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MEXICO – MEASURES AFFECTING TELECOMMUNICATIONS SERVICES

Report of the Panel

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I. INTRODUCTION

1.1 On 17 August 2000, the United States requested consultations with Mexico pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and Article XXIII of the General Agreement on Trade in Services (the "GATS").[1] This request concerned Mexico's GATS commitments and obligations on basic and value-added telecommunications services.

1.2 The consultations took place on 10 October 2000, but the parties failed to reach a mutually satisfactory resolution. On 10 November 2000, the United States requested the Dispute Settlement Body (the "DSB") to establish a panel, in accordance with Articles 4 and 6 of the DSU, in order to examine Mexico's measures with respect to trade in basic and value-added telecommunications services.[2] On the same date, the United States requested additional consultations with Mexico, pursuant to Article 4 of the DSU and Article XXIII of the GATS, regarding Mexico's measures affecting trade in telecommunications services.[3] The additional consultations took place on 16 January 2001, but the parties failed again to reach a mutually satisfactory resolution. On 13 February 2002, the United States again requested the DSB to establish a panel, in accordance with Articles 4 and 6 of the DSU in order to examine Mexico's measures affecting telecommunications services.[4]

1.3 At its meeting on 17 April 2002, the DSB established a Panel in accordance with Article 6 of the DSU.[5] At that meeting, the parties agreed that the Panel should have standard terms of reference as follows:

"To examine, in the light of the relevant provisions of the covered agreement the552 Tj -43bytates again rec

1.5 On 26 August 2002, the Director-General composed the Panel as follows:[7]

Chairman: Mr Ernst-Ulrich Petersmann

Members: Mr Raymond Tam
Mr Björn Wellenius

1.6 Australia, Brazil, Canada, Cuba, the European Communities, Guatemala, Honduras, India, Japan and Nicaragua reserved their rights to participate in the Panel proceedings as third parties.

1.7 The Panel met with the parties on 17 a

telecommunications; exercise the authority of the State on these matters to ensure national sovereignty; to promote a healthy competition among the different telecommunications service providers in order to offer better services, diversity and quality for the benefit of the users and to promote an adequate social coverage".[13]

2.4 The FTL establishes a Secretariat of Communications and Transportation ("*Secretaría de Comunicaciones y Transportes*" or "Secretariat"), which is authorized, *inter alia*, to grant concessions required for "installing, operating or exploiting public telecommunications networks".[14] A concession may only be granted to a Mexican individual or company, and any foreign investment therein may not exceed 49 per cent[15], except for cellular telephone services.[16]

2.5 Special rules apply to "*comercializadoras*" ("commercial agencies").[17] A commercial agency is any entity which, "without being the owner or possessor of any transmission media, provides telecommunication services to third parties using the capacity of a public telecommunications network concessionaire."[18] A concessionaire of a public telecommunications network may not, without permission of the Secretariat, have "any direct or indirect interest in the capital" of a commercial agency.[19] The establishment and operation of commercial agencies is "subject, without exception, to the respective regulatory provisions".[20] The Secretariat has issued regulations for commercial agencies to provide pay public telephone public telephony services (pay phones).[21]

2.6 The "interconnection" of public telecommunications networks with foreign networks is carried out through agreements entered into by the interested parties.[22] Should these require agreement with a foreign government, the concessionaire must request the Secretariat to enter into the appropriate agreement.[23]

2.7 Several fundamental technical terms are defined in the FTL. These are:

2.8 *Telecommunications*: "every broadcast, transmission or reception of signs, signals, written data, images, voice, sound or data of whatever nature carried out through wires, radio-electricity, optic or physical means or any other electromagnetic systems";

2.9 *Telecommunications network*: "systems integrated by means of transmission such as channels or circuits using frequency bands of the radio-electrical spectrum, satellite links, wiring, electric transmission networks or any other transmission means, as well as when applicable, exchanges, switching devices or any other equipment required";

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2.10 *Private telecommunications network*: "the telecommunications network used to meet specific requirements for telecommunications services of certain people not implying commercial exploitation of services or capacity of said network";

2.11 *Public telecommunications network*: "the telecommunications network through which telecommunications services are commercially exploited. The network does not include users' terminal telecommunications equipment nor telecommunications networks located beyond the terminal connection point".[24]

2. International Long-distance Rules

2.12 The International Long Distance Rules ("ILD Rules") are issued by the Federal Telecommunications Commission ("*Comisión Federal de Telecomunicaciones*" or "Commission"), an agency of the Secretariat of Communications and Transportation.[25] They serve "to regulate the provision of international long-distance service and establish the terms to be included in agreements for the interconnection of public telecommunications networks with foreign networks."[26] International long-distance service is defined as the service whereby all international switched traffic is carried through long-distance exchanges authorized as international gateways.[27]

2.13 Direct interconnection with foreign public telecommunications networks in order to carry international traffic may only be done by "international gateway operators".[28] These are long-distance service licensees authorized by the Commission "to operate a switching exchange as an international gateway"[29], that is, the exchange is "interconnected to international incoming and outgoing circuits authorised by the Commission to carry international traffic".[30] Traffic is "switched" when it is "carried by means of a temporary connection between two or more circuits between two or more users, allowing the users the full and exclusive use of the connection until it is released."[31]

2.14 Each international gateway operator must apply the same "uniform settlement rate" to every long-distance call to or from a given country, regardless of which operator originates or terminates the call.[32] The uniform settlement rate for each country is established, through negotiations with the operators of that country, by the long-distance service licensee having the greatest percentage of outgoing long-distance market share for that country in the previous six months.[33]

2.15 Each international gateway operator must also apply the principle of "proportionate return". Under this principle, *incoming* calls (or associated revenues) from a foreign country must be distributed among international gateway operators in proportion to each international gateway operator's market share in *outgoing* calls to that country.[34]

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[24] *See* FTL, Article 3.

[25] *See Rules for the Provision of International Long-Distance Service To Be Applied by the Licensees of Public Telecommunications Networks Authorized to Provide this Service (ILD Rules)* (Reglas para Prestar el Servicio de Larga Distancia Internacional que deberán aplicar los Concesionarios de Redes Públicas de Telecomunicaciones Autorizados para Prestar este Servicio). Issued by the Commission; published in the Federal Gazette on 11 December 1996; entered into force on 12 December 1996.

[26] *See* ILD Rule 1.

[27] *See* ILD Rule 2:XI.

[28] *See* ILD Rules 3 and 6.

[29] *See* ILD Rule 2:VII.

[30] *See* ILD Rule 2:VIII.

[31] *See* ILD Rule 2:XV

[32] *See* ILD Rules 2:XII(a) and (b); and 10.

[33] *See* ILD Rule 13.

[34] *See* ILD Rules 2:XII, 10, 13, 16, 17 and 19.

2.16 Private cross-border networks must lease capacity from a long-distance licensee (concessionaire).[35] Any cross-border traffic carried through dedicated infrastructure that forms part of a private network must be originated and terminated within the same private network.[36]

C. THE COMPETITION LAWS OF MEXICO

1. Federal Law of Economic Competition[37]

2.17 The Federal Law of Economic Competition ("*Ley Federal de Competencia Económica*" or "FLEC") is intended "to protect the process of competition and free market participation, through the prevention and elimination of monopolies, monopolistic practices and other restrictions that deter the efficient operation of the market for goods and services."[38]

2.18 Under the law, the "relevant market" is determined by considering, *inter alia*, "the possibilities of substituting the goods or services in question, with others of domestic or foreign origin, bearing technological possibilities, and the extent to which substitutes are available to consumers and the time required for such substitution".[39] Whether an economic agent has "substantial power" in the relevant market is determined, *inter alia*, on "the share of such agent in the relevant market and the possibility to fix prices unilaterally or to restrict supply in the relevant market, without competitive agents being able, presently or potentially, to offset such power".[40]

2. Code of Regulations (to Federal Law on Economic Competition)[41]

2.19 The Code of Regulations to the FLEC sets out in detail the rules, *inter alia*, for the analysis of the relevant market and substantial power.

2.20 For the relevant market analysis, the Code states that the Commission shall "identify the goods or services which make up the relevant market, whether produced, marketed or supplied by the economic agents, and those that are or may be substituted for them, whether domestic or foreign, as well as the time required for such substitution to take place." The Commission is also to take into account "economic and normative restrictions of a local, federal or international nature which prevent access to the said substitute goods or services, or which prevent the access of users or consumers to alternative sources of supply, or the access of the suppliers to alternative customers".[42]

2.21 With respect to substantial power, the Code requires the authorities to take into account the "degree of positioning of the goods or services in the relevant market"; the "lack of access to imports or the existence of high importation costs"; and the "existence of high cost differentials which could face consumers on turning to other suppliers."[43]

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[35] *See* ILD Rule 4.

[36] *See* ILD Rule 4.

[37] *See* FLEC. Approved by the Congress on 18 December 1992, promulgated by the President on 22 December 1992, published on 24 December 1992, entered into force 180 days after publication.

[38] *See* FLEC, Article 2.

[39] *See* FLEC, Article 12.

[40] *See* FLEC, Article 13.

[41] *See Code of Regulations to the Federal Law on Economic Competition* ("*Reglamento de la Ley Federal de Competencia Económica*"), published in the Official Gazette on 4 March 1998, entered into force on 5 March 1998 (with the exception of Article 6 which entered into force 6 months from 5 March 1998).

[42] *See Code of Regulations to the Federal Law on Economic Competition*, Article 9.

[43] *See Code of Regulations to the Federal Law on Economic Competition*, Article 12.

D. MEXICO'S COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

2.22 Mexico has undertaken specific commitments for telecommunications services under Articles XVI (Market Access), XVII (National Treatment), and Article XVIII (Additional Commitments). Its additional commitments consist of undertakings known as the "reference paper". These commitments are reproduced in Annex B.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The United States requests the Panel to find that:[44]

(a) Mexico's failure to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis on cost-oriented, reasonable rates, terms and conditions is inconsistent with its obligations under Sections 2.1 and 2.2 of the Reference Paper, as inscribed in Mexico's GATS Schedule of Commitments, GATS/SC/56/Suppl.2; in particular, that:

(i) Mexico's Reference Paper obligations apply to the terms and conditions of interconnection between Telmex and United States suppliers of basic telecommunications services on a cross-border basis;

(ii) Telmex is a "major supplier" of basic telecommunications services in Mexico, as that term is used in Mexico's Reference Paper obligations;

(iii) Mexico has failed to ensure that Telmex provides interconnection to United States suppliers at rates that are "*basadas en costos*" and terms and conditions that are *razonables* because:

- Mexico has allowed Telmex to charge an interconnection rate that substantially exceeds cost,

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(c) Mexico's failure to ensure United States basic telecom suppliers reasonable and non-discriminatory access to, and use of, public telecom networks and services is inconsistent with its obligations under Sections 5(a) and (b) of the GATS Annex on Telecommunications; and in particular, Mexico failed to ensure that United States service suppliers may access and use public telecommunications networks and services through:

(i) interconnection at reasonable terms and conditions for the supply of scheduled services by facilities-based operators and commercial agencies; and

(ii) private leased circuits for the supply of scheduled services by facilities-based operators and commercial agencies.

3.2 The United States also requests that the Panel recommend that Mexico bring its measures into conformity with its obligations under the GATS.

3.3 Mexico requests that the Panel reject all of the claims of the United States, and find that:

(a) The measures being challenged by the United States are not inconsistent with Sections 2.1 and 2.2 of the Reference Paper, inscribed in Mexico's GATS Schedule of Specific Commitments;

(b) Mexico has not acted inconsistently with its obligations under Section 1.1 of the Reference Paper, inscribed in Mexico's GATS Schedule of Specific Commitments; and

(c) The measures being challenged by the United States are not inconsistent with Section 5 of the GATS Annex on Telecommunications.[45]

IV. MAIN ARGUMENTS OF THE PARTIES

A. SECTION 2 OF THE REFERENCE PAPER

4.1 The **United States** claims that Mexico's ILD Rules fail to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis with cost-oriented, reasonable rates, terms and conditions and that this is inconsistent with its obligations under Sections 2.1 and 2.2 of the Reference Paper, as inscribed in Mexico's GATS Schedule of Commitments.[46] The United States argues that the interconnection obligations in Section 2 of the Reference Paper apply: (i) as legally binding GATS commitments; (ii) because of the specific commitments Mexico has undertaken in its GATS Schedule; and (iii) to the circumstances at issue in this case, namely the interconnection between United States service suppliers and Telmex for the purpose of delivering their basic telecom services from the United States into Mexico.[47]

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In the alternative, Mexico argues, if Section 2 of the Reference Paper is found to apply to the accounting rate regime as implemented between the United States and Mexico, the United States has nevertheless failed to establish a prima facie case that the accounting rates negotiated between United States and Mexican carriers are not "*basadas en costos*" ("cost-oriented") and "*razonables*" ("reasonable") pursuant to Section 2.2(b) of Mexico's Reference Paper.[49] Moreover, Mexico argues, the United States has failed to establish that the ILD Rules are inconsistent with Section 2.2 of the Reference Paper.[50]

1. Scope of application of the Reference Paper

4.3 The **United States** argues that Mexico undertook the interconnection obligations of Section 2 of the Reference Paper as additional binding commitments under Article XVIII7bse thh(TS.n) Tj 0 Tc 0.187

[19] (XVIII7bse th(TSr, Mexico Schedul

4.6 The **United States** contends that there is nothing in the Reference Paper to suggest that its only goal was to promote domestic competition. In its view, there is no textual basis for concluding that the Reference Paper is limited to one mode of supply of the service, i.e. that which is solely within its territory. Instead, the United States notes, Article I of the GATS states that the Agreement covers all measures affecting trade in services, including the cross-border supply of services. While the United States asserts that it is undoubtedly true that the Reference Paper "governs matters relating to domestic regulation", it further submits that this does not mean that foreign service suppliers are "outside the scope of application of" the Reference Paper, or that the Reference Paper governs only matters relating to domestic regulation.[60]

4.7 **Mexico** argues that the mere fact that Article I of the GATS ascribes a broad application of the general obligations of the GATS to all measures by Members affecting trade in services does not mean that Mexico's Reference Paper has a similarly broad application. Mexico submits that it is an "additional commitment" that it inscribed in its Schedule pursuant to Article XVIII of the GATS and, as such, its terms must be interpreted in accordance with the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention on the Law of the Treaties of 1969* ("*Vienna Convention*").[61] According to Mexico, the Model Reference Paper, upon which Mexico's Reference Paper is based, develops further the principles and obligations found in Article VI of the GATS on domestic regulation and Article VIII of the GATS on monopolies and exclusive service suppliers, both of which focus on activities within the territory of the Member in question. Thus, Mexico concludes, these Articles deal with matters relating to domestic regulation, and not "the supply of a service from the territory of one Member into the territory of any other Member", which is the focus of the United States' claims in this dispute.[62]

4.8 The **United States** contends that Section 2 applies to this case because United States suppliers of basic switched telecom services seek to link with Telmex to connect calls by their users originating in the United States to Telmex's users in Mexico. According to the United States, Telmex and United States basic telecom suppliers are *proveedores de redes públicas de telecomunicaciones de transporte o de servicios* ("suppliers providing public telecommunications transport networks or services") ("PTTNS") because they provide basic telecommunications services, which, pursuant to the *Decision on Negotiations on Basic Telecommunications* by the WTO Trade Negotiations Committee, is synonymous with "telecommunications transport networks and services"; also, it adds, such services are "public" because the Central Product Classification (CPC) codes that Mexico used to describe its commitments refer to "public" services. The United States further argues that supply on a

end-user in Mexico.[64] This *conexión*, in turn, allows the consumers of the United States basic telecom supplier ("users of one supplier") to communicate with Telmex's consumers in Mexico ("users of another supplier"), as well as the United States service supplier ("user") to access services provided by Telmex ("another supplier"), namely the services involved in delivering a call that originated in the United States to its final destination in Mexico.[65]

4.9 **Mexico** argues that the apparently broad technical definition of "interconnection" in Section 2.1 of Mexico's Reference Paper[66] is not determinative of the scope of application of Section

competitor. Mexico adds that competitors must also have a process to resolve disputes with incumbent carriers that arise during and after the negotiation process.[74]

4.15 The **United States** considers that Mexico's argument that United States law makes a "clear distinction" between interconnection and call termination is irrelevant. It submits that in the United States, as in the European Communities, a key purpose of the regulation of interconnection is to ensure that carriers may terminate calls on other carriers' networks at cost-oriented rates. The United States submits that the FCC (Federal Communications Commission) has made clear that "[t]he interconnection obligation of Section 251(c)(2) ... allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs,

interconnection would be governed by the provisions of the Reference Paper. Mexico further submits that its ILD Rules fully implement those provisions of the Reference Paper vis-à-vis foreign carriers with a commercial presence in Mexico, among others, AT&T, WorldCom and Verizon.[83]

4.18 The **United States** contends that the plain language of the Reference Paper simply does not support Mexico's argument. According to the United States, the definition of "interconnection" in Section 2.1 is not limited to domestic interconnection, or in other words, interconnection provided to commercially present suppliers. Rather, it argues, it is written broadly to include all means of "linking" for the purpose of enabling users to communicate – whether domestic (mode 3) or international (mode 1).[84] Citing to provisions of Mexico's ILD Rules and Federal Telecommunications Law, the United States also argues that even Mexico, in almost all references in its internal laws and regulations, refers to the linking of foreign service suppliers to its international port operators as "interconnection".[85]

4.19 **Mexico** submits that the United States ignores ILD Rules 2, 10, 13, 16 and 19 which define "settlement rates" and explicitly distinguish between "settlement rates", which are applicable to

meaning of a term and that the United States has therefore failed to take into account the context of the term and object and purpose of Mexico's Reference Paper.[92]

4.22 As regards the context, **Mexico** submits that, the history of the negotiations on basic telecommunications confirms that "interconnection", "accounting rates" and "termination services" were discussed but that agreement was reached only on interconnection. Accordingly, Mexico contends, accounting rates were clearly outside the scope of what was agreed. Mexico contends that a specific draft text on accounting rates was removed from the negotiating drafts for the Model Reference Paper.[93] For example, Mexico states that the following bracketed text was included in a 6 March 1996 provisional negotiating text:

> "[Accounting rate is the rate per traffic unit agreed upon between administrations for a given relation, which is used for the establishment of international accounts, as per International Telecommunication Union Recommendation D. 150 New System for Accounting in International Telephony.]…
>
> [7. Public availability of accounting rates
>
> International accounting rates maintained by any supplier of public telecommunications transport services with foreign correspondents will be open to public review. Upon request of another Member, and [sic] essential facilities supplier will be required to justify why an international accounting rate differs significantly from domestic interconnection rates.]"

But the final version of the Reference Paper did not include any of this text. Furthermore, Mexico submits that accounting rates were consciously excluded from this text is confirmed by the fact that they are "on the table" in the Doha Round of negotiations.[94]

4.23 The **United States** responds that Mexico's citation of an earlier draft of the Reference Paper does not support its argument that accounting rates (or international interconnection rates) were intended to be excluded from the definition of "interconnection." According to the United States, Mexico's argument ignores the rules of treaty interpretation included in the *Vienna Convention*. The United States submits that whatever provisions were considered during the drafting process, the Panel is charged with interpreting the final version of the Reference Paper. Mexico's final version includes, in Section 2.1, a definition of "interconnection" that broadly covers "linking ... to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier."[95]

4.24 The **United States** also argues that the requirement in that earlier draft of the Reference Paper that "a dominant supplier explain the reasons why an international accounting rate differs significantly from domestic interconnection rates" at the request of a Member indicates that the negotiators considered accounting rates and domestic interconnection rates to be charges for two types of interconnection. According to the United States, the former is a charge for international interconnection and the latter is a charge for domestic interconnection and that the deletion of this provision merely demonstrates that Members did not undertake those specific obligations. The United States further argues that it does not affect the remaining Reference Paper obligations,

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[92] *See* Mexico's first written submission, paragraph 151. *See also* Mexico's first oral statement, paragraph 27

[93] *See* Mexico's first written submission, paragraphs 167-169. *See also* Mexico's first oral statement, paragraphs 21-22, Mexico's second written submission, paragraph 37 and Mexico's answer to question No. 7 of the Panel of 19 December 2002. For question No. 7, *see* footnote 60

The United States further argues that Mexico's claim based on the Chairman's Note (the Understanding)[104] is unsound for at least two reasons.[105] First, the Chairman's Note is at best a non-binding statement that did not find its way into the GATS, the Reference Paper or Mexico's Schedule itself.[106] In support of this, the United States cites to a report by the Group on Basic Telecommunications[107], which states that "[t]he Chairman stressed that this was merely an understanding, which could not and was not intended to have binding legal force. It therefore did not take away from Members the rights they have under the Dispute Settlement Understanding . . ."[108] Second, the United States argues that the report itself made clear that the Chairman's Note "was merely intended to give members who had not taken MFN exemptions on accounting rates some degree of reassurance." Even in that limited context, the Note has no application outside of GATS Article II - the MFN article.[109] The United States argues that this is clear from the Note's text: the reference in the Chairman's Note to "such" accounting rates is a reference back to the introductory paragraph of the Note, which speaks to "differential" accounting rates and the MFN exemptions actually taken by the five countries mentioned in the Note. However, it argues, because the United States has not brought a claim under Article II of the GATS, the Note is irrelevant to this dispute.[110] The United States further indicates that the fact that accounting rates are subject to discussions in the ITU has no relevance to whether they are covered by Mexico's WTO commitments; nor is it relevant that WTO Members are considering further commitments on accounting rates in the current services negotiations.[111]

(ii) Subsequent practice

4.28 **Mexico** submits that the rule of interpretation in paragraph 3(b) of Article 31 of the *Vienna Convention*, which provides that "[t]here should be taken into account together with the context… any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", is also relevant to this dispute. According to Mexico, all fifty-five of the WTO Members (including the United States) that inscribed the interconnection commitments in Section 2.2(b) of the Model Reference Paper maintain the traditional joint service accounting rate regime. Thus, Mexico argues, WTO Members, including the United States, did not intend Section 2

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paragraph 7). If Section 2 of the Reference Paper requiring 'cost-oriented' rates and 'reasonable' terms applies to accounting rates, why would there have been a need for the Group on Basic Telecommunications to arrive at a separate understanding on accounting rates?").

[104] The Panel takes note here that, from the context of the United States' submission, the document referred to by the United States should be the Report of the Group on Basic Telecommunications (S/GBT/4, 15 February 1997).

[105] *See* the United States' first oral statement, paragraph 25. *See also* the United States' second written submission, paragraph 49.

[106] *See* the United States' first oral statement, paragraph 26. *See also* the United States' second written submission, paragraph 50.

[107] The Panel takes note here that, from the context of the United States' submission, the document referred to by the United States should be the Report of Meeting of 15 February 1997 (S/GBT/M/9, 10 March 1997).

[108] *See* the United States' first oral statement, paragraph 26. *See also* the United States' second written submission, paragraph 50.

[109] *See* the United States' first oral statement, paragraph 27. *See also* the United States' second written submission, paragraph 51.

[110] *See* the United States' first oral statement, paragraph 27. *See also* the United States' second written submission, paragraph 51. *See also* the United States' answer to question No. 16(b) of the Panel of 19 December 2002 ("*What is the significance of the statement in the understanding that 'the accounting rate system ... by its nature involves differential rates'?*").

[111] *41. See also* the United States' answer to

meaningful accounting rate reform through the ITU, the 189-country membership of which includes the large majority of countries for which benchmark rates were established by the Benchmarks Order. The countries opening their markets and accepting the Reference Paper comprised less than 25 per cent of the nearly 250 routes for which the FCC established benchmark accounting rates. According to the United States, the Benchmarks Order was necessary to fill this gap.[115]

4.32 The **United States** also argues that Mexico is incorrect in its argument that its accounting rates are consistent with ITU recommendations on benchmark rates. The United States submits that neither ITU recommendations nor ITU benchmarks are relevant to Mexico's WTO obligations. In addition, according to the United States Recommendation ITU D.140, included by Mexico as Exhibit MEX-11, expressly states, at paragraph E.3.2, that the benchmark levels discussed therein should not be "taken as cost-orientated levels."[116]

4.33 Finally, according to **Mexico**, the United States has argued that its own ILD rules are consistent with Section 1 of the Reference Paper because it only applies the rules to foreign carriers that have market power. As shown above, however, the FCC continues to apply the rules to Mexico notwithstanding that, according to the FCC's own standards, there is "meaningful economic competition" within Mexico. Mexico has also submitted documents from the FCC establishing that it has waived its International Settlements Policy only for 15 countries, and that it deems virtually every major foreign carrier to have market power. According to Mexico, the conduct of the United States in maintaining uniform settlement rate, symmetrical rate and proportionate return requirements is evidence that the United States either does not believe that the Reference Paper applies to accounting rate arrangements or that such market control practices are consistent with Section 1.[117]

(iii) Supplementary means of interpretation

4.34 According to **Mexico,** even if the United States' interpretation could be considered a proper application of Article 31 of the *Vienna Convention*, it "leads to a result which is manifestly absurd [and] unreasonable", thus requiring recourse to the negotiating history and to the circumstances surrounding the conclusion of the treaty.[118] Mexico explains that, under Article 4.34

accounting rate regime. In terms of the international scope, it argues, only fifty-five of the one hundred and forty-four WTO Members inscribed a version of the Reference Paper in their schedules that included the "cost-oriented" requirement in paragraph 2.2(b) of the Model Reference Paper while the remaining eighty-nine WTO Members are under no such obligation. Mexico contends that, under the United States' interpretation of Section 2.2 of Mexico's Reference Paper, those fifty-five WTO Members would be required to implement termination rates on their own national carriers using the strict "cost-oriented" standard posed by the United States, while nothing would oblige carriers from the remaining eighty-nine WTO Members and from non-Members to do the same. In its view, the result would be that the net outflows of payments from countries subject to Section 2.2(b) disciplines to countries not subject to Section 2.2(b) disciplines would rise astronomically, forcing carriers of the former countries to choose between bankruptcy and refusing to pay. It further indicates that the accounting rate regime would collapse completely without a viable replacement, possibly even leading to interruptions in international traffic.[121]

4.37 Also, **Mexico** claims, the bilateral nature of accounting rate regimes could lead to a further absurdity. Mexico explains that the financial pressures caused by one of the parties in a bilateral accounting rate arrangement dropping its settlement rate to a very low level could pressure the other party to reduce its rates in order to sustain the economic viability of the arrangement. In such a situation, the other party would effectively be compelled to bring itself closer into compliance with a WTO standard or requirement that it did not inscribe in its Schedule. Thus, it argues, even if that WTO Member had been careful in its Schedule to ensure that its accounting rate regime was not disciplined, it would be indirectly subject to disciplines inscribed in the schedules of other WTO Members with whom it had accounting rate arrangements in place. In Mexico's view, this circumstance would undermine the overall balance of concessions that formed the basis for the agreement.[122]

4.38 The **United States** submits that neither Mexico nor any other Member violates the Reference Paper by continuing to use "accounting rates", or violates the ITU's International Telecommunications Regulation by subjecting "accounting rates" to the obligations in the Reference Paper. According to the United States, Members that have scheduled the Reference Paper may continue to allow their carriers to charge "accounting rates" to terminate traffic. Those Members must simply ensure that those "accounting rates", when used by major suppliers, are consistent with the requirements of Section 2.2(b).[123]

4.39 The **United States** further submits that Mexico need not worry that Telmex will be faced with "net outflows of payments." In fact, it argues, ISR or other types of interconnection arrangements fes P l g

cover costs, including a reasonable rate of return.[126] Moreover, the United States notes, approximately 80 per cent of Mexico's international traffic is exchanged with the United States. Thus, it submits, if Telmex were to charge cost-based interconnection rates to terminate this traffic, given the large imbalance in traffic flows between the United States and Mexico, the result will not even approach a situation in which Telmex makes "net outflows of payments".[127]

cc) Circumstances of the conclusion of the treaty: Mexican legislation at the time of negotiations

4.40 As to the circumstances of the conclusion of the treaty, **Mexico** turns to Mexican legislation and regulation in effect at the time of the basic telecommunications negotiations. This includes the ILD Rules. Those rules recognize that the term "interconnection" can be used to describe the technical aspects of interconnection in all contexts. However, they also explicitly distinguish between "settlement rates" for international incoming calls and "interconnection charges" for interconnection within Mexico's borders. Accordingly, Mexico submits that, under these laws, at the time of the conclusion of the negotiations, interconnection disciplines such as those in Section 2.2 of Mexico's Reference Paper applied only to domestic interconnection and points out that this is still the case today.[128] As support, Mexico cites to the Appellate Body Report in *EC – Computer Equipment*[129], where the Appellate Body found that, *inter alia*, a Member's legislation on customs classification at the time of conclusion of the negotiations was part of the circumstances of the conclusion of the treaty.[130]

4.41 The **United States** argues that, while it is true that in *EC – Computer Equipment*, the Appellate Body found that a Member's legislation at the time of negotiations can be used as a *supplementary* means of interpretation, Mexico considers that its ILD rules should *override* the definition of "interconnection" used in Section 2.1.[131] The United States submits that Mexico ignores the Appellate Body's cautionary note that "[t]he purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties." The Unites States submits that, according to the Appellate Body, if the prior practice of a party is not consistent, it is not relevant at all as a supplementary means of interpretation. The Unites States further submits that, while Mexico focuses on one particular provision of Mexican law which it contends distinguishes between "interconnection" and "settlement rates", it has demonstrated that elsewhere in Mexican law, the linking of foreign service suppliers to Mexican international port operators is referred to as "interconnection", and that throughout its laws and regulations, Mexico uses the term "interconnection agreement" to describe agreements with foreign operators.[132]

(c) Whether the Reference Paper obligations extend to accounting rate regimes

4.42 The **United States** claims that the interconnection obligations in Section 2 of the Reference Paper apply to the interconnection between United States service suppliers and Telmex for the purpose of delivering their basic telecom services from the United States into Mexico.[133] Because

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[126] *See* the United States' second oral statement, paragraph 35.
[127] *See* the United States' second oral statement, paragraph 36.
[128] *See* Mexico's second written submission, paragraph 38. *See also* Mexico's answer to question No. 7 of the Panel of 19 December 2002. For question No. 7, *see* footnote 60 of this Report.
[129] Mexico refers to paragraphs 92-94 of the Appellate Body Report, *EC – Computer Equipment*.
[130] *See* Mexico's second written submission, paragraph 38. *See also* Mexico's answer to question No. 7 of the Panel of 19 December 2002. For question No. 7, *see* footnote 60 of this Report.
[131] *See* the United States' second oral statement, paragraph 44.
[132] *See* the United States' second oral statement, paragraph 45.
[133] *See* the United States' first written submission, paragraph 44.

accounting rates are interconnection rates between carriers located in two different countries, the Reference Paper obligations apply to accounting rate regimes as well.[134]

4.43 **Mexico**, on the contrary, argues that the substantive provisions in Section 2.2 of Mexico's Reference Paper can be given full meaning only in the domestic context and therefore cannot be given full meaning in the context of arrangements under the accounting rate regime.[135]

(i) Concept of

interconnection, and that accounting rates are one, and only one, of the alternative charging mechanisms that are available for use between carriers in different countries to interconnect their networks.[140]

4.47 **Mexico** acknowledges that the ITU instruments do not assist in the determination of when "*tarifas basadas en costos*" or "cost oriented rates" are reasonable and economically feasible within the meaning of Section 2.2(b) of Mexico's Reference Paper. However, Mexico argues, they could have some relevance in the interpretation of Section 2.2(b) of Mexico's Reference Paper in the context of interconnection rates within Mexico's borders. In addition, Mexico notes, International Telecommunications Regulation ("ITR") 6.2.1, which requires that accounting rates be established by mutual agreement among administrations or recognized private operating agencies is an important element of the context in which the negotiations on basic telecommunications took place. Mexico submits that ITR 6.2.1 requires that accounting rates be determined in negotiations between carriers. As a result, accounting rates that a carrier negotiates for carrying traffic to different countries typically vary widely. Mexico further submits that other recommendations of ITU working committees, such as E.110, also help to illustrate the context in which certain terms are used within the telecommunications sector, which in turn may assist the Panel in determining the "ordinary meaning" of terms in the Reference Paper.[141]

4.48 **Mexico** also notes that the ITRs are supplemented by a series of D-series Recommendations produced by ITU-T Study Group 3. Recommendation D.140 states that "accounting rates for international telephone services should be cost-orientated and should take into account relevant cost trends." At the same time, this same Recommendation recognizes that that "the costs incurred in providing telecommunication services, although based on the same components, may have a different impact depending on the country's development status."[142] Thus, Mexico contends, as a whole, the Recommendation encouraged a transition to lower accounting rates, but did not mandate a particular methodology for calculating costs nor contemplate that countries would be able to immediately establish cost-oriented rates.[143]

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4.50 The **United States** argues that, under the definition included in Section 2.1 of Mexico's Reference Paper, the "linking" accomplished via the accounting rate regime is just one form of "interconnection." As a result, there is no element of an "accounting rate regime" that cannot also be an element of an "interconnection regime." Any commercial, contractual, technical or regulatory differences between various types of interconnection arrangements, including accounting rate arrangements, fall under the broad definition included in Section 2.1.[146]

4.51 In response to a question by the Panel, the parties commented on the possible differences between domestic interconnection and accounting rate regimes from a commercial, contractual, technical and regulatory point of view.[147]

aa) Differences from a commercial point of view

4.52 **Mexico** argues that domestic interconnection and accounting rate regimes are different from a commercial viewpoint. According to Mexico, a national carrier entering into an accounting rate arrangement with a national carrier of another nation is not in competition with that carrier, because the two carriers cannot compete for each other's customers. Moreover, it argues, under the accounting rate regime, carriers from different countries must come to a mutual agreement on their relationship; there is no supra-147

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as possible.[151] Thus, Mexico concludes, regulators again play an important role in setting the terms, conditions, and rates for interconnection between domestic long-distance and local carriers.[152] In conclusion, Mexico submits, the accounting rate regime by its nature must be cooperative, whereas domestic interconnection involves fierce competition that must be regulated.[153]

4.54 The **United States** considers that, from a commercial viewpoint, interconnection is a key wholesale input in supplying a basic telecommunications service because it allows suppliers to complete phone calls where the person placing the call uses a different network from the person receiving the call. Because no telecommunications supplier has a worldwide, ubiquitous network, all telecommunications suppliers must interconnect with other telecommunications suppliers to complete phone calls to receiving parties that use different networks. Similarly, it argues, telecommunications suppliers without their own local networks also must interconnect with other telecommunications suppliers to originate calls. The United States submits that all interconnection, including accounting rate arrangements between carriers in different countries, performs this key commercial function of allowing the completion of calls between the networks of different suppliers. The definition of interconnection set forth in Section 2.1 of the Reference Paper includes all such "linking" between the networks of different suppliers.[154]

4.55 The **United States** further submits that Mexico wrongly seeks to imply that the regulation of interconnection rates is necessary only where interconnecting suppliers compete with each other. Mexico goes on to acknowledge that interconnection is also an important concern in domestic markets where the interconnecting carriers do *not* compete with each other, such as where "a domestic long-distance carrier (or inter-city or interexchange carrier) must interconnect with local carriers throughout a country in order to be able to reach all end-user customers. " In these circumstances, it argues, the domestic long-distance carrier must interconnect with local carriers for both call termination *and* call origination. The United States submits that Mexico further acknowledges that the regulation of interconnection rates is necessary in such circumstances, not because the interconnecting carriers are targeting the same customers, but because "the local carrier has the incentive and ability to set interconnection rates as high as possible." For the same reasons, it submits, the regulation of interconnection rates is necessary for the cross-border supply of international basic telecommunications services, which are also dependent on interconnection arrangements for call termination with suppliers that have "the incentive and ability to set interconnection rates as high as possible."[155]

bb) Differences from a contractual point of view

4.56 In response to a question by the Panel, **Mexico** lists the major provisions of the standard domestic interconnection agreement in comparison with accounting rate agreements. According to Mexico, most of the provisions of one agreement are either not applicable or can never be a provision in the other agreement.[156] For example, Mexico pointed to an accounting rate agreement that provided for dispute settlement through international commercial arbitration, while a US domestic interconnection agreement provided for dispute settlement in the courts, before a state public utility commission, or before the Federal Communications Commission. Mexico also highlighted that the

[151] *See* Mexico's first written submission, paragraph 41. *See also* Mexico's answer to question No. 8 of the Panel of 19 December 2002. For question No. 8, *see* footnote 77 of this Report.

