35/2016, Appeal 62/2016 and Appeal 48/2016.[254]

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[253] Exhibit C-084, pp. 33, 34 and 68.

[254] Exhibit C-084 p. 69; Exhibit C-114 ¶¶ 82-84.

III. Legal Arguments

169. Respondent stated in its Statement of Defense that most of the contested issues in this case were matters of fact and that there were few controversial matters of law. Notwithstanding, Claimants have submitted 99 pages of legal arguments that address non-controversial points.

170. The following arguments are submitted without prejudice to the position of Mexico on the facts, including the following:

- A binding agreement never existed according to Mexican Law - *i.e.,* a contract - between Tele Fácil and Telmex that established the rate that Telmex would pay Tele Fácil or vice-versa;
- Resolution 381 did not determine the interconnection rate between Telmex and Tele Fácil and, therefore, it did not determine which rate should be included in the interconnection agreement that the operators should execute in order to comply with the resolution;
- Decree 77 was a clarification about the scope of Resolution 381, issued after listening to the positions of both parties, in which it was confirmed that Resolution 381 did not determine the interconnection rate between Tele Fácil and Telmex;
- Resolution 127 was issued in accordance with the IFT legal mandate and the procedure established by law. Both parties were offered due process and it was decided based on rational and transparent considerations;
- The decisions of the national courts in the *amparos* 351/2014 and 1381/2015 against Resolution 381 and Decree 77 and *amparo* appeals 62/2016, 35/2016 and 48/2016 are reasonable, consistent and were duly grounded and motivated.
- Respondent never prevented the operation of the company, neither the execution of an interconnection agreement with Telmex, nor with any other operator, nor the interconnection (direct or indirect) with Telmex or with any other operator.

171. Claimants have made a significant effort to divert from certain matters that are a problem therefor. The first one is that their claim for expropriation lacks merit because:

a) A claim for expropriation of a Tele Fácil asset cannot be filed unless the interference of the State with this asset is equivalent to an expropriation performed against;

b) Even if Claimants could overcome the impediment described in the previous item, they have not been able to prove that the alleged Tele Fácil "interconnection rights"[255] are an "investment" in accordance with the definition of Article 1139(g) or (h); and

c) Even if Claimants could overcome both previous impediments, an expropriation claim cannot be filed when the contested measure is the decision of an administrative or judicial body that resolves a dispute between private parties.

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[255] *See* section III(A)(1)(a) of the Reply named "Tele Fácil's interconnection rights constitute" intangible property"" The original in English: "*Tele Fácil's interconnection rights constitute "intangible property*.""

d) In any case, Claimants have not proven that the measures claimed have had expropriation effects.

172. On the other hand, since the IFT measures and the decisions of the national courts were issued in good faith, in an effort to resolve a dispute between private parties, Claimants may only file one claim for violation of Article 1105, on behalf of Tele Fácil, based on the fact that there was a denial of justice - as this concept is understood according to international law - during the course of the final resolution of the dispute. Most of the arguments of the parties of NAFTA on this matter, as well as the applicable case law and the comments from scholars on the matter, support Mexico's position on this point.

A. Applicable definitions and their application to material and procedural obligations under Chapter XI of the Agreement

173. A disciplined analysis of this claim begins with understanding the applicable Chapter Eleven definitions and their application to the relevant substantive obligations in Section A and procedural provisions in Section B. The following applicable definitions are listed in the order that they appear in Articles 201 and 1139 and have been edited for brevity:

> **Article 201: Definitions of General Application**
>
> **enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;
>
> **Article 1139: Definitions**
>
> [...]
>
> **investment** means:
>
> (b) an equity security of an enterprise;
>
> […]
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> > (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
> >
> > (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
> >
> > […]
>
> **investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

[…]

174. The relevant substantive obligations of Section A, Chapter XI are the following:

Article 1102: National Treatment

1. Each Party shall accord to **investors of another Party** treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord **to investments of investors of another Party** treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

[…]

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to **investors of another Party** treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to **investments of investors of another Party** treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105: Minimum Standard of Treatment

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.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to **investors of another Party,** and to **investments of investors of another Party,** non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

[…]

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an **investment of an investor of another Party** in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

[...]

175. The relevant provisions of Section B of Chapter XI are the following:

> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> 1. **An investor of a Party** may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A […]
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> **Article 1117: 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:
>
> 4. An **investment** may not make a claim under this Section.4. An investment may not make a claim under this Section.
>
> **Article 1135: Final Award**
>
> […]
>
> 2. Subject to paragraph 1, where a claim is made under Article 1117(1):
>
> (a) an award of restitution of property shall provide that restitution be made to the **enterprise;**
>
> (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the **enterprise**; and
>
> (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

B. Observations on the applicable text of NAFTA's Chapter XI

176. It is readily apparent that Chapter XI employs precise definitions that are used purposefully and consistently throughout both Section A and Section B. It is important for the Tribunal to be cognizant of these terms to understand the differences in *to whom* each substantive obligation is owed and *by whom* each procedural remedy can be employed.

177. "To whom" the relevant the Section A substantive obligations are owed can be summarized as follows:

- The protection against discrimination on the basis of national origin under Articles 1102 and 1103 applies to *both* **investors of another Party** *and* **investments of investors of another Party** – however there is no claim under Article 1102 or 1103 in this case;

- The requirement under Article 1105(1) to accord treatment in accordance with international law applies *only* to **investments of investors of another Party –** there are numerous alleged violations of Article 1105(1) in this case;
- The requirement under Article 1105(2) to accord non-discriminatory treatment with respect to measures relating to losses suffered by investments owing to armed conflict or civil applies to *both* **investors of another Party**, and to **investments of investors of another Party**.
- Article 1110 prohibits measures equivalent direct or indirect nationalization or expropriation[256] of **investments of investors of another Party** – in other words, it protects *investments of investors* from expropriation but does *not* purport to protect *investments of investments* of investors from expropriation of their assets.

178. Regarding the second point - *i.e.*, who may file a claim due to violation of a material obligation of Section A - Respondent summarizes it as follows:

- An **investor of a Party** – such as Messrs. Nelson and Blanco – can submit a claim under article 1116 alleging that another party has breached an obligation under Section A that has caused a damage.
- An **investor of a Party** – such as Messrs. Nelson and Blanco – can submit a claim under article 1117 - which Mr. Nelson has done – on behalf of an **enterprise** under his property or under his direct or indirect control.

C. Expropriation

179. Claimants argue that they listed in their Statement of Claim that "they have listed the different assets property of Tele Fácil, in its capacity as investment company, and Claimants in their role as shareholders of Tele Fácil that constitute protected "investments" as provided in Chapter Eleven".[257]

180. Respondent has agreed that some of these assets are protected investments under the NAFTA, however, Claimants have not yet identified precisely which of these alleged investments were indirectly expropriated through the issuance of Decree 77 and/or Resolution 127 and, even more important, they have not yet proven that the measures claimed had effects equivalent to an expropriation:

- The company Tele Fácil S.A. de C.V., is still in the hands of its shareholders. If the argument is that the measures claimed prevented the operations thereof, and this is an indirect expropriation of the company, Respondent sustains that this has not been proven.

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256 Although in cases where it is specified.

257 Reply, ¶ 172. The original text in English: "the *many assets owned by Tele Fácil, in its capacity as investment company, and by Claimants, in their role as shareholders of Tele Fácil, that constitute protected 'investments' under Chapter Eleven*".

- Messrs. Nelson and Blanco still own their shares in Tele Fácil S.A. de C.V. If Claimants' argument is that the IFT and/or the Specialized Courts actions took away all the value from their shares, Respondent again sustains that this has not been proven.
- The Concession granted to Tele Fácil is still valid, and despite of being fully capable of using it, the company decided not to do so, violating in this way the terms and conditions of the Concession. In any way, the holder of the Concession is Tele Fácil, not the Claimants;[258]
- The telecommunications equipment that Tele Fácil allegedly acquired in order to begin providing the service at the end of 2014 are allegedly still in their possession and they were neither affected, nor expropriated, in any way by the measures claimed. Also, this equipment would be assets belonging to Tele Fácil, not to Claimants;
- The alleged "rights to receive significant income through the exchange of traffic of calls under the interconnection agreement with Telmex"[259] do not fit in any of the 8 investment categories identified in Article 1139 of the NAFTA and, therefore, they are not a protected investment. Even if they were, the holder of the rights would be Tele Fácil and not the Claimants;
- The same can be said about the alleged "interconnection rights" of Tele Fácil, *i.e.*, the alleged rate agreement with Telmex allegedly reached in 2014 and that, according to their reading of Resolution 381, it should have been incorporated to the interconnection agreement that said resolution ordered to be signed. These alleged rights do not fit in any of the investment categories of Article 1139 and, in any case, the holder thereof would be the company Tele Fácil S.A. de C.V., not the Claimants.

181. The Claimants correctly contend that Messrs. Nelson and Blanco are "investors of another Party" because (*inter alia*) they each own an equity interest in an enterprise by virtue of their ownership of shares in Tele Facil -- 60% as to Mr. Nelson and 20% as to Mr. Blanco.[260] It is not disputed that they have standing under Article 1116 to submit a claim for damages they have suffered *qua* shareholders for a breach of a Section A obligation owed to them as investors of another Party.

182. Relying on the well-known *dictum* in *GAMI*, the Claimants further contend that Messrs. Nelson and Blanco are entitled to claim for the loss of value their shares on a "derivative" basis.[261] It is not disputed that they are each entitled to recover the loss of value of their shares to the extent that damages arising out of a breach of a Section A obligation *to Tele Facil* demonstrably flows through to them as shareholders.

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258 Exhibit C-012, p. 2.

259 Reply, ¶ 172.

260 The Claimants also contend that each have "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise" that qualifies as an "investment" under Article 1139 (e). This is not disputed but it does not add anything to the scope of their claim. As shareholders they are already entitled to a share in the profits of Tele Facil through payment of dividends as decided by the directors.

261 Reply, ¶ 218.

183. Mr. Nelson also sustains that he is entitled to file a claim on behalf of Tele Fácil under Article 1117, because he has maintained legal control of the company at all relevant times. Neither is it contested that Mr. Nelson has procedural legitimacy to file a claim, on behalf of Tele Fácil in accordance with Article 1117, for damages suffered by the company as the result of the violation of some of the obligations of Section A, which the State assumed towards Tele Fácil in its capacity as "investment of an investor of another Party".

184. What Respondent contests is which claims can be filed on their own right, and which on behalf of the company, as explained below.

1. A claim for expropriation of a Tele Fácil asset cannot be filed unless interference of the State with this asset is equivalent to a Tele Fácil expropriation

185. Respondent sustains that Messrs. Nelson and Blanco cannot file a claim for the alleged expropriation of the interconnection/contractual rights of Tele Fácil, because Article 1110 does not protect "investments of investments of investors of another Party".

186. Notwithstanding that the NAFTA has been valid since 1994, and that tens of BITs signed by the United States, Canada and Mexico have adopted the set of definitions of the NAFTA, there isn't an example of a Tribunal that have agreed that a claim can be filed for the alleged expropriation of an asset that is an "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.

187. The foregoing is commonly known as the "substantive deprivation" that appears in the NAFTA's case law, which is not contested here. The following excerpt from *Freeman's Fund,* which was quoted with approval from *Corn Products*, under somewhat similar circumstances to this case, states:

> 86. Article 1110(1) of the NAFTA provides that:
>
> "1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (expropriation'), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation in accordance with paragraphs 2 through 6.
>
> 87.The recent award in *Fireman's Fund Insurance Company v Mexico* ("*FFIC*") summarises the effects of the existing NAFTA jurisprudence on expropriation in the following terms (footnotes omitted).
>
> (a) Expropriation requires a taking (which may include destruction) by a government-type authority <u>of an investment by an investor</u> covered by the NAFTA.
>
> (b) The covered investment may include intangible as well as tangible property.

(c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).

(d) The taking must be permanent, and not ephemeral or temporary.

(e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).

(f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.

(g) The taking may be *de jure* or *de facto*.

(h) The taking may be 'direct' or 'indirect'.

(i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called "creeping expropriation").

(j) To distinguish between a compensable expropriation and a non-compensable regulation by a host State the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.

(k) The investor's reasonable 'investment-backed expectations' may be a relevant factor whether (indirect) expropriation has occurred.

88. The present Tribunal agrees generally with this analysis. It considers that three points are of particular importance for the present case.

89. First, it is important not to confuse the question whether there has been an expropriation with that of whether the four criteria in paragraphs (a) to (d) of Article 1110 have been satisfied. Those paragraphs come into play only if it has been decided that there has been an expropriation, or a measure tantamount to an expropriation, but the absence of one or more of them is not in itself indicative of expropriation.

