1.1 Text of Article XVII004 Tc 0.009 Tw iA6 T0 Tc 0 Tw 34.293 0 Td( )TjEMC /Span <</MCID 21 >>BDC -0.004 Tc 0.004

> 'examples of inscriptions found in the additional commitments column', and an examination of such examples in Attachment I to that note shows that only one of a total of fifty-two inscriptions contains a condition similar to the one in Mexico's' schedule."[3]

4. In examining the meaning of "anti-competitive practices", the Panel in *Mexico – Telecoms* stated that, on its own, the term is "broad in scope, suggesting actions that lessen rivalry or competition in the market."[5] Referring to the three examples ((a)-(c)) of such practices set out in Section 1.2 of the model Reference Paper, the Panel stated:

> "All three examples show that 'anti-competitive practices' may also include action by a major supplier *without collusion or agreement* with other suppliers. Cross-subsidization, misuse of competitor information, and withholding of relevant technical and commercial information are all practices which a major supplier can, and might normally, undertake on its own."[6]

5. The Panel in *Mexico – Telecoms* also supported its reasoning in paragraph

> government, that a WTO Member should no longer allow an operator to 'continue'. Accordingly, to fulfil its commitments with respect to 'competitive safeguards' in Section 1 of the Reference Paper, a Member would be obliged to revise or terminate the measures leading to the cross-subsidization. This example clearly suggests that not all acts required by a Member's law are excluded from the scope of anti-competitive practices."[9]

8. The Panel in *Mexico – Telecoms* pointed out further that obligations in the Reference Paper could and did refer to practices that were not dependent on their consistency with a Member's national law. The Panel stated:

> "Section 2.1 illustrates that Members did not hesitate to undertake obligations, with respect to a major supplier, that defined an objective outcome – 'cost-oriented' interconnection. There is no reason to suppose, and no language to suggest, that the desired outcome in Section 1 – preventing major suppliers from engaging in anti-competitive practices – should depend entirely on whether a Member's own laws made such practices legal."[10]

9. The Panel in *Mexico – Telecoms* observed further that, although legal doctrines applicable under national law might protect a firm in compliance with a specific legislative requirement from the application of national competition law, these doctrines did not provide cover from international obligations. The Panel stated that:

> "[P]ursuant to doctrines applicable under the competition laws of some Members, a firm complying with a specific legislative requirement of such a Member (e.g. a trade law authorizing private market-sharing agreements) may be immunized from being found in violation of the general domestic competition law. The reason for these doctrines is that, in most jurisdictions, domestic legislatures have the legislative power to limit the scope of competition legislation. International commitments made under the GATS 'for the purpose of preventing suppliers … from engaging in or continuing anti-competitive practices' are, however, designed to limit the regulatory powers of WTO Members. Reference Paper commitments undertaken by a Member are international obligations owed to all other Members of the WTO in all areas of the re

11. The Panel in *Mexico – Telecoms*, in examining the specific practices of the major supplier, stated that:

> "[T]he removal of price competition by the Mexican authorities, combined with the setting of the uniform price by the major supplier, has effects tantamount to those of a price-fixing cartel. We have previously found that horizontal practices such as price-fixing among competitors are 'anti-competitive practices' under Section 1 of Mexico's Reference Paper."[13]

12. The Panel in *Mexico – Telecoms*, in further examining the specific practices of the major supplier, found that "the allocation of market share between Mexican suppliers imposed by the Mexican authorities, combined with the authorization of Mexican operators to negotiate financial compensation between them instead of physically transferring surplus traffic, has effects tantamount to those of a market sharing arrangement between suppliers."[14]

13. The Panel in *Mexico – Telecoms* described the meaning of "appropriate measures" in the following terms:

> "We recognize that measures that are 'appropriate' in the sense of Section 1 of Mexico's Reference Paper would not need to forestall in every case the occurrence of anti-competitive practices of major suppliers. However, at a minimum, if a measure *legally requires* certain behaviour, then it cannot logically be 'appropriate' in *preventing* that same behaviour."[15]

14. The Panel in *Mexico – Telecoms*, in examining whether certain commitments triggered the interconnection obligation, found that:

> telecommunications suppliers to be linked. This provision therefore could not be read to exclude suppliers outside of Mexico from "linking" to public telecommunications transport networks and services in Mexico."[17]

16. The Panel in *Mexico – Telecoms* supported the above observation by noting that from legislative, commercial, contractual or technical points of view, there was no fundamental difference between national and international interconnection:

> "In sum the ordinary meaning, in the heading of Section 2 of Mexico's Reference Paper, of the term 'interconnection' – that it does not distinguish between domestic and international interconnection, including through accounting rate regimes – is confirmed by an examination of any 'special meaning' that the term 'interconnection' may have in telecommunications legislation, or by taking into account potential commercial, contractual or technical differences inherent in international interconnection. We find that any 'special meaning' of the term 'interconnection' in Section 2 of Mexico's Reference Paper does not justify a restricted interpretation of interconnection, or of the term 'linking', which would exclude international interconnection, including accounting rate regimes, from the scope of Section 2 of the Reference Paper."[18]

17. Further, the Panel in *Mexico – Telecoms* considered that the object and purpose of the GATS supported the inclusion of international interconnection within the disciplines of the Reference Paper:

> "Trade in services is defined in Article I:2 to include the cross-border supply of a service 'from the territory of one Member into the territory of any other Member'. This mode of supply, together with supply through commercial presence, is particularly significant for trade in international telecommunications services. There is no reason to suppose that provisions that ensure interconnection on reasonable terms and conditions for telecommunications services supplied through the commercial presence should not benefit the cross-border supply of the same service, in the absence of clear and specific language to that effect."[19]

18. The Panel in *Mexico – Telecoms* found also that the existence of an explicitly non-binding understanding on accounting rates contained in the Report of the negotiating group report did not support the notion that international interconnection was excluded from the scope of the interconnection obligations in the Reference Paper. The Panel stated:

> "In sum, the Understanding seeks to exempt a very limited category of measures, temporarily, and on a non-binding basis, from the scope of WTO dispute settlement. Simply because Members wished to shield a *certain type* of cross-border interconnection from dispute settlement, because of *possible* MFN inconsistencies (with respect to differential rates), it does not follow that they wished to shield *all* forms of cross-border interconnection from dispute settlement. The clear intention to do so is not expressed in the Understanding. This suggests that the content and purpose of the Understanding is of limited assistance in interpreting the scope of application of the term 'interconnection' in Section 2.1 of Mexico's Reference Paper."[20]

19. In examining whether Telmex was a "major supplier", the Panel in *Mexico – Telecoms* analysed first whether there was a "relevant market":

> "The fact that arrangements for interconnection and termination may take the form of 'joint service' agreements, and may not be price-oriented, does not change the fact that the market exists. Nor is it pertinent to the determination of the 'relevant market', as Mexico suggests, that most WTO Members have not undertaken market

[17] Panel Report, *Mexico – Telecoms*, para. 7.105.
[18] Panel Report, *Mexico – Telecoms*, para. 7.117.
[19] Panel Report, *Mexico – Telecoms*, para. 7.121.
[20] Panel Report, *Mexico – Telecoms*, para. 7.138.

> access commitments specifically in 'termination services'; facilities for the termination and interconnection are *essential* to the supply of the services at issue in this case.
>
> Is this market for termination the 'relevant' market? For the purposes of this case, we accept the evidence put forward by the United States, and uncontested by Mexico, that the notion of demand substitution – simply put, whether a consumer would consider two products as 'substitutable' – is central to the process of market definition as it is used by competition authorities. Applying that principle, we find no evidence that a domestic telecommunications service is substitutable for an international one, and that an outgoing call is considered substitutable for an incoming one. One is not a practical alternative to the other. Even if the price difference between domestic and international interconnection would change, such a price change would not make these different services substitutable in the eyes of a consumer. We accept, therefore, that the 'relevant market for telecommunications services' for the services at issue – voice, switched data and fax – is the termination of these services in Mexico."[21]

20. In examining further whether Telmex could affect the market to the extent required to be a major supplier, the Panel in *Mexico – Telecoms* found:

> "[S]ince Telmex is *legally* required to negotiate settlement rates for the entire market for termination of the services at issue from the United States, we find that it has patently met the definitional requirement in Mexico's Reference Paper that it have 'the ability to materially affect the terms of participation', particularly 'having regard to price'."[22]

21. The Panel in *Mexico – Telecoms* found that "[t]he ability to impose uniform settlement rates on its competitors is the "use" by Telmex of its special "position in the market", which is granted to it under the ILD Rules."[23]

members of the ITU, the special definition adds precision to the ordinary meaning by classifying allowable cost *elements*, and establishing the causality between the cost elements and the services provided. While leaving a margin of discretion to national authorities to choose the precise cost method by which to arrive at 'cost-oriented' rates, the ITU recommendations indicate that the term 'cost-oriented rates' can be understood as rates related to the cost *incurred in providing the service*."[25]

24. The Panel in *Mexico – Telecoms*

27. In evaluating whether in fact the rates were "cost-oriented", the Panel in *Mexico – Telecoms* found:

> "We think it is justified to presume that the aggregate price charged by Telmex for the use of network components, when used for purely domestic traffic, is an indication of the cost-elel PT (el)-2 o2-8 t th5[(T)6.7 (el)- (e)1453 0 570.004 Tc10218M13.4 ()5 (j)1.4 (5 (t)11.3 (e pr)