[152] *See* Mexico's first written submission, paragraph 41.

[153] *See* Mexico's answer to question No. 8 of the Panel of 19 December 2002. For question No. 8, *see* footnote 77 of this Report.

[154] *See* the United States' answer to question No. 8 of the Panel of 19 December 2002. For question No. 8, *see* footnote 77 of this Report.

[155] Ibid.

[156] *See* Mexico's answer to question No. 8 of the Panel of 19 December 2002. For question No. 8, *see* footnote 77 of this Report; *see also* Mexico's answer to question No. 17 of the Panel of 14 March 2003. For question No. 17, *see* footnote 146 of this Report.

domestic interconnection agreement contained many provisions not included in accounting rate agreements, such as with respect to audits, indemnification, insurance, discontinuation of service, intellectual property, directory and operator assistance, access to unbundled network elements, access to poles, ducts, conduits, and rights-of-way, access to databases needed to provide 911 emergency call service, and a provision that each party reserves the right to institute an appropriate proceeding with the appropriate federal or state governmental body of appropriate jurisdiction regarding the prices charges for services by the incumbent carrier.[157]

4.57 The **United States** points out that, from a contractual viewpoint, interconnection arrangements between suppliers in the same or different countries, including accounting rate arrangements between suppliers in different countries, may include a wide variety of rates, terms and conditions concerning such matters as specific services covered by the agreement, the rates applicable to specific services, payment schedules, procedures for dispute resolution, time duration of the agreement, restrictions on assignments of rights, and various network technical considerations. The United States explains that interconnection arrangements may provide for one-way or two-way traffic flows, with the same or different rates applying in each direction, and two-way traffic flow. Interconnection arrangements may also provide for "net" payment arrangements under which the two carriers set off their interconnect payments with one carrier remitting the balance to the other carrier.

4.58 The **United States** indicates that, under a traditional accounting rate regime, an agreed accounting rate is divided in half and applied to traffic flows in both directions. However, it argues, Mexico's ILD rules governing "interconnection agreements with foreign operators" (Rule 23) do not restrict the compensation methods that may be negotiated by the "concession holder who holds the largest outgoing long-distance market share" (Rule 13). Notably, the rates that Telmex currently charges United States suppliers differ significantly from the "accounting rate revenue division procedure" described by the informal note submitted by the ITU to the Council on Trade in Services ("a net settlement payment is made on the basis of excess traffic minutes, multiplied by half the accounting rate"). The United States explains that United States suppliers are currently charged different rates for each of three rate zones in Mexico. Additionally, under that arrangement, another rate applies to Mexico-United States traffic. Furthermore, the United States submits, negotiated interconnection rates, including accounting rates between suppliers in different countries, are normally established by the interconnecting suppliers. Mexico's ILD Rule 13 requirement that only the concession holder with the largest market share may negotiate with foreign operators rates that are then binding on its competitors does not reflect any traditional accounting rate regime and, to the knowledge of the United States, is not required by any Member other than Mexico.[158]

cc) Differences from a technical point of view

4.59 **Mexico** argues that domestic interconnection and accounting rate regimes are different from a technical viewpoint. Mexico submits that Section 2.2 of the Reference Paper requires that interconnection be ensured at "any technically feasible point" in the major supplier's network. In contrast, under the accounting rate regime international carriers connect at a border or some international mid-way point that is decided privately between the carriers, who have a mutual interest in cooperating with each other to complete international calls. In Mexico's opinion, unless a country permits foreign carriers to establish their own facilities within its territory – which Mexico has not,

[157] *See* Mexico's answer to question No. 8 of the Panel of 19 December 2202. For question No. 8 *see* footnote 77; s*ee also* Mexico's answer to question No. 17 of the Panel of 14 March 2003. For question No. 17 *see* footnote 146 of this Report.

[158] *See* the United States' answer to question No. 8 of the Panel of 19 December 2002. For question No. 8, *see* footnote 77 of this Report.

United States are required to provide to new entrants. Thus, Mexico can not exclude the accounting rate regime from interconnection on this ground.[163]

4.63 The **United States** contends that Mexico's attempt to exclude the accounting rate regime from interconnection on the grounds that "international carriers connect at a border or some international mid-way point" is unfounded. In its view, such "linking" of networks is plainly interconnection under Section 2.1 of the Reference Paper, and also is similar to the "meet-point interconnection arrangements" that incumbent local exchange carriers in the United States are required to provide to new entrants. The United States considers that meet-point arrangements are arrangements by which each telecommunications carrier builds and maintains its network to a meet point. The FCC found in 1996 that meet-point arrangements for interconnection between carrier facilities, also known as "mid-span meets", were commonly used between neighbouring LECs (local exchange carriers) for the mutual exchange of traffic.[164]

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contrast, it argues, unbundling does not arise in the context of the accounting rate regime because once a carrier hands traffic off at a border, the terminating carrier is completely responsible for ensuring that the call reaches its final destination.[170]

4.66 **Mexico** notes that Section 2.2(c) of the Reference Paper provides that a major supplier shall provide interconnection upon request "at points in addition to the network termination points offered to t

"interconnection" under Section 2.1 of the Reference Paper.[179] The fact that some of the requirements of Section 2 may not apply to interconnection provided to cross-border suppliers does not mean that other requirements of Section 2 are equally inapplicable.[180] As stated by the European Communities, "from a regulatory point of view, accounting rates are just one form of interconnection."[181] The United States further submits that Mexico is wrong in implying that the regulation of interconnection rates is necessary only where interconnecting suppliers compete with each other. The United States points out that Mexico also acknowledges that interconnection is an important concern in domestic markets where the interconnecting carriers do not compete with each other, such as where "a domestic long-distance carrier (or inter-city or interexchange carrier) must interconnect with local carriers throughout a country in order to be able to reach all end-user customers". The United States further notes that Mexico also acknowledges that the regulation of interconnection rates is necessary in such circumstances, not because the interconnecting carriers are targeting the same customers, but because "the local carrier has the incentive and ability to set interconnection rates as high as possible." The United States argues that, for the same reasons, the regulation of interconnection rates is necessary for the cross-border supply of international basic telecommunications services, which are also dependent on interconnection arrangements for call termination with suppliers that have "the incentive and ability to set interconnection rates as high as possible."[182]

4.69 The **United States** further submits that Mexico is also wrong to contend that a major supplier "has no interest in impeding calls or providing inferior quality service" to cross-border suppliers because these suppliers are not competitors. In fact, major suppliers are direct competitors with cross-border suppliers that originate services in-country through home-country direct and similar call reversal services. Moreover, a major supplier has an incentive to impose a competitive disadvantage on a foreign cross-border supplier if an affiliate of the major supplier competes with the cross-border supplier – as many such affiliates were expected to do following a successful outcome of the basic telecommunications negotiations.[183] The United States also notes that the requirements of non-discrimination and unbundling are equally relevant to the interconnection of international traffic as they are to the interconnection of domestic traffic.[184]

3. Specific Commitments of Mexico

4.70 The **United States** claims that Section 2.1 of Mexico's Reference Paper defines the scope of Mexico's interconnection obligations. Section 2.1 states that "[t]his section applies, on the basis of the

telecom services and Telmex) to enable users of the United States supplier to communicate with users of Telmex and to access Telmex's services.[185]

4.71 **Mexico** submits that a proper interpretation of the provisions of Mexico's Reference Paper and Schedule demonstrates that Section 2 of Mexico's Reference Paper does *not* apply to the terms and conditions of interconnection between United States suppliers of basic telecommunications services and Telmex, that is, to "international" interconnection.[186]

(a) Definition of the service and mode of supply

(i) Definition of services

4.72 **Mexico** submits that the services at issue are basic telecommunication services and not "telephone calls" or any other customer-supplied information or data (e.g., voice or facsimile). Mexico argues that, the services at issue are the services related to the transportation or transmission of such data. In Mexico 's view, it is the "public telecommunications infrastructure" that permits the supply of such services. In support of its argument, Mexico cites to the CPC definitions of "voice telephony" (found in CPC codes 75211 and 75212), and "circuit-switched data transmission services" (CPC 7523).[187]

4.73 **Mexico** deems it significant that "communications" are listed in Section 7 along with "transport" and "storage" services. Mexico contends that its view is substantiated by the fact that no Member imposes restrictions on the number of incoming or outgoing calls, whereas many of them impose restrictions on services relating to the calls. Mexico also notes the specific wording used to describe the modes for trade in services highlights this difference. Mode 1 covers cross-border "supply" of a service. Thus, Mexico argues, it cannot reasonably be established that United States carriers "supply" telephone calls; what they supply is the service that transports their customers' telephone calls.[188]

4.74 The **United States** argues that Mexico's argument should be rejected because Mexico ignores the text of the CPC codes it inscribed. According to the United States, the CPC codes states that the services subject to Mexico's market access commitments are not simply the "transmission or transport of customer-supplied information". Contrary to Mexico's argument, the United States submits, the nature of the service and its cross-border character is not affected by the fact that the Mexican concessionaire assumes responsibility for the traffic at the border. This "hand off" is expressly contemplated in CPC 75212, which provides that the customer has access to both "the s of 4hat .and

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[185] *See* the United States' first written submission, paragraph 48.

[186] *See* Mexico's second written submission, paragraph 22.

[187] *See* Mexico's second written submission, paragraphs 64-65. *See also* Mexico's answer to question No. 3(a) of the Panel of 19 December 2002 ("*The cross-border supply of telecommunications services is defined as the supply of a service 'from the territory of one Member into the territory of any other Member.' Mexico states that a foreign s of 4ha of facilitiesbased telecommunications services can only supply these services cross-border, if that s of 4ha is also permitted to supply facilities -based services in Mexico (para 234). (a) Does Mexico consider that cross-border supply of basic telecommunications by a foreign s of 4ha can take place only if that s of 4ha terminates its cross-border services on the facilities of the concessionaire owned or controlled by that same s of 4ha? Does Mexico therefore consider that an international telecommunications service terminated on facilities of any other concessionaire cannot be considered a service s of 4hd through mode 1?* ").

[188] *See* Mexico's answer to question No. 1 of the Panel of 14 March 2003 ("*Why do you consider that the service being scheduled is the transport of the calls instead of the calls themselves? Please relate to the standard definitions in the Central Product Classification (CPC)*").

connecting carriers' entire telephone network". Thus, it concludes, the CPC code specifically contemplates the "joint provision" of voice services.[189]

4.75 According to the **United States**, the CPC codes make clear that the services covered by Mexico's market access commitments include, under CPC 75212, "switching and transmission services necessary to establish and maintain communications between local calling areas." Establi

4.82 According to **Mexico**, the United States has not established that such cross-border supply of basic telecommunications services is at issue in this dispute. As a matter of law, it cannot make this demonstration because the transport and transmission services supplied by United States suppliers are not provided across the border, but merely to the border. At that point, traffic is handed off to a Mexican concessionaire, which receives and carries the calls to the recipient, that is, supplies telecommunications transport services into and within Mexico. Therefore, Mexico argues, the United States is mistaken when it states that "the way in which United States suppliers complete calls into Mexico is by routing through the facilities of an enterprise that has a concession". The fact is that United States suppliers do not "complete calls" and, hence, do not supply transport and transmission services across the border into and within Mexico.[197]

4.83 **Mexico** also notes that, under the United States' interpretation, its suppliers are providing telecommunications services on a cross-border basis when the calls are routed through the facilities of another supplier. This is not tenable. "Routing" (i.e., transmitting) traffic is the service being provided by basic telecommunications suppliers. When the calls are "routed" through the facilities of a Mexican supplier, it is that supplier, not the United States supplier, that provides the transport and transmission services at issue in this dispute.[198] Mexico further claims that, accepting the United States' argument that the fact that signals are transmitted across the border demonstrates that basic telecommunications services are provided on a cross-border basis would mean that market access under mode 1 would be granted by any WTO Member allowing its suppliers to be transmitted across its borders, regardless of who is supplying that service. This is also untenable.[199] There is not a single WTO Member that prohibits incoming calls to its citizens from the territories of other WTO Members. This does not mean that all WTO Members have granted market access under mode 1.[200] Mexico submits that, cross-border supply does not occur under the half-circuit regime established between Mexico and the United States, as laid down in Mexico's Schedule. According to Mexico, cross-

aa) Half-circuit v. full-circuit regimes

4.84 In response to a question by the Panel, **Mexico** describes the difference between the half-circuit and full-circuit regimes. Mexico first submits that, the "half-circuit" regime does not allow

"establish[es] a switch" or a "point of presence" in Mexico.[205] Mexico states that the United States supplier does not have a commercial presence on the Mexican side of the border in this example. According to the United States, however, whether or not "establishing a switch" or a "point of presence" on the Mexican side of the border is a "commercial presence," "establishing a switch" or a "point of presence" certainly involves operating in some fashion on the Mexican side of the border. This interpretation therefore adds an element that is not present in Article I:2(a) of GATS, which defines the cross-border supply of a service as the supply of a service from the territory of one Member into the territory of any other Member because Mexico's interpretation requires that to provide basic telecommunications services in the cross-border mode, a service supplier must operate on both sides of the border.[206]

4.87 **Mexico** submits that, under the full-circuit regime, a foreign supplier carries traffic to the "interior" of the destination country. It thenj 246.TD /gn8 a switch" or a0 -5 It thenjeD /Fs

the purchase by a "customer" of a "communication" over the entirety of a telephone call, from its point of origin to its point of termination.[211]

(b) Mexico's commitment on cross-border supply

4.91 According to the **United States**, Mexico undertook market access and national treatment commitments in its schedule for basic telecom services supplied by "facilities-based" operators on a cross-border (mode 1) basis. The United States also notes that Mexico limited this commitment to ensure that service suppliers route international traffic through the facilities of an entity licensed in Mexico (known as a "concessionaire"), thus confirming its specific intention to include international services within the scope of these commitments.[212]

4.92 The **United States** further submits that Mexico scheduled cross-border commitments for non-facilities-based telecom services ("commercial agencies") as well. Based on Mexico's Schedule, the United States argues that Mexico committed to accord market access and national treatment to United States suppliers, which do not themselves own facilities, but instead provide telecommunications services over capacity (such as a line) that they lease from a concessionaire.[213]

4.93 **Mexico** argues that it did not schedule cross-border commitments for basic telecommunications services supplied by facilities-based and non-facilities-based operators.[214] Mexico submits that the phrase "*respecto de los cuales se contraigan compromisos específicos*" in Section 2.1 of its Reference Paper limits the application of Section 2 to the precise market access allowed in Mexico's specific commitments inscribed in its Schedule. The phrase translates as "on the basis of specific commitments undertaken" or "in respect of which specific commitments are undertaken". It qualifies the entire provision and, thereby, links Section 2 of the Reference Paper to the specific commitments in Mexico's Schedule. It means that Section 2 applies only within the bounds of Mexico's inscribed market access for the supply of services.[215]

4.94 **Mexico** submits that, in order to understand its scheduled commitments in basic telecommunications services, the first thing to consider is the circumstances in which those commitments were negotiated. Mexico started to liberalize its basic telecommunications market with the privatization of Telmex in 1990 and with the implementation of the FTL in 1995. One of the principal objectives of the FTL was to liberalize the Mexican market for basic telecommunications by granting concessions to new entrants, which could include up to 49 per cent foreign ownership. As a result of these reforms, Mexico introduced competition into the international long-distance service market. However, under Mexican law, only those carriers able to meet the conditions necessary to obtain a concession are allowed to enter the market. As to foreign enterprises, they were neither allowed to provide international services, nor to install, operate or use facilities in Mexico.[216]

4.95 **Mexico** argues that it was within this context that Mexico agreed to the market access commitments with accompanying limitations relating to basic telecommunication services in its Schedule, which means that Mexico bound itself to the regulatory *status quo* as it existed in 1997 at the end of the WTO negotiations on basic telecommunications. That *status quo* did not permit

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[211] *See* the United States' comments on Mexico's answer to question No. 5 of the Panel of 14 March 2003, paragraph 22.

[212] *See* the United States' first written submission, paragraph 54. *See also* the United States' answer to question No. 2(a) of the Panel of 14 March 2003 ("*What is a 'facilities based public telecommunications network'? Please elaborate by referring to relevant regulations. Are there public telecommunications networks that are not 'facilities based'?*").

[213] *See* the United States' first written submission, paragraphs 55-57.

[214] *See* Mexico's first written submission, paragraph 134. *See also* Mexico's second written submission, paragraph 76.

[215] *See* Mexico's second written submission, paragraph 41.

[216] *See* Mexico's first written submission, paragraphs 120-122.

United States suppliers to supply public telecommunications transport networks and services (PTTNS) from the territory of the United States into the territory of Mexico. Thus, Mexico did not, by inscribing this commitment, permit market access for the supply of basic telecommunications services through mode 1. However, it did permit market access for facilities-based suppliers through commercial presence in Mexico in the form of up to 49 per cent direct foreign ownership of a concessionaire.[217]

4.96 **Mexico** also points out that, according to paragraph 1 of Arti1bw4m1(217) Tj 11.25 -5.m1(217) Tj 11.25

(iii) Third, the United States is wrong to interpret the phrase "where specific commitments are undertaken" to simply mean that where any commitments are undertaken by a WTO Member the Reference Paper applies fully. The inscription of the Reference Paper in the fourth column of a Member's Schedule is, itself, a commitment that would invoke the application of Section 2 of the Reference Paper under the United States' interpretation. Such an interpretation means that the phrase "respecto de los cuales se contraigan compromisos específicos" in Section 2.1 of the Reference Paper is unnecessary. This renders the phrase meaningless and, therefore, is an impermissible interpretation under Article 31 of the Vienna Convention.[222]

4.99 **Mexico** further argues that its interpretation that its Reference Paper applies only within the bounds of its specific commitments and limitations on market access is consistent with the object and

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Member did not inscribe "unbound" in the relevant column and this is exactly what Mexico has done.[233] 0 9 t h a M e x 3 8 1 0 T D c o ' s

4.106 The **United States** argues that Mexico's reliance on the Scheduling Note is misplaced. The United States points out that the part of the Note that Mexico relies on only applies to "a residence requirement, nationality condition or commercial presence requirement." Thus, it is not applicable to the limitation in Mexico's Schedule, which is a routing requirement.[234]

4.107 The **United States** argues that Mexico's commitment is clear and straightforward: there are no limitations on the mode 1 commitment, with the exception of a routing requirement. The United037 TgUnitment is csforward: there are

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that has a concession granted by the Ministry of Communication and Transport (SCT).[240] Under Mexican law, only Mexican individuals or companies may obtain such a concession.[241] Thus, the limitation in the market access column of Mexico's Schedule creates a nationality and commercial presence requirement for suppliers of scheduled services.[242] Therefore, Mexico effectively froze the level of market access to that prevailing at the time of the negotiations and reserved its right to limit those enterprises authorized to supply basic telecommunications services within Mexico to service suppliers that have commercial presence in Mexico (i.e., concessionaires).[243] Since United States suppliers (e.g. AT&T and WorldCom) of basic telecommunications services cannot obtain concessions, they are not allowed to supply basic telecommunications services from the territory of the United States into the territory of Mexico, that is, on a cross-border basis.[244] Mexico also claims

mode any of the types of measures listed in Article XVI."[250] Thus, the United States argues that the routing requirement is superfluous and without legal effect because it is not one of the limitations listed in Article XVI:2 of GATS.[251]

4.114 **Mexico** submits that the United States' interpretation is wrong. Instead, Mexico argues, the correct interpretation is that, in fact, the transport and transmission services provided by United States suppliers do not enter the territory of Mexico when United States suppliers hand over traffic to Mexican suppliers at a border point.[252]

4.115 **Mexico** argues that the United States' interpretation is based on its mistaken belief that United States suppliers are providing basic telecommunications transport services into Mexico when they rely on other service suppliers (i.e., Mexican concessionaires) to transport and transmit signals in Mexico. To the contrary, the transport and transmission services supplied by United States carriers end at the border. There is no cross-border supply simply because United States suppliers do not supply end-to-end services. Accepting the United States argument would mean that suppliers established in United States territory have to be deemed to supply services into another Member's territory when they hand

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i.e. a "concessionaire" – as well as nationality and other requirements. The use of a more specific phrase is consistent with the GATS Guidelines for the Scheduling of Commitments, which establish that "[i]f in the context of such a commitment, a measure is maintained which is contrary to Article XVI or XVII, it must be entered as a limitation in the appropriate column (either market access or national treatment) for the relevant sector and modes of supply; the entry should describe the measure concisely, indicating the elements which make it inconsistent with Article XVI or XVII".[264]

4.124 According to **Mexico**, the requirement that "international traffic must be routed through th

equipment of a concessionaire. Either by virtue of Article 31(4) or Article 32 of the *Vienna Convention*, this term must be interpreted in the light of its special meaning under Mexican law. Mexico notes that FTL Article 47 limits installation of telecommunications equipment for cross-border traffic to concessionaires and those otherwise specifically authorized by the SCT. ILD Rule 3 specifies that international long-distance traffic can be carried only by international gateway operators. ILD Rule 6 specifies that long-distance concessionaries may carry international long-distance traffic only through international gateways. This means that the term "through the facilities of" means through an international gateway. This excludes ISR traffic because such traffic, by its character, passes through private lines and not through an international gateway. It effectively imposes a "zero quota" on ISR traffic and, as such, is a limitation that falls within GATS Article XVI:2(a).[269]

4.128 The **United States** further submits that Mexico's position fails to recognize that "facilities" is in fact a much broader term than "ports," and embraces a variety of means that might be used to terminate cross-border traffic, including private leased circuits. The United States argues that Mexico's own laws and regulations recognize that the term "facilities" is broader than just "international ports." Article 47 of Mexico's Federal Law on Telecommunications requires a concession to install "telecommunications equipment and transmission means," a category of facilities obviously broader than merely international ports.[270] Likewise, Mexico's ILD Rule 4 clarifies that the facilities of an international concessionaire include the international port and "telecommunications equipment and means of transmission that cross the country's borders."[271][272]

4.129 The **United States** submits that these definitions are also consistent with the WTO's Telecommunications Services Glossary of Terms, which defines "networks or facilities" to include "the ensemble of equipment, sites, switches, lines, circuits, software, and other transmission apparatus used to provide telecommunications services." International switched ports are only one of the many types of telecommunications facilities embraces by this definition. According to the United States, Mexico's scheduled facilities routing requirement must therefore be interpreted to permit routing through any facilities. Nothing in Mexico's Schedule, with respect to services provided under mode 1, allows Mexico to preclude the termination of cross-border traffic using private leased circuits obtained from a Mexican concessionaire. This is the essence of International Simple Resale ("ISR").[273]

4.130 The **United States** notes that, even if the term "facilities" is construed to mean just "international ports," this conclusion would only affect Mexico's right to prohibit the interconnection of private leased circuits at network points other than the international port, which is relevant to the United States' claim under the Annex on Telecommunications. Mexico would still be required to allow private lines to be interconnected at the international port. According to the United States, even if Mexico's Schedule were interpreted to allow Mexico to require international traffic to route through a switched port operated by a Mexican concessionaire, United States carriers would still be providing telecommunications services on a cross-border (mode 1) basis. Thus, the obligations of Section 2 of the Reference Paper would still apply.[274]

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[269] *See* Mexico's answer to question No. 6(b) of the Panel of 19 December 2002 ("*Mexico has inscribed in its schedule that it 'will not issue permits for the establishment of a commercial agency until the corresponding regulations are issued'. (b) Mexico asserts that international simple resale is prohibited. Please explain how this follows from its scheduled commitments.*").

[270] *See* Mexico's Federal Telecommunications Law attached as Exhibit US-16 to the first written submission of the United States.

[271] *See* Mexico's ILD rules attached as Exhibit US-1 to the first written submission of the United States.

[272] *See* the United States' second written submission, paragraph 24.

[273] *See* the United States' second written submission, paragraph 25.

[274] *See* the United States' second written submission, paragraph 26.

4.131 **Mexico** argues that the term "bypass" in the United States' submission refers to means that carriers can use to avoid paying settlement rates for having their traffic terminated in a foreign country. According to Mexico, the most commonly used method is international simple resale (ISR). Mexico argues that the Reference Paper does not override Mexico's limitation on international simple resale (ISR). Unlike a traditional accounting rate arrangement whereby carriers hand off traffic at the

United States carriers can arrange for their traffic to evade (i.e. bypass) authorized Mexican carriers.[278]

4.135 **Mexico** submits that it has therefore made clear that once the operator of a private network "resells" that network in order to connect public traffic to the public network, the private network no longer constitutes a "private" end-to-end connection. The operator becomes subject to all the rules and limitations governing public networks and no longer qualifies as a private-line carrier – which by definition precludes it from being used for ISR.[279]

4.136 The **United States** notes that, while Mexico continues to argue that a private circuit cannot carry public traffic, it has failed to respond to the United States observation that Telmex in fact offers such private lines to other public network operators, not just private businesses. The United States argues that this demonstrates that the inscription on "private leased circuit services" in Mexico's Schedule does not mean what Mexico now contends. The inclusion in Mexico's Schedule of "private leased circuit services" relates only to the obligation of private "network operators" in Mexico who want to exploit their networks commercially to obtain a concession, not to the ability of firms operating on a resale rather than a facilities basis in Mexico to send traffic through leased private lines obtained from a network operator that has a concession. The separate provision for "commercial agencies" under mode 3 operating on a permit, not a concession, reinforces this interpretation. Though an owner of network facilities in Mexico would need a concession in order to lease its lines to others to carry public traffic on a resale basis (i.e., become the "lessor"), the firms leasing such lines (the "lessee") would not themselves need the concession. The United States contends that ISR does not "evade" the authorized Mexican carriers' networks. Rather, commercial agencies under mode 1 would use the networks of the Mexican carriers as required by the routing restriction, but are simply not bound to send their traffic through the international switched ports subject to the cartel pricing provision of ILD Rule 13.[280]

(iii) Commercial agency permit requirement

4.137 **Mexico** submits that the permit requirement establishes a "zero quota" on mode 3 access for commercial agencies which is a limitation under GATS Article XVI:2(a).[281] to obt T6es to ot75States cer GATS A to obt Tw ( )der GtStates contends that

Schedule simply does not require foreign suppliers sending international traffic into Mexico to themselves have a concession. Rather, it only requires that they route that traffic through the facilities of an entity that has a concession. The United States further submits that this interpretation of Mexico's routing requirement is reinforced by the contrast between Mexico's mode 1 and mode 3 market access limitations. To enjoy market access as a facilities-based operator in mode 3, Mexico's Schedule states that "[a] concession from the SCT is required." This wording shows that Mexico knew how to describe a concession requirement, where it so intended.[284]

4.139 **Mexico** replies that it is not arguing that its limitation requires the United States-established supplier "itself" to maintain a commercial presence but that, given the nature of the half-circuit regime, routing services over the Mexican half circuit must be supplied by a concessionaire established in Mexico.[285]

4.140 The **United States** does not agree that the routing requirement falls within the limitations listed in GATS Article XVI:2(a) and (e). According to the United States, however, even accepting Mexico's point solely for the sake of argument, classifying the routing requirement under subparagraphs (a) or (e) would not reduce Mexico's cross-border commitment to "unbound", and thus Section 2 of the Reference Paper and Section 5 of the Annex would still apply.[286]

4.141 In response to a question by the Panel, the **United States** further claims that Mexico's argument that the cross-border supply of basic telecommunications services by a foreign supplier can take place only if that supplier terminates its cross border services on the facilities of a concessionaire owned or controlled by that same supplier is untenable for the following reasons:[287]

(i) Mexico's own Schedule does not limit market access in mode 1 to only those foreign service suppliers that route traffic through the facilities of a Mexican concessionaire that the foreign service supplier itself owns or controls.[288]

(ii) Second, accepting Mexico's argument would mean that the provision of basic telecommunications services on a cross-border basis would only be possible if a service supplier also operated on a commercial presence basis. The result would be to make mode 1 redundant, and to render meaningless Members' mode 1 commitments in the basic telecommunications sector – a result that is contrary to the rules of interpretation to be applied by the Panel.[289] Such an interpretation would be contrary to the meaning of mode 1, which is defined in GATS as the supply of a service "from the territory of one Member into the territory of any other Member." The ordinary meaning of these terms is that the service moves from the territory of one Member into the territory of the other Member, not the service supplier. This reading is also supported by an explanatory scheduling note, which states that "international transport, the

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[284] *See* the United States' second oral statement, paragraphs 8-9.

[285] *See* Mexico's answer to question No. 3(c) of the Panel of 14 March 2003 ("*If so, does the supplier have to supply through its network(s) the entire service, or is it sufficient that it supplies through its network for a portion of the transmission service? Please elaborate by using evidence from relevant regulations, and consider the following scenarios: the cross-border service is supplied over a facilities-based network: (i) on all segments of the transmission service, and on both sides of the border; or (ii) on any segment of the transmission service, and on either side of the border; or (iii) on the originating side of the border only; or (iv) on the terminating side of the border only?*"). *See also* the United States' comments on Mexico's answer to question No. 3(c) of the Panel of 14 March 2003, paragraph 13.

[286] *See* the United States' second written submission, paragraph 17.

[287] *See* the United States' answer to question No. 3(a) of the Panel of 19 December 2002. For question No. 3(a), *see* footnote 187 of this Report.

[288] Ibid.

[289] Ibid.

supply of a service through telecommunications or mail, and services embodied in exported goods (e.g. a computer diskette, or drawings) are all examples of cross-border supply, h0ince4i -0.175o6 h48is not present Tw (87) Tj Tj 0

United States "resellers" or "commercial agencies", to hand of their traffic at the border for transport services on the Mexican side of the half circuit to be supplied by Mexican concessionaires established in Mexico.[296]

4.147 The **United States** argues that this asserted prohibition does not follow from Mexico's scheduled commitments. According to the United States, Mexico's commitments for commercial agencies specifically include both the supply by a foreign supplier of scheduled basic telecommunications services from the United States into Mexico over capacity leased from a Mexican concessionaire (mode 1), and the acquisition by a foreign service supplier of a locally-established commercial agency for the purpose of supplying scheduled international basic telecommunications services from Mexico to the United States over capacity leased from a Mexican concessionaire (mode 3). Both of these situations are examples of what is typically known as international simple resale. The United States also notes that Mexico's routing requirement does not equate to a prohibition on the use of private leased circuits because a foreign service supplier that leases capacity from a concessionaire is still in compliance with the Mexican requirement to route traffic through the facilities of a concessionaire.[297]

4.148 **Mexico** argues that Article XVIII of the GATS establishes a distinction between measures that affect market access and national treatment, which are subject to scheduling under GATS Article XVI and XVII, and other measures that affect the supply of a service within a Member's territory. Only the latter category of measures can be covered by additional commitments under Article XVIII of the GATS. This means that the terms and conditions governing market access for foreign service suppliers are determined by the commitments made under Article XVI of the GATS, and not by the commitments made pursuant to Article XVIII. Since the Reference Paper was included in Mexico's Schedule pursuant to Article XVIII, it does not relate to Mexico's Scheduled market access commitments.[298]

4. Whether Telmex is a major supplier within the meaning of the Reference Paper

4.149 The **United States** submits that the Reference Paper defines "major supplier" as a "supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of (a) control over essential facilities or (b) use of its position in the market". According to the United States, this definition requires the determination of the "relevant market for basic telecommunications services" and whether, in that market, the supplier in question can use either control over essential facilities or its position in the market to materially affect terms of participation. The United States further notes that, because "control over essential facilities" and "use of its position in the market" are in the disjunctive, either is sufficient to meet the definition.[299]

4.150 **Mexico** notes first that the burden is on the United States to demonstrate that the interconnection at issue concerns a "major supplier". According to Mexico, the analysis of the United

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[296] *See* Mexico's answer to question No. 6 of the Panel of 14 March 2003 (*What in your view, would be the legal significance of the routing restriction, in the absence of any mode 3 limitations in Mexico's Schedule? Under this hypothesis, which subparagraph of ArticleXVI:2 of the GATS would the routing restriction fit under?*). *See also* Mexico's answer to question No. 8 of the Panel of 14 March 2003 (*Mexico's commitments relating to commercial agencies –*

States is flawed. Mexico also claims that the United States has not presented a prima facie case that Telmex is a "major supplier" within the meaning of the Reference Paper.[300]

(a) The relevant market

4.151 The **United States** submits that, according to well-accepted principles of market analysis deriving from competition law, which are similar in both United States antitrust and Mexican competition law, markets are defined in terms of substitution, looking at the alternatives available and acceptable to consumers. According to the United States, international telecommunications services, whether involving termination of cross-border supply or origination through a commercial presence in the country, are distinct from domestic telecommunications services and not substitutes. In support of its argument, the United States cited to decisions by the Mexican competition authority, the *Comisión Federal de Competencia* ("CFC"), which stated that international long-distance service is a relevant market for which there are "no close substitutes," and that such service is distinct from domestic local, access, long-distance or carrier toll services.[301]

4.152 The **United States** further submits that, within the broad category of international services, it is necessary to distinguish the markets for originating traffic and for terminating traffic. According to the United States' substitution analysis, because a United States carrier cannot own its own facilities in Mexico and is required to hand off its cross-border telecommunications traffic into Mexico to a Mexican concessionaire at the international border, termination by Telmex (and other Mexican carriers authorized to operate international ports) is needed by United States and other foreign carriers to complete their international telecommunications traffic into Mexico. Therefore, argues the United Sta

telecommunications carriers that have their own networks, they are prohibited from competing on the price of terminating cross-border traffic into Mexico by operation of Mexican law.