90. Secondly, as the tribunal in *FFIC recalls*, it is necessary to bear in mind that there is a distinction between discriminatory treatment of the property of an investor (and, for that matter, unfair and inequitable treatment) and expropriation. It is not the case that, because a measure which affects property rights is discriminatory, it is therefore an expropriation (or something tantamount to an expropriation). Rather, if a measure is established to be an expropriation (or something tantamount thereto), it cannot then be justified if it is discriminatory. In *FFIC*, the tribunal held that there was a clear case of discriminatory treatment but that this did not rise to the level of a claim under Article 1110.

> 91.Thirdly, where there is no physical taking of property or forcible transfer of title, in the words of the *FFIC* award, ―the taking must be a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)" In the words of the tribunal in *Waste Management (No. 2)*, - it is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise"
>
> 92. Applying that test to the claim advanced by CPI, the Tribunal has concluded that CPI has failed to make good its claim under Article 1110. In the absence of a physical taking or transfer of ownership, CPI needed to show that there had been such a degree of interference as to sterilise its business; in the words of the tribunal in *FFIC* ―the taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof. It has failed to do so. That CPI's HFCS production facilities suffered a substantial blow to their market for a period of some two years is not in doubt. But CPI retained full control of its investment at all times, was able to report to its shareholders that the HFCS tax would not make a long term difference to its business [XXX]. In these circumstances, the Tribunal concludes that the effects of the HFCS Tax cannot be considered to have amounted to a substantially complete deprivation of the economic use and enjoyment of the investment, even if (see paragraph 81, above) one takes the more restrictive view of what constitutes the investment for which CPI contended in its Article 1110 claim.
>
> 93. Government measures which have a detrimental effect on an investor's markets, even if they are discriminatory (an issue considered in the next section of this award), are not expropriatory unless they have the effect of destroying the business in question. That was simply not the case here. Whether or not one considers the standard laid down in *Metalclad* to be too broad, the fact is that what happened in the present case would not meet that standard substantially complete deprivation of the economic use and enjoyment of the investment […].[262]
>
> [Our own emphasis, footnotes are omitted]

188. To be perfectly clear, the Claimants cannot assert a claim for alleged expropriation of Tele Facil's assets. They have not taken issue with the Respondent's observation in the Statement of Defense that, as a matter of municipal law everywhere, that shareholders do not have an ownership interest in a company's assets.

189. Therefore, Claimants could only argue that the State's interference with these interconnection/contractual rights is an indirect expropriation of Tele Fácil or of their shares in

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[262] Exhibit RL-014. *Corn Products International, Inc. c. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, January 15, 2008, ¶¶ 86-93.

said company. However, in order to file a claim of this nature, it must prove: (i) that the rights in question existed, which is denied[263]; (ii) that the State interfered with these rights, which is denied;[264] and (iii) that the effects of this interference were equivalent to an expropriation of Tele Fácil, which has not been proven.

190. The first two points were addressed in the fact section of the Statement of Defense and in this Rejoinder. About the third one, Respondent reiterated that the effect of the contested measures cannot be considered as something even close to a material deprivation of the value of Tele Fácil, or a sterilization of its business, and it reiterates the following excerpt of the Statement of Defense:

> 265. It is based on Tele Fácil's alleged expectation of collecting the interconnection fee that Telmex was paying to other operators prior to its designation as a PEA, while benefiting from the zero rate that was imposed on Telmex after its designation as a PEA. As discussed at length in the damages section that follows, this plan – if it existed – was wholly unrealistic and unattainable. The entire industry knew that interconnection rates chargeable by the other operators would be based on a well-publicized costs model and were expected to be reduced very substantially. Even if Telmex had complied, voluntarily or under duress, with the alleged agreement for the full duration of its originally propose term, it would have lasted two years, or three at most. One is compelled to ask rhetorically, "then what?".
>
> 266. Moreover, Tele Fácil remained fully possessed of its concession, the switching equipment that it apparently purchased and the business relationships that it claims to have cultivated. Put simply, it strains credulity to contend that Tele Fácil could not have provided any of the telecommunications services covered by its concession if it could not benefit from the 'old' Telmex interconnection rate for a period of two to three years while all other operators were limited to charging each other – including Telmex – the 'new' cost-based interconnection rate.[265]

191. Claimant's repeated contention that the impugned measures "destroyed Tele Fácil's business" and "destroyed Claimants' investment" simply fails to accord with reality. Tele Fácil's right to provide any of the teleccomunication services services covered by its concession has not suffered any changes, and the rate regime based on costs - which was known by everybody in the industry before Claimants' investment had been made - did not interfere with the business with the rest of the operators that compete profitably in Mexico.

192. Claimants' decision to abandon their investment was apparently based on a calculation of damages that included the damages corresponding to a false line of business, which was not even under consideration when Resolution 381 was issued. In simple terms, they made this calculation and decided to submit this inflated claim under Chapter XI, instead of operating the business.

2. *Even if* the Claimant could overcome the impediment described in the previous section, the alleged "interconnection rights" are

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263 See above, ¶ 57. See Mr. Buj's Second Report, ¶¶ 223-228, see also the first bullet point of the executive summary.

264 Statement of Defense, ¶¶ 266-267. See Mr. Buj's Second Report, executive summary.

265 Statement of Claim, ¶¶ 265 and 266. *See* also ¶¶ 340 to 341 of the Statement of Defense and ¶¶ 255 to 265 of this document below.

not an "investment" according to the definition of Article 1139(g) or (h)

193. The Claimant continues to rely exclusively on non-NAFTA jurisprudence for the contention that contractual rights can be the subject of an expropriation. None of the cases cited are applicable here because none of the investment treaties at issue in those arbitral awards have the precise definitions and consistent usage of terms that appear in NAFTA Chapter XI. The treaties in the cited cases typically cover "every kind of asset" and do not draw any distinction between obligations owed to "investors" of the counterparty and "investments of investors" of the counterparty.

194. The main question in this case is if the rights resulting from an alleged private agreement between Telmex and Tele Fácil, the terms thereof, according to Claimants, should be incorporated to the interconnection agreement ordered by Resolution 381 (*i.e.,* the interconnection agreement) may be considered "intangible property" according to Article 1139(g) that covers "real estate or other property, tangible or intangible, acquired or used with the purpose of obtaining an economic benefit or for other corporate purposes".

195. Two things are evident from the definition of Article 1139(g): it covers *property* - *i.e.*, things that can be owned, bought and sold, - not contractual rights, and (ii) it requires that this "real estate or other property tangible or intangible" is *acquired* or used with the purpose of obtaining an economic benefit or for other corporate purposes".

196. Respondent maintains that the alleged interconnection rights of Tele Fácil which, according to it, result from Resolution 381, are not "intangible property [...]". It is not an asset that can be bought, sold or pledged. Applying the *ejusdem generis* principle, it would not be considered "intangible property", as intellectual property, trade brands or patents would be. Neither would it be an asset that would appear in the Tele Fácil balance sheet, as would a real estate, for example.

197. The Claimants additionally argue that Resolution 381 is covered under Article 1139 :"(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise".

198. This argument is specious. These alleged interconnection rights 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). The following questions reveal the fallacy implied in Claimants' position:

- What capital was contributed or committed?

Answer: Claimants have not identified any capital contribution from which their alleged rights result, and neither do they submit a damage claim regarding the loss of the participation that resulted from said contribution.

- How would the rights in question result in "a participation" that would result from the capital?

Answer: The alleged interconnection rights of Tele Fácil would not give Claimants a "participation" in the profits of Tele Fácil. Resolution 381 is simply a decision of the

IFT that resolved a dispute between Telmex and Tele Fácil. Even if it had had the effect of determining the rates (as Claimants presume), the right to receive a certain rate would not be a "participation that results from the capital..."

199. It is clear from the application of the principle *ejusdem generis* that the alleged rights of Tele Fácil would not fit within the protected interests according to the definition of Article 1139(h) that includes "*contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions*", and "*contracts where remuneration depends substantially on the production, revenues or profits of an enterprise".*

3. Even if the Claimant could overcome the impediments described in A and B above, a claim of expropriation does not lie where the impugned measure is a decision of an administrative body or court a resolving a dispute between private parties

200. The Claimant takes issue with the Respondent's position that judicial and quasi-judicial decisions in taken in the course of resolving a dispute between private parties cannot be held to amount to expropriation under Article 1110.

201. For ease of reference, the Respondent's position was stated as follows in the Statement of Defense:

> 267. Second, there is the question of whether the measures at issue are capable of amounting to a violation of Article 1110. All of the measures in question – Resolution 381, Decree 77 and Resolution 127 – pertain to the resolution of a dispute between private parties on the terms of interconnection between their respective networks. Likewise, the ensuing proceedings in the specialized tribunals were a continuation of a dispute between Tele Fácil and Telmex. Importantly, the administrative resolutions at issue did not involve a dispute between Tele Fácil and the Mexican State.
>
> 268. The Claimants have been unable to cite any jurisprudence holding a judicial measure in a dispute between private parties to be an expropriation of an investment of an investor of a Party. The reason is stated succinctly by the United States its Article 1128 submission in *Eli Lilly v. Canada*:
>
> > Separately, decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1). It is therefore not surprising that commentators have acknowledged the particular "dearth" of international precedents on whether judicial acts may be expropriatory. Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law.[266]

202. The "dearth" of international precedents is hardly surprising. In most civil disputes one party will prevail over the other. This will be the case in contractual disputes and disputes over the title to land or other assets. With the proviso that the judicial body must act as a "neutral and independent arbiter", a decision against the interest of a party that happens to be a foreign investor

[266] Statement of Defense, ¶¶ 267 and 268.

is not equivalent to expropriation of that party's assets. If that were so, there would be a very large body of jurisprudence on the subject under both NAFTA and the rest of the investment treaties.

203. Respondent would only add a point here that would be developed in greater detail in subsequent sections. Claimants seek to treat the impugned measures taken by IFT decisions (Resolution 381, Decree 77 and Resolution 127) as acts or omissions of the regulatory authority which be considered separately and in isolation from the decisions of the courts which deal with the appeals of those decisions. But this is not a situation where the IFT has taken a decision *qua* regulator that pertains to Tele Facils rights to carry on business in telecommunications underthe LFT or the LFTR.

204. Each one of the contested measures pertains to the resolution of a dispute between Telmex and Tele Fácil over the terms and conditions of an interconnection agreement that one sought with the other. The intervention of the IFT was in its capacity as a quasi-judicial entity, in order to resolve the dispute, which is evident in the nature of Claimants' accusations - *i.e.*, that the IFT did not act according to due process with regard to Tele Fácil, and that certain acts were *ultra vires.* These are primary elements of a claim due to denial of justice.

D. The Claimants are limited to asserting a claim under Article 1105(1) that Tele Facil, suffered "denial of justice" – as that concept is known at international law – in the course of the ultimate resolution of its interconnection fee dispute with Telmex

205. The Claimants contend that the Respondent has not challenged its submissions on the application of Article 1105. For the record, The Respondent maintains its submissions at paragraphs 273 to 315 in the Statement of Defense which it expressly incorporates here. Put simply, viewed objectively, the manner in which IFT and the Specialized Courts dealt with the interconnection dispute between Tele Fácil and Telmex meets none of the requirements to establish denial of justice at international law. IFT and the Specialized Courts all concluded that Resolution 381 did not decide interconnection rates between Tele Facil and Telmex, a conclusion that was perfectly reasonable in circumstances, and in the Respondent's submission, factually and legally correct.

206. The Claimants strenuously resist the Respondent's position that their claim under Article 1105 is limited to alleging denial of justice, contending that as a regulatory authority, IFT is to be judged by the standard articulated in the frequently cited passage from *Waste Management* as further elucidated in *Glamis Gold* and *International Thunderbird*:

> 443. In [*Waste Management*], applying Article 1105 of the NAFTA, the Tribunal stated the standard as follows:
>
> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

> 447. In *Cargill v. Mexico*, for example, the tribunal observed:
>
> To determine whether an action fails to meet the requirement of fair and equitable treatment, a court must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.
>
> 449. In *International Thunderbird v. Mexico*, the court described the standard of fair and equitable treatment similarly, though more efficiently, using more concise terminology:
>
> [T]he Court views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual standards context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international.[267]

207. To be clear, Respondent does not question the expressions of the minimum standard of treatment of these awards. What Respondent sustains is that *even if* said standard was applied to the IFT decisions that allegedly violated Article 1105(l) - notably Decree 77, but also Resolution 127 - when viewed objectively and without the hyperbole and invective that infects both the Statement of Claim and the Reply, there simply is no basis to find a breach of the minimum standard of treatment.

208. Respondent makes an additional and more important point. It is evident that the IFT decisions contested in this case – notably Ruling 77 and Resolution 127 - were made in IFT's capacity as an *adjudicatory* body in the resolution of a dispute between Tele Facil and Telmex. This is to be distinguished from IFT's purely regulatory functions. The foregoing must be distinguished from its functions as regulator. Contrary to what Claimants state, IFT does indeed act "in the role of neutral and independent arbiter of the legal rights of litigants"[268] when resolving interconnection disagreements between operators. It is the first step in a process established in the LFTR - and previously in the LFT - that allows telecommunications operators to submit their disagreements to the *Pleno* for resolution in first instance and, if applicable, to contest such decisions through the *amparo* proceedings before the Specialized Courts, if it is considered that there was a violation to a rule or if the resolution in question is illegal or unconstitutional. Both Tele Fácil and Telmex invoked these procedures in first instance before the IFT, and later before Specialized Courts, in order to contest the decisions issued by the IFT.

209. It is useful to refer again to the United States' Article 1128 submission in *Eli Lilly v Canada* that was cited in the Statement of Defense. It is a comprehensive, articulate and scholarly statement that both Canada and Mexico fully agree with. Put simply, there is little more to say:

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267 Exhibit RL-002, 20-24.

268 Reply, ¶ 17. The original text in English: "*in the role of neutral and independent arbiter of the legal rights of litigants".*

20. As noted above, the obligation to provide "fair and equitable treatment" under Article 1105(1) includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[35] Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered.[36] "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control[.]

21. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust"[38] or "egregious"[39] administration of justice "which offends a sense of judicial propriety."[40] More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[41] Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process.[42] At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.[43] Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication, implicates a denial of justice denial of justice.[44]

22. The international responsibility of States may not be invoked with respect to non-final judicial acts,[45] unless recourse to further domestic remedies is obviously futile or manifestly ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence,[46] the particular nature of judicial action,[47] and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts.[48] Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[49]

23. In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law.[50] Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. A fortiori, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law. Moreover, an investor bringing an Article 1105(1) claim may not invoke an alleged host State violation of an international obligation owed to another State or its home State, for example an obligation contained in another treaty or another Chapter of NAFTA such as Chapter Seventeen.[51] A violation of that Chapter, which is subject to the State-to-State dispute resolution provisions of NAFTA Chapter Twenty, may be the basis of a

claim by one NAFTA Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Eleven, Section A. And, as stated previously, the FTC Interpretation provides that 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" the minimum standard of treatment.[52]

24. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 1105(1) only if they are final[53] and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Eleven tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.[54] Nor may judicial measures be challenged under Article 1105(1) for violating another rule of international law. Such a result would extend the obligations of the NAFTA Parties well beyond the customary international law minimum standard of treatment and what they consented to under Article 1105(1), as reflected in the FTC Interpretation.

[Underlining added, footnotes remain for reference below]

210. The following selected footnotes are worthy of the Tribunal's consideration:

38 JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) ("PAULSSON") (quoting J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 406 (1944)); id. at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.") (emphasis omitted); *Chattin Case (United States v. Mexico)*, 4 R. INT'L ARB. AWARDS 282, 286-87 (1927), reprinted in 22 AM. J. INT'L L. 667, 672 (1928) ("Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, willful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted).

39 PAULSSON at 60 ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

40 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*"); Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case ARB(AF)/99/2, Award ¶ 127 (Oct. 11, 2002) (finding that the test for a denial of justice was "not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]"); …

41 Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, art. 9, 23 AM. J. INT'L L. SP. SUPP. 131, 134 (1929). The commentary notes that a "manifestly unjust judgment" is one that is a "travesty upon justice or grotesquely unjust." Id. at 178

43 Id. at 134 ("An error of a national court which does not produce manifest injustice is not a denial of justice."); PAULSSON at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice."); DUMBERRY at 228 (noting that a simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice) (internal quotes omitted); BORCHARD at 196 (explaining that a government is not responsible for the mistakes or errors of its courts and that: "[A]s a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Christopher Greenwood, State Responsibility for the Decisions of National Courts, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004) ("Greenwood") ("[I]t is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.").

45 See *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 282 (June 14, 2013) ("[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); *Loewen*, Award ¶ 156 ("The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."); PAULSSON at 108 ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself."); Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63(3) INT'L. & COMP. L.Q. 28 (2014)("Douglas") (explaining that "international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.").

47 See, e.g., Douglas at 10-11 (explaining that the "rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, . . . sets adjudication apart from other institutions of social ordering within the State," and that an authoritative decision by a domestic adjudicative body "cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that . . . body. . . . International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces.") (footnotes omitted).

49 *Azinian,* Award ¶ 99 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were

> wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretense of form to achieve an internationally unlawful end.") ...
>
> 50 *Apotex*, Award ¶ 278 ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court."); *Azinian*, Award ¶ 99 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."); Waste Management Inc. v. United States of America, NAFTA/ICSID Case ARB(AF)/00/3, Award ¶ 129 (Oct. 30, 2004) ("[T]he Court would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties.")

211. It follows from the foregoing:

- The concept of denial of justice applies to administrative adjudicatory proceedings as well as court proceedings;
- The threshold to establish denial of justice is very high - *e.g.*, requiring a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety";
- It does not suffice to establish that domestic adjudicators have erred, or misapplied or misinterpreted domestic law;
- A claim of denial of justice can only be based on adjudicative measures that are a final, *i.e.*, Claimant must exhaust its rights of appeal unless recourse to further domestic remedies is obviously futile or manifestly ineffective.

212. In this case there was no denial of justice in connection to any of the contested measures. As explained in the Statement of Defense:

- Tele Fácil was given full access to the disagreement resolution system before the IFT, and it was also able to challenge IFT's decisions before Specialized Courts;
- Tele Fácil was provided a full opportunity to submit its case before the IFT, including in-person meetings with the Compliance Unit and members of the *Pleno*;
- Tele Fácil was given a full opportunity to submit its case, both as the plaintiff in *amparos* proceedings against Decree 77 and Resolution 127, and as an interested third party in the *amparo* against Resolution 381.
- The Specialized Courts and the IFT considered the arguments of both parties and gave reasons for their decisions;
- Tele Fácil was entitled to appeal the IFT decisions - Decree 77 and Resolution 127 - before Specialized Courts, which it exercised unsuccessfully in the first and second instances in the amparo proceedings without success, due to causes attributable to Tele Fácil;

- Tele Fácil had rights of appeal against the decisions of the specialized tribunals, which it exercised in the case of Sentence 351/2014 (pertaining to Resolution 381 and Decree 77) and Sentence 1694/2015 (pertaining to Resolution 127). In both cases, Tele Fácil decided to withdraw from the proceeding before the appeal was decided;
- Tele Fácil had rights of appeal against Sentence 1381/2015, issued in the *amparo* against Decree 77, but it failed to do so in a timely manner.

213. Claimants have stated that the Specialized Courts did not perform an appropriate administration of justice, specifically at the time of resolving Amparo 1381/2015, filed by Tele Fácil against Decree 77.[269] As it has already been mentioned, Claimants critize the income of the Sentence 1381/2015 due to format and structure aspects, due to its briefness and its "insufficiently conclusive and analytic declarations", as well because it included a comparative table between Resolution 381 and Decree 77.[270]

214. What they fail to state is that the First District Court, when resolving Amparo 1381/2015, determined that the IFT had the powers to establish the scope of a resolution issued by IFT's *Pleno*.[271]

215. Likewise, Claimants fail to state that Sentence 1381/2015 considered that Decree 77 resolved all the documents submitted by Telmex and Tele Fácil, as well as the confirmations criteria submitted by the Supervision General division and Telmex, respectively.[272] In other words, the First District Court, as jurisdictional authority, resolved that the purpose of Decree 77 was to address all the communications submitted by the concessionaires regarding the scope and interpretation of Resolution 381.

216. In addition, Claimants do not state that Sentence 1381/2015 resolved that some of the acts claimed by Tele Fácil did not have the characteristics of being *unilateral, imperative and coercive",* and therefore they did not affect Tele Fácil at all.[273] Such rule would also apply to Decree 77's drafts, which, as stated by Mr. Buj, lack any legal value, because they were not final and because they are simply internal working documents, which can be subject to modifications, adjustments and deletions.[274]

217. Therefore, there is no way in which Claimants may consider Sentence 1381/2015 "inappropriate", "deficient" or "surprising".[275] Those adjectives should be used to describe the behavior of Tele Fácil litigation representatives, considering that (i) the belated submission of the Appeal 36/2016 is only attributable to Claimants, because they tried to submit it at the last possible

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269 Statement of Claim, ¶ 612; Reply, ¶¶ 344 and 349,

270 Reply, ¶ 348.

271 Exhibit C-063, p. 6.

272 Mr. Buj's Second Expert Report, ¶ 172.

273 Exhibit C-063, p. 5.

274 Mr. Buj's Second Expert Report, ¶ 197-99.

275 Reply, ¶¶ 349, 351 and 352.

minute before the Specialized Courts (literally), and (ii) because they performed unnecessary procedures the next day, instead of submitting the Appeal 35/2016 at 9:01 am at the correspondence office of the First District Court.

218. In the Reply, Claimants accused the Specialized Courts of "gross incompetence".[276] However, the reality is that Claimants did not respect the deadline for submitting an *amparo* appeal against Sentence 1381/2015. This situation constitutes a lack of due diligence regarding the necessary procedural aspects for accessing to justice.[277] By not challenging Sentence 1381/2015, the judgment was final and therefore, Decree 77 was considered legal and constitutional (a measure that Claimants describe in their Statement of Claim as a "monstrosity").[278]

219. It is somewhat ironic that Claimants' representative appeared on the last day, close to (or after) midnight, to submit the amparo appeal. Available evidence indicates that:

- Ms. Mayorga arrived at the Specialized Courts venue after midnight on February 11, 2016 and she could not enter the building (in spite of her driver trying to bribe the security guard so he would allow her to file the Appeal 35/2016).
- When trying to file the Appeal 35/2016 on the following day (*i.e.*, on February 12, 2016) at the correspondence office of the Specialized Courts, at around 8:45 am, she suggested indirectly that she was willing to pay in order for the officer to change the delivery date.[279]
- Tele Fácil's representative knew about the existence of the case law ("*jurisprudencias*") issued by the Supreme Court of Justice that allowed the possibility of submitting the Appeal 35/2016 during the first business hour after the expiration of the deadline, because she mentioned them when she tried to file the *amparo* appeal at the common correspondence office of the Specialized Courts.[280]
- Also, instead of submitting the Appeal 35/2016 the next day (*i.e.*, February 12, 2016) directly at the correspondence office of the First District Court, as of 9:01 am, Tele Fácil's representatives filed the Appeal 35/2016 until almost 12 pm, due to unnecessary procedures because of a lack of experience of Tele Fácil's representatives.[281]

220. Claimants have only provided second hand evidence of what happened that night and in the next day. Without a testimony from Ms. Mayorga, the certification of facts witnessed by a notary

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276 Reply, ¶ 345.

277 Mr. Buj's Second Expert Report, ¶ 102.

278 Mr. Buj's Second Expert Report, ¶ 108 and 112.

279 Exhibit C-066, p. 10. "[…] at approximately 8:45 hours, on Friday February 12, 2016, Ms. Diana Margarita Mayorga Rea appeared, asking him to do her the favor of receiving the documentation in reference, as well as to modify the date and time of the time-date printer clock to the previous day, suggesting that they could come to an arrangement, which was immediately rejected".

280 Exhibit C-066, pp. 9 and 10.

281 C-066, p. 10; Mr. Buj's Second Expert Report, ¶ 125.

public must be considered as correct, which shows that the persons responsible for not submitting the *amparo* appeal on time were Claimants or their Mexican attorneys.

221. Two aspects must be explained in order to refute Claimants' arguments regarding the alleged denial of justice suffered by Tele Fácil.

222. First, Claimants argued that the Appeal 35/2016 was initially admitted and dismissed later by the First Circuit Court, a situation that has been considered as a "simulation".[282] What Claimants do not explain (and neither do their experts) is that the initial decisions of a Circuit Court (*e.g.*, the admission order issued by the President of a Circuit Court) are not final; they consist of a preliminary examination of the *amparo* appeal filed.[283]

223. The First Circuit Court, with the purpose of granting greater access to justice to Tele Fácil, preliminary admitted Appeal 35/2016. However, the final study of the matter corresponds to the Circuit Court, comprised by three magistrates, who issue a final resolution that determines the origin and substance of an *amparo* appeal filed against an *amparo* decision.[284]

224. Second, Claimants have stated that the decision of the First Circuit Collegiate Court at the time of dismissing the Appeal 35/2016, does not reflect *"the discussion in the opinion of the Court of Appeals about the exception of the general time rule for submission"*.[285] What Claimants do not detail (and neither does the Statement of Claim, nor the Reply) is that Tele Fácil also filed Complaint 11/2016, without explaining the interaction thereof with Appeal 35/2016.