4.164 **Mexico** argues that it has taken a number of steps to establish a comprehensive regulatory framework for the incumbent (former monopoly) carrier, Telmex, which are designed to introduce competition while protecting and promoting the nation's telecommunications infrastructure.[317] According to Mexico, Telmex's concession title was substantially modified when it was privatized.[318]

market share.[330] Mexico also notes that, in the case of the market for international long-distance traffic, new entrants in Mexico have performed even better in capturing market share.[331] This is reflected in the market share of Telmex, which at the end of 2000 was at a 61%, whereas in European Union member countries the incumbents had an average market share of 80% in terms of minutes.[332]

Article 31(1) of the *Vienna Convention*, which states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[341] According to the United States, the interconnection obligations in Section 2 are one part of the set of pro-competitive regulatory commitments embodied in the Reference Paper, which mandates major suppliers to charge interconnection rates based on the cost that the major supplier incurs in providing interconnection.[342]

4.170 **Mexico** claims that the United States interprets the term "*basadas en costos*" narrowly to mean that the rate in question must equal the bare cost of providing the service and this narrow interpretation must be rejected.[343] According to Mexico, *basadas en costos* allows for more distance between the rate and the cost than is argued by the United States.[344] In support of its argument, Mexico first notes that if the negotiators of the Model Reference Paper and Mexico's Reference Paper had intended this narrow interpretation, they would have referred to "rates that equal cost" or "rates that at most recover cost".[345] Instead, they used a much more flexible term.[346] Further, interpreting "cost oriented" to mean "equal to cost" would lead to an absurdity, in that the carrier supplying the service would be prohibited from making any profit at all in transactions with other carriers.[347]

4.171 According to **Mexico**, cost-oriented rates should allow an adequate rate of return, even without the modifiers "reasonable" and "economically feasible" being taken into consideration. Determining an adequate rate of return is an extremely complex matter and one which is not necessarily restricted to the charges for carrying international calls; rather, it could quite legitimately involve overall carrier costs. Specifically, a multi-product firm (one offering a range of services) incurs different kinds of costs in providing its services, some of which can be directly allocated to specific services, given that it is provision of these particular services which gives rise to the cost incurred. However, in addition to direct costs, a multi-product firm incurs costs that are shared between groups of services and costs which are common to all services. Both common and shared costs can only be avoided if the group of services is terminated (in the case of shared costs) or if the whole firm closes down (in the case of common costs). In spite of the fact that common and shared costs cannot be directly allocated to the various services offered by a multi-product firm, they are nevertheless real economic costs which must be recovered if the firm hopes to earn a competitive return on the capital used and to continue to attract investment funds for the business. Most firms in competitive industries are multi-product and the margins referred to are necessary, as are cost increases. Such increases provide the expected revenue and recoup both common costs and any historic costs permitted by the market. The extent of the margins depends on market conditions. In short, Mexico argues, fixing a carrier's interconnection rate at direct cost level would be incorrect from an economic point of view. At the same time, an "economically correct" increase in common and shared costs is mainly a question of market conditions.[348]

proa10(a) of the Panel of 19 December 2002. For question *Mexico consider that the rates the Mexican companies currently charge for terminating incoming traffic from the United States are cost*

raph proa1See also Mexico's answer to question 10(a), *see* footnote 343 of this Report.

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4.176 The **United States** also points to evidence showing one major operator's wholesale rates to terminate calls to various countries, including six EC member States and eighteen other WTO Members that included the interconnection commitments under Section 2.2(b) of the Reference Paper. All of those rates are lower than the current average rate Telmex charges United States suppliers, and many are below 2 cents per minute. Mexico has challenged none of this evidence. Thus, the United States argues, to the extent that any WTO Member does not fulfil its obligations under Section 2.2(b) of the Reference Paper, other WTO Members have the right to challenge that failure in dispute settlement.[353]

4.177 **Mexico** argues that, under a "cost-based" or "cost-oriented" standard, a rate is not limited to simply recovering cost but can also recover amounts that reflect social policy and other concerns. Therefore, the narrow benchmark established in the United States' first written and oral submissions is without legal basis. By implication, the evidence used to argue that Mexico does not comply with the narrow benchmark is irrelevant and does not establish a prima facie case of a violation of Section 2.2(b) of Mexico's Reference Paper.[354]

4.178 **Mexico** notes that the United States' accounting rate arrangements with a number of other countries provide for much higher settlement rates than the current United States –– Mexico arrangement. Noting that accounting rate arrangements exist side-by-side with ISR even in countries where ISR is legal, Mexico argues that the United States continues to ignore those accounting rate arrangements and insists on comparing the United States-Mexico accounting rate arrangement to ISR charges purportedly available to United States' carriers to send traffic to other countries. Mexico submits that the United States refuses to acknowledge a comparison of the United States — Mexico accounting rate arrangement to United States accounting rate arrangements with other countries. Mexico further argues that the United States implicitly admits that other WTO Members "do not have explicit requirements for settlement rates to be cost-based."[355]

4.179 **Mexico** argues that, because accounting rate arrangements provide for access to an entire country's public network, the phrase in Section 2.2(b) does not mean that the charges associated with the interconnection cannot include an amount to offset the cost of rolling out telecommunications infrastructure.[356] Clearly, such charges can be allocated to any and all network components. Under the United States' argument, a WTO Member inscribing commitments analogous to Section 2.2(b) of Mexico's Reference Paper could not include any amount to offset infrastructure roll-out. Such an interpretation is absurd and is contrary to Article IV and paragraph five of the Preamble to the GATS.[357]

4.180 **Mexico**GATS.356

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accomplished" and "suitable".[359] In the context of interconnection rates, the term means that the obligation to ensure that rates are cost-oriented is not absolute, but rather tempered by factors arising from economic feasibility, which can include considerations of a nation's overall policy goals for expanding its telecommunications infrastructure.[360] Thus countries – especially developing countries such as Mexico – have wide latitude to allow rates that would permit the continued development of needed infrastructure and the achievement of universal service.[361]

4.181 **Mexico** submits that the United States' claim must fail because the United States did not interpret "based in cost" in light of the entire qualifying phrase.[362] Mexico argues that, in applying the "economically feasible standard," account must be taken of Mexico's clear policy goal of promoting universal access to basic telecommunications service for its population. Accounting rate revenues remain an important potential source of funds for infrastructure development. However, Mexico's net revenue from settlement rates (from all countries) has already been declining. Thus, in light of the important need of Mexico for investment in the telecommunications sector, further and immediate drastic cuts in settlement revenue are not economically feasible.[363]

4.182 **Mexico** cites to a statement of a United States representative in the context of discussions that led to the Annex on Telecommunications.[364] According to Mexico, this statement highlights that the term "cost-based" was not intended to require that the "price of a specific service on a specific route to be identified and charged on a cost-based basis"; rather, the term as used in the telecommunications sector implies considerable flexibility for regulators to take into account social policy goals, the need to balance out varying cost structures across different regions and as between local and long-distance service. Mexico also cites to two reports by the Mexican Government, which shows that Mexico has had an established policy to promote the construction of telecommunications infrastructure with a view toward broadening the availability of telephone and related services. Neither the Reference Paper, nor the GATS more generally, should be interpreted in such a way as to prevent Mexico from carrying out this policy.[365]

4.183 The **United States** argues that the terms "*basadas en costos*" and "cost-oriented" require a relationship between interconnection rates and the cost incurred in providing interconnection, rather than costs incurred in connection with infrastructure development or other social policy goals. The WTO website defines "cost-based pricing" as "the general principle of charging for services in relation to the cost of providing these services." Furthermore, Section 2.2(b) of Mexico's Reference Paper requires that a supplier purchasing interconnection "need not pay for network components or facilities that it does not require for the [interconnection] service to be provided." This language provides relevant context for the interpretation of "*basadas en costos*", and makes clear that the scope of all interconnection charges is limited to the specific network components and facilities required for the interconnection service provided, and not other unrelated costs. By claiming that "accounting rate revenues remain an important source of potential revenue for infrastructure development," the

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[359] *See* Mexico's second written submission, paragraph 93. *See also* Mexico's answer to question No. 14(a) of the Panel of 19 December 2002 ("*What is the meaning of '… having regard to economic feasibility …' in paragraph 2.2 of the Reference Paper?*")

[360] *See* Mexico's first written submission, paragraph 181. *See also* Mexico's second written submission, paragraph 93. *See also* Mexico's answer to question No. 14(a) of the Panel of 19 December 2002. For question No. 14(a), *see* footnote 359 of this Report.

[361] *See* Mexico's answer to question No. 14(a) of the Panel of 19 December 2002. For question No. 14(a), *see* footnote 359 of this Report.

[362] *See* Mexico's first written submission, paragraph 181. *See also* Mexico's second written submission, paragraph 88.

[363] *See* Mexico's second written submission, paragraph 95. *See also* Mexico's answer to question No. 14(a) of the Panel of 19 December 2002. For question No. 14(a), *see* footnote 359 of this Report.

[364] *See* Mexico's second written submission, paragraph 82.

[365] *See* Mexico's answer to question No. 10(a) of the Panel of 19 December 2002. For question No. 10(a), *see* footnote 343 of this Report.

United States argues, Mexico effectively concedes that its international interconnection rates recover more than the cost of the "network components or facilities . . . require[d] for service to be provided" to United States suppliers.[366]

4.184 The **United States** submits that nothing in this definition supports consideration of the public policy factors cited by Mexico. According to the United States, Mexico's definition of "economically feasible" as requiring consideration of the "efficient" use of income and wealth in fact prohibits consideration of the non-cost-oriented factors Mexico seeks to include through this language. The efficient use of resources requires cost-oriented pricing and not subsidization**.** Citing an ITU statement, the United States argues that the efficient use of income and wealth must preclude the open-ended subsidization of "policy goals" such as infrastructure development and universal service. The terms "*basadas en costos*" and "cost-oriented" require a relationship between interconnection rates and the costs incurred in providing interconnection.[367]

4.185 The **United States** also submits that cost-oriented pricing, as that term is used in Section 2 of the Reference Paper, does not permit Mexico so-called "flexibility" to implement the national goals that Mexico identified in its submission. According to the United States, the provisions on interconnection serve to achieve the requirement to which all Members that subscribed to the Reference Paper committed, namely to ensure that the scope of all interconnection charges is limited to the specific network components and facilities required for the interconnection service provided, and not other unrelated costs.[368] Furthermore, the United States disagrees with Mexico's interpretation of its statement during the 1990 negotiations. According to the United States, it is clear from this statement, that the United States was drawing a distinction between a cost-based rate and a price that includes a universal service component. As Mexico notes, this statement was made in the context of the Annex negotiations, which did not lead to the adoption of any "cost-based" or "cost-orientation" rate requirement. In contrast, the Reference Paper separates the disciplines on interconnection rates in Section 2 from the disciplines on universal service in Section 3.[369]

4.186 The **United States** argues that the phrase "having regard to economic feasibility" does not "temper" a Member's obligation to provide interconnection at cost-oriented rates, in light of its "overall policy goals for expanding its telecommunications infrastructure." According to the United States, Section 2.2(b) of the Reference Paper requires a relationship between interconnection rates and the cost incurred in providing interconnection, rather than costs incurred in connection with telecommunications infrastructure roll-out. Additionally, Section 3 of the Reference Paper imposes separate and particular requirements for Members wishing to impose universal service obligations to fund the requirements of Members seeking to rollout their national telecommunications infrastructure. Thus, the United States argues that Mexico seeks to avoid the requirements of Section 3 (and to read

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to such reading, this phrase immediately follows the requirement for "reasonable" terms and conditions for interconnection, which prohibits the use of such terms and conditions to restrict the supply of a scheduled basic telecommunications service. Second, under the ordinary meaning of the phrase "having regard to economic feasibility," a term or condition for interconnection will not be "*razonables*" if it restricts the supply of a scheduled telecommunications service where such interconnection is economically practical or possible – that is, where the resulting revenues are sufficient to cover the expenses of its operation or use.[371]

4.188 The **United States** further explains that this means that the obligation to provide interconnection is limited only where there is insufficient demand from interconnecting suppliers to generate sufficient revenue to cover the expenses of operation or use, or where a major supplier requires an additional period of time to install necessary switching capabilities or other required network components or facilities where more rapid installation would entail very high costs that could not be recovered from interconnecting suppliers. However, because the United States-Mexico route carries the world's largest one-way volume of international calls, there is no question of insufficient demand for interconnection; also, because United States suppliers are already interconnected with Telmex, such interconnection does not require additional switching capabilities or other network components or facilities. Thus, neither is the case in Mexico. Third, to the extent that the phrase "having regard to economic feasibility" limits the obligation to provide interconnection at rates that are "*basadas en costos*", interconnection rates should be sufficient to cover the expenses of the operation and use of interconnection, which requires no more than that interconnection rates should cover both direct costs and common costs, and should permit a reasonable return on an operator's investment. According to the United States, all of these costs are already included in the rates set out by the United States as benchmarks for the determination whether Mexico's interconnection rates are "*basadas en costos*".[372]

4.189 The **United States** also notes that, Mexico may meet its other national goals, unrelated to interconnection, in a variety of ways. For example, Mexico could put in place a universal service obligation, under Section 3 of the Reference Paper. However, the recovery of universal service subsidies through inflated interconnection charges paid to the major supplier would be contrary to the Section 3 requirement that universal service obligations be "administered in a transparent, non-discriminatory and competitively-neutral manner . . .". Such recovery would not be transparent, because universal service obligations would be hidden in interconnection rates paid to the major supplier. Nor would it adhere to the requirements for non-

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does not in any way discipline the rates charged for interconnection.[375] Furthermore, Mexico has not imposed, nor can it impose, any universal service obligations on United States carriers. According to Mexico, universal service obligations involve costs for domestic carriers, which must then be able to recover them, together with a reasonable return. This is only possible by means of the rates, including the interconnection rates, which they charge. Section 2.2(b) of Mexico's Reference Paper must therefore permit rates which, *inter alia*, allow for the cost of rolling out infrastructure, plus a reasonable return. Mexico submits that this is particularly significant for developing country Members, such as Mexico, which require substantial investment in their telecommunicati

lead to cost-oriented rates are not allowed in Mexico. The United States points out that, Mexico imposes a naked prohibition on competition on all international routes between firms that would otherwise be competitors, Mexico's ILD rules require a horizontal price-fixing cartel among Mexican suppliers. Those rules prevent all price competition between Mexican suppliers providing interconnection to United States cross-border suppliers. Even if other WTO Members do not have explicit requirements for settlement rates to be cost-based, they also do not have restrictions on competition like Mexico, and therefore can reasonably rely on competitive market dynamics to yield cost-based rates.[380]

4.195 **Mexico** further argues that, with respect to the unilateral reduction of settlement rates for incoming calls to domestic interconnection rate levels, Mexico would have to require that Mexican carriers unilaterally reduce their charges to foreign carriers from all GATS Members for transporting and terminating incoming international telephone traffic, but Mexico would have no assurance that the other Members would implement the same radical change in their regulatory systems, because only Mexico is the subject of the current complaint. This would expose Mexican carriers to huge financial liabilities to foreign carriers, including those of the United States. Thus, Mexico argues, the accounting rate regime cannot be changed or abandoned without a multilateral agreement on a system to replace it.[381]

(ii) Whether Telmex interconnection rates are "based in cost"

4.196 The **United States** submits that, in August 2002, Cofetel approved a Telmex proposal to charge United States suppliers' settlement rates based on three zones within Mexico. The "settlement rate" is the interconnection rate that Telmex (and other Mexican suppliers) charge United States cross border suppliers to connect their calls to their final destination in Mexico. Telmex charges 5.5 cents per minute for traffic terminating in the three largest cities in Mexico (Mexico City, Guadalajara, and Monterrey) (Zone 1); 8.5 cents per minute for the other roughly 200 medium-sized cities in Mexico (Zone 2); and 11.75 cents for traffic terminating in all other locations in the rest of Mexico (Zone 3).[382] The United States argues that these rates are not based in cost.

4.197 The **United States** submits that, because Mexico declined to make Telmex's interconnection cost data available to the United States, it uses other relevant public data as proxies for measuring the cost of interconnection provided to United States cross-border suppliers. According to the United States, these include: (1) published Mexican price data on maximum rates that Telmex charges for the network components used to provide interconnection; (2) grey market rates for calls between the United States and Mexico; (3) international proxies; and (4) rates Mexican carriers charge each other for settling accounts relating to international calls.[383]

4.198 **Mexico** notes that the European Commission allows the regulatory authorities of member states to use target rates for domestic interconnection rates to determine whether rates charged by their carriers could be deemed cost-oriented. Mexico argues that, if the use of target rates is satisfactory to comply with the obligations of Section 2.2 for domestic interconnection rates, the use of target rates is also acceptable for settlement rates. In this regard, Mexico's international settlement rates with the United States are consistent with the target rate recommended by ITU Study Group 3 for Mexico. Mexico also submits that the current accounting rate arrangement between Mexican and United States carriers even complies with the benchmark rate for Mexico unilaterally set by the FCC of the

[380] *See* the United States' second oral statement, paragraphs 55-58.

[381] *See* Mexico's second written submission, paragraph 96. *See also* Mexico's answer to question No.

United States. Thus, Mexico argues, its rates are consistent with the cost-based obligation even if the term "cost-based" is viewed in isolation.[384]

4.199 The **United States** questions Mexico's attempts to justify the use of this ITU target rate by citing the European Commission's use of "current best practices" domestic interconnection rates. For 2000, the EC established best practice rates of 1.5 to 1.8 Euro-cents (about 1.4 to 1.65 United States cents) for double transit (or nationwide termination) at peak (time of day) rates. Adding the Cofetel approved rate of 1.5 cents (used in the pricing methodology by the United States as an estimated charge for the additional network components (international transmission and gateway switching) required to terminate an international call) to the EC best practices rates for nationwide termination yields an international "best practices" target of only about 3 cents per minute. The current 5.5, 8.5 and 11.75 cents per minute international rates charged by Telmex exceed this target by 83%, 183% and 292%.

4.204 **Mexico** submits that the United States' assertion that the FCC's "benchmarks" are not cost-oriented, ignores Mexico's point that the current United States-Mexican accounting rate is not at the level of the United States benchmark for Mexico, but well below it. The FCC's benchmark for Mexico's settlement rate is $.19, while the current rates are $.055, $.085 and $.115. Thus, the rate for calls to the three largest Mexican cities is about 71 per cent lower than the United States benchmark, and the rate for calls to rural areas is about 40 per cent lower than the benchmark. Mexico also identifies portions of the FCC's 1999 *ISP Reform Order* in which it established its policy that the United States international settlements policy (that is, the requirements for uniform and symmetrical settlement rates and proportionate return) could be waived for a country where the settlement rate was

(iv) Long-distance links: this network component consists of those facilities utilized to transport traffic from the entry point in the Telmex/Telnor domestic network to the last switch in the network chain."[393]

4.207 According to the **United States**, these network components reflect the guidelines promulgated by the ITU for identifying the costs incurred in terminating international calls. According to the ITU, the network components used to provide international telephone services are international transmission and switching facilities (component 1 above) and national extension (which incorporates components 2 through 4 above).[394] As a basis for its calculation, the United States uses the published Telmex prices, which are approved by Cofetel, for these network components. The United States further argues that, because Mexican law requires these Cofetel-approved rates to recover at least the total cost of these network components, they therefore include at least the true costs of these network components, including direct and indirect costs.[395] For certain network components, the United States relies on either Telmex's retail prices or on certain non-cost-oriented wholesale rates that Telmex charges. The United States argues that Telmex prices, as such, set an upward limit (cost ceiling) of cost; rates above this cost ceiling cannot be "*basadas en costos*".[396]

4.208 The **United States** then discusses the specific prices of these network components, depending on the destination of a call into Mexico. According to the United States, cross-border suppliers of basic telecom services interconnect with Telmex in order to terminate calls to three "zones" in Mexico. These three zones are: (1) calls terminating in Mexico City, Guadalajara, and Monterrey; (2) calls terminating in approximately 200 medium cities in Mexico; and (3) calls terminating in all other locations in Mexico. The United States notes that each successive calling zone reflects progressively more extensive use of Telmex's network (and hence progressively higher prices, based on Telmex's current pricing practices).[397]

4.209 For calls to Zone 1 cities, the **United States** submits that Telmex's costs can be no more than 2.5 cents per minute (1.5 cents for international transmission and switching plus 0.022 cents for local link plus 1.003 cents for subscriber line) for the network components to interconnect a call from the United States border.[398] However, Telmex currently charges a Cofetel-approved rate of 5.5 cents to connect these calls. Thus, the United States asserts that Telmex charges United States suppliers an interconnection rate that is approximately 220 per cent of the maximum cost it incurs to terminate a call in Zone 1.[399]

4.210 According to the **United States**, calls to Zone 2 cities require one additional network component, i.e., a "long-distance link" used for transport within Mexico between the international gateway switch and the switch in the destination city. For these calls, Telmex allows its competitors to purchase "on-net" interconnection. The United States submits that Telmex's costs can be no more than 3 cents per minute (1.5 cents for international transmission and switching plus 0.022 cents for local link plus 0.536 cents for long-distance link plus 1.003 cents for subscriber line) for the network components used to interconnect a call from the United States border to a Zone 2 city. However, Telmex currently charges a Cofetel-approved rate of 8.5 cents to connect these calls. Thus, the

[393] *See* the United States' first written submission, paragraph 122.
[394] *See* the United States' first written submission, paragraph 123; *see also* International Telecommunication Union, Recommendation D.140 (Accounting Rate Principles for the International Telephone Service) ("D.140"), October 2000.
[395] *See* the United States' first written submission, paragraph 124.
[396] *See* the United States' first written submission, paragraph 126.
[397] *See* the United States' first written submission, paragraph 127.
[398] *See* the United States' first written submission, paragraph 130.
[399] Ibid.

United States argues that Telmex charges United States suppliers an interconnection rate approximately 275 per cent of the maximum cost it incurs to terminate a call in Zone 2.[400]

4.211 The **United States** further notes that, calls to Zone 3 cities are classified as "off-net", which means that Telmex has not opened to originating competition and does not allow competitors to purchase "on-net" termination. According to the United States, Telmex uses the same network components as it does for Zone 2 to terminate calls in Zone 3 cities. However, unlike the preceding two calling patterns, Telmex's rate for terminating interconnection is substantially higher than that charged by Telmex for "on-net" interconnection. In Zones 1 and 2, Telmex terminates calls in cities where competitors are allowed to purchase "on-net" termination at rates established by Cofetel and incorporated into commercial agreements between Mexican operators. However, Telmex charges highly inflated rates (known as "*reventa*" or "off-net" rates) to terminate calls in cities where competitors are not allowed to buy "on-net" terminating interconnection. Because unbundled pricing information for the network components used to provide *reventa* service is not readily avail[illegible] United States utilizes the 7.76 cent *reventa* rate that Telmex charges its compet[illegible] to off-net cities. Based on this, the United States submits that Telmex's cost[illegible] 9.28 cents per minute (1.5 cents for international transmission and switching plu[illegible] link plus 7.76 cents for terminating interconnection) for the network componen[illegible] a call from the United States border to a Zone 3 city. However, Telmex curre[illegible] approved rate of 11.75 cents to connect these calls. Thus, the United State[illegible] charges United States suppliers an interconnection rate approximately 127 per[illegible] cost it incurs to terminate a call in Zone 3.[401]

4.212 In conclusion, the **United States** argues that the 9.2 cents per minute [illegible] three zone rates that Telmex charges United States suppliers for interconnec[illegible] published price for the network components used to provide such interc[illegible] Telmex's maximum blended average costs, by 77 per cent. As to each o[illegible] United States argues that the rates that Telmex charges United States supplie[illegible] exceeds Telmex's published price for the network components used to provide[illegible] and hence, Telmex's maximum costs by 27 to 183 per cent. The United State[illegible] the data it is using – including Telmex's retail rates for private lines and Tel[illegible] interconnection net exceeds per-minute [illegible]

means that the costs of transporting and terminating international calls should be deemed the same as the costs of domestic interconnection.[405]

4.214 The **United States** replies that it is not arguing that the costs of mode 1 interconnection must be equal to the costs for domestic interconnection for commercially-present suppliers. Instead the United States submits that the point of its estimated cost model is to show that the rates currently charged by Telmex substantially exceed the prices charged for the same elements domestically. Since Mexican law requires that interconnection rates for commercially-present suppliers must recover at least the total cost of all network elements, interconnection rates for cross-border suppliers that exceed rates for commercially-present suppliers are by definition not based in cost. The United States

4.222 **Mexico** also submits that the United States makes "apples to oranges" comparisons. According to Mexico, the United States compares ISR rates from the United States to various countries with the United States-Mexico accounting rates, rather than comparing the United States accounting rates with those countries to the United States-Mexico accounting rates. Mexico also points out that, in the same submissions in which it complains about the unavailability of ISR into Mexico, the United States presents detailed information about the rates United States carriers are currently paying for ISR into Mexico. This contradiction serves to highlight that the United States has not presented the complete factual picture.[414]

cc) International proxies

4.223 The **United States** also shows that Telmex termination rates exceed wholesale rates

terminate that traffic and then negotiate financial compensation agreements (or "true-up" payments) with the operator entitled to receive the traffic under the allocation formula.[419]

4.226 The **United States** argues that, the mere existence of Rule 17 should be regarded as an admission by Mexico that the interconnection rate charged to cross-border suppliers is not *basadas en costos*.[420] The United States claims that, if the settlement rate was *basadas en costos*, no Rule 17 "financial compensation" would be available for any "entitled" operator to receive, because the settlement rate received by the operator actually receiving and

cannot be said, categorically, that an action or a measure that restricts the supply of a scheduled

especially in the long run. However, in the telecommunications sector technological change has been very rapid, so much so that fixed asset obsolescence has led to high depreciation rates and, consequently, higher costs. Currently there is an excess of transmission capacity that must be depreciated very quickly, but with a very low capacity utilization and profitability. Mexico submits that it is not an exception to this global problem.[439]

4.241 According to **Mexico**

4.247 **Mexico** further asserts that the United States interpretation leads to an absurd result. If carried to its logical conclusion, the United States argument implies that any charge for access is unreasonable, because any fee higher than zero conceivably "restricts" supply.[446]

4.248 The **United States** replies that it is not arguing that any charge for interconnection or that any term or condition imposed upon interconnection is unreasonable. Rather, the determination of reasonableness must be made on a case-by-case basis. In this case, the facts clearly show that Mexico has failed to ensure that the terms and conditions for interconnection with Telmex are reasonable - that is, Mexico has failed to ensure that those terms and conditions reign in Telmex's ability to abuse its market power and restrict the supply of basic telecommunications services. The result of Mexico's failure to ensure interconnection on reasonable terms and conditions is that Telmex has indeed restricted the supply of scheduled services.[447]

4.249 **Mexico** replies that the United States' qualification highlights a fundamental flaw in the United States' claim. According to Mexico, what the United States is now arguing is that whether or not the rate is reasonable depends on how much it restricts the supply rather than the fact that it restricts supply in the first place. Under this new legal test posited by the United States, a multitude of facts could have a bearing on "how much is too much". Accordingly, the fact that a measure "restricts the supply of a scheduled service" is no longer determinative of "reasonableness" and the entire basis for this claim is eviscerated.[448]

(ii) Whether Telmex interconnection rates are "reasonable"

4.250 The **United States** argues that, because Mexico has given Telmex *de jure* monopoly power to set and maintain interconnection rates with foreign operators enabling it to restrict the supply of scheduled services, it has failed to ensure that Telmex provides interconnection at reasonable rates. According to the United States, Mexico has enabled, through its ILD Rules, its major supplier to affect the supply of scheduled basic telecom services through its exclusive negotiating authority and power to set interconnection rates for all Mexican carriers. The United States alleges that, on their face, the ILD Rules prevent Telmex from providing interconnection as required by Section 2.2 of the Reference Paper. Instead, the rules establish a structure and process that allow Telmex to set inflated interconnection rates and insulate Telmex from any competitive pressures that would otherwise lead to rates that are reasonable. The United States explains that Rule 13 grants Telmex alone the exclusive authority to negotiate the interconnection rate with cross-border suppliers, while Rules 3, 6, 10, 22, and 23 prohibit any alternatives to this Telmex-negotiated rate. As a result, the United States argues, these particular ILD Rules prevent Mexico from fulfilling its obligations under Section 2.2 and, for that reason, are inconsistent with that provision.[449]

4.251 The **United States** further contends that Mexico has failed to honour its commitments under Section 2.2(b) by rejecting proposals from United States and Mexican suppliers to approve alternative interconnection agreements that would exert competitive pressure on the Telmex-negotiated rate. According to the United States, since 1998, United States and Mexican suppliers have tried to convince Mexican authorities to permit competitive alternatives to the Telmex-negotiated cross-border interconnection rates. However, Mexican authorities either rejected or ignored each request. The United States alleges that, these examples reinforce the conclusion that Mexico has taken affirmative steps to prevent any competition to the Telmex-negotiated interconnection rate.[450]

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[446] *See* Mexico's first written submission, paragraph 184.
[447] *See* the United States' second written submission, paragraphs 74-75.
[448] *See* Mexico's second oral statement, paragraph 87.
[449] *See* the United States' first written submission, paragraphs 167-175.
[450] *See* the United States' first written submission, paragraphs 178-179.

> "*Desiring* the early achievement of progressively higher levels of liberalization in trade in services … while giving due respect to national policy objectives;
>
> *Recognizing* the right of Members to regulate … the supply of services within their territories in order to meet national policy objectives and, given wide asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;
>
> *Desiring* to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness …"[461]

4.256 **Mexico** also submits that Section 1.1 does not require a Panel to act as a domestic anti-trust authority, as, Mexico indicates**,** the United States implicitly argues. In Mexico's view, Section 1.1 sets out "principles and definitions" for regulatory authorities and does not mean that a single and common regulatory system should be imposed in the territory of all WTO Members.[462]

2. Section 1.1 of Mexico's Reference Paper

(a) Purpose of Section 1.1

4.257 According to the **United States**, Section 1.1 of Mexico's Reference Paper provides for the maintenance of appropriate measures to prevent major suppliers from engaging in or continuing anti-competitive practices.[463] The United States recalls that those appropriate measures are intended to prevent anti-competitive conduct by suppliers who "alone or together" are a major supplier. The United Sates submits that the "or together" language in Section 1.1 indicates that the negotiators attached relevance to horizontal coordination between suppliers. The United States also points out that, although this phrase has direct relevance to the definition of "major supplier," it also lends context to the interpretation of the term "anti-competitive practices," which the United States contends includes, at the very least, horizontal price-fixing agreements.[464]

4.258 According to **Mexico**, the obligation in Section 1.1 is to maintain "suitable or proper" measures with the object or the intention of preventing Telmex from engaging in anti-competitive practices.[465] Mexico claims that Section 1.1 is drafted in such manner that it allows Mexico a large measure of discretion in deciding what measures would be suitable or proper to accomplish the intended objectives and cannot be interpreted to mean that Mexico is required to prevent all suppliers from even engaging in or continuing anti-competitive practices, as suggested by the United States.[466] Mexico further submits that, Section 1.1 creates an obligation of means, not an obligation of result.[467]

(b) Extent of the requirement under Section 1.1

4.259 **Mexico** maintains that Section 1 of the Reference Paper does not require markets to be opened to competition. According to Mexico, the opening of markets is a market access issue that is

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[461] Mexico refers to the preamble of the GATS. *See* Mexico's answer to question 17(a) of the Panel of 19 December 2002, paragraph 273 ("*Are Mexican rules that impede price competition among Mexican companies terminating incoming international calls consistent with the GATS and the Reference Paper?*").

[462] *See* Mexico's first written submission, paragraph 204.

[463] The United States refers to Section 1.1 of Mexico's Schedule, Reference Paper, Sec 1, GATS/SC/56/Supp.2, p.7, Spanish Version. *See* the United States' first written submission, paragraph 191.

[464] *See* the United States' second written submission, paragraph 80.

[465] *See* Mexico's first written submission, paragraph 201.

[466] *See* Mexico's first written submission, paragraph 202.