225. On April 21, 2016, the First Circuit Court resolved the Complaint 11/2016, as well as the Appeal 35/2016. Due to procedural times, the First Collegiate Court analyzed Complaint 11/2016 first.[286]

226. When resolving it, the First Circuit Court assessed the Attestation of of Facts, and determined that case law criteria were applicable, which would allow Tele Fácil: *a)* to file the *amparo* appeal at the correspondence office of the district courts between 8:30 am and 9:00 am on February 12, 2016, or *b)* to file the Appeal 35/2016 before the First District Court as of 9:01 am.[287] When resolving, in the same session, the Appeal 35/2016, the First Circuit Court took into account what had been previously resolved in Complaint 11/2016.[288]

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282 Reply, ¶¶ 358, 381 and 382.

283 Mr. Buj's Second Expert Report, ¶ 131.

284 Mr. Buj's Second Expert Report, ¶ 131 and 132.

285 Reply, ¶ 380.

286 Mr. Buj's First Expert Report, ¶ 120. It is interesting that neither the Statement of Claim, nor the Reply, nor the expert reports from Claimants mentions Complaint 11/2016. *See* Mr. Buj's Second Expert Report, ¶ 114.

287 Exhibit R-035 pp. 24-26, and 40; Mr. Buj's First Expert Report, ¶ 119; Mr. Buj's Second Expert Report, ¶ 126.

288 "Since it was confirmed in the aforementioned motion for complaint Q.A. 11/2016, the court order issued on February 12, 2016 in the *amparo* 1381/2015, of the index of the First District Court on Administrative Matters Specialized on Antitrust, Radio Broadcasting and Telecommunications, therefore the statement contained therein about the enforceability of the judgment issued in the constitutional hearing is final. [...] Therefore, since the

227. In other words, "the discussion that contains the opinion of the Court" is contained both in the judgments of Complaint 11/2016 and in the Appeal 35/2016, respectively.

228. Tele Fácil had full access to justice in Mexico, since it could have the opportunity to file *amparos* and *amparo* appeals that it deemed appropriate. Also, it must not be overlooked that the First Circuit Court considered that Tele Fácil had the possibility of filing the Appeal 35/2016 during the first business hour of February 12, 2016. This situation is clearly an extension to access of justice for Tele Fácil. However, the inappropriate action of Claimants' representatives was once more the factor that precluded the challenge of Sentence 1381/2015.[289]

requirements for admittance of the *amparo* appeal were not met, hence it is appropriate to dismiss it. Exhibit C-075, p. 14.

[289] Mr. Buj's Second Expert Report, ¶ 126.

IV. Damages

229. Nothing said in the Reply, the second expert report of Dr. Dippon or the second expert report of Dr. Mariscal leads the Respondent to modify its positions with respect to the claim of damages. Respondent contends that the claim is extremely exaggerated and subjective and cannot serve as a basis to compensate Claimants, even if this Tribunal determined that Mexico violated the NAFTA (which is denied).

230. Claimants resort to the gross recourse of questioning the independence and credentials of Mr. Joan Obradors. According to its argument, the Tribunal should not consider what was said by the Respondent's expert because Analysys Mason (AM) has provided consulting services to the IFT and because Mr. Obradors is not an economist. Both questions are ungrounded and only demonstrate the Claimants' insecurity about the quantification of damages.

231. AM is a company recognized worldwide in the area of Telecommunications and the independence of the expert cannot be questioned simply because he has worked in the past with IFT/COFETEL. As stated in his second report, the fees received by the Mexican regulator represent approximately 1.9% of total AM revenues, a percentage that rises to 3.0% if we consider the last 5 years and decrease to 2.4% if we only consider the last 2 years.[290]

232. Respondent also argues that an economist is not required to comment on the quantification of damages in investor-State cases and that Mr. Obradors credentials are more than sufficient to present an expert report. However, to alleviate the concerns of Claimants, Mexico presents the expert report of Dr. Buccirossi from the firm Lear to respond to certain purely economic aspects that, according to the Claimants' expert, lie outside AM's area of expertise.[291]

233. The damage section of the Reply begins with a response to a series of alleged misstatements in the Statement of Defense that are reproduced in italics below:

- First, Claimants respond to the assertion that it was not interconnected with NEXTEL and that, as a result, it was not prepared to begin operations in the time foreseen by Claimants' damages experts.[292]

  Respondent reiterates that Tele Fácil was not interconnected with Nextel (or any other operator) at the end of 2014, which is when the damages period begin according to Dr. Dippon. Mexico also notes that even assuming that Tele Fácil had been able to establish physical interconnection with Nextel's network shortly after entering into the agreement, it would still have had to sign agreements with the rest of the operators and establish physical interconnection. It is reiterated that, at the end of 2014 - when the damages period supposedly began - Tele Fácil did not have interconnection agreements with any operator except Nextel.

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290 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 4-5.

291 Expert report of Dr. Buccirossi-Lear.

292 Reply, ¶ 413. In the original English text: "*First, Claimants respond to the assertion that it was not interconnected with NEXTEL and that, as a result, it was not prepared to commence service in the time frames set forth by Claimants' damages experts"*

- Second, it refers to the argument that the business lines and associated damages claimed in this case, must adhere to the business plan presented by Tele Fácil in its application for concession to operate as a telecommunications operator, in 2011.[293]

  The Respondent never argued such a thing. The passage cited by the Claimants is part of the list of facts that Mexico offered in its Statement of Defense[294] and it is a non-contested fact that the "*DID/Conferencing*", "*Competitive Tandem Services*" and the "International Call Termination" service were not part of the Business Plan that Tele Fácil filed with its concession application.

  Mexico effectively considers that *Competitive Tandem Services* cannot be included in the damages claim, but not because it was not included in the original project, but because there is no evidence that Tele Fácil intended to undertake this project. Indeed, as it will be explained in greater detail in section IV.E.1 of this Rejoinder, that the project was apparently developed in 2017 only for the purpose of increasing the claim of damages in this arbitration.[295]

- Third, Claimants refer to the Respondent's flawed assertion that the "double transit" is illegal in Mexico and that, as a result, Tele Fácil could not have offered its competitive tandem services.[296]

  Respondent maintains that double transit is not allowed in Mexico under current regulations and warns that Claimants seek to confuse by equating two different concepts: "Double transit" and "double tandem". This is explained further in section IV.C.2. of this Rejoinder and in the second statement of Mr. Sóstenes Díaz.[297]

- Fourth, and last, Claimants respond to the erroneous argument that Telmex was one of the beneficiaries subject to the principle of non-discrimination contained in the LFTyR.[298]

  Respondent states that those who are wrong are the Claimants. The principle of non-discrimination definitely applies to Telmex, as it will be explained in more detail in section IV.C.1 of this Rejoinder and in the second testimonial statement by Mr. Díaz.[299]

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293 Reply, ¶ 413. The original English text states: "*Second, it addresses the argument that the business lines and associated damages claimed in this case must comport with the business plan submitted by Tele Fácil in its 2011 application for its concession to operate as a telecommunications operators*."

294 Claimants cite paragraphs 18-19 of the Statement of Defense.

295 Statement of Defense, ¶ 363.

296 Reply, ¶ 413. The original English text states: "*Third, Claimants address Respondent's flawed assertion that "double transit" is unlawful in Mexico and that, as a result, Tele Fácil could not have offered its competitive tandem services*."

297 Second Statement of Mr. Sóstenes Díaz, Section C, ¶¶ 22-48.

298 Reply, ¶ 413. The original English text states: "*Fourth, and finally, Claimants respond to the erroneous argument that Telmex was an intended beneficiary of the non-discrimination principle contained in the FTBL*"

299 Second Testimonial Statement of Mr. Sóstenes Díaz, Section C, ¶¶ 49-68.

234. The following submissions are without prejudice to the Respondent's legal arguments. Nothing in this section should be interpreted as an admission of liability or as a waiver of any of the defenses on the merits.

235. The Respondent will address next what it considers to be the main issues concerning the damages claim. Failure to address a specific argument should not be interpreted as an admission. For purposes of the record, any argument of damages from the Reply that is not addressed in this Rejoinder is rejected.

A. The use of the DCF methodology is inappropriate in the circumstances of this case

236. Respondent finds it curious that Claimants insist on using a lost profits approach to determine damages corresponding to an expropriation, which implies the total loss of the value of the investment. As noted in the Statement of Defense, the claim for damages is based on the alleged lost profits of Tele Fácil from 2015 to 2017, which is not consistent with the alleged expropriation of the company.[300]

237. However, Mexico does not question the use of the "lost profits" approach *per se*. What it questions is that the results of a company that never operated can be reliably projected to determine those "lost profits". It argues that, in the absence of a proven track record of profitable operations, a DCF valuation becomes a speculative exercise that is not suitable for the determination of damages in an arbitration proceeding.

1. International jurisprudence manifests itself against the use of the DCF Methodology in cases such as the one at hand

238. Respondent cited the *Metalclad* and *Tecmed* cases as prominent examples of cases in which the court rejected the use of the DCF methodology as too speculative. Claimants have sought to refute this argument by referring to other cases in which the tribunal accepted the method.[301]

239. Respondent acknowledges that international jurisprudence is not unanimous in this respect; however, the overwhelming majority of cases support Mexico's position. On the other hand, Respondent does not wish to leave the impression that the two cases cited in the Statement of Defense are the only cases that are against the use of the DCF.

240. In the *Merril & Ring* case, the court observed:

> 264. Of course, there is always some element of uncertainty involved in future scenarios, and even in often used valuation methods, such as the discounted cash flow, future estimates are based on assumptions. But these are inevitably drawn from specific information provided by a historical record of profitability, or other elements that allow for an educated estimate. In the instant case, such an educated estimate is not possible because the record of profitability on the Investor's British Columbia operations has been inextricably and permanently related to the existence and application of the

300 Statement of Defense, ¶ 321.

301 Reply, ¶ 526.

> regulatory regime. There is thus no measure of profitability relating to the period before the measures were adopted. However, in these circumstances, the future scenario will be characterized more by speculation than by educated estimates, an approach which has not been favored by arbitration tribunals, and upon which this Tribunal would not be prepared to base an award of damages.[302] [Emphasis added]

241. In *Gemplus c. Mexico,* despite the fact that the business in question was a national vehicle registry and that the owners were legally required to register their cars, the tribunal determined:

> 13-72 DCF Method: The Tribunal does not consider the DCF method to be an appropriate methodology to apply on the facts of the present case; and it rejects the Claimants‟ case on the use of the DCF method. The Tribunal accepts the Respondent's submissions to the effect that the status of the Concessionaire as a business, during the period from August/September 2000 up to the relevant valuation date of 24 June 2001, was far too uncertain and incomplete to provide any sufficient factual basis for the DCF method. Moreover, the Claimants‟ use of the DCF method, with its expert (LECG), produces figures for the Concessionaire's future lost profits which are manifestly too high on the facts found by the Tribunal.[303] [Emphasis added]

242. In *Tza Ya Shum c. Peru,* the tribunal referred to the fact that TSG had only three years in operations and in two of those three years the company had losses. On that basis, it concluded that TSG did not have a sufficient track record of favorable results and rejected the use of the DCF methodology:

> 263. For these reasons, we cannot opt for a valuation model such as CFD, which presupposes the predictable and long-term future operational capacity of the investment. The lack of proof of the existence of a history of profitability in the activity of TSG implies that the positive projected results of TSG lack certainty.[304] [Emphasis added]

243. In the case *Caratube v. Kazakhstan*, after noting that the CIOC had existed for a little over 5 years and had not realized profits, the tribunal concluded:

> 1098. Therefore, for the Tribunal, the Claimants have not convincingly established that CIOC was a going concern with a proven record of profitability. For the reasons set forth below, the Tribunal finds that the Claimants also have not sufficiently established that CIOC would have become a going concern but for the termination of the Contract.
>
> 1099.The Tribunal cannot follow the Claimants' argument that, in the circumstances of the present case, it can apply the DCF method to assess CIOC's alleged lost profits even in the absence of a going concern. [...] [305] [Emphasis added]

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

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

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

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

244. Notably, in *Wena Hotels v. Egypt*, the tribunal concluded that the DCF method was inappropriate for the determination of damages, despite the fact that the experts from both parties offered estimates based on variations of that method:

> 122. Although experts presented by each party adopted variations of the well-known discounted cash flow ("DCF") method of calculating the amount of the damages sustained by Wena, the experts reached widely varying results from their calculations. Since, however, the Tribunal is not persuaded that the DCF method is appropriate in this case, it deems it unnecessary to enter into a detailed discussion of the differences that the experts' calculations disclosed.
>
> 123. The Tribunal agrees with Egypt that, in this case, Wena's claims for lost profits (using a discounted cash flow analysis), lost opportunities and reinstatement costs are inappropriate–because an award based on such claims would be too speculative. As another ICSID panel recently noted in the *Metalclad* decision:
>
> > Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value29
>
> Similarly, the ICC panel in the SPP (*Middle East*) *v. Egypt* arbitration case declined to accept a discounted cash flow projection because, *inter alia*, "by the date of cancellation the great majority of the work had still to be done," and "the calculation put forward by the Claimants produces a disparity between the amount of the investment made by the Claimants" and the "supposed value" of the investment as calculated by the DCF analysis.
>
> 124.Like the *Metalclad* and *SPP* disputes, here, there is insufficiently "solid base on which to found any profit... or for predicting growth or expansion of the investment made" by Wena. Wena had operated the Luxor Hotel for less than eighteen months, and had not even completed its renovations on the Nile Hotel, before they were seized on April 1, 1991. In addition, there is some question whether Wena had sufficient finances to fund its renovation and operation of the hotels. Finally, the Tribunal is disinclined to grant Wena's request for lost profits and lost opportunities given the large disparity between the requested amount (GB£ 45.7 million) and Wena's stated investment in the two hotels (US$8,819,466.93).[306] [Emphasis added]

245. In this case, the problem is not that Tele Fácil has a limited operating historical records or that it has suffered losses in some years, as in the cases cited above. Tele Fácil, completely lacks this historical records because it never started operations. The information gap that this situation generates cannot be amended with projections based on other markets and other companies without falling into unacceptable speculation.

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[306] Exhibit RL-019. *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID case No. ARB/98/4, Award, December 8, 2000, ¶¶ 123-124.

246. Who can say with some degree of certainty how many customers Tele Fácil could have attracted; how much investment would have been necessary to maintain and expand its operations; if it would have had access to the necessary funding; or how successfully the competition would have faced well-established operators such as Telefónica, AT&T and América Móvil. The reality is that there is not an adequate answer to these and many other relevant questions, and the very limited information available is not enough even to make an "*educated guess*".

2. The available evidence supports the position of Mexico and shows the speculative nature of the claim of damages

247. The Respondent's position is also supported in:

- The Guidelines for the Treatment of Foreign Direct Investment published by the World Bank, which recommend the DCF approach "for a going concern with a proven record of profitability"[307]
- A leading expert and author in business valuation who explains that "this approach [*i.e.*, DCF] is easiest to use for assets (firms) whose cash flows are currently positive and can be estimated with some reliability for future periods, and where a proxy for risk that can be used to obtain discount rates is available. The further we get from this idealized setting, the more difficult discounted cashflow valuation becomes"."[308]
- A valuation of Tele Fácil's concession conducted by Aldwich Capital which specifically notes that "*[o]nce Tele Fácil becomes operational, the Company can be valued by using dynamic and more traditional metrics such as DCF*", and further down *"[w]hen the Company become operational with 1-2 years of track record, potential interested parties will consider valuing the asset using more traditional valuation metrics used in the telecommunications sector- DCF public company trading multiples and acquisition multiples*"."[309]

248. The speculative nature of the Claimants' estimation of damages is also demonstrated by the available evidence that has not been contested by Claimants:

- The Tele Fácil Business Plan anticipated losses in the first two years and modest profits in the next three until reaching an amount of MXP$ 1.2 million (approximately

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307 Statement of Defense, ¶ 348 citing Exhibit RL-011.

308 Statement of Defense, ¶ 347, quoting: Aswath Damodaran, *Investment Valuation*, University Edition (John Wiley & Sons, Inc.), p. 12.

309 Statement of Defense, ¶ 352-353 citing Exhibit R-042. The original English text states: "[*o]nce Tele Fácil becomes operational, the Company can be valued by using dynamic and more traditional metrics such as DCF", y "[w]hen the Company become operational with 1-2 years of track record, potential interested parties will consider valuing the asset using more traditional valuation metrics used in the telecommunications sector- DCF public company trading multiples and acquisition multiples*".

USD$ 78,647.43) in the fifth year. In contrast, Claimants' experts estimate positive flows of USD$ 235,411 *million in the first year alone*.[310]

- The valuation carried out by Aldwych Capital Partners in December 2013 places the value of the Tele Fácil concession between 1 and 2 million dollars, which represents 0.3% of the damage claim.[311]
- Claimants have not indicated how much they invested in the project before the alleged expropriation; however, according to the balance sheet, the company was financed almost exclusively with a long-term liability, which, as of December 31, 2014, amounted to MXP$ 9,172,564 (equivalent to USD$ 623,220.81).[312]
- The Reference Manual for Scientific Evidence, which Dr. Dippon cites on multiple occasions, states:

> An alternative to calculating new business damages based on lost profits uses market valuations of the firm. For a publicly traded business, the valuation is implicit in the stock price—it is the market capitalization of the firm. For a new venture, the valuation is implicit in financing decisions. Startup firms are often financed by venture capitalists who invest funds in exchange for ownership in the venture. The valuation at the time of financing is the amount of financing divided by the ownership transferred. For example, if venture investors pay $4 million for 10% of the firm, the total value of the firm is $4 divided by 0.10, or $40 million.[313]

Under this approach and assuming that 100% of the long-term liabilities were granted by the Claimants and, in exchange for such financing, they received 80% of Tele Fácil, the value of the company would be USD$ 779,026. In any case, it is simply not credible to assume that Claimants could have obtained more than USD$472 million from this modest investment.

249. Contrary to what the Claimants argue in their Reply, Mexico is not suggesting that a business plan cannot be changed or updated, or even that it is an accurate approximation of what a business will accomplish.[314] It, nevertheless, provides a good idea of what the company expected and shows that Tele Fácil was willing to proceed with its project despite its modest profitability in the first years.

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310 Statement of Defense, ¶ 364-365.

311 *Id.*, ¶ 353 citing Exhibit R-042.

312 Exhibitt R-080, Financial Statements of Tele Fácil. The company had a minimum share capital of MXP$ 50,000 (USD$ 3,397.20). For the conversion to US dollars, the exchange rate was used to settle obligations denominated in US dollars published by the Bank of Mexico as of December 31, 2014 (14,718 pesos per dollar) http://www.anterior.banxico.org.mx /portal-market-change/index.html

313 Manual for Scientific Evidence, p. 469, available at https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf

314 It is further noted that Dr. Dippon and Mr. Bello disagree on the validity of the Business Plan data. *See* Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 54.

250. In contrast, Claimants now seek to convince the Tribunal that the inability of Tele Fácil to charge Telmex a high interconnection rate prevented its entry into operations and caused its shareholders losses of more than US$ 472 million. The foregoing without providing any evidence that its business plan underwent major changes from the Constitutional Reform, the AEP Declaration, the entry into force of the LFTR or for any other reason.

251. The implied position of Claimants is that the Tele Fácil business consisted mainly of providing interconnection services to Telmex at a high cost for three years. This goes against, not only of common sense, but of regulatory policy in Mexico and many other countries that sought to orient interconnection rates to costs.[315]

252. Notwithstanding the abundance of evidence pointing to an exaggerated estimate of damages and the overwhelming amount of jurisprudence against the use of DCF in cases like this, Claimants seem to suggest that all this should be ignored because the expert from Mexico allegedly accepted the DCF methodology when using it to provide an alternative estimate of damages.[316] The argument misinterprets AM's analysis and confuses the conclusion that emerges therefrom.

253. Analysys Mason did not opine on the methodology and certainly did not conclude that DCF was the best valuation method for this case. Contrary to what Dr. Dippon suggests in his second report, Mr. Obradors did not "accept the damages study" or "agree with the damages model".[317] Analysys Mason simply recalculated the same revenue streams using realistic assumptions and/or correcting perceived mistakes. There was no point in taking issue with the methodology itself or certain parameters, such as the discount rate, because the recalculation of the revenues was sufficient to prove that the damages were speculative, unreliable and grossly overstated.[318]

254. In fact, the disparity between the experts' revenue projections stbolsters the argument that the DCF method is not appropriate in the circumstances of this case. In the words of the court in the *Tecmed* case:

> 186. The Arbitral Tribunal has noted both the remarkable disparity between the estimates of the two expert witnesses [...] and also the considerable differences in the amount paid under the tender offer for assets related to the Landfill – US$4,028,788 – and the relief sought by the Claimant, amounting to US$52,000,000, likely to be inconsistent with the legitimate and genuine estimates on return on Claimant's

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315 Exhibit R-081, p. 275 states:

"It is a generally accepted principle that interconnection rates are cost-oriented. The WTO Reference Document states that interconnection rates will be based on transparent, reasonable, economically feasible and disaggregated costs so that the interconnected operator pays only the network elements it requires.2 Rates must find the right balance to promote competition, preserve incentives for the maintenance and updating of the network, ensure that the costs for the provision of interconnection are as low as possible, and limit the regulatory costs of both operators as well as regulators."

316 Reply, ¶ 528 & 536.

317 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 11 & 198.

318 *Id.*, ¶ 12-14.

> investment at the time of making the investment. The non-relevance of the brief history of operation of the Landfill by Cytrar – a little more than two years – and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made – building of seven additional cells – in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant.[319]

B. There was no expropriation: the decision not to start operations that reflects the "real scenario" is a consequence of a decision of Tele Fácil and not of the claimed measures

255. As indicated in the Statement of Defense, Claimants' quantification of damages is based on an assumption that is unsustainable: that the measures at the center of this case frustrated the entry into operations of Tele Fácil. This erroneous assumption leads to the fact that the income in the real scenario is zero and that the only thing that is subtracted from the counter-factual income is the incremental costs. Respondent disputes this fundamental assumption for several reasons.

256. The first is that Claimants have not shown that the measures claimed had expropriation effects. Tele Fácil maintained at all times its concession, its telecommunications equipment and the business relationships it claims to have cultivated (in fact, it could still start operations if it wanted to).

257. The Tele Fácil Business Plan demonstrates that Claimants were willing to operate a company that would offer the typical services offered by a telecommunications concessionaire in Mexico and that the company would incur losses in the first two years and modest gains in the next three years. Now, Claimants argue that Mexico thwarted its investment because it did not enforce an alleged rate contract with Telmex that would have given it hundreds of millions of dollars in the first 3 years.

258. Mexico also noted that the Business Plan did not address the issue of interconnection rates or indirect interconnection with Telmex, and Claimants have been unable to provide evidence to confirm that the economic viability of the company depended on successfully negotiating these two interconnection terms with Telmex. [320] However, that is exactly what they argue in that procedure: without the rate allegedly agreed with Telmex, Tele Fácil could not sign an interconnection agreement with that operator and, therefore, could not start operating.

259. The second reason is that the measures claimed to be in violation of the NAFTA would not have prevented two of the four business lines that account a substantive part of the projected revenues. Respondent insists that there is no causal link between the measures and the International Call Termination and the Retail Services.

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319 *See* Statement of Defense, ¶ 350 citing Exhibit RL-013. *Técnicas Medioambientales Tecmed, S.A. v. los Estados Unidos Mexicanos*, ICSIDCase No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 186.

320 Statement of Defense, ¶ 114 and 147.

260. Respondent has demonstrated that the high interconnection rate that Tele Fácil allegedly negotiated with with Telmex did not apply to the termination of international calls, but to the traffic that Telmex sent to Tele Fácil users. The reason is simple: traffic ending in the Telmex network was subject to the *zero rate* imposed on that operator as Preponderant Economic Agent (AEP).

261. Claimants do not seem to dispute this point. Now they argue that Mexico has completely ignored that Tele Fácil also required indirect interconnection with Telmex.[321] Mexico has by no means forgotten this part. In fact, it showed in his Statement of Defense that the only thing that was required to carry out this business was that Tele Fácil interconnected its network with that of Telmex and that it was Tele Fácil who refused to do so.[322]

262. In any case, it is not credible that Claimants have decided to abandon two lines of business that, according to their experts, would have paid them approximately USD$ 241.8 million because they were not willing to make the relatively modest investments necessary to interconnect directly with Telmex. Nor is it credible that Claimants have decided not to proceed with the entire project because they could not have pursued a line of business that was invented for the purposes of this procedure (*Competitive Tandem Services*) and another that represents approximately 8% of lost revenue (*DID/Conferencing*).

263. The golden rule of investment should be undertaken if it has a positive net present value and if Claimants believe in their own valuation of damages, the flows of the International Call Termination, by themselves, would have more than justified to go ahead with the project.

264. The third reason is the implausible hypothesis that the Tele Fácil business would last only three years. However, that is exactly what they intend this Tribunal to conclude. As noted in the Statement of Defense,

> 321. More surprising yet is the fact that Tele Fácil's intended business would last only three years. The Tribunal will appreciate from the tables included in the Claimants' expert reports that the lost profits are confined to the years between 2015 and 2017, that is, the term of the alleged agreement with Telmex. After this period, Tele Fácil's sources of revenue dry out or are significantly reduced and the lost profits turn negative.

265. Tele Fácil cannot seriously maintain that the viability of the company depended on the interconnection rate with the dominant operator. An operator cannot live from the interconnection, especially in a country like Mexico that has made significant efforts to implement a rate policy that seeks to have cost-oriented interconnection rates.[323]

C. The assumptions used in the counterfactual scenario do not hold

266. The experts of Claimants and Respondent operate under different assumptions regarding the principle of non-discrimination and double transit in Mexico. Both are issues of Mexican law and regulation that have a severe impact on the Claimants' estimate of damages.