[467] *See* Mexico's first written submission, paragraph 203.

dealt with in Mexico's Schedule of Specific Commitments. Mexico submits that Section 1 requires only that appropriate measures be maintained for the purpose of preventing major suppliers from engaging in or continuing anti-competitive practices.[468]

4.260 The **United States** submits that it is not arguing that Section 1 requires a guaranteed result and agrees that it is the maintenance of appropriate measures that is required.[469] According to the United States, what matters is that a Party maintain measures of some sort to prevent, not stimulate or condone, anti-competitive marketplace conduct.[470] The United States further submits that it does not claim that Section 1 of the Reference Paper contains language requiring a market to be opened to competition or that the requirement of the Reference Paper can only be met by opening a market to competition. According to the United States, Mexico's obligation to open various markets derives from the broad range of market access commitments on basic telecommunications contained in its Schedule.[471]

receives fees proportionate to the number of calls it actually handles.[479] According to Mexico, the combination of these policies prevents a large carrier taking advantage of that authority by retaining

penetrating the domestic market for outgoing international calls. This is why, in Mexico's view, the ILD rules must be evaluated in their totality.[495]

4.270 The

not be prohibited simply because one of the effects might be "anti-competitive" according to a particular criterion or measure.[502]

4.273 The **United States** submits that Mexico finally admits that no other WTO Member maintains a measure similar to Rule 13, and fails to identify any WTO Members, other than purportedly the United States, which it claims "have a de facto Rule 13." The United States submits that Mexico then repeats its false charges that United States rules and policies are similar to those of Mexico, and again makes no attempt to rebut the evidence put forward by the United States showing that the United States International Settlements Policy requires nondiscriminatory rather than uniform rates, that ISP non-discrimination and proportionate requirements apply only to arrangements with dominant carriers that maintain high rates, and that all United States carriers negotiate rates independently. [503]

bb) Whether a proportionate return system could be an anti-competitive measure

4.274 **Mexico** claims that Rule 13 prevents international anti-competitive activities. According to Mexico, the United States fails to mention that the two other major Mexican long distance carriers are affiliates of carriers from the United States and also fails to explain how allowing those carriers to dictate rates to their Mexican affiliates would serve any anti-competitive purpose. Mexico submits that its ILD Rules were adopted to mirror those of the United States, which otherwise would give carriers from the United States an unbalanced negotiating advantage over Mexican carriers.[504] Mexico contends that its rules have prevented large foreign carriers from pressuring their own affiliated Mexican companies to agree to predatory, uneconomic prices that would serve only the interest of companies from the United States to the detriment of the Mexican market, undermining the opportunity to expand access to basic telecommunications services to those who now lack such services, and who comprise two-thirds of Mexican households.[505]

4.275 The **United States** replies that its international regulatory scheme upon which Mexico's ILD Rules were allegedly based is qualitatively different from Mexico's rules. According to the United States, its rules are designed to prevent monopolistic abuses where the potential for them still exists, not to authorize and mandate such abuses like Mexico's ILD Rules. According to the United States its uniform or nondiscriminatory settlement rate and proportionate return requirements only apply to foreign carriers with market power, whereas Mexico's rules apply to all foreign carriers regardless of their market power. The United States claims that its rules encourage all its carriers to negotiate cost-oriented rates. The United States further points out that Mexico's rules prohibit all carriers, except Telmex, from negotiating rates and thus encourage artificially high rates, the exact opposite of cost-based.[506] The United States submits that it has not at any time given one carrier the exclusive authority to negotiate international interconnection rates for itself and other competitive carriers.[507]

4.276 Mexico contends that, despite the United States claim that it applies its International Settlements Policy in a narrowly targeted fashion, it has waived the policy only for 15 countries, and

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[502] *See* Mexico's answer to question No. 24 of the Panel of 14 March 2003, paragraphs 128-129. For question No. 24, see footnote 492 of this Report.

[503] *See* the United States' comments on Mexico's answer to question No. 24 of the Panel of 14 March 2003, paragraph 67.

[504] *See* Mexico's first written submission, paragraph 210. *See* Mexico's answer to question No. 17(a) of the Panel of 19 December 2002, paragraph 256. For question No. 17(a), see footnote 461 of this Report.

[505] *See* Mexico's answer to question No. 17(a) of the Panel of 19 December 2002, paragraph 256. For question No. 17(a), see footnote 461 of this Report.

[506] *See* the United States' first oral statement, paragraph 40.

[507] *See* the United States' first oral statement, paragraph 41.

it deems virtually every major foreign carrier to have market power, including all local exchange carriers in the countries to which the Policy applies.[508]

4.277 In the **United States**' view, the use of a proportionate return system is not an anti-competitive practice where it is used solely to prevent the abuse of market power. The United States claims that it applies proportionate return requirements only to cross border suppliers that both (1) possess market power at the foreign end of the international route, and (2) maintain high settlement rates.[509] According to the United States, proportionate return is applied to d

of ILD Rule 13, in other words, is not directed at preventing harm to competition but rather is directed at preventing the natural results of competition. Mexico prohibits price competition in the market for interconnection provided to United States suppliers operating on a cross-border basis, and justifies this prohibition as necessary to prevent such competition from reducing rates. This can only be regarded as anti-competitive.[514]

4.280 In **Mexico**'s view, the proportional return system is a pro-competitive practice, directed at Mexico's legitimate policy objectives.[515] According to Mexico, its ILD Rules promote competition in the Mexican domestic market, while protecting Mexican carriers from being played off each other by foreign carriers. Mexico submits that among other pro-competitive features, ILD Rules prevent

The United States defines the relevant market as the termination of voice telephony, facsimile and circuit-switched data transmission services supplied on a cross-border (*i.e.*, international) basis from the United States into Mexico, which, in its view, is demonstrated by well-

submissions during the negotiations, Australia stated that termination of international traffic is interconnection, and there is no indication that any other Member objected to this characterization.[532]

4.286 **Mexico** submits that, basically, Mexico and the United States differ on what constitutes the

on the Interaction Between Trade and Competition Policy describes the nature and consequences of "horizontal" agreements which are likely to have a direct, negative impact on competition and to give rise to the exercise of market power.[536]

4.289 **Mexico** indicates that a definition of "anti-competitive practices" is provided in Section 1.2, which states that:

> "The anti-competitive practices referred to in the above paragraph shall include in particular:
>
> (a) Engaging in anti-competitive cross-subsidization;
>
> (b) using information obtained from competitors with anti-competitive results; and
>
> (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide service." (emphasis added)[537]

4.290 **Mexico** argues that the term "shall include" indicates that the list is non-exhaustive and that the addition of the words "in particular" demonstrate a focus on certain types of activities – namely, actions taken by private companies to gain an advantage over their competitors. Mexico claims that carriers from the United States are not competing with Mexican carriers when they enter into bilateral accounting rate arrangements since they do not offer service to Mexican customers. Mexico submits that, even if the legal requirement that all Mexican carriers charge the same settlement rate somehow could be construed as a "horizontal price fixing agreement" by private companies, such an agreement would not be encompassed by Section 1 because all Mexican carriers would be participating in the conspiracy and none would be harmed by it.[538]

bb) Government intervention

4.291 According to the **United States**, the fact that anti-competitive conduct is compelled by the government does not change the underlying nature .25 TDiiFwhi/ie (-) 357ted 5mracy and none Tj 11.25 0 Tt585.

interpretation of Section 1 would encourage Members affirmatively to maintain measures requiring anti-competitive conduct, rather than put in place measures to prevent anti-competitive conduct.[540]

4.292 **Mexico** submits that the United States has failed to establish that Section 1 disciplines regulatory "measures" of a WTO Member that have an anti-competitive effect.[541] In Mexico's view, "anti-competitive practices" refer to the practices of a major supplier and not to governmental measures that may have an anti-

cc) Price fixing as an anti-competitive practice

4.293

equivalent[55]

(d)

would be impossible for many service suppliers to deliver their services.[569] The United States claims that access to telecommunications as a transport mechanism depends on those entities which control telecommunications networks and offer telecommunications services. Such entities – principally monopolies or former monopoly providers – have represented the principal obstacle to access and use of telecommunications as a transport mechanism.[570] Like the Reference Paper, the Annex represents an effort to prevent dominant telecom providers from using their control over public telecom networks and services to undermine the supply of a scheduled service and to ensure that dominant telecom suppliers cannot nullify the services commitments that their home country undertakes.[571]

4.307 **Mexico** contends that enhanced services and suppliers of services in sectors other than the telecommunications sector rely on "access to and use of" the existing public telecommunication network. According to Mexico, the Annex establishes general obligations to ensure that such services have access to and use of the public network on non-discriminatory and reasonable terms and conditions. Mexico claims that the Annex does not confer any right to supply telecommunications transport networks and services (i.e. basic telecommunications services) other than as provided in a Member's Schedule. It further submits that market access rights for the supply of basic telecommunication services were the subject of the later negotiations that led to the Fourth Protocol.[572]

4.308 The **United States** maintains that the Annex requires each WTO Member to ensure that foreign service suppliers have reasonable and non-discriminatory access to and use of public telecommunications networks and services to supply a scheduled service. According to Section 5 of the Annex:

> "(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and service on reasonable and non-discriminatory terms and conditions for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f) [footnote omitted].
>
> (b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits."[573]

4.309 The **United States** submits that for each service inscribed in its Schedule, includi
telecom services, each WTO Member must ensure that foreign service suppliers may acces
public telecommunications networks and services – whether through interconnection or a
form of access and use – to transport their service.[574] According to the United States the scop
obligation is wide and extends to any public telecom network and service offered within or a
border of that Member. The definition of such networks and services is broad enough to en
all types of public networks and services that a telecom provider may offer.[575]

4.310 **Mexico** submits that the focus of the Annex on Telecommunications services is as a t
means for other economic activities, and not the supply of basic telecommunications services.
term "access to and use of" is not defined in the Annex, but paragraphs (b) and (c) of Section 3

[569] 56 T9j -108 -8.25SeeD /F1 4.25 Tf 0 Tc 0 Tw (56 e)59
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6 9 j -1 0 8 -8. 2 5 2 0 8 3 7 T w 6. h e A n
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4.313 In **Mexico**'s view, the Annex was not drafted to provide "market access" to foreign suppliers of basic telecommunications services[586]. According to Mexico, paragraph (c) of Section 2 of the Annex provides important exemptions from the application of the Annex:

> "Nothing in this Annex shall be construed:
>
> (i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided in its Schedule; or
>
> (ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally."[587]

4.314 According to **Mexico**, the services at issue in this dispute are "telecommunications transport … services", governed by Mexico's Schedule. In Mexico's view, pursuant to Section 2(c)(i), nothing in the Annex can be construed to require Mexico to authorize service suppliers from the United States to supply these services beyond the terms and conditions inscribed in its schedule.[588] The **United States** submits that Section 1 of the Annex states that telecommunications has a "dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities." It further submits that Section 2(a) states that the Annex applies to "all measures" affecting access to and use of public telecommunications transport networks and services, which would include measures regulating telecommunications "as a distinct sector of economic activity . . ." The United States also recalls Section 5(a), which imposes obligations "for the supply of a service included in [a Member's] Schedule," without imposing any limits on the type of service that would be relevant, including basic telecommunications services scheduled by Mexico.[589]

4.315 **Mexico** maintains that the fact that Section 1 (entitled "Objectives") of the Annex on Telecommunications refers to a "dual" role of the telecommunications services sector does not mean that the Annex covers both aspects of this "dual" role. In Mexico's view, Section 1 simply confirms that the Annex is based on the recognition that, beyond constituting a service sector of their own, telecommunications services and networks are essential tools for other economic activities, such as banking, insurance, etc. According to Mexico the fact that these other activities rely heavily on telecommunications services as an underlying transport means that is the *raison d'être* of the Annex, supporting Mexico's view that the Annex is aimed at addressing the second aspect of the dual role. The first aspect mdulehorize7j"vc ties, such as

[illegible]

Services. Section 1(a) of that Annex states "[t]his Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement". Thus, where the negotiators of the GATS intended that an annex apply to the "supply" of a service within the broader meaning of the GATS, they did so explicitly.[592]

4.316 According to **Mexico** the Annex distinguishes between *access to and use of* public telecommunications transport networks and services, which is relevant to telecommunications services as an underlying transport means for other economic activities, and the *supply* of such services, which is relevant to trade in telecommunications services as a distinct sector of economic activity.[593] In Mexico's view, Section 2 of the Annex makes clear that the Annex is devoted solely to the guarantees of access and use. It explains that Paragraph (a) of Section 2 stipulates that the Annex "shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services". In Mexico's view, the Annex is limited in scope and deals only with the right to access and use public telecommunications transport networks and services and not the right to provide and supply them.[594] Mexico contends that the services at issue in this dispute are the transport of customer-

United States postal services by delivering mail sent from the United States and handed over at the border, that a pipeline within Mexican territory would be transporting United States pipeline services when it transports oil received from a United States pipeline that stops at the border, and that a Mexican transport company would be performing United States transport services when it delivers the freight that was transferred to it at the border. In Mexico's view, Mexican service suppliers – including public telecommunications transport suppliers – only supply their own transport service.[600]

4.318 The **United States** contends that Mexico's assertion that the services at issue are "transport and transmission" services, is erroneous, as it ignores the text of the CPC codes Mexico has inscribed in its Schedule. In the view of the United States, Mexico's Schedule does not limit its cross-border commitment to only a portion of the service defined in the CPC codes, but the entirety of a telephone call's path, from its point of origin to its point of termination.[601] The United States further disagrees with the analogy that Mexico draws with regard to the transport of oil or of goods sent via mail. In case of the transport of goods, the goods are separate products, while a basic telecommunications service – a telephone call or a "communication" is an inseparable part of the service itself. Section 1 of the Annex draws an explicit distinction between telecommunications services as a distinct sector of economic activity and as the underlying transport means for other economic activities.[602]

2. Application of Sections 5(a) and 5(b) of the Annex

4.319 The United States submits that, its claims are related to *five* distinct situations for which, in the United States' view, Mexico has made specific commitments, and for which Mexico must comply with its Annex obligations. According to the United States, under the first two situations, in accordance with Section 5(a) of the Annex, Mexico must ensure that foreign facilities-based and non-facilities based suppliers of cross border telecommunications services are accorded access to and use of public telecommunications transport networks and services (PTTNS) on reasonable and non-discriminatory terms and conditions.[603] Under the third and fourth situations, the United States claims that, according to Section 5(b) of the Annex, Mexico must ensure that these suppliers have access to and use of private leased circuits.[604] The United States further points out that locally established non-facilities based operators (commercial agencies) must likewise be afforded access to and use of private leased circuits to supply international telephone services.[605]

(a) Claims under Section 5(a) of the Annex

4.320 According to the **United States**, pursuant to the Annex, services suppliers from the United States are entitled to access and use of public telecommunications networks and services. The United States claims that interconnection is the means by which service suppliers from the United States access and use Mexico's public telecommunications networks and services. The United States asserts that its service suppliers must interconnect with the Mexican network in order to ensure they can transport their scheduled service to its final destination in Mexico. The United States further points out that without such access, a service supplier from the United States could never supply a scheduled facilities-based or non-facilities-based basic telecom service.[606]

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[600] *See* Mexico's answer to question No. 26 of the Panel meeting on 13 March 2003, paragraph 137. For question No. 26, *see* footnote 597 of this Report.

[601] *See* the United States' comments on Mexico's answer to question No. 26 of the Panel of 14 March 2003, paragraph 71.

[602] *See* the United States' comments on Mexico's answer to question No. 1 of the Panel of 14 March 2003, paragraph 5.

[603] *See* the United States' first written submission, paragraph 211.

[604] *See* the United States' first written submission, paragraph 213.

[605] *See* the United States' first written submission, paragraph 214.

[606] *See* the United States' first written submission, paragraph 216.

> International traffic must be routed through the facilities of an enterprise that has a concession granted by the Ministry of Communications and Transport (SCT).
>
> …
>
> (3) A concession from the SCT is required. Only enterprises established in conformity with Mexican law may obtain such a concession.
>
> Footnote 1 – Concession: The granting of title to install, operate or use a facilities-based public telecommunications network."[618]

4.327 The **United States** submits that unlike the term "non-discriminatory", the Annex does not define "reasonable". In the United States view, to determine the scope of "reasonable" terms and conditions, a treaty interpreter should look to the ordinary meaning of "reasonable" in its context and in light of the object and purpose of the Annex and the GATS.[619] According to the United States, the terms and conditions that Mexico has imposed are unreasonable under the object and purpose of the Annex and the GATS.[620]

4.328 **Mexico** contends that the term "reasonable" set out in Section 5(a) of the Annex does not have the same meaning as the term "reasonable" set out in Section 2.2 of the Reference Paper.[621] In Mexico's view, although the ordinary meaning is applicable to the term "reasonable" in both provisions, Section 5(a) of the Annex and Section 2.2(b) of Mexico's Reference Paper provide different contexts for interpreting its meaning.[622]

4.329 **Mexico** submits that in *US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, the Appellate Body stated that "[i]n view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *a treaty interp8Annex a Comma4.7r2 TD -0phrica.*

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and use of public telecommunications transport networks" on terms and conditions that are *inter alia*, "reasonable", the Panel must examine all relevant facts and circumstances related to access to and use of PTTN.[625]

(b) Claims under Section 5(b) of the Annex

4.330 The **United States** submits that Section 5(a) of the Annex requires Mexico to ensure that service suppliers of other Members can access and use public telecom networks and services on reasonable terms and conditions to provide a scheduled service.[626] The United States further submits that, to this end, Section 5(b) of the Annex requires Mexico to ensure that foreign suppliers can access and use private leased circuits offered within and across Mexico's border and interconnect those circuits with public networks and services.[627] Consequently, both facilities and non-facilities based suppliers of cross-border telecom services must have access to and use of private leased circuits. Further, established non-facilities based operators (commercial agencies) must likewise be afforded access to and use of private leased circuits under reasonable terms and conditions, to supply scheduled basic telecom services. In the United States' view, Mexico's measures preclude foreign suppliers from offering scheduled basic telecom services over private leased circuits; and are therefore violating the basic obligation to provide access to and use of private leased circuits for the provision of a scheduled service by Mexico.[628]

4.331 **Mexico** contends that under Mexican law, only companies established in Mexico and qualifying for a "concession" may "install, operate or use a facilities-based public telecommunications network". It contends that under Mexican law, suppliers of facilities-based telecommunications services from the United States are not permitted to provide facilities-based telecommunications services in Mexico. Mexico further submits that it made clear, by specifically inscribing limitations in its Schedule, that suppliers of facilities-based telecommunications services from the United States would not be permitted to supply basic telecommunications services cross-border.[629]

4.332 The **United States** submits that Section 5(b) contemplates both principal forms of interconnection, as follows:

> "Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network and service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted . . . (ii) to interconnect private leased or owned circuits with public telecommunications transport networks or with circuits leased or owned by another service supplier."[630]

4.333 **Mexico** claims that there is no basis for the allegation from the United States that Mexico committed itself to cross-border access for facilities-based suppliers of basic telecommunications.[631] According to Mexico, the language of Section 5(b) explicitly demonstrates that WTO Members intended and expected that "access to and use of any public telecommunications transport network or service" was something that could be "offered" or not "offered", within or across the border of a particular Member. Mexico claims that it did612.75 expe Tw0n0 (cxick and s2 itW,) Tj Tw (.) 88888888888888

public telecommunications transport network or service either within Mexico or across its border. In Mexico's view, two provisions of a treaty - Sections 2(c)(i) and 5(b) - should not be interpreted in a manner which renders one of them ineffective or inutile.[632]

4.334 According to the **United States**, Section 5(b) specifically guarantees that foreign service suppliers may obtain access to and use of Mexican public telecom networks and services through interconnection of private leased or owned circuits.[633] The United States maintain that, in both cases, its service suppliers must rely on interconnection with a Mexican supplier of public telecom networks and services – such as Telmex – in order to access and use Mexican public telecom networks and services for the supply of a scheduled basic telecom service between the United States and Mexico. In the United States' view, Mexico must therefore ensure – under Section 5 of the Annex – that suppliers of scheduled basic telecom services from the United States may interconnect with Mexican suppliers on reasonable terms and conditions.[634]

4.335 In **Mexico**'s view, Section 2(c)(i) of the Annex exempts Mexico from allowing non-facilities-based suppliers of basic telecommunications services to supply their services cross-border over capacity that they lease from operators in Mexico. Mexico claims that to interpret the Annex otherwise would not only be inconsistent with the provisions of Section 2(c)(i) of the Annex, but would also undermine and render ineffective the express language of the limitations on Market Access inscribed in Mexico's GATS Schedule.[635]

4.336 According to the **United States**, private leased circuits are essentially lines that a user leases from a public telecom operator over which it transports (or supplies) its service. As an example, the United States explains that a bank might lease a line from a public telecom operator over which it sends financial information from its branch in Mexico City to its home office in New York, or a telecommunications company may lease a line from a public telecom operator over which its sends a phone call from its customer in Los Angeles to the end-user in Montreal. In the United States' view, in both cases the service supplier (the bank or the phone company) needs access to a line (a public telecom network or service) to provide a scheduled service (a financial service or a basic telecom service).[636] It claims that Mexico has not ensured that suppliers from the United States have access to and use of any public telecommunications network and service for the supply of the basic telecom services inscribed in Mexico's Schedule[637], failing to honour its commitments under the Annex.[638]

4.337 **Mexico** submits that, even if the Annex were to apply to this dispute, the terms and conditions that Mexico applies on access to and use of PTTNS would have to be considered reasonable. According to Mexico, the Annex allows WTO Members great latitude to regulate access to and use of PTTNS. In Mexico's view the word "reasonable" in Section 5(b) would have to be interpreted broadly

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supplier".

argues that, because Mexico did not indicate otherwise, this mode 3 commitment allows a locally established commercial agency to provide international basic telecom services over leased capacity.[648]

4.343 The **United States** contends that Mexico undertook mode 1 and mode 3 commitments for

use of private leased circuits.[654] The United States further submits that Telmex, through its subsidiary in the United States, assured the FCC that Mexico's WTO commitments requires Mexico "promptly" to adopt the relevant regulations and issue reseller permits.[655]

4.347 The **United States** submits that Mexico also undertook cross-border market access and national treatment commitments for specific public basic telecom services supplied by a facilities-based operator. According to the United States, Mexico limited this commitment to ensure that foreign service suppliers route international traffic through the facilities of a Mexican concessionaire. The United States contends that, for the supply of these public facilities-based services from the territory of the United States into the territory of Mexico, Mexico promised to accord market access and national treatment to suppliers of these services provided that the service supplier, from the United States, routes international traffic through the facilities of a Mexican concessionaire.[656]

4.348 According to the **United States**, access to and use of private leased circuits is essential to the supply of the following services inscribed in Mexico's Schedule: (a) facilities-based services (i.e., voice telephone, circuit-switched data, facsimile services by a facilities-based operator from the United States into Mexico) supplied on a cross-border basis; (b) commercial agencies (i.e., basic telecom services by a non-facilities-based operator over leased capacity from the United States into Mexico) supplied on a cross-border basis; and (c) locally established commercial agencies (i.e., basic telecom services by a non-facilities-based operator over leased capacity from Mexico into the United States). The United States claims that Mexico has failed to ensure that private leased circuits are available for the supply of these scheduled services.[657]

4.349 The **United States** submits that Mexico committed under Section 5(a) and (b) to ensure that foreign facilities-based suppliers, foreign commercial agencies and locally established commercial agencies have access to and use of private leased circuits to supply scheduled international basic telecom services over such circuits and can interconnect such circuits with public telecom networks and services. The United States contends that because Mexican suppliers offer private leased circuits to their customers, then Mexico must ensure that these circuits are available to all suppliers of scheduled basic telecom services.[658] The United States claims that foreign suppliers do not have access to and use of private leased circuits to supply scheduled basic telecom services. The United States further submits that Mexican suppliers have refused to provide these circuits, Mexican law prevents foreign basic telecom service suppliers from using such circuits, and Mexican authorities continue to refuse to permit the supply of scheduled services over leased capacity. According to the United States, these restrictions prevent foreign service suppliers from accessing and using private leased circuits to supply scheduled basic telecom services.[659]

4.350 The **United States** submits that its suppliers based in the United States have no access to private leased circuits for the supply of scheduled basic telecom services and even if they did, Mexican ILD Rules prevent foreign suppliers from interconnecting private leased circuits with public telecom network services, violating the obligation to provide access to and use of private leased circuits.[660] It claims that Telmex has refused to make private leased circuits available for the cross-

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[654] *See* the United States' answer to question No. 6(c) of the Panel of 19 Dec 2002, paragraph 32. For question No. 6(c), *see* footnote 653 of this Report.

[655] The United States refers to the Consolidated Opposition of Telmex/Sprint Communications, L.L.C. to Applications for Review, page. 7, Exhibit US-54. *See* the United States' answer to question No. 6(c) of the Panel of 19 Dec 2002, paragraph 34. For question No. 6(c), *see* footnote 653 of this Report.

[656] *See* the United States' first written submission, paragraph 258.

[657] *See* the United States' first written submission, paragraph 261.

[658] *See* the United States' first written submission, paragraph 266.

[659] *See* the United States' first written submission, paragraph 267.

[660] *See* the United States' first written submission, paragraph 268.

border supply of scheduled voice telephone services[661], and that Mexican authorities have done nothing to ensure that Telmex or any other supplier provides these leased circuits to suppliers from the United States for the cross-border supply of scheduled basic telecom services.[662]

4.351 The **United States** contends that Mexico not only has failed to ensure that its suppliers provide private leased circuits to foreign suppliers for the cross-border supply of scheduled basic telecom services but has also maintained measures that preclude foreign suppliers from ever using these circuits to supply such services.[663] The United States recalls that under Mexico's ILD Rule 3[664], a foreign supplier cannot interconnect a private circuit leased in Mexico with foreign public networks and services for the provision of scheduled basic telecom services.[665] The United States submits that according to this Rule, only "international port operators" may interconnect with the public telecommunications networks of foreign operators in order to supply basic telecom services, but Mexican ILD Rules require an international port operator to be a supplier with a concession to supply long-distance services and Mexican law prohibits non-Mexican entities from holding such a concession, since Mexico inscribed this nationality restriction for concessionaires in its Schedule.[666]

4.352 The **United States** contends that the interconnection of a private circuit leased in Mexico with the public telecom network in the United States is essential to the cross-border provision of public basic telecom services over private leased circuits, which is a commitment included in Mexico's Schedule. Because a non facilities-based service supplier cannot be a long-distance concessionaire, it cannot interconnect a private circuit leased in Mexico with the public telecom network in the United States, as it is unable to supply the scheduled public telecom service.[667]

4.353 The **United States** submits that Mexico undertook cross-border commitments for "commercial agencies", which Mexico defined as the supply by non-facilities-based providers of telecommunications services to third parties over capacity leased from a Mexican concessionaire. According to the United States, by Mexico's definition, the supply of this international "resale" service requires a Mexican concessionaire to provide a foreign service supplier access to and use of private leased circuits. The United States claims that without such circuits, foreign suppliers cannot provide cross-border telecom services as commercial agencies.[668] The United States recalls that Sections 5(a) and (b) of the Annex ensure that foreign commercial agencies have access to and use of these circuits and can interconnect these circuits with public telecom networks and services on reasonable terms and conditions to provide "resale" services on a cross-border basis – services that cannot be supplied without such circuits. In the United States' view, Mexico has failed to comply with these commitments, prohibiting foreign service suppliers from offering this "resale" service that it scheduled. The United States further points out that even if Mexico permitted foreign suppliers to offer this "resale" service, ILD Rule 3 precludes the supply of this service by preventing all commercial agencies (domestic and foreign) from interconnecting private leased circuits with foreign telecom networks.[669]

4.354 The **United States** submits that the policy of the Mexican Government – since undertaking commitments for commercial agencies – has been to refuse to permit any foreign carrier from supplying international "resale" services (i.e., international telecom services supplied over private leased circuits). Eight months after finalizing its "commercial agencies" commitments, the then-Secretary of Mexico's Secretariat of Communications and Transportation (SCT) wrote a letter to

[661] *See* the United States' first written submission, paragraph 269.
[662] *See* the United States' first written submission, paragraph 272.
[663] *See* the United States' first written submission, paragraph 274.
[664] *See* the United States' first written submission, paragraph 275.
[665] *See* the United States' first written submission, paragraph 274.
[666] *See* the United States' first written submission, paragraph 275.
[667] *See* the United States' first written submission, paragraph 276.
[668] *See* the United States' first written submission, paragraph 278.
[669] *See* the United States' first written submission, paragraph 279.

the United States, the refusal to issue such regulations raises questions about whether Mexico ever intends to implement this scheduled mode 3 commitment for commercial agencies.[678]

4.358 **Mexico** replies that there is nothing in the wording of the limitations that indicates that

5(b) through 5(f)[685], it interprets Sections 5(a) and 5(b) in isolation. Mexico claims that one cannot demonstrate a violation of Section 5 without adducing evidence sufficient to raise a presumption that the measures at issue are inconsistent with paragraphs (e) and (f) of Section 5, as follows:

> "(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:
>
> (i) to safeguard the public service responsibilities of the suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;
>
> (ii) to protect the technical integrity of public telecommunications transport networks or services: or
>
> (iii) to ensure that services suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.
>
> …
>
> (f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:
>
> (i) restrictions on resale or shared use of such services;
>
> (ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;
>
> (iii) - 1051 Tw (interrrrnot) Tj73c telecom TD 0 Tc mmuniupplicou fo -12.180hie

together to determine the meaning of a Member's obligation under Section 5.[687] me7 0 TD 0 Tc 0.1875 Tw ( ) Tj -45

4.365 **Mexico** submits that the obligations in Section 5(a) and 5(b) are qualified in an important

infrastructure and service capability and to increase its participation in international trade telecommunications services" within the meaning of paragraph (g) of Section 5 of the Annex. These measures are integral conditions to the limitations specified in Mexico's Schedule.[703]

4.370 The **United States** contends that Section 5(g) explicitly requires that any conditions restricting access to and use of private leased circuits, as in Mexico, "shall be specified in the Member' s Schedule." However, Mexico specified no such condition prohibiting the use of private lines in its Schedule. Mexico's inclusion of a routing restriction under mode 1 does not provide a basis for Mexico to prohibit the use of private leased circuits. As long as the circuit is leased from a concessionaire, it is consistent with the requirement to route international traffic through the facilities of a concessionaire. For this reason alone, Mexico cannot rely on Section 5(g). Even if Mexico had included such a condition in its Schedule, there is no basis to conclude that the prohibition on the use of private leased circuits in Mexico otherwise satisfies the criteria of Section 5(g). Mexico's assertion that this restriction is "necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services" is unsupported, and cannot substitute for evidence and cannot form the basis for the factual findings that would be necessary to justify Mexico's invocation of this subparagraph.[704]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 From the third parties in these proceedings, i.e. Australia, Brazil, Canada, Cuba, the European Communities, Guatemala, Honduras, India, Japan and G28Ilduru, Jony oustralia, Brazil, Che

5.13 According to Australia, recommendations of the ITU provide some guidance on relevant cost components in the development of cost-based rates. In addition, Australia submits that the Panel should, in its interpretation of "cost-oriented rates", consider the application of dynamic costing models for interconnection in GATS Member countries that are encouraging the competitive supply of telecommunications networks and services.[718]

B. BRAZIL

1. Introduction

5.14 According to Brazil, to analyse this dispute the Panel should take into account the scope and reach of the specific commitments of market access and national treatment undertaken by Mexico. Brazil considers that, for that purpose, the Panel should analyse Mexico's commitments in light of the national treatment discipline of the GATS as set out in its Article XVII and as qualified by footnote 15 of the GATS. Brazil submits that in conducting this analysis the Panel should take into account the applicability of the national treatment discipline in relation to the four modes of supply of services, as defined in GATS Article I:2(a) to (d), particularly as regards "mode 1".[719] [720]

5.15 Brazil states that the Panel should consider whether the national treatment discipline applies individually to each mode of supply or whether it applies across all modes noting that, for the purposes of the application of the GATS Annex on Basic Telecommunications, the disciplines of "non-discrimination" contained in Article II (Most-Favoured Nation) and Article XVII (National Treatment) of the Agreement are qualified by the concept of "like circumstances", as set out in footnote 15 of the GATS.[721]

5.16 Brazil submits that it can be inferred from Article XVII.1 and footnote 15 that the meaning and the scope of the national treatment obligation lies in the definition of likeness. Brazil considers that this determination can only be made in relation to each mode of supply and not "across modes". Under Brazil's view, the scope of the national treatment obligation is given much more legal certainty by the interpretation that it applies for and within each mo

committed to ensure the rights and obligations established in the GATS to suppliers that are not "facilities-based".[724]

5.19 However, Brazil argues that under subsector "o y1.S Tj 600 TD -0.4173 Tc -3.5721 Tw ( )Ohe r"

inscribed in national schedules by mode of supply, which allows for the perception that the whole architecture of the Agreement stems from the clear separation between the four modes, as defined in Article I of the GATS. Brazil submits that even when full commitments are entered in all four modes in a given sector or subsector, the extent to which services and services suppliers operating in different modes can be considered "like" remains unclear. Therefore it is not evident, for Brazil, how national treatment should apply to them. According to Brazil, the same situation arises in regard to the interpretation of Mexico's commitments.[730]

5.25 In view of the above, Brazil contend that two possible interpretations should be considered. The first interpretation borrows from one of the approaches identified in the "jurisprudence" on trade in goods, which is to define likeness in terms of the essential characteristics of the products. In a services context this would perhaps mean that services and/or service suppliers would be considered "like" on the basis of the nature of the economic activity being performed regardless of the territorial presence of the supplier and the consumer. Under this point of view all service suppliers operating in the same sector would be considered "like service suppliers" and all the services supplied in the same sector would be considered "like services". In this case, if all services suppliers are "like" services suppliers, the only possible way of defining the national treatment obligation is to compare the treatment granted to all foreign services suppliers altogether regarding the treatment granted to national services suppliers based in their home country. Brazil states that, if the determination of likeness is independent of the mode of supply, it follows that national treatment applies across modes in relation to a same common reference: national services suppliers in their home country.[731]

5.26 Brazil further points out that in the second possible interpretation, the definition of "like services and service suppliers" would be based on a comparison of the service suppliers that operate

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implies that services and services suppliers operating through different modes cannot always be treated as "perfect substitutes" because, in reality, they will be subject to different regulatory frameworks. Brazil recalls that this approach is in keeping with the "principle of equality" (from which flows the concept of *like circumstances*), according to which the same treatment must be accorded to persons under the same condition and similarly situated.[734]

C. EUROPEAN COMMUNITIES

5.29 The European Communities recalls that the United States' claims, in its first written submission to this Panel, are based exclusively on alleged violations of Mexico's additional commitments on Telecommunications under Article XVIII of the GATS as incorporated via the Fourth Protocol to the GATS and based on the Reference Paper (Sections 1.1, 2.1 and 2.2); and alleged violations of the Sections 5(a) and 5(b) of the GATS Annex on Telecommunications.[735]