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321 Reply, ¶ 548.

322 Statement of Defense, section II.G, ¶¶ 138-147.

323 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 64-71 & 239. See also Exhibit R-081, p. 275.

1. The principle of non-discrimination is applicable to the interconnection rate charged by Tele Fácil

267. In order to better understand how this principle operates, it is useful to remember that the service in question is the *termination of calls* and who provides it is the one who charges for the service. Thus, for example, when a Nextel user calls a Telefónica user, it will be Telefónica who will provide the call termination service and pay Nextel the agreed rate. When the call goes in the opposite direction, Nextel will provide the service and charge Telefonica the interconnection rate.

268. In accordance with Article 125 of the LFTR, all operators are obliged to interconnect their networks under non-discriminatory conditions.

> Article 125. Concessionaires operating public telecommunications networks are bound to interconnect their networks with those of other concessionaires in non-discriminatory and transparent conditions and based on objective criteria and in strict compliance with the plans referred to the previous Article, except as provided by this law on the subject of rates.
>
> The interconnection of public telecommunications networks and their rates, terms and conditions, are of public order and social interest.
>
> The terms and conditions for interconnection offered by a concessionaire to another by virtue of an agreement or a resolution issued by the Institute, shall be granted to any other party requesting it, as from the date of the request.[324] [Emphasis added]

269. The exception to "the provisions of this Law regarding rates" in the first paragraph of the Article, refers to the rates applicable to the AEP in accordance with Article 131(a). This provision requires the AEP to offer the free call termination service (zero rate) to all concessionaires. The rest of the operators can freely negotiate the rate charged to the AEP and the one that will be charged to each other in accordance with Article 131(b).

270. However, the fact that the rate charged by the AEP is governed by Article 131(a) does not mean that the operators can discriminate freely against it or that the AEP cannot invoke the principle of non-discrimination to avoid it. Tele Fácil, like any other operator, is obliged to offer Telmex the same interconnection terms it offers to a third party if Telmex so requests in accordance with the last paragraph of Article 125.

271. In this way, if Tele Fácil charges Nextel a fee of USD$ 0.0018 for terminating calls in its network and charges Telmex a fee of USD$ 0.00975 for the same service, Telmex could invoke the principle of non-discrimination to demand Tele Fácil the same rate offered to Nextel. The foregoing does not imply the elimination of the rate asymmetry foreseen in the LFTR[325], since Telmex would still be obliged to offer the termination service to Tele Fácil free of charge in accordance with Article 131(a) of the LFTR.

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[324] *See* also the Second Statement of Mr. Sóstenes Díaz, ¶ 53.

[325] In the example, Telmex would end up paying Tele Fácil the same rate that Nextel pays (USD$ 0.004), but would be obliged to provide the interconnection service to Tele Fácil free of charge (Zero Rate).

272. Claimants incorrectly argue that the principle of non-discrimination is not applicable to the AEP.[326] Respondent maintains that this question has already been analyzed and resolved by the IFT in two confirmations criteria that appear in the case file as Exhibits C-126 and C-127 in relation to Megacable. The regulator's conclusions are summarized below:

- The AEP is a beneficiary of the non-discriminatory treatment referred to in Article 125 of the LFTR, provided it is not about i) requesting non-discriminatory treatment with respect to charging for termination of traffic in its network and ii) negotiating rates for termination of traffic in your network.[327]
- Except for the two assumptions, it should be understood that the AEP is free to negotiate rates, terms and conditions regarding interconnection, as well as to request a non-discriminatory treatment from any concessionaire.[328]
- The foregoing is confirmed by the provisions of Article 124, section II of the LFTR, which establishes "giving non-discriminatory treatment to concessionaires except for the asymmetric or specific measures provided by this law".[329]
- Although Article 125 of the LFTR makes reference in the last paragraph to "terms and conditions", it should be understood that the rates are part of the terms and conditions; therefore, they are also subject to the principle of non-discriminatory treatment.[330]
- Assuming that the concessionaires not considered as AEP are excluded from the principle of non-discriminatory treatment in terms of rates would lead to conclude that the case of exception established in Article 125 is applicable to all concessionaires, making the exception a general rule.[331]
- The principle of non-discriminatory treatment includes the terms, conditions and rates that a concessionaire offers to another because of an agreement or derived from a resolution of the Institute.[332]

273. On these two decisions, Claimants limit themselves to saying that they are *ex post facto* rationalizations that cannot be considered because such decisions were subsequent to the measures.[333] However, as noted above, criteria confirmations are interpretations of a decision or rule and do not create or modify rights (or non-binding advisory opinions, as defined by the

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326 Reply, ¶ 413 & 419.

327 Exhibit C-126, p. 8.

328 *Id.*

329 *Id.*

330 *Id.*

331 Exhibit C-126, p. 9.

332 Exhibit C-126, p. 11 and Exhibit C-127, p. 23.

333 Reply, ¶ 492 *et seq.*

Claimants).[334] Therefore, they reflect the correct interpretation of that decision or rule, regardless of when they have been issued.[335]

274. The remaining arguments of Claimants around this point are largely irrelevant given the existence of an official interpretation of the IFT that is the body empowered to do so.[336]

275. Claimants argue, for example, that the exception in the first paragraph of Article 125 should be understood as meaning that the principle of non-discrimination does not apply to rates.[337] This interpretation would lead to an anomalous result: that the LFTR allows operators to discriminate in terms of rates, which is unsustainable. It is clear that the exception in the first paragraph of Article 125 refers to the rates applicable to the AEP in accordance with Article 131(a), as indicated by Mr. Díaz in his second testimonial statement.[338]

276. Claimants also seem to argue that the absence of an explicit reference to "rates" in the third paragraph of Article 125 allows to conclude that they are exempt from the obligation that all operators have to grant, to any other concessionaire that so requests, same terms and conditions that they offer to third parties due to an agreement or a resolution of the Institute. This interpretation would lead to the same anomalous result described in the previous paragraph.

277. Rates are "conditions" of interconnection. So it is that Article 126 specifically exempts "the rates referred to in Article 131" of "the conditions under which the interconnection thereof will take place" that concessionaires will agree upon. Otherwise, there would be no need to make the exception:

> Article 126. With the exception of the rates referred to in Article 131 of this Law, concessionaires of public telecommunications networks will agree on the conditions under which the interconnection thereof will take place, in accordance with the legal and regulatory provisions, and those established in the fundamental technical plans and other applicable standards and methodologies that, if applicable, the Institute issues.

278. It should also be noted that, the legal expert of the Claimants, Dr. Clara Luz Álvarez, recognizes that discrimination can occur in rates. In fact, it is the first example she offers in her book:

> *Equality and non-discrimination.* The interconnection must necessarily be granted in accordance with a principle of equality to avoid unjustified discriminatory treatment.

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334 Reply, ¶ 460.

335 First Statement by Mr. Gorra, ¶ 11.

336 *See* Art. 15, section LVII of the LFTR and Art. 6 section XVIII of the Organic Statute of the Federal Telecommunications Institute. *See* also, First Statement of Mr. Gorra, ¶ 7 where he states: "[i]n terms of the LFTR, the power to interpret the law and administrative provisions on the subject of telecommunications and broadcasting corresponds in the first place to the *Pleno* of the Institute."

337 Reply, ¶ 467.

338 Second Statement of Mr. Sóstenes Díaz, ¶ 55(i).

> The interconnection must be offered and given without discrimination, that is, under conditions no less favorable than those offered to others.
>
> The discrimination can be in the interconnection rate, in terms of the opportunity to perform interconnection in networks, in the delivery time of a connection, in the time required to repair any failure, in the quality of the interconnection that is provided, in the availability (or rejection) for allowing the connection only in certain interconnection points of the network that raise the cost of competitors and without a technical justification, in providing certain infrastructure to be shared with some concessionaires and not with others, in selling only to certain concessionaires elements unbundled from the network, among many other forms of discrimination.. [...][339]

279. On the other hand, the discussion of paragraphs 473 to 477 of the Reply on the opinion of the SCJN in the *amparo* under review 426/2010 in the sense that asymmetric rates do not violate the constitutional right to equality, is not relevant for this discussion for two fundamental reasons: (i) Mexico has never argued otherwise; and (ii) the application of the principle of non-discrimination does not eliminate the asymmetry of rates, as explained above (see paragraph 271 above).

280. Nor is it true that Respondent has forgotten the provisions of Article 131(b) of the LFTR. Mexico has never ignored that, with the exception of the AEP, operators can freely negotiate the rates they charge for the termination of calls. However, it is clear that Article 131 establishes a regime of exception for the AEP and does not regulate the rates charged by the rest of the operators "during the time when there is a preponderant economic agent".

281. Finally, Respondent observes that it is easy to confuse the rate that is paid with the one charged and complicate the interpretation of the principle of non-discrimination. For example: in paragraph 504 of the Reply it is suggested that the operation of the principle of non-discrimination far from reducing the rate that Telmex would pay to Tele Fácil, would in any case allow the rest of the operators to demand from Telmex the high rate.

> 504. Respondent's speculation is flawed. The volumes of traffic that competitive carriers would have terminated to Tele Fácil's network would have been infinitesimal in comparison to the volumes that those carriers would have been terminating on behalf of Telmex on their own networks. Thus, under the IFT's flawed view of how the non-discrimination principle works in practice, each carrier would have faced a straightforward and uncomplicated choice: does it pay a higher rate to Tele Fácil for a smaller volume of traffic in order to be able to use the non-discrimination principle to require Telmex to pay it the same rate that it voluntarily agreed to pay Tele Fácil? In other words, would a rational economic actor pay out $10.00 in order to be able to collect $100.00? The proposition is no more complicated. Thus, the Respondent's

[339] Exhibit R-082, p. 111.

> contention that other operators "would have hardly agreed to the Telmex Rate" is fundamentally illogical and bad economics.[340] [Emphasis added]

282. Similarly, Mr. Bello states:

> [A]fter Telmex was named the PEA, all competitive operators would be net recipients of termination fees from Telmex. Moreover, given Telmex's huge market share as compared to Tele Fácil's market share, it is unavoidable that all operators would receive more traffic from Telmex then they would terminate to Tele Fácil. Thus, based on pure logic and economics, concessionaires would have opted to go to Telmex to request to receive the more favorable, higher rate and would have been incentivized to avoid doing anything to cause Tele Fácil to lose the benefit of that rate [...][341] [Emphasis added]

283. This is nonsense. In the first place, it is observed that Telmex would have had no incentive to agree on a rate higher than the regulated rate with any operator after the AEP Declaration. Any concessionaire that would propose a higher rate than the regulated one would have faced the rejection of Telmex and the IFT would have had to resolve the disagreement (by law) based on the regulated rate, as was the case of Resolution 127.

284. Secondly, the principle of non-discrimination does not oblige the consumer to pay the same price to all providers of a service. It obliges the service provider (*i.e.*, whoever provides the call termination service) to offer it in non-discriminatory terms. In other words, an operator cannot demand to *be paid* a higher rate based on this principle, but may require that a particular operator *may charge* the same rate that it charges a third party. It is clear that Claimants only seek to confuse.

285. Respondent's interpretation of the principle of non-discrimination is based on the text of the LFTR, the criteria confirmations of the IFT, the second expert report of Mr. Buj, and the second witness statement of Mr. Sóstenes Díaz. The Tribunal is invited to review the provisions and the corresponding excerpts.[342]

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340 Reply, ¶ 504. The original English text states: "*504. Respondent's speculation is flawed. The volumes of traffic that competitive operators would have terminated to Tele Fácil's network would have been infinitesimal in comparison to the volumes that those operators would have been terminating on behalf of Telmex on their own networks. Thus, under the IFT's flawed view of how the non-discrimination principle works in practice, each operator would have faced a straightforward and uncomplicated choice: does it pay a higher rate to Tele Fácil for a smaller volume of traffic in order to be able to use the non-discrimination principle to require Telmex to pay it the same rate voluntarily agreed to pay Tele Fácil? In other words, would a rational economic actor pay out $10.00 in order to be able to collect $100.00? The proposition is no more complicated. Thus, the Respondent's contention that other operators "would have hardly agreed to the Telmex Rate" is fundamentally illogical and bad economics.*"

341 Exhibit C-109, Second Statement of Mr. Bello, ¶ 14. In the English text: *"[A]fter Telmex was named the PEA, all competitive operators would be net recipients of termination fees from Telmex. Moreover, given Telmex's huge market share as compared to Tele Fácil's market share, it is unavoidable that all operators would receive more traffic from Telmex then they would terminate to Tele Fácil. Thus, based on pure logic and economics, concessionaires would have opted to go to Telmex to request to receive the more favorable, higher rate and would have been incentivized to avoid doing anything to cause Tele Fácil to lose the benefit of that rate [...]*".