5.30 The European Communities notes that the request for the establishment of the Panel and therefore the Panel's terms of reference also include Article XVII of the GATS. The European

European Communities clearly states that there are other obligations under the GATS that the Member has to respect.[740]

5.35 The European Communities submits that the "exception" to the commitment on telecommunication services under mode 1 inscribed by Mexico in its Schedule is pointless since the measure that is specified (an obligation to route international traffic through the facilities of an enterprise that has a concession granted by the Ministry of Communications and Transport) is not a measure of the kind listed in Article XVI:2.[741]

5.36 The European Communities recalls that the measure mentioned in the "exception" is regulatory in nature and is expressed to apply to all international traffic (whether foreign service supply or a foreign service supplier is involved or not).[742]

5.37 The European Communities notes that it is in fact precisely because the supply of telecommunication services is so susceptible to being affected, and even rendered impossible, by regulatory measures that the adoption of additional commitments concerning telecommunications services was so important and that the Reference Paper was a central element in the negotiations on basic telecommunications.[743]

5.38 According to the European Communities, Mexico relies to a great extent in its first written submission on the contention that additional commitments under Article XVIII of the GATS can only cover measures that are not subject to scheduling under Articles XVI and XVII of the GATS. The European Communities agree with this approach.[744]

5.39 However, under the European Communities' point of view the correct conclusion for this case is the opposite of that which Mexico submits. According to the European Communities the "exception" on which Mexico seeks to rely should be included as a limitation to any additional commitments made on regulatory measures.[745]

5.40 In the European Communities' view the "exception" to the commitment in Mexico's Schedule has no legal effect since it was not necessary for the purpose of allowing Mexico to maintain the measure described. According to the European Communities the "exception" to the specific commitment can only be read as an additional information to the reader about the legal situation in Mexico. The European Communities contends that the United States is correct in basing its claim only on the additional commitments of Mexico, which do not include the exception on which Mexico relies.[746]

5.41 The European Communities note that the "exception" inserted by Mexico in its Schedule of

5.42 With regard to Brazil's concern based on the interpretation of Mexico's Schedule of Specific Commitments,[748] the European Communities contends that the condition in the Spanish language is that the service has to be provided "por", which in context means through or over a public telecommunication network, not limiting the concession to facilities based suppliers.[749]

2. Mexico's commitments under mode 3

5.43 In the European Communities' view, the two sentences of the statement in Mexico's Schedule referring to permits for the establishment of commercial agencies under mode 3 cannot be read in combination as making the coming into effect of the entire commitment subject to the discretion of Mexico.[750] According to the European Communities a consistent reading is that the regulations will be issued before permits are granted so as to ensure that no commercial agencies will be allowed to have "acquired rights" to operate without respecting the regulations.[751]

5.44 The

3. Application of the interconnection rules contained in the Reference Paper

5.48 The European Communities disagrees with Mexico's view that the obligations on interconnection contained in the Reference Paper do not apply to termination of international calls under the accounting rate system.[756]

5.49 According to the European Communities the term "interconnection", as used in Section 2 of the Reference Paper, interpreted in accordance to Article 31 of the *Vienna Convention* appears to relate to all modes of linking two operators. In the European Communities view the wording of Section 2.1 of the Reference Paper which defines "interconnection" supports this idea.[757]

5.50 The European Communities contends that the very object and purpose of the GATS is the liberalisation of international trade in services. In the European Communities view it is difficult to maintain that an interpretation of the Reference Paper should be limited to enhancement of "national" competition to the detriment of "international" one.[758]

5.51 The European Communities contends that the negotiations which led to the final Reference Paper were conducted on the assumption that termination of international calls under the accounting rat

identical obligations were undertaken by all except where expressly intended otherwise.[763] The European Communities submits that the term "cost-oriented" in English and "basadas en el costo" in Spanish were intended to be equivalent. It points out that the European Communities' additional commitments which are authentic in all three WTO languages uses the term "cost-oriented" in English and "basadas en el costo" in Spanish.[764] Since the additional commitments of the European Communities are an integral part of the GATS and were accepted by all parties to the Fourth Protocol, it is clear that the two terms were intended to be equivalent. According to the European Communities a different interpretation would vary the scope of WTO Members' obligations depending on the choice of authentic language for additional commitments.[765]

5.56 The European Communities further points out the fact that cost-orientation has been discussed extensively in the ITU, and some guidance can be found in ITU-T Recommendation D.140, entitled "Accounting Rate Principles for the International Telephone Service", and ITU-

5.66 The European Communities furthers point out that the GATS Annex on Telecommunications was never meant to provide wider market access obligations for WTO Members than those established in their Schedules as regards basic telecommunications.[778]

5.67 According to the European Communities even though the Annex on Telecommunications does not create market access commitments that are not contained in the Schedules, it is intended to facilitate the exploitation of market access commitments that are contained in the Schedules.[779] The European Communities also recalled that the obligations contained in the Annex only relate to "*public* telecommunications transport networks and services", which means "any telecommunications transport service required, explicitly or in effect, by a Member *to be offered to the public generally*".[780]

8. The notion of likeness

5.68 With respect of the notion of likeness, the European Communities asserts that footnote 15 relates only to the meaning of the term non-discriminatory in the Annex on Telecommunications and is not relevant to the interpretation of "like services and service suppliers" as they appear in Articles II and XVII of the GATS. In the European Communities' view, footnote 15 cannot in the absence of a clear textual indication to the contrary, be relevant to the interpretation of "like services and service suppliers," especially since this must have the same meaning for all service sectors. The European Communities further points out that the existing case-law (*Canada – Autos*[781]) clearly suggests that the notion of "like services and service suppliers" requires a comparison of the activity involved and that the mode of supply is irrelevant.[782]

D. JAPAN

1. Validity for an action by the United States

5.69 Japan contends that the Panel should first determine whether it is proper for the United States to use the dispute settlement procedure under the DSU to object to "interconnection" rates charged by Telmex based on the accounting rate system.[783]

5.70 Japan submits that the "Group" addressed the subject of matters that may not give rise to an action before a panel in its report dated 15 February 1997, which includes the application of the accounting rate system.[784]

5.71 Japan further points out that the position of the "Group" as to whether accounting rates could give rise to an action by Members under the DSU is further addressed in the report dated 10 March 1997, where the Chairman stressed that the report was merely an understanding, which could not and was not intended to have binding legal force and did not take away from Members the rights they have under the DSU.[785]

5.72 Japan considers that the "understanding" of the "Group" concerning the proper scope and treatment of "accounting rates" is not entirely clear. In Japan's view it is not clear whether the "rates"

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[778] *See* European Communities' third party submission, paragraph 59.
[779] *See* European Communities' third party submission, paragraph 60.
[780] *See* European Communities' third party submission, paragraphs 62-63.
[781] *See* Panel Report, *Canada – Autos*.
[782] *See* European Communities' oral statement, paragraphs 28- 29.
[783] *See* Japan's third party submission, paragraph 5.
[784] *See* Japan's third party submission, paragraph 6 where it refers to the Report of the Group on Basic Telecommunications of 15 February 1997, S/GBT/4.
[785] *See* Japan's third party submission, paragraph 7 where it refers to the Report of the Group on Basic Telecommunications of 10 March 1997, S/GBT/M/9.

5.80 Japan considers that Members adopted the term "cost-oriented" during the Negotiations on Basic Telecommunications ("NBT") on account of its ambiguity. [794]

4. Election of a uniform accounting rate and proportionate return system

5.81 Japan submits that the Spanish term "razonables, económicamente factibles" grants Mexico additional flexibility in determining interconnection rates. According to Japan, in the absence of any argument concerning the inapplicability of the qualification created by the term "económicamente factibles", the panel has insufficient information before it to find that the interconnection rates imposed by Mexico are not "razonables". [795]

5.82

VI. INTERIM REVIEW

6.1 On 10 July 2003, pursuant to Article 15.1 of the DSU, the Panel issued the draft descriptive part of its Report. As agreed, on 25 July 2003 both parties commented on the draft descriptive part. The Panel issued its Interim Report on 21 November 2003. On 15 December 2003, pursuant to Article 15.2 of the DSU, the United States and Mexico provided comments and requested the revision and clarification of certain aspects of the Interim Report. None of the parties requested that the Panel hold a further meeting with the parties. In the absence of a meeting and further to paragraph 16 of the Panel's Working Procedures[798], the parties were given until 15 January 2004 to submit further written comments on the other party's Interim Review comments. Only the United States filed further comments on that date.

6.2 Following the comments of the parties, the Panel has reviewed the claims, arguments and evidence submitted by the parties during the panel process. Where it considered it appropriate to ensure clarity and avoid misunderstandings, the Panel has revised the findings section of its Report, including the correction of typographical and editorial mistakes. It is important to note that in the findings section of a Report, a panel cannot be expected to refer to all the statements and arguments of the parties. Failure to do so does not therefore imply that the Panel has ignored statements or arguments of the parties. Taking into consideration this last statement, the Panel has addressed the following comments raised by the parties.

6.3 Generally, the United States' comments concern some additions or deletions to the text of the findings as a matter of clarity. The United States notes that it disagrees with the Panel's conclusion that Mexico's Schedule allows Mexico to prohibit market access for the cross-border supply of the services at issue into Mexico over capacity leased by the supplier (i.e., on a non-facilities basis) in Mexico. However, the United States states that it would not repeat its arguments in this respect in the comments provided to the Panel on the Interim Report.

6.4 On the other side, Mexico's comments refer to precise aspects of the Interim Report, including the identification of some evidence, the clarification of some definitions and the identification of the services at issue. Mexico submits that the review of all these aspects will help to clarify its position on certain issues.

6.5 Mexico notes in its submission dated 15 December 2003 that in paragraph 7.6 of the Interim Report (which has been deleted in this Report) and corresponding footnote the Panel identifies the services at issue in this dispute as "certain basic public telecommunications services" referring to a definition contained in paragraph 7.32 of the Interim Report to describe them. According to Mexico, the text quoted in paragraph 7.32 is from the definition of "Public telecommunications transport services" in Article 3(b) of the Annex on Telecommunications. Mexico further states that it understands that the Ministerial Decision on Negotiations on Basic Telecommunications refers to "basic telecommunications" as "telecommunications transport networks and services", but states that the latter term is not defined in the GATS Annex on Telecommunications. According to Mexico, Article 3 of the Annex on Telecommunications sets out two distinct definitions for the terms "Public telecommunications transport service" and "Public telecommunications transport network". Mexico states that it has argued that the services at issue in this dispute are transmission or transport services of customer-supplied information or data. In particular, Mexico requests that the Panel clarifies its

[798] Paragraph 16 of the Panel's Working Procedures reads as follows: "Following issuance of the Interim Report, the parties shall have no less than 7 days to submit written requests to review precise aspects of the Interim Report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at that time. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other parties' written requests for review. Such comments shall be strictly limited to referencing the other parties' written requests for review."

after the third sentence of the same paragraph. As regards Mexico's allegation, the United States considers that it is entirely reasonable for the Panel to have understood that under Mexico's interpretation, a foreign service supplier must "operate" in some sense in a foreign territory to provide scheduled services via the cross-border mode of supply. According to the United States, the Panel may clarify this by moving the fourth sentence of paragraph 7.27 of the Interim Report and making it the first sentence of paragraph 7.28 of the Interim Report, including some new editing. The United States suggests that it may be helpful for the Panel to adopt a uniform formulation such as "operates in some fashion, or is located" when it uses the word "present", "presence", "operate" or "located" in diverse paragraphs of the Interim Report. The United States submits that Mexico's assertion that the Panel did not address the argument made by Mexico is not accurate, since the Panel did in fact address and reject the relevance of Mexico's argument at paragraph 7.39 of the Interim Report. For all these reasons the United States asks the Panel to reject Mexico's request to add an additional sentence to paragraph 7.27 of the Interim Report. The Panel has amended the text of paragraphs 7.27 and 7.28 of the Interim Report to clarify Mexico's argument and adopted a uniform formulation regarding the word "present", "presence" etc., accompanied by an explanatory footnote, to clarify that the terms were not intended to refer to "commercial presence".

6.9 In relation to paragraph 7.28 of the Interim Report, Mexico submits that the issue before the Panel was whether the services provided by United States-based suppliers in the circumstances of this dispute cross the border into Mexico, and not whether cross-border "occurs only if the supplier itself operates, or is present, in the territory of both Members". Mexico requests that paragraph 7.28 of the Interim Report be accordingly replaced. In reference to the Mexico's comments, the United States submits that the reason the Panel addressed the question of whether "cross-border 'occurs only if the supplier itself operates, or is present, in the territory of both Members'" is because Mexico made that argument. The United States requests that the Panel rejects the replacement text proposed by Mexico for paragraph 7.28 of the Interim Report. In consideration of Mexico's comments, the Panel modified the wording of paragraph 7.28 of the Interim Report to define in more precise wording the "issue before the Panel" referred to in the paragraph.

6.10 Mexico, for the same reasons explained in its comments on paragraph 7.27 of the Interim Report, requests that the Panel clarifies whether by using the word "present" in paragraphs 7.28, 7.32, and 7.35 of the Interim Report, and the word "presence" in paragraphs 7.39, 7.40 and 7.88 of the Interim Report (paragraphs 7.39, 7.40 and 7.90 of this Report), it meant "commercially present" and "commercial presence" within the meaning of the GATS. Regarding the use of these terms, the United States refers the Panel to its discussion regarding Mexico's comments on paragraph 7.27 of the Interim Report. The approach taken by the Panel to address the question posed by Mexico is described above in the paragraph dealing with Mexico's initial comment regarding the use of these terms in paragraph 7.27 of the Interim Report.

6.11 As regards paragraph 7.36 of the Interim Report, the United States requests the Panel to rectify a typographical error when referring to "telephony services". The Panel notes that the term "telephony" does not appear in W/120 or the CPC. However, it is used in the translation of Mexico's scheduled service commitments, in the ITU contexts, and by the parties to this dispute. The Panel considers appropriate the suggested modification. For clarification, the Panel also added a footnote to paragraph 7.45 (paragraph 7.43 of this Report) stating that it considers the terms "telephony" and "voice telephony" (as used in the English translations of Mexico's Schedule and the claims by the United States) to be equivalent to the terms "telephone services" and "voice telephone services" (as used in the GATS sectoral classification the CPC).

6.12 Mexico submits that the Panel refers to "communications services supplied between Members" in paragraph 7.38 of the Interim Report. Since, according to Mexico, the United States has limited its challenge to "certain basic public telecommunications services", Mexico requests that the Panel clarifies what is meant by the terms "communications services" and make additional findings on whether and how such services are supplied by United States-based suppliers on a cross-border basis

from the United States into Mexico. According to the United States, the Panel's reference to "communications services" is equivalent to "telecommunications services," but suggests that the Panel may clarify it. With respect to Mexico's comments on the interpretation of the services at issue in this dispute, the United States recalls its discussion regarding Mexico's comments on paragraphs 7.23-7.25 (paragraphs 7.22-7.23 and 7.26 of this Report). To address Mexico's concern, the Panel modified the first sentence of paragraph 7.38 of the Interim Report, replacing the word "communications" with "basic telecommunications".

6.13 Mexico also notes that in paragraph 7.39 of the Interim Report the Panel states that "the CPC definition of the basic telecommunications services at issue provides for an especially high degree of interaction between operators on each side of the border". Mexico requests that the Panel identifies the specific definition to which it refers. Mexico requests that the Panel clarifies its statement in the fourth sentence of the paragraph and explain the legal basis for that statement. With respect to Mexico's comment that it "fails to see which CPC definition provides for interaction between operators 'on each side of the border'," the United States finds entirely clear that the CPC definition to which the Panel refers is CPC 75212 and that the Panel is applying the definition to the specific facts of the dispute. The Panel addressed Mexico's concern by amending paragraph 7.39 of the Interim Report to specify more precisely the reasoning that leads us to consider that the CPC definition foresees an especially high degree of interaction also between operators located in different Members.

6.14 As regards paragraph 7.41 of the Interim Report (paragraph 7.41 of this Report), Mexico recalls that the Panel states that "…all te748pecmifnic deafviiceswPrCaffic current ameicoe.37.1875 Tw8D -0.06he10.072,5

concern, the Panel modified the first sentence of paragraph 7.49 (paragraph 7.48 of this Report) to more clearly state the Panel's understanding of Mexico's arguments.

6.20 As regards paragraphs 7.51-7.61

4.67 of the Interim Report. According to the United States, Mexico raises an argument, with respect to the position of the United States' FCC on United States-Mexico accounting rates, that Mexico did not make during the Panel proceedings. The United States considers Mexico's suggested text misplaced in a paragraph that describes the conclusions of the Panel rather than the arguments of the parties. The United States therefore urges the Panel to reject Mexico's proposed text. The Panel declines Mexico's request to insert Mexico's proposed sentence, because paragraph 7.117 (paragraph 7.119 of this Report) contains the Panel's reasoning, and sets out what the Panel considers are relevant arguments for arriving at its conclusion.

6.30 As regards paragraph 7.118 (paragraph 7.120 of this Report), the United States requests the Panel to add a footnote referencing the paragraphs to which the final sentence of the paragraph refers. In view of the United States' request, the Panel decided to delete "as discussed later in this section", since the subsequent discussions do not address the issue alluded to in exactly the same context as in this paragraph and because it considers that the conclusion in this paragraph stands on its own.

6.31 Mexico requests that the Panel clarifies, in paragraph 7.119 (paragraph 7.121 of this Report), how telecommunications transport services are actually supplied cross border and explain what is the nature of the services that cross the border. According to the United States, Mexico's comments again speak to its arguments about the interpretation of the services at issue, and its insistence that those services are not provided on a cross-border basis. The United States sees no justification for further discussion of those issues in this paragraph. The Panel declines the clarification requested by Mexico with respect to this paragraph and notes that it has already dealt with the matter regarding the "services at issue", above.

6.32 With regard to paragraph 7.138 (paragraph 7.140 of this Report), Mexico submits that in paragraph 170 of its first written submission, it did argue that accounting rates and termination services were consciously excluded from the Reference Paper which is confirmed by the fact that they are "on the table" in the Doha Round of negotiations. Mexico requests that the Panel clarify how this argument was taken into account or respond to this argument. The United States notes that the argument cited by Mexico is only one of many put before the Panel on this issue, and as such, it would not be appropriate to single it out in this paragraph. The Panel reviewed the arguments and decided to insert additional text at the end of paragraph 7.138 (paragraph 7.140 of this Report) to reflect Mexico's argument and how it was taken into account.

6.33 Mexico requests that the Panel identifies the evidence on which it relied in reaching the conclusion in paragraph 7.140 (paragraph 7.142 of this Report) that "many of the 55 WTO Members which have committed to cost-oriented interconnection are unlikely to apply traditional accounting rate arrangements to a significant portion of their international traffic….". According to Mexico, it submitted reports from the United States' FCC that establish that United States' carriers have accounting rate arrangements with virtually every country, and that in 2001 a majority of international calls to and from the United States were made through "traditional settlement". The United States notes that support for the Panel's conclusion may be found in paragraph 38 and footnote 25 of the United States' oral statement of 13 March 2003 and paragraph 48 and footnote 51 of the United States' submission of 30 April 2003. The Panel's findings already demonstrate that it does not agree with Mexico regarding the significance of the submissions it cites. However, to accommodate Mexico's concerns, the second sentence of paragraph 7.140 (paragraph 7.142 of this Report) is modified and a footnote is added to identify the evidence on which we relied to reach our conclusion.

6.34 Mexico submits that paragraph 7.149 (paragraph 7.151 of this Report), is ambiguous in that it does not clearly define what is the service supplied by the United States suppliers and under what mode. Mexico requests that the Panel clarifies: the definition of the "services at issue" and the relevant mode of supply; whether the "Mexican operators" referred to in the paragraph are also "suppliers" of such "service" or "services"; what is meant by the term "termination of the service"; whether the United States suppliers "terminate" the "service" or "services" in question; and what is

meant by the term "outgoing services". According to the United States, Mexico's comments repeat its arguments about the interpretation of the services at issue in this dispute and its insistence that those services are not provided on a cross-border basis. Regarding Mexico's references to the Panel's use of the terms "termination of the service" and "outgoing services", the United States submits that the Panel is not employing those terms to further define the services at issue in this dispute. The United States further submits that the Panel is properly using those terms to define the relevant market, for the purpose of determining whether Telmex is a "major supplier". With respect to the definition of the "services at issue" the Panel notes that it has already addressed the matter, above. As to whether the "Mexican operators" referred to in the paragraph are also "suppliers" of such "service" or "services", the Panel does not consider this distinction to be relevant. With regard to what is meant by the term "termination of the service", the Panel considers it appropriate to add a footnote to paragraph 7.23 (paragraph 7.22 of this Report) to clarify that the term is used in our findings to refer to forms of "linking" that falls within the scope of "interconnection". As to whether the United States suppliers "terminate" the "service" or "services", the Panel considers its reasoning makes clear that suppliers do not need to "terminate" services to be "supplying" them. As regards what is meant by the term "outgoing services" the Panel has changed the term to "outgoing traffic".

6.35 Mexico argues that, in paragraph 7.150 (paragraph 7.152 of this Report), the Panel refers to the market for "termination services" and to domestic and international "communication". In the light of Mexico's arguments on the meaning of "termination services" Mexico requests that the Panel clarifies and makes additional findings on what it means when it refers to "termination services", whether "termination services" are "basic telecommunications services" or a service sector at issue in this dispute, the mode of supply of such services, and whether United States or Mexican suppliers provide such services. Mexico also requests that the Panel clarifies whether a "communication" is a service at issue in this dispute. The United States submits that with respect to Mexico's comments regarding the Panel's use of the term "termination services," the Panel is not employing this term to further define the services at issue in this dispute – that is, the services to which the United States' claims relate and the services subject to Mexico's commitments. Rather, the United States reads the paragraph as using that term to properly define the relevant market for the purposes of determining whether Telmex is a "major supplier." The Panel does not accept the inferences made by Mexico with respect to the Panel's use of the term "termination services". However for clarification, the Panel is replacing "termination services" with "termination of the service" in paragraph 7.150 (paragraph 7.152 of this Report).

territory. Mexico submits that the Panel's interpretation of Section 1 of Mexico's Reference Paper must take into account this GATS provision so as not to undermine its meaning. In the United States' view, the Panel addressed Mexico's argument, and the United States rebuttal thereto, in paragraphs 4.260-4.261 of the Interim Report. Having re-examined the submission containing the argument referred to by Mexico, the Panel declines to accept Mexico's request because the Panel considers the argument to be recorded as adequately as possible in the paragraphs cited by the United States.

6.49 In Mexico's view, there is no basis in the text of Section 1 of Mexico's Reference Paper to make important and complicated distinctions between permissible and impermissible anti-competitive "measures" or to judge the legitimacy of a WTO Member's internal policies in circumstances where no agreed-upon benchmarks exist. According to the United States, the Panel addressed Mexico's argument at paragraphs 4.257 of the Interim Report, 7.228-7.236, and 7.263-7.267 (paragraphs 7.230-7.238 and 7.265-7.269 of this Report). As addressed in paragraphs 7.233-7.234 (paragraphs 7.235-7.236 of this Report), there are international agreements on certain types of anti-competitive practices that should be prohibited, including in particular price-fixing cartels. The Panel declines Mexico's request, noting that it has already addressed Mexico's argument at paragraph 7.263-7.267 (paragraphs 7.265-7.269 he84.77 0.003811 Tw (request, noting that it has already addressed Mexico's argument (o.236, and

Reference Paper does not explicitly refer to cross-subsidisation per se, but rather anti-competitive cross-subsidisation. To conform to the phrasing used in the Reference Paper, the United States suggests the text to be amended. The Panel notes the United States' comment and has modified the text to reflect the concern raised.

6.52 With regard to paragraphs 7.272-7.286 (paragraphs 7.274-7.288 of this Report) , Mexico submits that the Panel sets out its reasoning that leads to its conclusion that the Annex applies to measures of a Member that affect access to and use of public telecommunications transport networks and services by basic telecommunications suppliers of any other Member. According to Mexico, the Panel's summary of Mexico's argument is incomplete. In Mexico's view, the Panel does not identify nor respond to Mexico's argument that the service at issue is not a "telephone call" or any other customer-supplied information or data, but, rather, is telecommunications transport networks or services that involve the transport or transmission of information or data between two or more points. As such, Mexican suppliers of telecommunications transport networks and services cannot transmit other telecommunications transport networks or services and cannot, therefore, constitute a mode of delivery for those services. Mexico requests that the Panel incorporate this argument in paragraph 7.274 (paragraph 7.276 of this Report) and make additional findings on the nature of the services at issue. In particular, Mexico requests that the Panel clarifies what constitutes the "supply of basic telecommunications services" and "international supply of basic telecommunications services". The United States submits that Mexico's comments repeat comments on the interpretation of the services at issue in this dispute and recalls its responses to Mexico's comments on paragraphs 7.23-7.25 (paragraphs 7.22-7.23 and 7.26 of this Report). The United States maintains the issues raised here require no further development at this point in the report. The Panel declines Mexico's request, noting that Mexico's comments essentially relate to arguments and conclusions concerning the services at issue in this dispute that are already addressed earlier in this is section.

6.53 With regard to paragraph 7.317 (paragraph 7.319 of this Report), Mexico fails to see how paragraph 7.178 of the Interim Report cited in footnote 924 (footnote 1023 of this Report) is relevant to the Panel's statement and requests that the Panel clarifies this. The United States submits that with respect to Mexico's comments regarding footnote 924 (footnote 1023 of this Report), the Panel may have intended to refer to paragraph 7.40 in this Report or one of the surrounding paragraphs. The Panel has reviewed the reference and corrected footnote 924 (footnote 1023 of this Report) to refer to paragraphs 7.40-7.45 of this Report.

6.54 Mexico also submits that the quoted statement in paragraph 7.317 (paragraph 7.319 of this Report) does not clearly describe the nature of the "basic telecommunications services" at issue and how foreign suppliers actually supply such services into Mexico. Thus, Mexico requests that the Panel clarifies and makes additional finding on: what "services" require suppliers to link their networks to those of other suppliers; whether the "services at issue" are the transport or transmission of information or data between two or more points; how Mexican suppliers can transmit "transport and transmission" are the transmit (Repe353) do

United States suggestions and adds a footnote cross-referencing paragraph 7.304 (paragraph 7.306 of this Report). It also modifies the paragraph as suggested by the United States.

6.56 As regards paragraph 7.369 (paragraph 7.371 of this Report), Mexico requests that the Panel clarifies and notes the fact that Mexico has issued regulations for the establishment and operation of commercial agencies for pay-telephone public services. The United States notes that Mexico's argument is reflected in paragraph 4.323 of the Interim Report. If Mexico's request is accepted by the Panel then the United States requests that the Panel also note the United States' observation that the service suppliers at issue in the United States' claim under Section 5(b) of the Annex on Telecommunications are locally-established commercial agencies offering international telecommunications services over private circuits leased from a Mexican concessionaire. Noting that pay phone services are not subject to the claims made by the United States in this dispute, the Panel does not consider it necessary to include in the Panel's findings the argument identified by Mexico on this point.

VII. FINDINGS

A. INTRODUCTION

7.1 The United States presents three main claims. First, that Mexico has failed to ensure that its major telecommunications supplier provides interconnection "on terms, conditions … and cost-oriented rates that are … reasonable", in accordance with Section 2 of its Reference Paper commitments. Second, that Mexico has not maintained appropriate measures to prevent Telmex, a major supplier, from engaging in "anti-competitive practices", in accordance with Section 1 of its Reference Paper commitments. Third, that Mexico has failed to ensure "access to and use of" its public telecommunications transport networks and services, including private leased circuits, on "reasonable and non-discriminatory terms and conditions", in accordance with its obligations under Section 5 of the GATS Annex on Telecommunications.

7.2 This case is the first panel proceeding in the WTO to deal solely with trade in services under the GATS. It is also the first WTO panel proceeding to deal with telecommunications services. The Panel is fully aware that the interpretation of the complex layers of GATS Articles, Annexes, Protocols and Schedules with GATS market access commitments, national treatment commitments and additional commitments poses many challenges to WTO Members and WTO dispute settlement bodies. This is especially so in the early years of GATS jurisprudence when the sometimes different

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rights and obligations of Members under the covered agreements" and to provide "security and predictability to the multilateral trading system". We have approached our daunting task with the utmost prudence and, in several parts of our findings, have decided to exercise "judicial economy". WTO negotiators sometimes praise the political wisdom of resorting to "constructive ambiguity" as a diplomatic means of enabling consensus on WTO rules.[800] The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the "ordinary meaning" of the WTO provisions concerned "in their context" and in light of the "object and purpose" of the agreement. Our legal findings are thus limited to the disputed meaning and scope of certain GATS obligations and commitments of Mexico in the very particular context of this bilateral dispute, and do not go beyond what we consider indispensable for deciding on the legal claims submitted to this Panel. Our focus on telecommunications services may mean that certain elements of our findings in this particular services sector may not be relevant for other services sectors with different legal, economic and technical contexts. Our findings also do not adversely affect the large degree of regulatory autonomy which WTO Members, individually and collectively, retain under the GATS, including the right to modify specific GATS commitments pursuant to the procedures and conditions set out in Article XXI of the GATS.

1. Telecommunications in the WTO

7.4 This case concerns obligations undertaken by Mexico as part of the GATS. The GATS, which is an integral part of the WTO Agreement, consists of a number of articles in its main body and several annexes, including an Annex on Telecommunications (the "Annex"). Both the main body of the GATS and the Annex are applicable to every WTO Member. In addition, each WTO Member has attached its own schedule to the GATS, in which the Member makes individual specific commitments on market access, national treatment, and any additional commitments the Member may wish to make. These specific commitments are inscribed by service sector and mode of supply of the service, and may be subject to limitations on market access and national treatment.

7.5 Special GATS negotiations intended to deepen and widen commitments in basic telecommunications were concluded in 1997. Members participating in these negotiations made commitments, or further commitments, in their schedules on market access or national treatment. Many, including Mexico, also made additional commitments in the form of a "Reference Paper", which contained a set of pro-competitive regulatory principles applicable to the telecommunications sector.

2. Measures at issue in this dispute

7.6 The government measures at issue in these proceedings are:

(a) The "Federal Telecommunications Law" ("FTL") (*Ley Federal de Telecomunicaciones*) of 18 May 1995.

(b) The "Rules for Long Distance Service" (*Reglas del Servicio de Larga Distancia*) published by the Secretariat of Communications and Transportation ("SCT") *(Secretaría de Comunicaciones y Transporte)* on 21 June 1996.

(c) The International Long Distance Rules ("ILD Rules") (*Reglas para prestar el servicio de larga distancia internacional*) published by the SCT on 11 December 1996.[801]

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[800] Cf. former WTO Director-General Mike Moore, "*A World Without Walls – Freedom, Development, Free Trade and Global Governance*", Cambridge, Cambridge University Press, 2003, p. 111.

[801] *See* footnote 25 of this Report.

(d) The "Agreement of the SCT establishing the procedure to obtain concessions for the installation, operation or exploitation of interstate public telecommunications networks, pursuant to the Federal Telecommunications Law" (*Acuerdo de la SCT por el que se establece el procedimiento para obtener concesión para la instalación, operación o explotación de redes públicas de telecomunicaciones interestatales, al amparo de la Ley Federal de Telecomunicaciones*) published on 4 September 1995.

3. Mexico's legal framework for the regulation of telecommunications services

7.7 The Federal Telecommunications Law (the "FTL") of Mexico provides the legal framework for the regulation of telecommunications activities in Mexico.[802] The FTL authorizes the SCT, *inter alia*, to grant concessions required for "installing, operating or exploiting public telecommunications networks".[803] A concession may only be granted to a Mexican individual or company, and any foreign investment therein may not exceed 49%[804], except for cellular telephone services.[805]

7.8 Special rules apply to "*comercializadoras*" ("commercial agencies").[806] A commercial agency is any entity which, "without being the owner or possessor of any transmission media, provides telecommunications services to third parties using the capacity of a public telecommunications network concessionaire."[807] A concessionaire of a public telecommunications network may not, without permission of the SCT, have "any direct or indirect interest in the capital" of a commercial agency.[808] The establishment and operation of commercial agencies is "subject, without exception, to the respective regulatory provisions".[809]

7.9 The "interconnection" of public telecommunications networks with foreign networks is carried out through agreements entered into by the interested parties.[810] Should these require agreement with a foreign government, the concessionaire must request the SCT to enter into the appropriate agreement.[811]

7.10 International Long-Distance Rules ("ILD Rules") are issued by the Federal Telecommunications Commission ("*Comisión Federal de Telecomunicaciones*"), a semi-autonomous agency of the Secretariat of Communications and Transportation.[812] The ILD Rules serve "to regulate the provision of international long-distance service and establish the terms to be included in agreements for the interconnection of public telecommunications networks with foreign networks."[813]

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[802] *See* FTL ("*Ley Federal de Telecomunicaciones*"), published in the Federal Gazette ("*Diario oficial de la Federación*") on 7 June 1995, entered into force on 8 June 1995.

[803] *See* FTL, Article 11.

[804] *See* FTL, Article 12. Foreign investment in cellular telephone services may however be greater than 49%, with the permission of the Commission on Foreign Investment.

[805] *See* FTL, Article 12.

[806] Also referred to in English language translations of the FTL as "telecommunications service marketing companies".

[807] *See* FTL, Article 52.

[808] *See* FTL, Article 52.

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International long-distance service is defined as the service whereby all international switched traffic is carried through long-distance exchanges authorized as international gateways".[814]

7.11

7.16 Article 31(1) of the Vienna Convention requires a treaty interpreter to determine the meaning of a term in accordance with the "ordinary meaning" to be given to the term "in its context", and in light of the "object and purpose" of the treaty. If, after applying the rule of interpretation set out in Article 31(1), it is desirable to confirm the meaning of the term, or the meaning of the treaty term remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, Article 32 allows the treaty interpreter to have recourse to "supplementary means of interpretation, including the preparatory work on the treaty and the circumstances of its conclusion".[825] 7.16

> (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; … "[827]

7.20 In determining whether commitments in Sections 2.1 and 2.2 have been met by Mexico, we shall first examine whether Mexico has *undertaken* an interconnection commitment with respect to the telecommunications services at issue in this case. In the event that we conclude that Mexico has indeed undertaken an interconnection commitment in respect of the telecommunications services at issue, we will then determine whether, with respect to the services at issue, Mexico has *fulfilled* any Section 2 interconnection commitment.

1. Whether Mexico has undertaken an interconnection commitment, in Section 2 of its Reference Paper, with respect to the telecommunications services at issue

7.21 Section 2.1 of Mexico's Reference Paper commitment on interconnection specifies that it applies only "on the basis of the specific commitments undertaken" ("*respecto de los cuales se contraigan compromisos específicos*"). We must first therefore determine what the *services* at issue are, and through which of the four modes specified in Article I:2 of the GATS they are supplied.[828] Only then can we determine whether Mexico has undertaken, with respect to these services, a commitment "on the basis" of which the interconnection commitment in Section 2.2 applies. Finally, in determining whether Mexico has undertaken interconnection commitments with respect to the services and modes of supply at issue, we must examine whether the "linking" of suppliers referred to in Section 2.1 of the Reference Paper covers not only domestic interconnection, but also *international* interconnection, understood as the linking of suppliers cross-border, including linking which involves traditional "accounting rate" regimes.

(a) What are the services at issue?

7.22 The United States focuses its first claim on the supply of certain basic public telecommunications services[829] for which United States suppliers seek to interconnect at the border

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[827] English translation. The authentic version of Mexico's Schedule is Spanish. It reads:
"2 Interconexión
2.1 Esta sección es aplicable a la conexión con los proveedores de redes públicas de telecomunicaciones de transporte o de servicios a fin de permitir a los usuarios de un proveedor comunicarse con los usuarios de otro proveedor y tener acceso a los servicios suministrados por algún otro proveedor, respecto de los cuales se contraigan compromisos específicos.
2.2 *Interconexión a ser garantizada*
La interconexión con un proveedor principal quedará asegurada en cualquier punto técnicamente factible de la red. Tal interconexión se llevará a cabo:
...
(b) de manera oportuna, en términos, condiciones (incluyendo normas técnicas y especificaciones) y tarifas basadas en costos que sean transparentes, razonables, económicamente factibles y que sean lo suficientemente desagregadas para que el proveedor no necesite pagar por componentes o recursos de la red que no se requieran para que el servicio sea suministrado; ... "

[828] The modes of supply are commonly known as: (a) cross-border supply; (b) consumption abroad; (c) commercial presence; and (d) presence of natural persons. They are also referred to numerically as modes 1, 2, 3 and 4. For the text of Article I:2 of the GATS, *see* paragraph 7.29.

[829] For the definition of basic public telecommunication services, *see* Section 3(b) of the GATS Annex on Telecommunications, which defines "public telecommunications transport services" as "any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any

with Telmex, or other Mexican operators, for termination[830] in Mexico, and for which,
the United States, Mexico has undertaken specific commitments in its schedule. The sp
telecommunications services subject to the claims are voice telephony, circuit-sw
transmission and facsimile services. These services are, according to the United States,
depending on how the service is provided. First, there are "facilities-based" services,
service supplier provides the services over its own facilities. Second, there are "non-faci
services (services supplied by "comercializad

[830]

services between the United States and Mexico".[836] These operators must link their network at the border to that of a Mexican operator. The United States does not illustrate the current supply of "commercial agency" services from the United States into Mexico, claiming that Mexico maintains measures that prohibit the cross-border supply of this type of service.

7.27 Mexico claims that the services at issue are not supplied cross-border in accordance with the terms of Article I:2(a). According to Mexico, the essential nature of the services at issue is the *transmission* of customer data. In order to transmit customer data cross-border "from" one Member "into" another Member, the supplier must *itself transmit* the customer data within the territory of that other Member. Mexico's view is that no country imposes restrictions on the quantity of incoming or outgoing calls, but rather only on services relating to the transmission of the calls, and therefore that the GATS commitments would be meaningless if they related to the calls rather than their transmission. Thus, an operator who simply "hands off" traffic at the border to another operator would not, argues Mexico, be supplying cross-border within the meaning of Article I:2(a). According to Mexico, a hand-off of traffic at the border amounts to a "half-circuit" provision of telecommunications services; only "full-circuit" or "end-to-end" provision by the same operator constitutes cross-border supply within the meaning of Article I:2(a).[837]

7.28 Mexico's argument that the supplier must *itself transmit* the customer data within the territory of that other Member implies, in effect, that cross-border supply within the meaning of Article I:2(a) can only occur if the supplier operates, or is present[838] in some way, on the other side of the border. Absent this, the supplier would presumably not have the capability to *itself transmit* there. The issue before us is therefore whether, with respect to the telecommunications services at issue, cross-border supply between two Members under Article I:2(a) occurs only if the supplier *itself* operates, or is present, on the other side of the border, or if cross-border supply can occur also if a supplier simply "hands off" traffic at the border. We now examine this fundamental issue.

7.29 The scope of the GATS is defined in Article I:1 as covering "measures by Members affecting trade in services". Trade in services is then defined in Article I:2 as "the supply of a service" through any of four modes of supply:

> "(a) from the territory of one Member into the territory of any other Member;
>
> (b) in the territory of one Member to the service consumer of any other Member;
>
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
>
> (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member."

7.30 Subparagraph (a) describes what is referred to as "cross-border", or "mode 1", supply of trade in services.[839] The ordinary meaning of the words of this provision indicate that the *service* is supplied from the territory of one Member into the territory of another Member. Subparagraph (a) is silent as regards the *supplier* of the service. The words of this provision do not address the service

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[836] *See* the United States' answer to question No. 2(a) of the Panel of 14 March 2003, paragraph 2. For question No. 2(a), *see* footnote 212 of this Report.

[837] *See* Mexico's answer to question No. 3(a) of the Panel of 19 December 2002, paragraph 56. For question No. 3(a), *see* footnote 187 of this Report.

[838] Mention in this section of the Report of the "presence" of a service supplier, or of a service supplier that is "present", should be understood in the general sense of these terms. The use of the terms "present" and

supplier or specify where the service supplier must operate, or be present in some way, much less imply any degree of presence of the supplier in the territory into which the service is supplied. The silence of subparagraph (a) with respect to the supplier suggests that the place where the supplier itself operates, or is present, is not directly relevant to the definition of cross-border supply.

7.31 We now examine the context of subparagraph (a) to determine whether our interpretation, based on the ordinary meaning of the words of the provision, is correct. Subparagraph (a) is one of four modes of supply which, as indicated above, are listed in Article I:2. If we look at the wording of the other modes of supply, we note that the silence in subparagraph (a) as regards the presence of the supplier of the service is in marked contrast to the modes of supply described in subparagraphs (c) ("commercial presence") and (d) ("presence of natural persons"). In both cases, the presence of the service supplier within the territory where the service is supplied is specifically mentioned. The context provided by subparagraphs (c) and (d) therefore suggests that, where the presence of the service supplier was required to define a particular mode of supply, the drafters of the GATS expressed this clearly.

7.32 Further contextual evidence that cross-border supply of the services at issue does not require the supplier to operate, or be present in some way, on both sides of the border is suggested by the definition of the basic telecommunications services at issue, which are defined in the GATS Annex on Telecommunications. The services at issue are "basic" telecommunications services and involve:

> "the real-time *transmission* of customer-supplied *information* between *two or more points* without end-to-end change in the form or content of the customer's information."[840] (emphasis added)

7.33 We note that this definition contains two closely linked elements that are relevant to our analysis: the *transmission* itself, and that which is transmitted – customer-supplied *information.* In our view, reading the word "transmission" alone as constituting the service, as Mexico does, fails to

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this high degree of interaction implicit in the definition of the service, we do not agree that these other services mentioned by Mexico provide persuasive evidence of the argument presented by Mexico.

7.40 A basic telecommunications operator, in other words, must typically link with other operators in order to supply a complete service to its customers. Likewise, those other operators will link with it, in order to give their customers a complete service. Public telecommunications networks are in

concession, Mexico argues, foreign suppliers would have to have both a commercial presence in Mexico and Mexican nationality.

7.49 It remains for us therefore to examine whether, in the light of the limitations inscribed in its schedule, Mexico has made any specific commitments with respect to the cross-border supply of the services at issue and, if so, whether these represent full market access and national treatment commitments, in the sense of Articles XVI and XVII.

(i) Cross-border services in Mexico's Schedule

7.50 We first examine Mexico's Schedule to determine which *service sectors* Mexico has made subject to cross-border commitments. We will start our analysis by looking at the inscriptions that Mexico has made in the *sector* column of its schedule, with respect to the services at issue.

aa) Service sectors inscribed in Mexico's Schedule

7.51 Mexico has set out the telecommunications services sectors that are subject to commitments by it by making the following inscription in the service sector column of its schedule:[850]

"2.C. Telecommunications Services

Telecommunications[10] services supplied by a facilities based public telecommunications network (wireservice sectors TD

interpretation, would on its face suggest that the telecommunications services committed in Mexico's Schedule must be supplied by or through telecommunications "infrastructure". Yet if the term

– for public use
– for non-public use"

7.63 We note particularly the use of the terms "on a resale basis" and "facilities-based" as categories by which specific commitments may be subdivided.

– *The Note by the Chairman*

7.64 A Note by the Chairman of the Negotiating Group on Basic Telecom, entitled "Notes for Scheduling Basic Telecom Services Commitments" was issued on 16 January 1997.[862] The purpose was "to produce a brief and simple note on assumptions applicable to the scheduling of commitments in basic telecoms."[863] Although the Note states that it is "not intended to have any binding legal status", it specifies that its purpose is "to assist delegations in ensuring the transparency of their commitments and to promote a better understanding of the meaning of commitments."[864] The Note draws on the Draft Model Schedule, restating its categories and confirming that they are to be used in scheduling commitments. The Note states an important assumption: that, "unless otherwise noted in the sector column" any telecommunications service listed in the sector column "encompasses" or "may be provided" by or through all of the different "categories" of the service.

7.65 The Note by the Chairman was attached to the final Report of the Group on Basic Telecommunications, which was adopted on 15 February 1997.[865] The Report states that the Chairman issued a Note "reflecting his understanding of the position reached in discussion of the scheduling of commitments" and that this Note "set out a number of assumptions applicable to the scheduling of commitments and was intended to assist in ensuring the transparency of commitments".[866]

– *Scheduling Guidelines*

7.66 The Note by the Chairman, together with the Draft Model Schedule, were attached to the "Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)", (the "Scheduling Guidelines") which were adopted by Members in the Council on Trade in Services on 23 March 2001.[867] The Scheduling Guidelines were an update of the Explanatory Note issued in 1993 for the Group of Negotiations on Services.[868] The objective of the Scheduling Guidelines is "to explain, in a concise manner, how specific commitments should be set out in schedules in order to achieve precision and clarity."

ii) Interpretative value of the supplementary documents

7.67 The Draft Model Schedule and the Note by the Chairman were documents given considerable prominence by Members, since they were attached to the final Report adopted by the Negotiating Group on Basic Telecommunications in 1997.[869] Members gave further prominence to these two documents by attaching them to the Scheduling Guidelines adopted by the Council for Trade in Services in 2001. Annex 2 of the Scheduling Guidelines is entitled "List of attached documents

[862] *Notes for Scheduling Basic Telecommunications Services Commitments*, Note by the Chairman. S/GBT/W/2/Rev.1.
[863] Note by the Chairman, 16 January 1997. S/G/W/2/Rev.1, preamble.
[864] Note by the Chairman, 16 January 1997. S/G/W/2/Rev.1, preamble.
[865] Report of the Group on Basic Telecommunications, S/GBT/4 of 15 February 1997.
[866] Report of the Group on Basic Telecommunications, S/GBT/4 of 15 February 1997, paragraph 5.
[867] *Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS)*, adopted 23 March 2001, S/L/92 (28 March 2001).
[868] *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*. MTN.GNS/W/164 (3 September 1993).
[869] Report of the Group on Basic Telecommunications, S/GBT/4 of 15 February 1997.

relevant for scheduling purposes". (emphasis added) Nonetheless, a footnote to the title of Annex 2 states that "[t]he fact that these documents are annexed to these guidelines should not be interpreted as changing their status." We accept that the footnote means that the attachment of the Draft Model Schedule and the Note by the Chairman to the Scheduling Guidelines should not in itself affect the existing interpretative status of the two documents. However, the footnote does not affect the interpretative status that the Draft Model Schedule and the Note by the Chairman might otherwise have, including the interpretative value derived from being attached to the Report by the Negotiating Group on Basic Telecommunications. Consequently, even if the Draft Model Schedule and the Note by the Chairman cannot be seen as part of the "context" under paragraph 2 of Article 31, nor be "taken into account" under Article 31 – a legal question that we leave open – we find that these documents are, with respect to the GATS Protocol on Telecommunications (to which Mexico's Schedule was attached) an important part of the "circumstances of its conclusion" within the meaning of Article 32 of the Vienna Convention. Under the terms of Article 32, we may therefore use the Draft Model Schedule and the Note by the Chairman to confirm the ordinary meaning, arrived at through the application of Article 31 of the Vienna Convention, of Mexico's GATS commitments on telecommunications services.

7.68 Confirmation of the interpretative value of the supplementary documents is provided by the extensive use in Members' schedules of the categories indicated in the Chairman's Note and Draft Model Schedule. Schedules on occasion indicate even finer distinctions in categories, where needed, to reflect accurately the nature of the services on which Members were undertaking commitments. In some cases, the categories are used to limit the scope of a subsector by distinguishing the categories of services that are being committed. In other cases, the categories are used to specify different levels of commitments for some categories of a subsector, as compared with other categories of the subsector. Typical examples in schedules include commitments that offer greater levels of access for a given service supplied on a facilities basis, or that specify that public telephony remains under monopoly while non-public telephony does not. The categories are often cited in the sector column of schedules, as provided in the Chairman's Note. In some schedules, however, categories are listed in the market access column instead of the sector column. In these cases, the entries nonetheless appear to clarify the category or categories of *service* to which the market access limitation itself applies. Indeed, for those schedules that use not categories at all, it is only by reference to these understandings that there can be certainty that the commitments "encompass" all of the forms in which the services may be supplied. Because of this extensive use in Members' schedules of

as discussed earlier, Mexico's reference to supply by or through "facilities" were understood simply to refer to supply by means of an infrastructure, then the term would be redundant, since any supply of the service is ultimately possible only through a network of physical assets of some operator. In consideration of the categories of the Chairman's Note, however, it becomes apparent that such an interpretation would also make redundant the contrasting categories of supply – "facilities-based" and "by resale". Were this the case, it would not be possible, as provided by the Chairman's Note, for Members to use these categories as a basis for distinguishing between types of supply of basic telecommunications services being committed and those that are not.

7.71 We find therefore that the use of the word "facilities-based" in the phrase "facilities-based public telecommunication network" contained in the introductory heading to Mexico's telecommunications commitments means that Mexico has undertaken commitments for the services at issue supplied only on a facilities basis over such networks – and not by resale or leased capacity. The examination of the supplementary documents thus confirm our interpretation of the ordinary meaning of the terms "facilities-based" in Mexico's Schedule.

7.72 Nonetheless, Mexico's services sector listing does contain a subsector listing for "commercial agencies" ("*comercializadoras*"), defined as "[a]gencies which, without owning transmission means, provide third parties with telecommunications services by using capacity leased from a public network concessionaire." This subsector listing can be read only as an exception, for the services at issue that are supplied through leased capacity, to the general exclusion of such services expressed in the introductory heading. The separate commitment on supply of telecommunications services through leased capacity has meaning in the context of Mexico's Schedule, since supply in this manner is subject to market access limitations that are somewhat different from those inscribed with respect to facilities-based supply.

(ii) Market access and national treatment commitments for cross-border supply

7.73 We now consider what cross age(-)

must be read to mean that full market access is granted, subject only to any measures specifically inscribed, the inscription of the words "None, except" was not necessary.[873]

7.76 We now examine what sort of limitation, if any, on market access is achieved by Mexico's inscription that "[i]nternational traffic must be routed through the facilities of an enterprise that has a concession …". Article XX:1(a) sets out the general requirement for Members to "specify" the terms, limitations and conditions on market access for committed sectors in their schedule. "Specifying" requires that an entry describe each measure concisely, indicating the elements that make it inconsistent with Article XVI:2.[874]

(iii) Mexico's "routing restriction"

7.77 We now examine whether the terms of the "routing restriction" in the market access column of Mexico's Schedule indicate that it comes within the scope of Article XVI:2. This provision contains six categories of measures that restrict market access. These categories differ depending on whether they place limitations on:

(a) the number of service suppliers;

(b) the value of services transactions or assets;

(c)

7.78 Mexico's routing restriction contains three main elements. The first element relates to "international traffic". The second element concerns traffic that "must be routed through the facilities of" an enterprise. The third and final element concerns "an enterprise that has a concession". We assess each of these elements in turn, with respect to their relevance to the six categories of market access measure set out in Article XVI:2.

aa) "International traffic"

7.79 The first element of the routing restriction narrows its scope to "international traffic". This element reflects one of the "categories" contained in the Chairman's Note, and can be contrasted with other categories of local and domestic long-distance service. Since the services at issue are services supplied cross-border, they would necessarily involve traffic that is international in character. Even if "domestic" services were to transit borders, they would do so as international "traffic". Therefore, Mexico has not, through use of this element, placed a substantive limitation on the number of suppliers of scheduled services on a cross-border basis, the quantity of the cross-border services supplied, or on any of the other categories of measure described in Article XVI:2.

bb) "Routed through the facilities"

7.80 The second element requires that international traffic "must be routed through the facilities" of a Mexican concessionaire. The United States argues that the requirement that services supplied cross-border "through the facilities" of a Mexican concessionaire means simply that United States calls must be terminated using the *assets or equipment* of a Mexican concessionaire, and that these include the use of leased lines and other leased capacity.[876] Mexico disagrees, specifying that "through the facilities" means "through an international gateway" of a Mexican concessionaire, which it claims is its meaning in Mexican legislation.

7.81 In examining the meaning of this element of the routing restriction, we note that the ordinary meaning of the term "facilities" (in the Spanish authentic text "*instalaciones*"), on its own, is very broad. A specialized telecommunications dictionary defines "telecommunications facilities" as follows:

> "The aggregate of equipment, such as telephones, teletypewriters, facsimile equipment, cables, and switches, used for various modes of transmission, such as digital data, audio signals, image and video signals."

7.82 The same dictionary defines "transmission facility" as:

> "A piece of a telecommunication system through which information is transmitted for example, a multi pair cable, a fiber optic cable, a coaxial cable, or a microwave radio."[877]

7.83 Neither of these broad definitions makes clear whether supply of the services at issue routed through the "facilities" would include supply using capacity *leased* to another operator. It is therefore necessary to examine further the meaning of the term "facilities", viewed in its context within Mexico's Schedule.

7.84 We recall that the Chairman's Note provided guidance for Members making commitments in basic telecommunications.[878] The use of the word "facilities" in the Note corresponds to a possible category by which a service sector could be narrowed down or refined. The category is referred to as

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[876] *See* the United States' first written submission, paragraph 57.
[877] Newton's Telecom Dictionary, 19th Edition, March 2000.
[878] *See* paragraphs 7.58-7.68 of this Report.

the "facilities-based" supply of a service. We therefore find that the phrase "through the facilities of", placed in the context of the categories of the Chairman's Note, refers not to a requirement simply to use the equipment or physical assets of a Mexican concessionaire, but to supply the service on a facilities-basis, and not through capacity leased to the cross-border supplier.

7.85 We now assess whether this element of the routing restriction introduces a market access restriction in the sense of Article XVI:2, with respect to the cross-border supply of the service. To this end, it is necessary to assess the effect of this element on the relevant services listed by Mexico in its schedule. With respect to services falling under the main sectoral heading, this element would appear to reinforce the inscription in the main sectoral heading that the services committed must be supplied on a facilities-basis. However, this element of the routing restriction also further specifies that the terminating segment of cross-border supply not only *may*, but *must*, be supplied on a facilities-basis. This element of the routing restriction means, therefore, that supply of the service by means of one of the categories (over leased capacity) within Mexico is prohibited, and is subject to a zero quota in the sense of Article XVI:2(a), (b) and (c). We note that, while this limitation prohibits services that originate on a facilities basis from being terminated over leased circuits, it does not prevent these services from being supplied when they fall within the facilities-based category with respect to termination.

7.86 With respect to Mexico's commitments falling under the subsector heading of "commercial agencies", this element of the routing restriction would mean that *even if* the originating segment of the cross-border service is supplied over leased capacity, it is nevertheless restricted only to facilities based supply on the terminating segment within Mexico. Therefore, with respect to the commercial agencies (*comercializadoras*) services described as a subsector, this routing restriction prohibits the cross-border supply upon termination within Mexico by means of the very "leased capacity" which defines this type of service. While this element of the routing restriction does not expressly prohibit cross-border supply over leased capacity on the originating segment, it means that supply over leased capacity on the terminating segment is prohibited. Therefore, this element of the routing restriction prohibits end-to-end International Simple Resale (ISR), and effectively eliminates the possibility of any cross-border supply of services over leased capacity. In this sense, with respect to cross border services supplied by commercial agencies, the routing restriction falls within the scope of Article XVI:2(a), (b) and (c).

cc) "Enterprise that has a concession"

7.87 The third element requires that the traffic be routed through the facilities of an "enterprise that has a concession". In particular, Mexico argues that the requirement that international traffic be "routed through the facilities" of an enterprise that has a "concession" must be read in conjunction with the use of the term "concession" contained in its market access column for the supply of the services at issue through *commercial presence.*

7.88 Mexico's Schedule, with respect to the supply of the services at issue through *commercial presence* reads, in relevant part:

> "A *concession*[1] from the SCT is required. Only *enterprises established* in conformity with Mexican law may obtain such concession.
>
> [1] Concession: The granting of title to install, operate or use a facilities-based public telecommunications network.
>
> Direct *foreign investment up to 49 percent* is permitted in an enterprise set up in accordance with Mexican law." (emphasis added)

7.89 Thus, the "concession" needed to supply the services at issue through commercial presence requires: (a) the establishment of an enterprise; with (b) no more than 49% foreign ownership. For Mexico, the use of the word "concession" has the same meaning in the context of cross-border supply as it does in the context of commercial presence. Therefore, in Mexico's view, a concessionaire entitled to route international traffic into Mexico must be a juridical person of Mexican nationality. Mexico then reasons that the mention of the word "concession" in the routing restriction for cross-border supply "creates commercial presence and nationality requirements to supply basic telecommunications services in Mexico".[879] Since a foreign service supplier wishing to supply cross

language of its Reference Paper, states that Section 2 applies only within the bounds of inscribed market access.[883]

7.93 We recall that Section 2.1 reads:

> "2. Interconnection
>
> 2.1 This section applies,

domestic interconnection than to international interconnection is not determinative. In the United States view, there are no important technical differences between international and domestic interconnection, and the underlying reasons for competition disciplines in both cases are the same. Call termination is simply a form of interconnection. According to the United States, even Mexico's own laws and regulations governing such cross-

7.101 We note that this delimitation of the type of interconnection which falls within the scope of Section 2.2 contains four main elements: (a) a "linking"; (b) with "suppliers of public telecommunications networks and services"; (c) "to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier"; and (d) "on the basis of the specific commitments undertaken". We examine the scope of the interconnection provided for in Section 2 in the light of these elements.

(i) Ordinary meaning

7.102 The ordinary meaning of the word "linking" is very broad. The general dictionary meaning of "link" is "a connecting part, whether in material or immaterial sense; a thing (*occas.* a person) serving to establish or maintain a connexion; a member of a series or succession; a means of connexion or communication." Similarly, the meaning of the verb form of "link" is "to couple or join with", and the phrase "to link up with" includes "by means of transport or system of communication".[886] The dictionary meaning of the term link thus suggests that linking can involve *any* kind of connection between networks. The ordinary meaning of linking is broad and does not, in particular, imply any particular location of the object being linked. This ordinary meaning of link is consistent with the definition provided by a telecom glossary of a link as "a general term used to indicate the existence of communications facilities between two points".[887]

7.103 Section 2 of Mexico's Reference Paper describes the form of linking to which it applies as that occurring "with suppliers providing public telecommunications transport networks or services". A "public telecommunications transport *service*"[888] is defined in the Annex as:

> "a telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer1 62.7316 85.0 Ts "by means of transport or system of co0c 0
> *service*"[888] 8ec5,5des"1 1826 Tjf1-0.7253ystem 08an

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interconnection.[896] Article 47 of the law states that "[i]nterconnection of public telecommunications networks *with foreign networks* shall be carried out through agreements entered into by the interested parties".[897] The ILD Rules likewise do not define "interconnection" directly, but again, usage of the term in the Rules makes it clear that it includes interconnection with foreign networks. The introductory clauses of the ILD Rules state that the Federal Telecommunications Commission has the authority to "oversee the efficient interconnection of public telecommunications networks and equipment, *including interconnection with foreign networks*".[898] Likewise, the stated purpose of the ILD Rules is to "regulate the provision of international long-distance service and establish the terms to be included in agreements for the *interconnection* of public telecommunications networks *with foreign networks*."[899] This confirms that the term "interconnection" is used in Mexico for interconnection between domestic networks, and between domestic and foreign networks.

7.111 We have not been provided evidence of laws or regulations of other Members which offer definitions or usage that indicate that the definition of "interconnection" is inconsistent with the ordinary meaning of the term "linking" in Section 2 of Mexico's Reference paper.[900] We note that under EC law, the term "interconnection" is defined comprehensively in a manner that is consistent with the ordinary meaning of the term "linking":

> "the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators."[901]

7.112 A "special meaning" of the term "interconnection" in Section 2, inconsistent with the ordinary meaning of this term, is also not evident from an examination of the differences between domestic and international interconnection from *commercial, contractual, or technical* points of view.

7.113 From a *commercial* perspective, we disagree with Mexico that international interconnection under a traditional, "joint service" regime is distinctive because the two operators cooperate, and do not compete for the same customers, unlike in domestic interconnection. In a domestic setting, it is true that two operators in the same geographic area and providing the same type of service will usually compete directly for the same customers. In an international setting, two operators may however also compete for the same customers through subsidiaries or services offered in each others'

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[896] A glossary published by Cofetel, does, however, offer a formal definition of interconnection, in similar terms to Section 2.2(b) of Mexico's Reference Paper: "Physical and logical connection between two public telecommunications networks, that allows the exchange of switched public traffic between the switching central offices of both networks. The interconnection allows the users of one of the networks to interconnect and exchange public switched traffic with the users of the other network and vice versa, or to use the services provided by the other network." English translation. Source: www.cft.gob.mx/html/la_era/glo_pub2de4.html#I.

[897] Federal Communications Law, Article 47. (emphasis added)

[898] Rules for the Provision of International Long-Distance Service to be Applied by the Licensees of Public Telecommunications Networks Authorized to Provide this Service, Decision No. RES PC 961207 of 4 December 1996 ("ILD Rules"). Preambular clause. (emphasis added)

[899] ILD Rules, Rule 1. (emphasis added)

[900] *See* notably, for the United States: "Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic. " *47 CFR Ch. 1 §51.5 (10-1-02 Edition) (FCC) [Interconnection regulations implementing ss. 251-252 of the Communications Act of 1934];*

[901] Article 2 of EC Directive 2002/19/EC (Access Directive) (OJ 2002 L108, p. 33). In this respect, *see also* the "Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services" (2002/C 165/03), Official Journal of the European Communities 165/6, 11.7.2002. The Panel is aware that the EC Access Directive regulates a common market for telecommunications among EC member States.

markets. Even if they do not, there is still an incentive for a major supplier to set interconnection rates at anti-competitive rates, and not to provide optimal service to the other supplier in terms of quality and timeliness. Domestic and international interconnection do not therefore differ significantly in this respect.

7.114 From a *contractual* perspective, we also find that there are no significant differences between the domestic and international interconnection, including through accounting rate arrangements. We cannot accept Mexico's assertion that "most of the provisions of one agreement are either not applicable or can never be a provision in the other agreement."[902] From a contractual point of view, domestic and international interconnection, including the accounting rate regime, do not form two distinct regimes that cannot overlap. After reviewing the evidence before it, including copies of standard agreements furnished by Mexico, and the arguments of the parties, the Panel agrees substantially with the statement by the United States that interconnection agreements between suppliers in the same or different countries, including through accounting rate regimes:

> "may include a wide variety of rates, terms and conditions concerning such matters as specific services covered by the agreement, the rates applicable to specific services, payment schedules, procedures for dispute resolution, time duration of the agreement, restrictions on assignments of rights, and various network technical considerations. Interconnection arrangements may provide for one-way or two-way traffic flows, with the same or different rates applying in each direction, and two-way traffic flow. Interconnection arrangements may also provide for 'net' payment arrangements under which the two carriers set off their interconnect payments with one carrier remitting the balance to the other carrier."[903]

7.115 Even Telmex's contractual arrangements with United States suppliers do not adhere fully to the traditional accounting rate regime described by the ITU in which "a net settlement payment is made on the basis of excess traffic minutes, multiplied by half the accounting rate".[904] In fact, United States suppliers are charged three different rates depending on the destination zone in Mexico, while a still different rate applies to traffic from Mexico to the United States.

7.116 From a *technical* perspective, we find that the United States provides convincing evidence that the "mid-point" cross-border link-up, which Mexico argues is particular to international interconnection, arises also in certain situations of domestic interconnection.[905] More generally, we consider that technical issues arise under both domestic and international interconnection, including through accounting rate arrangements, and that these are solved in both cases through the use of technical standards and agreements, joint planning and coordination.

7.117 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

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[902] *See* Mexico's answer to question No. 8 of the Panel of 19 December 2002. For question No. 8, *see* footnote 77 of this Report. *See also* Mexico's answer to question No. 17 of the Panel of 14 March 2003. For question No.17, *see* footnote 146 of this Report.

[903] *See* United States' answer to question No. 8 of the Panel of 19 December 2002, paragraph 44. For question No. 8, *see* footnote 77 of this Report.

[904] *Accounting Rate Reform Undertaken by ITU-T Study Group 3*, Communication from the International Telecommunication Union, Informal Note, Council for Trade in Services, Job. no. 2947, 11 May 2000, paragraph 2.

[905] *See* the United States' answer to question No. 8 of the Panel of 19 December 2002, paragraph 47. For question No. 8, *see* footnote 77 of this Report.

Mexico's

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. Since the GATS deals specifically with international trade in services by four modes of supply that are considered comprehensive, it would indeed be unusual for interconnection disciplines not to extend to an obvious and important mode of international supply of telecommunications services – cross border.

(v) Supplementary means – the "Understanding"

7.122 The rules of the Vienna Convention provide that "supplementary means" of interpretation may be applied in two cases.[907] First, to *confirm* the meaning resulting from the application of the primary rules of interpretation – those we have applied up to this point.[908] Second, to *determine* the meaning when the application of the primary rules leaves the meaning "ambiguous or obscure" or leads to a result that is "manifestly absurd or unreasonable". The supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion.[909]

7.123 Mexico has presented extensive arguments, based on the preparatory work of the GATS and the circumstances of its conclusion, to show that a reading of the term "interconnection" to include interconnection with foreign suppliers and networks would lead to a result which is "manifestly absurd or unreasonable". Mexico refers specifically to early drafts of the Reference Paper, and to an understanding on accounting rates reached by negotiators. In order to "confirm the meaning" resulting from the application of the primary rules of interpretation, it would therefore be appropriate to examine these supplementary means of interpretation.

7.124 The text cited by Mexico (the "Understanding") is contained in a Report by the Group on Basic Telecommunications made on 15 February 1997, at the close of the negotiations on the Fourth Protocol – the instrument which contained Members' new commitments on basic telecommunications, including Mexico's Reference Paper commitments. The Report, which appended the draft schedules of Members, states:

> "7. The Group noted that five countries had taken *1-p -45. TD -2F1 11.25 Tf -0.1649 Tc 1.8epora imary*

7.134 Relevant, non-binding recommendations referred to in Article 6.2 of the Regulations are the ITU-T Recommendations D.140 and D.150.[917] They deal with methods of compensating administrations for the cost of international telecommunications. At the time of the WTO negotiations on basic telecommunications, Recommendation D.140 already contained the principle of cost-orientation, transparency and non-discrimination. Subsequent to the WTO negotiations, ITU Members modified these Recommendations, adding principles for determining costs, transitional periods for achieving cost oriented rates, and explicit alternatives to the traditional accounting rate procedures between administrations.

7.135 Read together, the Regulations, its Appendix, and the related Recommendations result today in a number of different ways in which operators in different countries can be compensated for international traffic exchanged between them, ranging from traditional methods to more modern alternatives.[918] Regardless of whether the traditional or new alternative arrangements are being used, the ITU instruments require that the arrangements be cost-oriented and non-discriminatory.

7.136 We therefore conclude that the accounting rates described in the Understanding should be understood to be limited to: (a) a traditional accounting rate that is not cost-oriented; (b) that can be interpreted as a measure of a Member, or that triggers a Member's obligations under Article VIII on monopolies; and W4le T1818ligations under Article VIII on

in "the complete collapse of the accounting rate regime without a viable replacement, possibly even leading to interruptions in international traffic."[922]

7.142 We are not convinced by Mexico's argument that a broad interpretation of interconnection would lead in this sense to a result that is "manifestly absurd or unreasonable". First, a large and increasing proportion of all international traffic is routed outside the traditional accounting rate system.[923] Second, the "outflows" predicted by Mexico would only occur if those other countries without cost-oriented international interconnection were able to maintain high interconnection charges, and at the same time were high net recipients of incoming calls. Third, traditional accounting rate regime charges are falling quickly, under influences such as the ITU-T D.140 Annex E Benchmarks, the 1997 United States FCC Benchmarks, use of leased lines, and new technology such as voice-over-IP. In sum, Mexico has not demonstrated that a requirement for Members having undertaken Reference Paper commitments to grant international interconnection at cost-oriented pricing to all other WTO Members would lead to results which were "manifestly absurd or unreasonable".

7.143 We find, therefore, that Section 2 of Mexico's Reference Paper applies to the interconnection of cross-border suppliers.