342 Second Statement of Mr. Sóstenes Díaz, Section D, ¶¶ 49-68. Second Expert Report of Mr. Buj, ¶¶ 83-93.

286. In order to demonstrate to the Tribunal the importance of the correct interpretation of this principle, Respondent has asked its expert to determine the impact of reducing the counterfactual rate applicable to Telmex to the regulated rate that the IFT publishes each year to resolve interconnection disagreements.

287. The impact of the correct application of the principle of non-discrimination can be easily appreciated from Figures 4 and 5 of the second AM expert report[343] which are reproduced below. In order to avoid confusion, Figure 5 corresponds to the original income estimatation and Figure 4 corresponds to the recalculation of said income assuming that Telmex would have the right to demand the regulated rate by operation of the principle of non-discrimination.

Figura 4:: Tabla resumen del impacto de la tarifa regulada en los ingresos de Tele Fácil [Fuente: Analysys Mason, 2018]

		2015	2016	2017	2018	2019	2020
Ingresos							
DID	USD	3,296,690	845,849	1,124,768	1,290,152	1,143,929	866,988
Retail	USD	155,348	286,113	359,254	435,549	511,845	588,142
Tandem Services	USD	-	-	-	-	-	-
Total revenues	**USD**	**3,452,038**	**1,131,963**	**1,484,021**	**1,725,702**	**1,655,775**	**1,455,130**

Figura 5:: Tabla resumen del impacto de la tarifa regulada en los ingresos de Tele Fácil[30] [Fuente: Analysys Mason, 2018]

		2015	2016	2017	2018	2019	2020
Ingresos							
DID	USD	10,516,75	8,708,372	10,871,77	1,290,152	1,143,929	866,988
Retail	USD	155,882	287,404	360,804	435,549	511,845	588,142
Tandem Services	USD	20,987,50	32,785,41	34,405,33	-	-	-
Total revenues	**USD**	**31,660,13**	**41,781,19**	**45,637,91**	**1,725,702**	**1,655,775**	**1,455,130**

2. Double transit is not allowed in Mexico

288. Dr. Dippon regrets that Mr. Obradors supposes, on the basis of Mr. Sóstenes Díaz's statement, that double transit is not allowed in Mexico. To refute this point, Dr. Dippon simply points out "*I understand from counsel that nothing in Article Third, numeral 8.7 of the Signaling Plan imposes a prohibition of double transit*".[344]

289. Dr. Dippon continues his argument by explaining that double transit is allowed in the United Kingdom and the United States, which is irrelevant and false.[345] The only relevant consideration for the case at hand is whether this is allowed in Mexico and the Respondent insists that it does not.

290. The double transit service contravenes section 8.7 of the Signaling Plan, which provides:

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343 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 46-48. The international call termination services are not affected by the rate that Tele Fácil charges Telmex and for that reason they are not included in the tables.

344 Second Expert Report of Dr. Dippon, Exhibit C-112, ¶ 26.

345 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 19-21 & 27.

> 8.7. Operators offering local transit service will only process calls in which the IDO or BCD they receive corresponds to the concessionaire from which interconnection trunk they are receiving the call, and will retransmit these same codes to the network of destination.
>
> The foregoing notwithstanding that the shared use of interconnection trunks is allowed, and that consequently the same trunk corresponds to more than one IDO, as well as other facilities that allow a more efficient use of the infrastructure, under the legal, regulatory and administrative provisions applicable to the interconnection.[346] [Emphasis added]

291. As explained in the example offered in the second statement by Mr. Sóstenes Díaz, the first paragraph of this provision requires any operator that provides the transit service to verify that the identifier of the trunk through which the traffic is received coincides with the identifier of the originating network (IDO) of the call.

292. This verification does not represent any problem for the operator who provides the first transit, but it is impossible for the operator who makes a second transit. The above is due to the fact that, in the second case, the call would be received by the trunk identified with the operator that provided the first transit, but the IDO of the call would correspond to the originating network. Since these identifiers do not match, the call could not be processed.

293. The foregoing is explained in greater detail in paragraphs 36 to 42 of Mr. Díaz's witness statement.

294. Claimants argue that paragraph 8.7 of the Signaling Plan does not establish an absolute prohibition.[347] Respondent agrees that the Signaling Plan does not expressly prohibit double transit; however, paragraph 8.7 prevents the processing of calls with double transit. The use of the term "only" in the first paragraph leaves no doubt of the obligation of the verification described to process the call.

295. As explained in the second witness statement of Mr. Díaz, the second paragraph refers to the possibility of concentrating traffic with different IDOs in the exit trunk of the operator providing the transit for delivery to the destination network.[348] Claimants' interpretation , in the sense that the second paragraph annuls the provision states in the first one go against the *effet utile* principle.

296. With regard to the so-called "Sixth Rule of Dominant Agent", Mr. Díaz points out that this only applies to the AEP and, anyway, it would not imply a license to breach the provisions of the Signaling Plan.[349] Likewise, what is stated in Article 4 of the Fundamental Interconnection Plan does not have the meaning attributed thereto by Claimants.[350]

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346 CL-147, p. 39.

347 Reply, ¶ 435.

348 Second Statement of Mr. Sóstenes Díaz, ¶ 36.

349 *Id.*, ¶¶ 43-46.

350 *Id.*, ¶¶ 47-48.

297. The implications of this have been discussed briefly in the Statement of Defense. If double transit is not allowed, as claimed by Respondent, this would imply that Tele Fácil could only interconnect with Nextel and Telmex and, thus, lose the rest of the market.

298. However, it is observed that the impact of double transit is of secondary importance since it would mainly affect the International Call Termination that cannot be considered due to the absence of a causal link between the measure and the damage, and *Competitive Tandem Services,* which cannot be considered, among other things, because the project was developed only for the purpose of increasing the claim of damages.

D. Causation and mitigation of damages

299. In paragraphs 537 *et seq* of the Replyt, Claimants state that:

> 537. Respondent blends the doctrines of causation and mitigation into a mélange from which it argues that, because Claimants theoretically could have negotiated a new interconnection agreement with a low interconnection rate that also allowed for indirect interconnection and because Claimants proceeded with two of their four lines of business without a high interconnection rate with Telmex, they are therefore precluded from recovering damages from these two lines of business, i.e., International Termination Services and Retail Services. This argument is legally and factually incorrect.
>
> 538. Notwithstanding Respondent's obfuscation, the chain of causation here is clear: after officially recognizing and expressly validating Claimants' legitimate investment rights in a lengthy, reasoned and unanimous resolution, the IFT later abruptly and unjustifiably repudiated its own rulings. The IFT's dramatic change in position targeted Claimants' investment for elimination. Never before had the IFT acted in such a manner, and, indeed, never since. The clawing back of the interconnection agreement between Tele Fácil and Telmex approved in Resolution 381 directly caused all of Claimants' damages because Tele Fácil could not realistically provide telecommunications services in Mexico without an interconnection agreement with Telmex.[351]

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[351] Reply, ¶ 537 & 538. In the original English text: "*537. Respondent blends the doctrines of causation and mitigation into a mélange from which it argues that, because Claimants theoretically could have negotiated a new interconnection agreement with a low interconnection rate that also allowed for indirect interconnection and because Claimants proceeded with two of their four lines of business without a high interconnection rate with Telmex, they are therefore precluded from recovering damages from these two lines of business, i.e., International Termination Services and Retail Services. This argument is legally and factually incorrect.*

538. Notwithstanding Respondent's obfuscation, the chain of causation here is clear: after officially recognizing and expressly validating Claimants' legitimate investment rights in a lengthy, reasoned and unanimous resolution, the IFT later abruptly and unjustifiably repudiated its own rulings. The IFT's dramatic change in position targeted Claimants' investment for elimination. Never before had the IFT acted in such a manner, and, indeed, never since. The clawing back of the interconnection agreement between Tele Fácil and Telmex approved in Resolution 381 directly caused all of Claimants' damages because Tele Fácil could not realistically provide telecommunications services in Mexico without an interconnection agreement with Telmex."

300. Claimants misinterpret the Respondent's arguments. It is true that Claimants could have negotiated a "new" interconnection agreement and this would have allowed them to start operations and pursue the lines of business included in the damages claim; however, Mexico never argued such a thing.

301. Mexico argued that Tele Fácil could have interconnected its network to that of Telmex in mid-2015 when said operator urged it to do so[352], and that would have been enough to implement the "International Call Termination" business. This would not have prevented it from continuing its efforts to challenge Decree 77 and Resolution 127 and/or try to enforce, through the legal remedies at his disposal, the contract it claims to have perfected with Telmex in July 2014.

302. It is also noted that Claimants' response is based on controversial facts. To be clear: as explained in the facts section, Mexico denies that there has been a binding agreement on rates between Telmex and Tele Fácil; denies that Resolution 381 has incorporated said "agreement" as part of its decision; and denies that Decree 77 or Resolution 127 have annulled the alleged interconnection agreement ordered in Resolution 381. Therefore, contrary to what Claimants suggest, "the chain of causation" is not proven.

303. The only thing that is fully demonstrated is that Tele Fácil refused to interconnect its network with Telmex in the terms it had originally requested –*i.e.*, indirectly through Nextel.

304. Claimants also misrepresent another argument of the Respondent, to subsequently give a strong response to that argument that Mexico did not: "Respondent is actually arguing that Claimants' damages are not recoverable because they were not foreseeable" and subsequently "[T]he Respondent objects the law with respect to the Claimants' predictability and expectations. The fact that the damages are foreseeable is due to the damages [...] "[353]

305. Mexico never argued that the lack of predictability of the *amount* of damages prevented its recovery. The approach was, in fact, very simple: the company had presented a business plan based on traditional telecommunications services; had projected losses in the first years and modest profits in the following three; and did not mention the interconnection rates or the mode of interconnection with Telmex as a decisive factor for the success of the company. These were the basis on which Tele Fácil planned to start operations and convince the IFT to grant the concession. Therefore, it cannot argue now that the failure to obtain a high interconnection rate with Telmex (which no other operator had) prevented its entry into operations.

306. México never suggested that the Business Plan could not be amended or that the projections included there are a precise forecast of the future. It simply argued that there was no evidence that Claimants had adjusted their Business Plan to include the business lines on which they base their claim for damages. The point was simply that these initial projections, which reflected the expectations of Claimants, bore no relation to the damages they now claim.

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352 Statement of Defense, ¶ 138-147.

353 Reply, ¶ 550 & 551. In the original English text: "*Respondent is actually arguing that Claimants' damages are not recoverable because they were not foreseeable"* and later *"Respondent gets the law wrong in regard to foreseeability and Claimants' expectations. Whether or not damages are foreseeable goes to the fact of damages* [...]"

307. Mexico maintains its claim on both fronts: the measures did not result in an indirect expropriation and the amount of damages is exaggerated and speculative. There are many other arguments that Claimants attribute to Mexico that Respondent simply did not make and, therefore, are not answered.

E. Business lines

1. "Competitive Tandem Services"

308. Respondent reiterates what is stated in paragraphs 415 to 422 of the Response Document and refers the Tribunal to section 3 of the second expert report of Mr. Obradors[354] and section "E" of the second testimonial statement of Mr. Díaz[355] for a complete response to Claimants' criticisms of the arguments related to this line of business.

309. Respondent argued in its Statement of Defense that it appeared that this line of business was conceived in 2017 for the sole purpose of increasing the amount of damages[356] and, thus, it relied on a document dated May 18, 2017, which it obtained through its first request for documents, which is reproduced here for the convenience of the Tribunal:

> It is important to point out that the final dimension of the proposed project must be tied to a study of financial modeling that reveals, in the light of the real fixed telephony traffic that flows between Telmex and the rest of the Public Telecommunications Networks (RPTs), which would be the final magnitude of this project and the shielding of what is proposed within the legal and regulatory framework (the latter must be included in the modeling to be carried out). So that it can be finally incorporated into the financial model of damages in the NAFTA claim with the confidence that it is duly supported and grounded, which would contribute to increase the credibility of what it presented in the International Arbitration Panel, and obviously increase the amount to claim.[357] [Emphasis added]

310. Of course, it would be inconceivable that two years after having abandoned their investment, Claimants are barely trying to determine the "final dimensions of the proposed project" and whether it is "within the legal and regulatory framework". It is clear, from this document, that it is an unanticipated damage that cannot be included *a posteriori* in a damages claim.

311. Respondent has been able to confirm its initial hypothesis that Tele Fácil never had plans to pursue this line of business before submitting this claim based on its request for documents:

> Request 4
>
> Internal documents and Internal Records of Communications discussing and/or explaining:
>
> a) plans to offer the so-called Competitive Tandem Services in Mexico;

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354 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 125-156.

355 Second Statement of Mr. Sóstenes Díaz, ¶ 69-75.

356 Statement of Defense, ¶ 363. First Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 78.

357 Exhibit R-059.

b) how Competitive Tandem Services would be implemented;

c) the economic viability of Competitive Tandem Services (including financial projections, market analyses, potential demand/clients, business plans);

d) the legality of Competitive Tandem Services;

e) contacts and agreements with potential clients of Competitive Tandem Services.

This request concerns documents prepared between 2013 and 2016 [...][358]

312. Claimants replied that the only documents that matched the application were four documents (Claimant4406[359], Claimant4407[360], Claimant4414[361], and Claimant4415[362]) that were not disclosed because, to their saying:

> The document includes information requested by legal counsel in order to permit counsel to do a preliminary case assessment in anticipation of litigation. Its disclosure would reveal the mental impression of the attorney regarding specific aspects of the case. The document was not relied upon for the damages analysis performed by Dr. Dippon. Therefore, the document is protected as Attorney Work Product.[363]

313. Although the contents of these four documents are not known, it points out that all of them apparently were prepared in the second half of 2015 "*in anticipation of litigation*", which reinforces the idea that this line of business was conceived only to increase the amount of damages in this case. It should also be noted that Claimants did not attempt to deny in their Reply the allegations of the Respondent in this regard.

314. Respondent contends that the objective in this type of dispute is to compensate an investor for damages *suffered as* a result of a violation of the Treaty, not to compensate for any damage imaginable *post hoc*. Investors who resort to dispute resolution mechanisms against a State have an obligation to act in good faith and, therefore, cannot allow claims of contrived damages, as that would imply bad faith that cannot be tolerated.

315. Regardless of the foregoing, Respondent's experts have warned in their rejoinder report that Dr. Mariscal still does not offer an explanation of how the number assignment mechanism would operate and, therefore, doubts persist about the technical feasibility and/or legality of the

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358 Procedural Order No. 8, p. 13.

359 According to the " *Privilege log* " that was presented as Exhibit R-062, the document consists of a PDF file identified as "*Lost Profit Projections v2 2-XI-2015-2.pdf* ", dated November 4, 2015.

360 According to the " *Privilege log* " that was presented as Exhibit R-062, the document consists of a PDF file identified as "*Lost Profit Projections v2 2-XI-2015-2.pdf* ", dated November 4, 2015. It is not clear to the Respondent if it is the same document identified as Claimant4406.

361 According to the " *Privilege log* " that was presented as Exhibit R-062, the document consists of a PDF file identified as "*Executive Summary 21JULY2015 (00000002).pdf*", dated July 21, 2015.

362 According to the " *Privilege log* " that was presented as Exhibit R-062, the document consists of a PDF file identified as "*Executive Summary 21JULY2015 (00000002).pdf*", dated July 21, 2015. It is not clear to the Respondent if it is the same document identified as Claimant4414.

363 *See* the " *Privilege Log* " provided by Claimants in response to the Respondent's Second Request for Documents, Exhibit R-085.

proposed business. AM concludes that the business model proposed in the report of Dr. Mariscal would not be viable for Tele Fácil, nor for the operators that would have given it the numbers. This is because:

- under a number assignment scheme, one of the fundamental assumptions originally raised in the report of Dr. Mariscal, is that other operators would give only the numbers of net call receivers (NCRs).

  As explained in the second report of Analysys Mason and in the second witness statement of Mr. Sóstenes Díaz, the number assignment is made by blocks of at least one thousand numbers and it is not possible to select from a given block the net call receivers or NCRs.

- Also, under the scheme proposed in the report of Dr. Mariscal, it would involve the migration or transfer of users to the Tele Fácil network and, thus, the operator that gives up the client would lose the revenue for the retail services;

- under the proposed scheme Tele Fácil should provide retail services to the transferred clients.

316. The report of Dr. Buccirossi (Lear), on the other hand, identifies several other defects in the estimation of Dr. Mariscal and the application of the model.[364] Besides identifying the use of certain unfounded parameters, Dr. Buccirossi indicates (*inter alia*) that Dr. Mariscal ignores that Telmex could have negotiated a higher rate with the rest of the operators to prevent the numbers from being ported or assigned to Tele Fácil and that, by itself, would imply that the project was unfeasible.[365]

317. In addition to doubts about the legality and technical feasibility of this service, the Respondent's experts reiterate that many of the assumptions used by Dr. Mariscal lack grounds and, therefore, cannot be accepted, for example:

- There is no support for the proportion of NCRs in the market. Dr. Mariscal uses two scenarios of 30% and 50% respectively, but neither of them has any support. As indicated in the AM report, 5% and 10% (or any other pair of scenarios) could be assumed with the same logic used by Dr. Mariscal[366];

- Dr. Marshal assumed that 100% of the outgoing traffic (*"outbound")* traffic is "off-net", i.e., targets a different network source. This ignores that a significant portion of the calls are made to users located in the same network and, therefore, do not pay interconnection.[367]

318. By virtue of the foregoing, it is estimated that the damages corresponding to this line of business are completely subjective and should be rejected.

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364 Expert Report of Dr. Buccirossi-Lear, section 3, ¶¶ 21-98.

365 Expert Report of Dr. Buccirossi-Lear, ¶¶ 73-80.

366 Second Expert Report of Mr. Obradors-Analysys Mason, ¶ 148-150.

367 *Id.*, ¶¶ 151-153.

2. "International Call Termination"

319. Respondent reiterates what is stated in paragraphs 408 to 414 of the Response Document and refers the Tribunal to section 2 of the second expert report of Mr. Obradors (AM)[368] for a complete response to Claimants' criticisms of the arguments related to this line of business.

320. Respondent and its expert maintain that this line of business was not impeded by any of the measures allegedly violating the Treaty and, therefore, there is no causal link necessary to award damages to Claimants for the alleged frustration of this business.[369]

321. As noted in previous paragraphs, Claimants seem to recognize that the USD$ 0.00975 rate does not apply to traffic delivered to Telmex by international calls, since Telmex is subject to the zero rate as an AEP. Claimants now argue that Mexico ignores that the claim is also due to the impossibility of indirectly interconnecting with Telmex.

322. Respondent notes that both Resolution 381 and Decree 77 confirm that Tele Fácil can indirectly interconnect with Telmex and, as noted above, that it was the Claimants who refused to conduct the tests to establish the interconnection.

323. Even ignoring the absence of a causal link, the Respondent's expert maintains that the estimate of damages related to this line of business presents, *inter alia*, the following problems:

- Tele Fácil would have had a significant disadvantage compared to other operators because it would have had to pay traffic to Nextel to deliver traffic to Telmex;[370]
- Due to the fact that double transit is not allowed in Mexico, Tele Fácil could only have delivered traffic to Telmex and Nextel. Other operators would not have faced this restriction;[371]
- Even assuming that double transit is allowed in Mexico, Tele Fácil would have had to pay for that second transit, which would have put it at an even more pronounced disadvantage compared to other operators;
- The estimation of the traffic volumes of Dr. Dippon is exaggerated by virtue of the fact that the rates that Tele Fácil would charge to Future Telecom are not competitive.[372]

324. Finally, Analysys Mason, although it admits having made a calculation error, concludes that this did not influence the results because it was not used in the recalculation of the damages.

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368 *Id.*, ¶¶ 83-124.

369 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 49, 86.

370 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 61 and 89.

371 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 61 and 88.

372 Second Expert Report of Mr. Obradors-Analysys Mason, ¶¶ 61, 91, 102-124.

Likewise, it reiterates that by making the necessary adjustments, the amount of damages would be reduced to USD$ 4.6 million.[373]

325. This alternative valuation is presented without prejudice to the central argument that the claim related to this line of business should be dismissed because of the absence of a causal link with the measures at the core of this claim and the fact that Claimants did not mitigate these damages.

3. Retail Services

326. Respondent reiterates what is stated in paragraphs 423 to 425 of the Statement of Defense and refers the Tribunal to section 5 of the second expert report of Mr. Obradors (AM)[374] for a complete response to Claimants' criticisms of the arguments related to this line of business.

327. This service was also not prevented by the measures allegedly violating the Treaty and, therefore, there would be no causal link necessary to compensate for the alleged loss of this line of business. On the other hand, the damages attributable to this line of business are marginal compared to the rest. Its relative importance is minimal and that is why the analysis did not go very deep.

4. "DID / Conferencing" services

328. Respondent reiterates what is stated in paragraphs 399 to 407 of the Statement of Defense and refers the Tribunal to section 4 of the second expert report of Mr. Obradors for a complete response to Claimants' criticisms of the arguments related to this line of business, and section 4 of the expert's report of Dr. Buccirossi.[375].

329. The Respondent's expert insists that the estimate of damages made by Dr. Dippon on this line of business is incorrect mainly because:

- Future demand in the Mexican market cannot be extrapolated directly from past experience in the North American market.
- Dr. Dippon's analysis ignores the differences between these two markets and, importantly, the fact that there are new technologies that allow essentially providing the same service at a lower cost.
- Dr. Dippon does not consider the effects of the application of the principle of non-discriminatory treatment that would have prevented Tele Fácil from maintaining the Telmex Tariff until the end of 2017;

330. Analysys Mason insists that its market projection, although different from that of Dr. Dippon, is more precise, since it contemplates a larger and more comparable sample of countries

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373 *Id.*, ¶¶ 98-101, The figure corresponds to the scenario where Tele Fácil can only terminate traffic in Telmex and Nextel and, therefore, it only terminates 26.6% of the calls.

374 *Id.*, ¶¶ 158-182.

375 Expert Report of Dr. Buccirossi-Lear, ¶¶ 99-146.

and is based on the information that the Claimants themselves provided in response to Mexico's requests for documents.

F. Conclusions about damages

331. Respondent considers that there is no damage to be compensated in this case. Respondent in no way restricted the operation of Tele Fácil and, therefore, cannot speak of an expropriation. Likewise, Tele Fácil exercised the legal remedies available to challenge these decisions and the fact that the Specialized Courts have ruled against them in no way implies that they have been denied justice.

332. Regardless of this position, Respondent notes that Claimants have not discharged the burden of proving their damages. As it can be seen from the above allegations, Claimants' estimate of damages is too speculative and cannot serve as a basis for awarding damages should the Tribunal determine that the State was responsible.

333. Respondent further affirms that it has no obligation to offer an alternative estimate of the damages when Claimants have not been able to prove their damages. In any case, if the Tribunal determines that: (i) there was a binding agreement on rates between Telmex and Tele Fácil; (ii) that the IFT incorporated the rates of said agreement in the determinations of Resolution 381; (iii) that Decree 77 and Resolution 127 reversed Resolution 381, and (iv) that the decisions of the Mexican Specialized Courts are aberrant to the extent of constituting a denial of justice, the Respondent contends that the damages must be calculated considering the investment made and/or the value of the concession.

334. In the first case (the investment made) would be based on the long-term financing that Claimants granted to Tele Fácil, in accordance with the company's financial statements at the valuation date (*i.e.*, end of 2014). In the second case, the best approximation is the independent valuation made at the request of Claimants that places the value of the concession between 1.5 and 2 million US dollars.

G. Interest

335. Respondent reiterates what has been said in paragraphs 426 to 430 of its Statement of Defense.

336. It is further noted that the WACC rate in this case is not used properly as a discount rate – *i.e.*, to discount future cash flows– but to compensate Claimants for the passage of time between the date on which the damages were allegedly incurred and October 1, 2018 (the date on which Claimants expect to receive an award). The correct thing would have been that Dr. Dippon and Dr. Mariscal discounted the lost flows using the WACC rate at the valuation date (*e.g.*, December 2014) and that Claimants, subsequently, requested the Tribunal pre-award interest at a reasonable commercial rate.

337. Claimants decided to ignore the above, including in the calculation of Dr. Dippon and Dr. Mariscal pre-award interest on the damages allegedly incurred in 2015-2017 at the WACC rate. This is not permissible. As the Tribunal pointed out in the *S.D. Myers* case:

> 161. SDMI's lost opportunity claim fails for a number of reasons. To be compensated for the value of the lost use of money by a payment of interest that reflects what the market considered to be the value of money at the time is appropriate. To allow SDMI

> a return based on what it might have done with the money would be to recognize claims that are speculative and too remote.

338. If the Tribunal finds that Mexico violated the treaty and decides to compensate Claimants, such compensation must include interest at a market rate that considers the value of the money over time, as determined by the court in the *S.D. Myers* case, or a reasonable commercial rate as prescribed in Article 1110 of the NAFTA.

339. The WACC is not a commercial or market rate. It is the weighted average cost of capital (debt and share capital) and as such, reflects the return that debtors and shareholders demand from the company as a reward for the risk they assume. Nothing would justify granting pre-award interest at the extraordinary rate of 13.3% for amounts denominated in US dollars.

V. Request for relief

340. For all the above, Respondent reiterates that the Arbitral Tribunal should dismiss the Claimants' claims in its entirety and order the Claimants, jointly and severally, indemnify the Respondent for arbitration costs and its legal costs, including travel expenses of the legal team, experts and witnesses.

Respectfully,

The General Director

/ signed /

Samantha Atayde Arellano

This a courtesy translation. This Rejoinder was originally written in Spanish and in case of discrepancy, the Spanish version shall prevail.