7.144 Since we have already found that Mexico has undertaken market access and national treatment commitments in its schedule with respect to the cross-border supply of the services at issue; and that these commitments can provide the basis for interconnection commitments in Section 2.2(b) of Mexico's Reference Paper; we are able to find overall that Section 2.2(b) of Mexico's Reference Paper applies to United States service suppliers supplying or seeking to supply the services at issue.

2. Whether Mexico has fulfilled its interconnection commitment, in Section 2.2(b) of its Reference Paper, with respect to the services at issue

7.145 We now consider whether Mexico has *fulfilled* the commitment contained in Section 2.2 of its Reference Paper, notably to ensure, with a major supplier, cost-oriented interconnection. We consider first the preliminary issue of whether Telmex is a "major supplier".

(a) Is Telmex a "major supplier"?

7.146 The United States claims that Mexico has not met its commitment under Sections 2.1 and 2.2 of its Reference Paper because it has failed to ensure that Telmex, a major supplier, provides interconnection to United States basic telecommunications suppliers on a cross-border basis with cost-based rates and reasonable terms and conditions. Mexico refutes this claim and also contests the United States assertion that Telmex is a major supplier.

7.147 We examine first the definition of the term "major supplier", as it appears in the Reference Paper:

> "A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:
>
> (a) control over essential facilities; or

[922] *See* Mexico's second written submission, paragraph 34.

[923] Estimates are that as much as half of all international traffic is outside the traditional accounting rate system. ITU Trends in Telecommunications Reform 2000-2001, Section 8.2 (Exhibit MEX-59).

(b) use of its position in the market."[924]

7.148 It is not in dispute that Telmex is a *supplier* of basic telecommunications services. In order to determine whether Telmex is a "major supplier", Mexico's Reference Paper indicates that we must examine three factors. First, what the "relevant market" is. Second, whether, in that market, Telmex has "the ability to materially affect the terms of participation (having regard to price and supply) in that market". Third, whether that ability results either from "control over essential facilities", or "use of its position in the market". We consider each of these factors in turn.

(i) What is the "relevant market for basic telecommunications services"?

7.149 The United States argues that the relevant market is the *termination* of the services at issue – voice telephony, facsimile and circuit-switched data transmission services – supplied cross-border from the United States to Mexico. According to the United States, this results from an application of basic principles of United States antitrust law and Mexican competition law, which define the relevant market in terms of demand substitution. Under this principle, it contends that international telecommunications services (whether supplied cross-border or through commercial presence) cannot substitute for domestic telecommunications services. Likewise, within international telecommunications services, originating traffic cannot substitute for terminating traffic, which is a separate market.[925]

7.150 Mexico contests this analysis. It argues that the United States fails to explain how the supply of cross-border services is relevant to the market for *termination*, which are supplied through commercial presence, a different mode of supply. Even if the market for termination were in principle relevant, Telmex does not provide such services, and Mexico does not permit trade in them. Instead, it argues, Telmex completes international calls on a shared-revenue basis, under a traditional accounting rate regime, and the relevant market would thus have to include two-way traffic.[926]

7.151 The services at issue are basic telecommunications services – voice, switched data and fax – originating in the United States, and for which United States suppliers are seeking interconnection with Mexican concessionaires for termination of the service in Mexico. United States suppliers have a choice of Mexican operators with whom they may interconnect and terminate, even though these operators, by Mexican law, must charge a single price set by the operator with the largest volume of outgoing traffic, and Telmex controls the majority of international gateways necessary to terminate the services. Contrary to Mexico's arguments, therefore, there does exist supply and demand – a "market" – in Mexico for termination. 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 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.

7.152 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

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[924] In the authentic Spanish version:

> "*Proveedor principal*, *es aquel proveedor que tiene la capacidad de afectar materialmente los términos de participación en el mercado relevante de servicios básicos de telecomunicaciones (teniendo en cuenta el precio y la oferta), como resultado del:*
> *(a) control sobre los recursos esenciales; o*
> *(b) uso de su posición en el mercado.*"

[925] *See* the United States' first written submission, paragraphs 72-78.
[926] *See* Mexico's second oral statement, paragraphs 67-74.

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.

(ii) Does Telmex have "the ability to materially affect the terms of participation (having regard to price and supply)" in that market?

7.153 The United States maintains that, within the market for termination, Telmex "can materially affect the terms of participation (having regard to price and supply)". It argues that this notion corresponds to the concepts of "market power", used by United States competition authorities, and "substantial power", used by Mexican competition authorities. A firm has market power if it has the ability profitably to maintain prices above competitive levels for a significant period of time, which implies both the ability to maintain prices well above costs, and protection (either governmental limitations or market circumstances) against a rival's entry or expansion. The United States argues that, in determining whether a firm has market power, United States antitrust authorities examine factors such as market share, barriers to entry, capacities of firms in the market, availability of substitutes, and opportunities for coordinated behaviour among firms.[927]

7.154 Within the market for termination in Mexico, the ILD Rules accord Telmex special powers. ILD Rule 13 provides:

> "The long-distance service licensee having the greatest percentage of outgoing long-distance market share for the six months prior to negotiations with a given country shall be the licensee that is authorized to negotiate settlement rates with the operators of said country. These rates shall be submitted to the Commission for its approval."

7.155 Rule 13 effectively grants to the long-distance licensee with the highest volume of outgoing traffic on a particular international market the sole right to negotiate settlement rates which, under Rule 10, all other operators must apply. Since Telmex has always had the largest share of outgoing traffic in every international market, including to the United States, it is, and has consistently been under the Rules, the "licensee authorized to negotiate settlement rates". In these circumstances, since 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 Tj 0 circumstancespof outg5 sexae5 firm has7nper 0.2625 9(iii) (parti. Tf -0.196625 T

relies on a market determination by the Mexican competition authority that is under review by Mexican courts precisely because it was based on data from 1996, that is, when the telecommunications market was not yet fully open.[928] The United States argues that the substantial power of Telmex in the international market would apply automatically to the market for *termination*, since the ILD Rules guarantee that Telmex, as an originator of international services, is entitled to terminate services in the same proportion. The United States notes that the FCC has also made a finding that Telmex is dominant in the provision of international telecommunications services between the United States and Mexico.[929]

7.157 The United States al

the cost of providing the interconnection is an important way of ensuring that competitors are on an equal footing.[935]

7.161 The United States argues that, to the extent that the term "having regard to economic feasibility" qualifies the term "cost-oriented" rates, it simply confirms that interconnection rates should cover "both direct costs and common costs, and should permit a reasonable return on the investor's investment".[936] According to the United States, the LRAIC method used by Mexico to develop its domestic interconnection rates includes the cost of capital to finance interconnection facilities, which already includes a reasonable rate of return. The United States agrees with the EC that the language in the EC Interconnection Directive served as a model for the phrase "having regard to economic feasibility", and it is intended there simply to ensure the return on an operator's investment is "reasonable".[937]

7.162 The United States also argues that the phrase "having regard to economic feasibility" does not temper the obligation to provide interconnection at cost

7.165 In resolving the issue of whether Mexico has ensured that Telmex charges "cost-oriented rates" to United States suppliers of the services at issue, we first examine the meaning of this term. In the light of this, we then determine whether the United States has proveil/R

equity"), and "other related costs" to be agreed between the parties.[945] The guidelines specify that several of the related direct costs are relevant only "if applicable", or "directly attributable" to the particular international telephone service. Likewise, related indirect or common costs "cannot be solely attributed to the international telephone service and thus must be allocated". The guidelines suggest therefore that the relevant cost elements are only those that relate to the actual cost of providing the service.

7.172 The principle of "cost-orientation" is confirmed in a related ITU Recommendation, D.150, which was amended in 1999 to describe possible procedures for the "remuneration of the Administration of the country of destination" for international telecommunications traffic. These procedures are: flat rate price, traffic-unit price, accounting revenue division, settlement rate, termination charge, and "other" procedures. For each of these procedures, the Recommendation states that administrations "should apply the principles of … cost-orientation".[946]

7.173 Recommendation D.140 also specifies that cost elements need be valued according to a cost *model* in order to arrive at specific cost figures. A set of principles adopted in 1999 and annexed to the Recommendation D.140 requires that administrations, in developing and using a cost model, adhere to a "principle of causality" between the service and the resources used to provide it:

"Principle of causality

5.1 The demonstration of a clear cause and effect relationshi -222 -12.75 Ttion of s71

incremental costs.[949] The increasing use of incremental cost methodologies indicates the special meaning that the term "cost-oriented" is acquiring among WTO Members.

7.176 Mexico is among the WTO Members that implements a type of long run incremental cost methodology, known as LRAIC. Article 63 of Mexico's Federal Law on Telecommunications gives the authority to impose on any public telecommunications licensee with substantial market power rates that aim at "recovery, at least, of the long run average incremental cost".[950] This measure is aimed at avoiding predatory pricing.

7.177 We find therefore that the increasing and wide-spread usage of incremental cost methodologies among WTO Members supports the interpretation of the term "cost-oriented" as meaning the costs incurred in supplying the service, and that the use of long term incremental cost methodologies, such as those required in Mexican law, is consistent with this meaning.

7.178 So far, we have examined the meaning of "cost-oriented rates" without taking into account the subsequent phrase in Section 2.2(b) of Mexico's Reference Paper: "that are transparent, reasonable, having regard to economic feasibility". We now examine what interpretative effect should be given this phrase. We recall that Section 2.2(b) requires a Member to ensure that interconnection is provided by a major supplier:

> "in a timely fashion, on terms, conditions (including technical standards and specifications) and *cost-oriented rates* that are transparent, *reasonable, having regard to economic feasibility,* and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided … "[951] (emphasis added)

7.179 We first examine the relationship of the phrases "reasonable" and "having regard to economic feasibility" with the other elements of the Section 2.2(b). We note that the provision isolates certain key elements in the relationship of interconnection between a supplier and a major supplier – "terms", "conditions" and "rates". It then lists some general qualifiers – including "reasonable", and "having regard to economic feasibility".

7.180 The phrase "terms and conditions" is commonly used to designate the elements of a contract or an agreement. The word "terms", in its specialized legal sense, can mean "conditions, obligations, rights, price, etc., as specified in contract or instrument"[952]; while "condition" may be defined as "a provision in a will, contract, etc., on which the force or effect of the document

(ii) Does Telmex interconnect United States suppliers at cost-oriented rates?

7.186 We now examine whether the United States has presented evidence demonstrating that Mexico has not ensured that Telmex has interconnected United States suppliers of the services at issue at cost-oriented rates, as required by Section 2.2 of Mexico's Reference Paper.

7.187 The United States uses four methods to show that Telmex does not charge cost-oriented rates to United States suppliers of the services at issue. First, it presents evidence that the same network elements used to interconnect United States suppliers, when used for domestic interconnection, cost on average 75% less. Second, it presents evidence that grey market rates for a variety of international routes to Mexico are far lower than the rates charged by Telmex. Third, it presents evidence that wholesale rates to terminate calls between various countries with competitive long-distance operators is much lower than the rates charged by Telmex. Fourth, the United States presents evidence that the financial arrangements related to "proportionate return" procedures among Mexican operators pursuant to the ILD Rules show that Telmex's rates are above cost. We examine in turn each of these methods.

ii) Prices for the relevant network components

7.197 The United States presents evidence that either Telmex or Cofetel has established rates for each of the relevant network elements. The rates established by Cofetel are published, and relate to international transmission and switching, and terminating interconnection to cities where there is long-distance competition. The rates established by Telmex are also published, and relate to local and long-distance links. Both Cofetel and Telmex are legally required to set prices that recover at least the total cost of these network components.[963]

7.198 The United States classifies all calls to Mexico into three price categories, according to the use they make of Telmex's network. These three zones are: (1) calls terminating in Mexico City, Guadalajara, and Monterrey; (2) calls terminating in approximately 200 medium size cities; and (3) calls terminating in other locations in Mexico. We now examine the pricing evidence which the United States presents for each of these three zones.

– *Termination in Zone 1 (large cities)*

7.199 The United States presents evidence that in these cities (Mexico City, Guadalajara, and Monterrey) United States suppliers need only use three network components. These components are charged at the following rates: international transmission and switching (1.5 cents/minute); local link (0.022 cents/minute) and subscriber line (1.003 cents/minute). Together these charges amount to 2.525 cents/minute. However, Telmex currently charges 5.5 cents per minute, or 120% more than the maximum cost it incurs to terminate these calls into zone 1.

– *Termination in Zone 2 (medium cities)*

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based on figures for traffic during the months of March to May 2002, the Telmex blended cost ceiling is 5.2 cents/minute, and the Telmex blended rate is 9.2 cents/minute, which is 77% more than the cost ceiling.

7.203 We earlier accepted in principle the United States method for determining the difference between interconnection rates charged by Telmex to the United States suppliers of the services at issue, and the aggregate costs for relevant network components. We found earlier that it is a justified presumption that any substantial difference between the two figures was evidence that the Telmex interconnection rates were not "cost-oriented" in the sense of Article 2.2(b) of Mexico's Reference Paper. The evidence reveals that the blended average difference in costs is in the order of 77%. Mindful of the fact that the cost-ceiling figures used are conservative (since they are based in part on *retail* rates for private lines, and Telmex's interconnection rates to cities without competition in call origination), we find that a difference of over 75% above Telmex's demonstrated cost-ceiling is unlikely to be within the scope of regulatory flexibility allowed by the notion of "cost-oriented" rates, in the sense of Section 2.2(b) of Mexico's Reference Paper.

bb) Comparison with "grey market" prices on the Mexico-United States route

7.204 We now examine the second method used by the United States to demonstrate that the rates charged by Telmex to United States suppliers of the services at issue are not "cost-oriented". The method is based on the use of data on exchange traded capacity (which the United States labels grey market). These grey market arrangements, which are based on the lease of cross-border links, bypass the uniform settlement rates required under Mexican regulations, and are technically illegal in Mexico. The United States presents evidence, derived from a major traffic exchange company, that grey market rates for transport and termination of international traffic into Mexico, sold in London, Los Angeles and New York also show that Telmex interconnection rates are not cost-oriented.

7.205

prices of only one major traffic exchange company[964] on 13 September 2002, we would not make an *independent* finding, based solely on these figures, that Telmex rates are not cost-based in the meaning of Section 2.2(b) of Mexico's Reference Paper. We find nonetheless that the substantial difference in costs goes some way to support the finding under the first method described above.

cc) Comparison with termination rates on other international routes

7.208 We now examine the third method used by the United States to demonstrate that the rates charged by Telmex to United States suppliers of the services at issue are not "cost-oriented". The method is based on a comparison of the market for wholesale transportation and termination of international calls. We accept that this method is a valid method for estimating costs of network components used for interconnection

7.209 The United States presents evidence, based on wholesale rates on a major exchange[965] to terminate calls to countries, like Mexico, that have more than one long-distance provider. The rates range from 1.2 cents/minute to 6.23 cents/minute, compared to Telmex blended average interconnection rate of 9.2 cents/minute. Telmex interconnection rates are therefore 48% to 667% above these wholesale rates.

7.210 We find that this method results in Telmex interconnection rates of between 48% to 667% above wholesale rates into other international markets with more than one long distance provider. We find that the results of this method lend credibility to the result under the first method. However, since this evidence is based only on the data of one major operator on one particular day, and does not concern traffic into Mexico, we would not base a finding solely on this evidence.[966]

dd) "Proportionate return" procedures among Mexican operators

7.211 f

7.213 We observe that the Rule 17 arrangements, which on the uncontested evidence of the United States, involve "most" of the market allocation adjustments, can only exist if there is a "surplus" to distribute after the full costs of interconnection have been deducted by the operator receiving the call. This surplus can only exist if the Telmex settlement rate does not reflect the operator's costs, and there is consequently something left to distribute. We find therefore that the existence and use of the "financial compensation agreements", which implement the "proportionate allocation" rules, are further evidence of the fact that Telmex interconnection rates are not cost-oriented in the sense of Section 2.2(b) of Mexico's Reference Paper.

7.214 More generally, Mexico argues that commitments made by developing country Members have to be interpreted in the light of paragraph 5 of the preamble to the GATS, and GATS Article IV which recognize that these Members need to "strengthen their domestic services capacity and efficiency and competitiveness".[969]o However, we note that these provisions describe the typ /F TD /F1etitiveness

Table 1

Mexico - summary of comparisons between interconnection costs and settlement rates

Method	Cost (US cents/min)	Settlement rate (in Mexico US cents/min)	Multiple (Settlement as multiple of cost)
1. Cost of components in Mexico			
3 largest cities	2.5	5.5	2.2
200 medium-size cities	3.0	8.5	2.8
Other localities	9.3	11.8	1.3
Weighted average [970]	5.2	9.2	1.8
2. Exchange traded capacity [971]			
3 largest cities	1.5		
200 medium-size cities	6.1		
Other localities	9.3		
3. International comparators [972]	2.5		

7.216 The Panel decided, after having received no evidence from Mexico in response to our questions relating to the United States cost estimates (*see* paragraph 7.188 and footnote 958 above), to base itself on the methodologies presented to the Panel by the United States and not refuted by Mexico. On this basis, we conclude overall that the interconnection rates charged by Telmex to United States suppliers of the services at issue are not "cost-oriented" within the meaning of Sectionquestions relating

supply of the service". The United States points to the *de jure* monopoly power granted by Mexican law to Telmex under the ILD Rule 13 to set the interconnection rate, and impose that rate on all other Mexican long-distance operators; it also points to the rejection by Mexican authorities of requests by both Mexican and United States suppliers to negotiate lower interconnection rates. For the United States, these measures result in "unreasonable" terms and conditions for interconnection with Telmex, since they restrict the supply of scheduled services through raising prices, reducing demand and lessening competition.

7.218 The United States argues that the term "having regard to economic feasibility" qualifies the requirement for "reasonable" terms and conditions.[973] In this sense, it limits the obligation to provide interconnection on reasonable terms and conditions in cases including where revenues from interconnecting operators would not cover costs due to insufficient demand or because of increased costs of rapid installation of facilities.

7.219 Mexico replies that the United States has not shown that either the ILD Rules regarding settlement rates, or the Mexican refusal to permit alternative rates, are "terms and conditions" of interconnection with a "major supplier" that are not "reasonable". The United States had not shown, according to Mexico, that factors concerning *rates* of interconnection are "terms and conditions" of interconnection and, even it they were, that these rates were terms and conditions of interconnection with a "major supplier", as required by Section 2.2(b) of Mexico's Reference Paper. Even if Telmex were considered a "major supplier", the requirements in the ILD Rules that the United States objects to could hardly be said to be "unreasonable": the need to interconnect through an international port; the need to interconnect through an interconnection agreement; and the right of Telmex to negotiate its own settlement rates. The fact that other Mexican operators have to apply the rate negotiated by Telmex is not, according to Mexico, a term and condition of interconnection with a "major supplier", since no one suggests that the other Mexican suppliers have that status.[974] Nor does the refusal of Mexican authorities to permit alternative rates constitute "terms and conditions" of interconnection with a "major supplier".

7.220 Mexico argues that the United States' interpretation of "reasonable" has no merit. All forms

by the interpretation of Mexico's obligations under Section 1 of the Reference Paper regarding "competitive safeguards", which we examine in the following Section C of our report. Moreover, in Section D of our report, we have to examine the claim by the United States that Mexico does not permit interconnection of United States suppliers on "reasonable terms and conditions" contrary to Section 5(a) of the GATS Annex on Telecommunications. Having already found an inconsistency with Mexico's obligations under Section 2.2(b) of the Reference Paper, we consider it wiser and justified to exercise "judicial economy" with regard to the United States claim of an additional inconsistency with the requirement in Section 2.2(b) of "reasonable" terms and conditions.

C. WHETHER MEXICO HAS MET ITS COMMITMENT UNDER SECTION 1 OF ITS REFERENCE PAPER

7.222 The United States argues that Mexico has not met the requirements of Section 1.1 of its Reference Paper, which provides that "[a]ppropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices." In the absence of a precise definition of "anti-competitive practices", the United States argues that the term encompasses, at a minimum, practices usually proscribed under national law: abuse of dominant position, monopolization, and cartelization. The United States argues that, far from proscribing such behaviour, Mexico maintains measures that *require* Mexican telecommunications operators to adhere to a horizontal price-fixing cartel led by Telmex. This requirement is contained in ILD Rule 13, which obliges the Mexican operator with the most outgoing traffic on a particular international route to negotiate with the suppliers of that country a single settlement rate, which then applies, by virtue of ILD Rule 23, to all other Mexican operators. Anti-competitive practices are also evidenced, according to the United States, by the required "proportionate return" system defined in ILD Rule 2:XIII, by which a Mexican operator is entitled to receive as much incoming traffic as it sends outgoing traffic.

7.223 In response, Mexico argues that its Reference Paper commitments apply only to matters within its border, and not to services supplied under an accounting rate regime. In any case, Mexico contends, it has put in place "appropriate measures" to prevent anti-competitive practices under its general competition laws. As for the ILD Rules they are, according to Mexico, aimed at increasing competition – by stopping new entrants from being undercut on pricing, and by preventing foreign operators from dictating prices to their Mexican affiliates. The United States had not shown that Telmex is a "major supplier" in the relevant market, and behaviour legally required under Mexican law could not be an "anti-competitive practice".

7.224 We examine first the terms of Section 1.1 of Mexico's Reference Paper. It reads:

> "Prevention of anti-competitive practices in telecommunications
>
> Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."[976]

7.225 We note that Section 1.1 contains three key elements: (i) a "major supplier"l6ilevan5negime. cont8pp

between firms, such as agreements to fix prices or share markets, in addition to other practices such as abuse of a dominant position and vertical market restraints.[983]

7.236 In addition, the meaning of "anti-competitive practices" is informed by related provisions of some international instruments that address competition policy. Article 46 of the 1948 Havana Charter for an International Trade Organization already recognized that restrictive business practices, such as price-fixing and allocation of markets and of customers, could adversely affect international trade by restraining competition and limiting market access. The importance of ensuring that firms refrain from engaging in horizontal price fixing agreements, market or customer allocation arrangements and other forms of collusion is likewise emphasized in the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[984] It is also worth pointing out, since both Mexico and the United States are members of the OECD, that the OECD has adopted a Recommendation calling for strict prohibition of cartels.[985] In the work of the WTO Working Group on the Interaction between Trade and Competition Policy, reference has been made to the pernicious effects of cartels, and to the consensus that exists among competition officials that price-fixing "hard core cartels" ought to be banned.[986] Cartels were also described as the most unambiguously harmful kind of competition law violation.[987]

7.237 An examination of the object and purpose of the Reference Paper commitments made by Members supports our conclusion that the term "anti-competitive practices", in addition to the examples mentioned in Section 1.2, includes horizontal price-fixing and market-sharing agreements by suppliers which, on a national or international level, are generally discouraged or disallowed. An analysis of the Reference Paper commitments shows that Members recognized that the telecommunications sector, in many cases, was characterized by monopolies or market dominance. Removing market access and national treatment barriers was not deemed sufficient to ensure the effective realization of market access commitments in basic telecommunications services. Accordingly many Members agreed to additional commitments to implement a pro-competitive regulatory framework designed to prevent continued monopoly behaviour, particularly by *former* monopoly operators, and abuse of dominance by these or any other major suppliers. Members wished to ensure that market access and national treatment commitments would not be undermined by anti-competitive behaviour by monopolies or dominant suppliers, which are particularly prevalent in the telecommunications sector. Mexico's Reference Paper commitment to the prevention of "anti-competitive practices" by major suppliers has to be read in this light.

7.238 Based on this analysis, we find that the term "anti-competitive practices" in Section 1 of Mexico's Reference Paper includes practices in addition to those listed in Section 1.2, in particular horizontal prion to t25 -12.75 toj 517s, which are particularly prevalent in the h 0 TD 099es" iTc 0.1875 Tw37 ent

colluding or, in other words, engaging in horizontal price fixing." It argues further that any other interpretation would render the provision self-defeating and meaningless, since a Member "could easily avoid the obligation to maintain appropriate measures to prevent 'anti-competitive practices' by formally requiring such practices."[988]

7.241 Mexico argues that the ILD Rules are part of the regulatory framework of laws intended to increase competition. Mexico also contends that in any case the focus of Section 1.1 of its Reference Paper is on anti-competitive "practices" by a major supplier that are not required under a Member's law. Otherwise, the language of Section 1.1 would have gone further and specifically prohibited anti-competitive "measures" implemented or maintained by a WTO Member. The European Communities, as third party to these proceedings, believes that under the ILD Rules "the fixing of a uniform price cannot be an anti-competitive practice since uniform prices are required by law. The same goes for the revenue sharing system ("proportional return") since this is also mandated by law."[989] The European Communities concludes that "[if] Mexico chooses not to allow competition between telecommunications operators on a certain matter, there is no scope for anti-competitive practices relating to that matter. It is not possible to restrict competition where competition is not allowed."[990]

7.242 We have examined the meaning of the term anti-competitive practices in the previous section. We now look at whether anti-competitive practices, as this term is used in Section 1 of the Reference Paper, also covers practices by a major supplier that are required by a Member's law. The first illustrative example in Section 1.2 of anti-competitive practices is anti-competitive cross-subsidization. Cross-subsidization We,i5vifanti

obligations owed to all other Members of the WTO in all areas of the relevant GATS commitments. In accordance with the principle established in Article 27 of the Vienna Convention[992], a requirement

> of said country. These rates shall be submitted to the Commission for its approval."[995]

7.250 Telmex is an "international gateway operator", and the "long-distance service licensee" authorized to negotiate settlement rates with United States operators on the United States – Mexico route.

(ii) Proportionate return

7.251 The ILD Rules also require international gateway operators to apply the system of "proportionate return", and distribute among themselves *incoming* calls from a country in proportion to the *outgoing* calls the operator sends to that country.[996] The system is implemented through ILD Rule 16 and 2:XIII.

7.252 Rule 2:XIII sets out, in relevant part, the principle of the scheme:

> "international gateway operators shall have the right to receive, regardless of the type of call, incoming call attempts from a given country during any one-month period, based on the percentages established for the previous monthly period."[997]

7.253 Rule 16 provides for the redistribution of calls:

> "In the event that an international gateway operator receives a greater share of incoming traffic than that to which it is entitled under the terms of subparagraph XIII of Rule 2, the operator shall distribute the surplus to another international gateway operator as to remain within the bound of its own percentage."[998]

7.254 In redistributing the incoming traffic, ILD Rule 17 provides that operators may also "negotiate financial compensation agreements among themselves, according to the rights that are generated for each of them". These agreements are notified to and approved by Mexican authorities.[999]

7.255 The principle of a uniform settlement rate must be applied by operators to all international incoming and outgoing traffic, and the principle of proportionate return must be applied by operators to all international incoming traffic, and both must appear in all interconnection agreements made by Mexican operators with foreign operators.[1000]

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[995] ILD Rule 13.
"*El concesionario de servicio de larga distancia que tenga el mayor porcentaje del mercado de larga distancia de salida de los últimos seis meses anteriores a la negociación con un país determinado, será quien deba negociar las tarifas de liquidación con los operadores de dicho país. Estas tarifas deberán someterse a la aprobación de la Comisión.*"

[996] ILD Rule 2:XIII.

[997] "*los operadores de puerto internacional tendrán derecho a recibir, en forma aleatoria respecto del tipo de llamada, los intentos de llamadas de entrada provenientes de un país determinado en cualquier periodo de un mes, en función a los porcentajes establecidos en el periodo mensual anterior*".

[998] "*En caso de que un operador de puerto internacional reciba tráfico de entrada en una proporción mayor a la que le corresponde conforme al inciso XIII de la Regla 2, dicho operador deberá distribuir a otro operador de puerto internacional el excedente para cumplir con el porcentaje correspondiente. En tal caso, el operador deberá descontar la contraprestación a que tiene derecho por prestar los servicios de conmutación, enrutamiento y contabilidad en el puerto internacional, y pagar el monto restante de la tarifa de liquidación a los operadores de puerto internacional a los que transfiera dicho tráfico. A su vez, estos últimos deberán pagar la tarifa de interconexión correspondiente al operador local que termine la llamada.*"

[999] ILD Rule 17.

[1000] ILD Rule 23.

7.256 In sum, these measures impose two main requirements on Telmex, which is the "major supplier", on the United States – Mexico route. First, Telmex must negotiate a settlement rate for incoming calls with suppliers in the other markets wishing to supply the Mexican market and apply, subject to approval by the Mexican authorities and in common with the other Mexican suppliers, that single rate to interconnection for incoming traffic from the United States. Second, Telmex must give up traffic to, or accept traffic from, other suppliers depending on whether the proportion of incoming traffic surpasses, or falls short of, its proportion of outgoing traffic. To this end, Telmex may enter into "financial compensation agreements"[1001] with other operators, which are to be approved by Mexican authorities.

(b) Are the acts required of Telmex and other Mexican operators "anti-competitive practices"?

7.257 The United States argues that the uniform settlement rate (that restricts price) together with the proportionate return system (that allocates market shares) has the "classic features of a cartel".[1002] According to the United States:

> "It is the setting of the rate by the monopolist (since Telmex is given the exclusive authority, it is acting as a monopolist in this context) and the use of this rate by all other suppliers (horizontal price fixing) that comprise the anti-competitive practices that form the basis for the United States' claim under Section 1 of the Reference Paper."[1003]

7.258 Mexico argues that the principles of uniform rates and proportionate return contained in the ILD Rules in fact *favour* competition. According to Mexico, the uniform rate requirement protects new entrants from predatory pricing by incumbent suppliers, and from being played off against each other by major foreign operators, while the proportionate return system prevents foreign operators from imposing predatory pricing on their Mexican affiliates.

7.259 In addition, Mexico states that it differs with the United States with respect to the relevant market in which competition must be promoted and protected.[1004] Mexico states:

> "Mexican policy, as shown by the ILD Rules, is that domestic carriers should share in and split agreements for incoming calls in terms of their success in securing a share on the domestic market and generating outbound calls. The United States sees it differently … the only market worth protecting is the one for terminating United States traffic to Mexico. The United States is acting as if new operators should compete to carry incoming international traffic calls instead of competing for new customers in Mexico. According to the criterion set by the United States, an operator who has made a minimal investment in Mexican infrastructure should be allowed to do so on an unlimited basis, taking all the revenue for international calls

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(i) Uniform settlement rate

7.261 With respect to the uniform settlement rate, we have found that the ILD Rules require Telmex to negotiate a price, that is then approved by Mexican authorities and applied by Telmex and the other Mexican suppliers to the termination of the services at issue. Mexico justifies this uniform pricing scheme as pro-competitive since, according to Mexico, it removes the possibility that Telmex, or Mexican operators which are foreign affiliates, engage in predatory pricing, or are played against each other by major foreign operators. This Mexican argument admits that one purpose of the uniform pricing requirement is to limit price competition such as "predatory pricing". Yet Mexico gives no evidence that its existing competition laws are inadequate to deal with predatory pricing, or that it has well-founded reasons for believing that predatory pricing or unfair treatment by foreign affiliates would occur in Mexico absent the uniform settlement rate in the ILD Rules. Nor does Mexico show that predatory pricing could not be dealt with by telecommunications regulations in ways other than through uniform pricing.

7.262 We find the United States argument convincing that the 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. We have also found that a GATS obligation "of preventing suppliers … from engaging in or continuing anti-competitive practices" cannot be unilaterally abrogated by a national regulation *requiring* such an anti-competitive practice

4. Has Mexico maintained "appropriate measures" to prevent anti-competitive practices by a major supplier?

7.265 Section 1.1 requires Mexico to maintain "appropriate measures" to prevent anti-competitive practices by a major supplier. The word "appropriate", in its general dictionary sense, means "specially suitable, proper".[1006] This suggests that "appropriate measures" are those that are suitable for achieving their purpose – in this case that of "preventing a major supplier from engaging in or continuing anti-competitive practices".

7.266 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. Since we have found already that Mexico maintains measures (the ILD Rules concerning uniform interconnection rate and proportionate return) which legally require anti-competitive conduct by a major supplier, we find that Mexico has failed to maintain "appropriate measures" to prevent such acts, contrary to Section 1 of its Reference Paper. As Mexico has not claimed that its general competition law is applicable to the anti-competitive practices mandated by the ILD rules, we do not consider it necessary to examine the broader issue of whether Mexico's competition laws are, in general, "appropriate measures" in terms of Section 1.1.

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interconnection of United States suppliers on *reasonable terms and conditions*, contrary to Section

1. Whether the Annex imposes obligations on Mexico to ensure access to and use of public telecommunications transport networks and services for the supply of the basic telecommunications services scheduled by Mexico

(a) Does the Annex apply to access to and use of public telecommunications transport networks and services for the supply of basic telecommunications services?

7.274 Mexico submits that the Annex applies only to access to and use of public telecommunications transport networks and services as a *transport* means for other economic

(c) Nothing in this Annex shall be construed:

(i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its schedule; or

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally."

7.278 Section 2(a) provides that the Annex shall apply to "all measures" of a Member that affect access to and use of public telecommunications transport networks and services. We observe that the wording of Section 2(a) does not specify that the provision is limited to measures affecting access to and use of public telecommunications transport networks and services by only *certain* services or service sectors. The ordinary meaning of the words in Section 2(a) suggests therefore that the scope of the Annex includes *all* measures that affect access to or use of public telecommunications transport networks and services with regard to *all* services, including basic telecommunications services.

7.279 In further assessing whether the Annex applies to access to and use of public telecommunications transport networks and services, we next examine the context provided by

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services would lead to unreasonable results. Public voice telephone services, for example, can only be supplied properly through access to and use of public telecommunications transport networks and services of other suppliers, except in markets where monopoly supply is maintained. While monopoly supply can and does exist in domestic telecommunications markets, the international market has always involved multiple suppliers. With respect to the supply of public voice telephony, whether on a cross-border basis or through commercial presence, it is essential that suppliers be able to access and use public telecommunications transport networks and services of other suppliers to complete calls placed by their customers to a user on another supplier's network.

7.286 While access to and use of public telecommunications transport networks and services may be important generally for the supply of services, such access is indispensable for the supply of basic telecommunications services. If the Annex did not apply to measures affecting access to and use of public telecommunications transport networks and services for basic telecommunications services, Members could effectively prohibit any supply other than that which originated and terminated within the same suppliers' network, even where commitments were undertaken, thereby rendering most basic telecommunications commitments without economic value.

7.287 Finally, if Members had made such a far-reaching decision, they would surely have stated specifically that basic telecommunications services were excluded from the application of the Annex, in the same way that they specifically stated in Section 2(b) that the Annex "shall not apply to measures affecting the cable or broadcast distribution of radio or television programming".

7.288 It would thus be unreasonable to suppose that the access and use of public telecommunications transport networks and services that is essential to the international supply of basic telecommunications services was not intended to be covered by the Annex. We find therefore that the Annex applies to measures of a Member that affect access to and use of public telecommunications transport networks and services by basic telecommunications suppliers of any other Member.

(b) Does Section 5 of the Annex apply to the basic telecommunications commitments scheduled by Mexico?

7.289 The United States maintains that the "obligations under the Annex trigger only to the extent to which [a Member] has undertaken commitments in its schedule".[1013] Mexico expresses a similar view, arguing that the Annex neither overrides a schedule, nor imposes obligations without regard to specific commitments taken.[1014] We now examine whether, and to what extent, Section 5 applies to the basic telecommunications commitments scheduled by Mexico.

7.290 We recall the wording of Section 2(c)(i) of the Annex, which determines the scop

"other than as necessary" to achieve any of three stated policy objectives. Paragraph (f) sets out an illustrative list of six types of regulatory conditions through which these objectives may be achieved.

7.298 Our first interpretative task is therefore to examine the structure of Section 5 and determine the relationship between the paragraphs at issue in this dispute.

(a) Structure of Section 5

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7.307 We next examine the relationship of paragraph (b) of Section 5 with the other elements of Section 5. This relationship is more straightforward. Paragraph (b) obligates Members to ensure that suppliers of other Members "have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits". To this end, suppliers must be permitted, "subject to paragraphs (e) and (f)":

> "(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;
>
> (ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and
>
> (iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally."

7.308 The obligations in paragraph (b) apply "subject to paragraphs (e) and (f)". We understand this to mean that the obligations in paragraph (b) are *subordinated to*, and are, therefore, *qualified by*, paragraphs (e) and (f). The obligations in paragraph (b) are therefore *subject to* any condition that a Member may impose that is necessary to achieve one of the policy objectives set out in paragraph (e)(i) to (iii).[1020] We recall that paragraph (b) is informed also by paragraph (a), and that the obligation in the latter provision to ensure reasonable and non-discriminatory access also applies to paragraph (b).

7.309 Based on the foregoing, we make the following conclusions with respect to Sections 5(a) and 5(b). We conclude that the obligation contained in Section 5(a) informs the other paragraphs of Section 5, and is likewise informed by elements of these paragraphs. We cannot therefore examine what constitutes "reasonable terms and conditions" for access to and use of public telecommunications transport networks and services in isolation from the question of whether or not a particular condition may be imposed, an issue that is addressed in paragraph (e). We conclude that an obligation arises for a Member under paragraph 5(b) subject to any term or condition that a Member may impose in a manner consistent with the provisions of paragraphs (a) and (e).

(b) Claim under Section 5(a)

7.310 Having established that the analysis of a claim under paragraph (a) requires an examination of whether any conditions that are imposed on access to and use of public telecommunications transport networks and services are "necessary" in the meaning of paragraph (e), we now examine the specifics of the United States claim under Section 5(a).

7.311 The United States claims that Mexico has failed to ensure that cross-border suppliers of facilities-based basic telecommunications services from the United States into Mexico are accorded access to and use of public telecommunications transport networks and services on reasonable terms and conditions. For the United States, the rates that foreign suppliers must pay constitute

negotiate exclusively with Mexico's long-distance licensee with the greatest percentage of outgoing long-distance market share over the preceding six months (ILD Rule 13), and prohibit foreign suppliers from concluding alternative terms and conditions with other Mexican suppliers of such networks and services (ILD Rules 3, 6, 10, 13, 22 and 23).

7.312 We now examine whether the substantive elements for a claim under Section 5 (a) are met. We recall that this provision reads:

> "Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for the supply of a service included in its Schedule. This obligation is applied, *inter alia*, through paragraphs (b) through (f)." [footnote omitted]

7.313 The "access to and use of" referred to in this provision must be granted: (a) to "any service supplier of any other Member"; (b) with respect to "public telecommunications transport networks and services"; (c) for the supply of a "service included in its schedule"; and (d) on "reasonable… terms and conditions". In order to determine whether Mexico has met the requirements of the Section 5(a), we need to examine each of these elements.

(i) "*Any service supplier of any other Member*"

7.314 The obligation of Section 5(a) arises only with respect to "any service supplier of any other Member". It is uncontested that facilities-based suppliers (such as AT&T, WorldCom/MCI, and Sprint) as well as commercial agencies supply or are seeking to supply the services at issue, and are suppliers "of any other Member", in this case, the United States.

(ii) *With respect to "public telecommunications transport networks and services*"

7.315 The United States submits that a United States supplier of basic telecommunications must access and use Mexican public telecommunications transport networks and services to transport its service (such as a phone call originating in the United States) to its final destination in Mexico. This is done through interconnection, which the United States considers the "principal method", by which United States suppliers obtain access to and use of Mexican public telecommunications transport networks and services for the cross-border supply of scheduled telecom services.[1021] The United States refers to Section 2.1 of Mexico's Reference Paper, which defines interconnection as the "linking of suppliers … to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier".

7.316 We observe that Mexico's market access inscription on cross-border supply requires that international traffic be routed through the facilities of a Mexican concessionaire. The facilities of Mexican concessionaires are clearly "public telecommunications transport networks and services", as this term is defined in the Section 3 of the Annex. Mexico has not argued otherwise. We find therefore that the facilities of the Mexican concessionaires which are relevant to the United States claim with respect to access and use are "public telecommunications transport networks and services".

(iii) "*For the supply of a service included in its schedule*"

7.317 The obligation in Section 5(a) on a Member to ensure access to and use of public telecommunications transport networks and services arises only "for the supply of a service *included* in its schedule". This language might suggest that the obligation in paragraph (a) arises as soon as *any* level of commitment is inscribed in a schedule. However the overall scope of the Annex, as

[1021] *See* the United States' first written submission, paragraph 223.

determined in Section 2, limits a Member's obligations under the Annex to those "provided for in its

7.322 Mexico states that "reasonableness" must be judged only within the context of all of the relevant facts and circumstances. If Section 5 were to apply in this case, it would apply to Mexico's accounting rate regime, and the "reasonableness" of any "terms and conditions" of that accounting rate regime would have to be evaluated in the light of all of the facts and circumstances related to that regime. The terms and conditions which the United States considers unreasonable were widespread in accounting rate regimes around the world, and existed even in the United States' regime. Accordingly, there was no basis for the United States to demonstrate that Mexico's measures were "unreasonable" within the meaning of Section 5(a) of the Annex.

aa) Rates charged for access and use

7.323 In assessing whether Mexico has ensured access to and use of public telecommunications transport networks and services on "reasonable … terms and conditions", we first examine the *rates* that are charged by Telmex and other Mexican concessionaires. We look at whether the rates constitute "terms" or "conditions" in the sense of Section 5(a), and then whether the rates are "reasonable". We note that the United States does not claim that the rates, or any aspect of the ILD Rules, constitute "discriminatory" terms or conditions.

7.324 Although paragraph (a) speaks of "terms and conditions", paragraph (e) refers only to "conditions". Since we earlier found that paragraphs (a) and (e) inform each other, we now analyse whether "rates" are "terms", or whether they are "conditions". Building on our earlier analysis,[1025] if the rates are terms, they would have to meet the "reasonable" standard in Section (a); if they are "conditions," they would, in addition, have to meet the "necessary" standard in Section (e).

7.325 As discussed in part B of these findings, the words "terms and conditions" may have many meanings. In relation to contracts and agreements, the word "terms" is defined to mean "conditions, obligations, rights, price, etc., as specified in contract or instrument"[1026], while "condition" is defined, *inter alia*, as "a provision in a will, contract, etc., on which the force or effect of the document depends".[1027] Although the words "terms" and "conditions" are closely related, and are frequently used concurrently, the ordinary meaning of the word "terms" suggests that it would include pricing elements, including rates charged for access to and use of public telecommunications transport networks and services.

7.326 We now examine whether the word "conditions", as used in Section 5 of the Annex, would also include pricing elements such as access rates. Pricing is a fundamental element of any access and use. Moreover, the importance of pricing-related measures for access and use suggests that the word "conditions" would also include pricing elements, such as conditions that relate to or affect the rate or price. However, Section 5 (f), which lists examples of "conditions," does not refer to specific pricing measures. In fact, pricing measures do not appear to be similar to any of the conditions included in paragraph (f), such as restrictions on resale or interconnection, and requirements to use specified technical interfaces. Given the importance of pricing measures for access to and use of public telecommunications transport networks and services, we cannot infer that Section 5 (f) would have omitted pricing from its illustrative list, if the Annex had considered access charges to fall under "conditions". Moreover, if access rates themselves constituted "conditions", a Member would have to ensure that *no* rates were imposed "other than as necessary" to fulfil one of the policy objectives in subparagraphs (i) to (iii) of Section 5(e). Yet, with respect to access to and use of public telecommunications transport networks and services supplied on a commercial basis, it is evident that some type of charge will be levied. Therefore, whether or not to charge, or the existence of a price, does not appear to fit within the meaning of the language of 5(f) and its subparagraphs.

[1025] *See* paragraph 7.309 of this Report.
[1026] *Black's Law Dictionary*, 6th edition, 1990.
[1027] *See* Panel Report, *US – Stainless Steel*, paragraph 6.75.

competitive situation, the Reference Paper obligations on interconnection apply only with respect to "major suppliers". Third, the Annex broadly deals with "access to and use of" public telecommunications transport networks and services, while the Reference Paper focuses on specific "competitive safeguards" and on "interconnection".

7.332 In spite of these differences, the Annex recognizes that its provisions relate to and build upon the obligations and disciplines contained in the Articles of the GATS – the Annex states expressly that it "provides notes and supplementary provisions to the Agreement".[1031] Similarly, many of the provisions of the Reference Paper also draw from and add to existing obligations of the GATS, such as Articles III, VI, VIII and IX and the Annex on Telecommunications. Accordingly, there is a degree of overlap between the obligations of the Annex and the Reference Paper, despite their differences in scope, level of obligations, and specific detail provided. To the extent that the Reference Paper requires cost-oriented interconnection on reasonable terms and conditions, it supplements Annex Section 5, requiring additional obligations as regards "major suppliers". The Reference Paper commitments do not in this sense subtract from the Annex or render it redundant.

7.333 Consequently, we do not accept Mexico's argument that a reading of a pricing element into the analysis of reasonable terms in Section 5(a) would render parts of Section 2.2(b) of Mexico's Reference Paper *inutile*. We find therefore that access to and use of public telecommunications transport networks and services on "reasonable" terms includes questions of *pricing* of that access and use.

7.334 We now examine what constitutes access to and use of public telecommunications transport networks and services on "reasonable" terms. We have previously noted that Mexico's Reference Paper contains obligations additional to those in the Annex. We consider therefore that rates charged for access to and use of public telecommunications transport networks and services may still be "reasonable", even if generally higher than rates for interconnection that are cost-oriented in terms of Section 2.2(b) of Mexico's Reference Paper. If this were not the case, it would have been redundant for Members to have made commitments additional to Annex obligations on access, especially on cost-oriented rates for interconnection, one of the most important forms of access. Further, those Members who took Reference Paper commitments did so in order to establish specific disciplines only for *major* suppliers, and especially for *interconnection.* This would not have been necessary if Members already had an obligation to ensure that *all* suppliers, major or not, would have to provide cost-based access and use, including interconnection.

7.335 In order to arrive at a finding in the present case, we do not consider it necessary to determine the exact point at which a rate for access to and use of public telecommunications transport networks and services is no longer "reasonable". We have already determined in part B of these findings that Membersberf

7.336 We arrived at this finding based on our determination that rates for access to and use of public telecommunications transport networks and services are "terms" under Section 5(a), but not "conditions" under Section 5(e). We now examine whether our finding would differ if, in the

It would also mirror the obligation of cost-based interconnection in the Reference Paper, with the important difference that the general Annex obligation would encompass *all* suppliers of public telecommunications transport networks and services, while the obligation in the Reference Paper only refers to *major* suppliers. The Annex would in this respect achieve the same depth of obligation as the Reference Paper, but on a broader level, and applicable to *all* WTO Members, making any particular Reference Paper commitments redundant. We would therefore reject an interpretation of "necessary" in Section 5(e) that would mean that a condition must be "indispensable" to achieve the policy goals listed in subparagraphs (i) to (iii).

7.342 We now examine whether the word "necessary" in Section 5(e) is closer to the meaning of "making a contribution to" one of the objectives listed in subparagraph (e)(i) to (iii). In this case, an access rate would only have to be found to be "making a contribution" to one of these policy goals, in order to satisfy the requirements of paragraph (e). In this case, it would be relatively easy to meet the objectives listed in paragraph (e), especially subparagraph (e)(i), and we consider that an examination of whether the access rates were also "reasonable" under paragraph (a) would still have to be undertaken. Even if a particular level of access rate were considered only to be "making a contribution" to one of the policy goals listed in subparagraph (e)(i), an examination under paragraph (a) of whether that rate was also "reasonable" would still have meaning.

7.343 We conclude that if access rates, in the alternative, were considered to be "conditions" under Section 5(e), then the term "necessary" in that provision would have a meaning that required a determination of whether the access rates were "reasonable" under Section 5(a). We would therefore arrive at the same finding that we have made in paragraph 7.334, that the access rates charged are not "reasonable", and that Mexico has therefore not met its obligations under Section 5(a) to ensure that such access rates are "reasonable".

bb) Underlying ILD Rules

7.344 The United States also claims that Mexico unreasonably conditions access to and use of public telecommunications transport networks and services in violation of Mexico's obligations under Section 5(a) of the GATS Annex on Telecommunications, by granting the exclusive authority to negotiate settlement rates with foreign suppliers to the long-distance licensee with the greatest percentage of outgoing long-distance market share over the preceding six months (ILD Rule 13), and by imposing the rate negotiated by that operator on all other operators of public telecommunications transport networks and services, thereby preventing foreign suppliers from reaching alternative agreements for access to and use of the public telecommunications transport networks and services in Mexico (ILD Rules 3, 6, 10, 13, 22 and 23). In addition, the United States claims that Mexican authorities have rejected petitions by Mexican and foreign operators to be permitted to conclude alternative terms and conditions.

7.345 The United States is of the view that these ILD Rules, and their application by the Mexican authorities, are not reasonable, as they contravene the purpose of the Annex, which is to prevent suppliers of public telecommunications transport networks and services from engaging in unfair, restrictive, or anti-competitive conduct. Far from ensuring this goal "by whatever measures necessary", the Mexican measures concentrate all power and control over access to and use of Mexico's public telecommunications transport networks and services in the hands of the dominant supplier of such networks, thereby impairing the ability of United States and other foreign suppliers of basic telecommunications services to negotiate fair and competitive access to and use of these networks.[1036]

7.346 Having already found that Mexico has failed, in violation of Section 5(a) of the Annex, to ensure that the interconnection rates resulting from Mexico's application of its ILD Rules provide

[1036] *See* the United States' first written submission, paragraphs 237-241.

access to and use of public telecommunications transport networks and services in Mexico on reasonable terms (see paragraph 7.335 above), the Panel does not consider it necessary to examine whether, and to what extent, the individual ILD Rules themselves are also inconsistent with Mexico's obligations under Section 5(a) of the Annex.

(c) Claim under Section 5(b) of the Annex

Mexico's commitments by Telmex/Sprint in testimony given to the FCC in 1997, that ind

> "Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each schedule shall specify:
>
> (a) terms, limitations and conditions on market access;
>
> (b) conditions and qualifications on national treatment;
>
> (c) undertakings relating to additional commitments;
>
> (d) where appropriate the time-frame for implementation of such commitments; and
>
> (e) the date of entry into force of such commitments."

7.360 Article XX:1 provides that Members "shall specify" certain elements in their schedules of specific commitments. The need to specify entries with regard to the *substantive* elements in Articles XVI (market access), Article XVII (national treatment), and Article XVIII (additional commitments) is dealt with in subparagraphs (a) to (c) of Article XX:1 respectively. Article XX:1 *reiterates* the need to "specify" the limitations for market access to be scheduled under Article XVI. Article XX:1 appears however to *add* to the requirements for the scheduling of national treatment limitations under Articles XVII (which reads "subject to any conditions and qualifications set out [in the schedule]"), and additional commitments under Article XVIII (which reads "commitments shall be inscribed in a Member's schedule").

7.361 The need for specificity on the *temporal* aspects of commitments is dealt with in subparagraphs (d) and (e) of Article XX:1. Subparagraph (e) requires that each schedule shall specify the date of entry into force of the commitments undertaken. Subparagraph (d) requires that a schedule "shall specify … where appropriate the time-frame for implementation of such commitments". The separate listing of temporal elements of entry into force and implementation in Article XX:1 confirms, in our view, that temporal elements are not part of the substantive elements that can be market access limitations under Article XVI:2.

7.362 Consequently, we find that Mexico's scheduled requirement that commercial agencies obtain permits, and that these permits be based on regulations, is a temporal limitation that is not a market access limitation within the meaning of Article XVI:2(a).[1044]

7.363 Since we have found that Mexico's entry in the market access column of its schedule for services supplied by commercial agencies through commercial presence is not a market access limitation, we now need to determine what meaning it does have. We return to Article XX:1, which specifies how Members should inscribe their specific commitments in their schedules. In particular, we examine Mexico's entry under the criteria set out in subparagraphs (d) (time-frame for implementation) and (e) (date of entry into force).

7.364 We note a

15 February 1997, and entered into force on 5 February 1998. Mexico has not included a date in its schedule to indicate that its specific commitment on commercial agencies was to enter into force at a date different from 5 February 1998. We consider therefore that Mexico's entry relates to the time-frame for *implementation*, and not the entry into force of the commitment.

7.365 We recall that Article XX:1 (d) requires, with respect to sectors where commitments are undertaken, that each schedule shall specify "where appropriate the time-frame for implementation of such commitments".

7.366 A "time-frame" is defined as "a period of time especially with respect to some action or project".[1045] The term does not require the setting of a precise date, but it does imply a beginning and an end of a time period. Where not expressed by beginning and end dates, a time-frame may be also expressed in terms of maximum duration (for example: within three years). Unlike a condition which may or may not occur, a time-frame is not open-ended and does not leave the time of the occurrence in doubt.

7.367 We consider that the obligation to specify "where appropriate" a time-frame for implementation of a commitment must be considered in the overall context of Article XX:1. The wording of that Article seeks to ensure a high degree of clarity and specificity as to the exact terms of commitments made by Members. Members must be able to infer from each schedule the precise conditions for market access, national treatment and, where inscribed in the schedule, any additional commitmentsa

7.381 The Panel notes that the United States presents evidence that "private leased circuits" are in fact "offered to the public generally" in Mexico. Further, the Panel recalls that it has found that, although Mexico has not committed to allow commercial agencies to use leased capacity for cross border supply, it has committed to allow commercial agencies to use leased capacity for the supply of the services at issue. We also recall that Mexico indicates no restriction on the geographic market (i.e. local, long distance, international) for the services that may be supplied by the commercial agencies established in Mexico. Mexico has inscribed no routing restriction – as it did for cross border supply – for supply through commercial presence. Therefore, the Panel considers Mexico to have undertaken commitments on the supply of the services at issue by commercial agencies through commercial presence, for which access to and use of private leased circuits is not only relevant but , by Mexico's own definition in its schedule, is essential. Therefore, we find that Mexico has failed to ensure access to and use of private leased circuits for the supply of the committed services in a manner consistent with the Section 5(b) of the Annex on Telecommunications.

(iv) Interconnection of private leased circuits

7.382 The United States maintains that according to Section 5(b)(ii), foreign suppliers must be permitted to interconnect private leased circuits to foreign public telecommunications transport networks and services. In its view, ILD Rule 3 would prohibit commercial agencies, even if they were permitted to establish, to interconnect any private leased circuits to foreign public telecommunications transport networks and services.

7.383 We note that ILD Rule 3 reads:

> "Only international gateway operators shall be authorized to interconnect directly with the public telecommunications networks of other countries' operators for the purpose of carrying international traffic."

7.384 Under this rule, only international gateway operators may interconnect with foreign public telecommunications transport networks and services to supply international telecom services. The ILD Rules require an international gateway operator to be a facilities-based supplier. ILD Rule 2:VII defines a gateway operator as a supplier with a concession to supply long distance services, and ILD Rule 7:3 requires such an operator to have infrastructure in at least three Mexican states. As discussed in part B, a gateway operator must always be a "concessionaire", and a commercial agency can never be a concessionaire. Therefore, a commercial agency can never be an international gateway operator. Thus, ILD Rule 3 prohibits a commercial agency to interconnect "directly with the public telecommunications networks of other countries' operators for the purpose of carrying international traffic".

(v) Subject to paragraphs (e) and (f)

7.385 We note that the obligation in Section 5(b) is made subject by the terms of the provision to paragraphs (e) and (f). Paragraph (e)(iii) permits Mexico to impose conditions "to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Members' Schedule". ILD Rule 3, as discussed above, would be a restriction on resale in the sense of paragraph (f)(i) of Section 5. We have found that Mexico has undertaken a mode 3 commitment on the supply of the telecommunications services at issue by commercial agencies. This commitment does not exclude supply of non-facilities-based services from Mexico into any other country. Therefore, ILD Rule 3 does not impose a condition necessary to achieve the objective set out in paragraph (e)(iii). Rather, this ILD Rule prevents interconnection to private leased circuits for a service on which a specific commitment has been taken. Therefore, we find that ILD Rule 3 is inconsistent with Mexico's obligations under Section 5(b) of the Annex.

8.5

IX. ANNEXES

A. ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES REFERRED TO IN THE REPORT

SHORT TITLE	FULL TITLE
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043.
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 875 531299, DSR

B. MEXICO: S

MEXICO - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
2.C. TELECOMMUNICATIONS SERVICES			
Telecommunications services supplied by a facilities based public telecommunications network (wire-based and			

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	Foreign governments may not participate in an enterprise set up in accordance with Mexican law nor obtain any authorization to provide telecommunications services. Direct foreign investment up to 49 per cent is permitted in an enterprise set up in accordance with Mexican law. Telecomunicaciones de Mexico (Telecomm) has exclusive rights to links with Intelsat and Inmarsat. Services other than international long-distance services which require use of satellites must use Mexican satellite infrastructure until the year 2002.		
	(4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section.	
(a) Voice telephony (CPC 75211, 75212)	(1) None, except as indicated in 2.C.1.	(1) None	
(b) Packet-switched data transmission services (CPC 7523**)	(2) None	(2) None	
	(3) As indicated in 2.C.3.	(3) None	
(c) Circuit-switched data transmission services (CPC 7523**)	(4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section.	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(f) Facsimile services (CPC 7521** + 7529**)	(1) None, except as indicated in 2.C.1. (2) None (3) As indicted in 2.C.3. A permit issued by the SCT	(1) None (2) None	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
(o) Other	(1) None, except as indicated in 2.C.1.	(1) None	
- Paging services (PC 75291)	(2) None	(2) None	
	(3) As indicated in 2.C.3.	(3) None	
	(4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section.	
- Cellular telephone services (75213**) on the "A" and "B" bands[2]	(1) None, except as indicated in 2.C.1.	(1) None	
	(2) None	(2) None	
	(3) As indicated in 2.C.3. Foreign investment in excess of 49 per cent of an enterprise's capital will be permitted following a favourable decision by the Foreign Investment Commission	(3) None	
	(4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section.	

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
- Commercial agencies[3]	(1) None, except as indicated in 2.C.1. (2) None (3) None, except: A permit issued by the SCT is required. Only enterprises set up in accordance with Mexican law may obtain such a permit. Foreign governments may not participate in an enterprise set up in accordance with Mexican law nor obtain any authorization to provide telecommunications services. Except where specifically approved by the SCT, public telecommunications network concessionaires may not participate, directly or indirectly, in the capital of a commercial agency.	(1) None (2) None (3) None	

[3] Agencies which, without owning transmission means, provide third parties with telecommunications services by using capacity leased from a public network concessionaire.

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
	The establishment and operation of commercial agencies is invariably subject to the relevant regulations. The SCT will not issue permits for the establishment of a commercial agency until the corresponding regulations are issued. (4) Unbound, except as indicated in the horizontal section.	(4) Unbound, except as indicated in the horizontal section	

REFERENCE PAPER

Scope

The following are principles and definitions on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications network of service that:

(a) Are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) Control over essential facilities; or

(b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to in the above paragraph shall include in particular:

(a) Engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies, on the basis of the specific commitments undertaken, to linking with suppliers providing public telecommunications transport networks or services in order to allow the

users of one supplier to communicate with users of another supplier and to access services provided by another supplier.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

(a) Under non-

4.

C. ILD RULES

RULES FOR THE SUPPLY OF INTERNATIONAL LONG-DISTANCE SERVICES

To be Applied by the Licensees of Public Telecommunications Networks
Authorized to Provide Such Services

11 December 1996

In the margin, a stamp displaying the Mexican Coat-of-Arms and the words "United Mexican States – Ministry of Communications and Transport, Federal Telecommunications Commission".

On the basis of Article 36 of the Basic Law on the Federal Public Administration; Articles 1 and 3 and other relevant articles of the Federal Law on Administrative Procedure; Articles 7 and 47, Transitional Article Ten, and other relevant articles of the Federal Telecommunications Law; Articles 2 and 37 *bis* of the Rules of Procedure of the Ministry of Communications and Transport; Articles 1, 2, 3, and 5 of the Decree establishing the Federal Telecommunications Commission, and other applicable provisions; and

WHEREAS:

Pursuant to Article 7 of the Federal Telecommunications Law, the Ministry of Communications and Transport shall promote the efficient development of telecommunications, and foster fair competition among the various telecommunications service providers so that users may be offered a better price, range, and quality of services;

Transitional Article Ten of the Federal Telecommunications Law establishes that licensees of public telecommunications networks that have concluded interconnection agreements, under the terms of said Law, with licensees of public networks wishing to provide national and international basic public long-distance telephone services, may begin to operate their respective interconnections as of 1 January 1997;

In the Regulations on Long-Distance Services, published in the *Diario Oficial de la Federación* [Official Journal] of 21 June 1996, the Ministry of Communications and Transport has determined the procedures that must be followed by licensees of public telecommunications networks authorized to provide basic public long-distance telephone services for their operations with other licensees or permit-holders, as well as for the supply of services to end users;

It is therefore necessary to establish the procedure applicable to those licensees of long-distance services wishing to establish and operate international gateways in order to interconnect with foreign telecommunications networks for the purpose of carrying international traffic, as well as promoting the efficient interconnection of public telecommunications networks within Mexican territory;

By means of a decree published in the *Diario Oficial de la Federación* of 9 August 1996, the Federal Executive established the Federal Telecommunications Commission as a decentralized agency of the Ministry of Communications and Transport, with technical and operational autonomy, for the purpose of regulating and promoting the efficient development of telecommunications;

As established in Articles 7(II) and 47 of the Federal Telecommunications Law, as well as Article 37 *bis* (XIII) and (XIV) of the Rules of Procedures of the Ministry of Communications and Transport, it is within the authority of the Federal Telecommunications Commission to promote and oversee the efficient interconnection of public telecommunications networks and equipment,

VIII. International gateway: switching exchange interconnected to incoming and outgoing circuits, authorized by the Commission to carry international traffic.

IX. Network terminal connection point: the site at which end-user facilities and equipment are connected to a public telecommunications network, or, as applicable, the site at which

XV. Switched circuit traffic: traffic which is carried by means of the temporary connection of two or more circuits between two or more users, allowing the said users the full and exclusive use of the connection until it is released.

Rule 3. Only international gateway operators shall be authorized to interconnect directly with the public telecommunications networks of other countries' operators for the purpose of carrying international traffic.

Rule 4.

Rule 8. The Commission shall authorize exclusively the installation of international gateways having the capacity to identify the technical and commercial parameters necessary to effect the required invoicing and to exchange accounts with their correspondents.

For this purpose, international gateways shall be equipped with the systems necessary to keep daily accounts comprising at least the following information:

I. Incoming and outgoing traffic volume in minutes for each type of call;

II. Total revenue from incoming and outgoing calls;

III. Duration of each call;

IV. Type of traffic, broken down into the following categories:

(i) Telephone-to-telephone;

(j) person-to-person;

(k) country-direct;

(l) collect-

Rule 11. The Commission may at any time require international gateway operators to show that the international gateways they own are equipped with each and every technical facility and capability needed to distribute traffic in accordance with the proportionate return system, without prejudice to the terms of Rule 17.

Rule 12. International gateway operators may supply, on a non-discriminatory basis, traffic switching, routing, and accounting services to any long-distance service licensees that request them.

Settlement Rate

Rule 13. The long-distance service licensee having the highest percentage of the outgoing long-distance market for the six months prior to negotiations with a given country shall be the licensee that is authorized to negotiate settlement rates with the operators of the said country. These rates shall be submitted to the Commission for approval.

Rule 14. Long-distance service licensees may register any rates or services, supplementary to those already filed, that they wish to offer within Mexican territory in coordination with one or more foreign operators. Their proposals shall be recorded in the Telecommunications Register to allow the Commission and the Committee to make comments. The Commission shall approve the proposal or request further information within 30 calendar days of the date of its receipt. Where the Commission requests further information from the long-distance service licensee, the Commission shall issue its decision within 15 calendar days of the date of receipt of the additional information.

Rule 15. The weighted average rates long-distance service licensees charge the public for the supply of international long-distan R

Rule 19. After consulting with the parties and taking into consideration the average long-term incremental costs, as well as the trends in international references for interconnection rates and settlement rates for Mexico's traffic with its principal trading partners and the growth and development of the telecommunications market in Mexico, *inter alia*, the Commission may establish the offsetting adjustments to which international gateway operators are entitled for the supply of switching, routing, and accounting services for any excess international traffic they distribute pursuant to Rule 16. International gateway operators shall require payment of the above-mentioned offsetting adjustments, on a uniform and non-discriminatory basis, from all long-distance service licensees that request the said operators to supply the above-mentioned services.

Rule 20. International gateway operators that receive international incoming traffic or send outgoing collect-call traffic and that receive the corresponding settlement rate from their foreign correspondents shall have a period not exceeding ten working days as of the date of receipt of the said rate in which to make payment to the local operator pursuant to Rule 16. Such payment shall be made at the exchange rate in effect on the day the local operator is paid, in the currency in which the settlement rate is to be paid pursuant to the interconnection agreement concluded with the foreign correspondent and in accordance with applicable provisions. The local access rate shall be paid within the time-period agreed in the relevant contract.

If after 180 calendar days the international gateway operator has not received payment of the settlement rate from his foreign correspondent, the said international gateway operator shall be liable for immediate payment of the rate to the local operator in question.

Rule 21. Under the terms of Article 71 of the Law, the Ministry may penalize long-distance service licensees that commit acts intended to avoid paying the local operator for international interconnections, without prejudice to any civil and criminal liability incurred.

Interconnection Agreements.

Rule 22. Pursuant to Article 47 of the Law, the interconnection of public telecommunications networks with foreign networks shall be carried out by means of an agreement to be concluded by the parties concerned.

Rule 23. Long-distance service licensees wishing to establish interconnection agreements with foreign operators must submit the said agreements to the Commission for approval before they are formally concluded.

Such agreements shall comply with the following requirements. They shall:

I. Expressly knowledge the authority of the Commission to approve all the terms of the said agreements;

II. Recognize the principles of the uniform settlement rate and proportionate return systems established in these Rules;

III. Stipulate that incoming and outgoing traffic may be carried only through international gateways previously authorized by the Commission;

IV. Establish the last day of the calendar year as the date of expiry of the agreement;

V. Establish the first five working days of each month as the period for making settlement payments;

VI. Set the first day of each calendar month as the deadline for making adjustments in the percentages determined under the proportionate return system;

VII. Provide mechanisms for automatic renewal and for the compulsory settlement of disputes that, in the Commission's view, avoid the potential interruption of traffic among interconnected operators;

VIII. Incorporate the settlement rates approved by the Commission; and

IX. Stipulate, where applicable, the geographical areas previously approved by the Commission in which the same settlement rate shall be applied.

Where a long-distance service licensee submits an interconnection agreement to the

the date the contract is concluded to file it with the Commission, which shall record it in the Public Telecommunications Register.

Rule 30. Any international gateway operator involved in a long-distance call shall be responsible for the quality of the service on its own network until the call reaches the network terminal connection point at which interconnection with the next licensee participating in the call is made. For this purpose, the international gateway operators and licensees participating in the call shall establish the necessary mechanisms and proced

Auditor

Rule 34. Subject to a favorable opinion by the Commission, the Committee shall hire an Auditor. The Auditor shall have a recognized reputation in the area of accounting and auditing in the telecommunications field.

The Auditor may not be a firm that is financially controlled by the long-distance service licensees represented on the Committee or by the partners or shareholders of the said licensees.

Rule 35. The Auditor shall have the following responsibilities, *inter alia*:

I. To recommend on a monthly basis, subject to consultation with the Committee and to the approval of the Commission, for each registered international gateway, and in accordance with available date on traffic, the percentages for the distribution of international incoming traffic to the various long-distance service licensees and of outgoing traffic to the various foreign operators. The percentage recommendations shall take into account call duration, time of day, type, and destination, as well as optimal routing of traffic;

II. To ensure that each international gateway operator applies its approved percentage;

III. To recommend, subject to consultation with the Committee and to the approval of the Commission, the accounting methodology to be applied to settlements with foreign operators, and to ensure that each international gateway operator applies the approved methodology;

IV. To define, subject to consultation with the Committee and to the approval of the

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international traffic and the number of international gateways operated by each licensee shall be taken into account, *inter alia*.

In the case of special audits of international gateway operators conducted on instructions from the Commission and arising from a dispute between international gateway operators or as the consequence of an irregularity detected by the Auditor, the costs shall be paid by the international gateway operator found liable for the irregularity or else by the operator(s) that requested the action that gave rise to the special audit if the claim of irregularity is found to be without merit.

Percentages

Rule 37. The Committee shall determine the percentages for each international gateway operator applicable to the month following the month during which the traffic was originated and shall make swn TD 0 mination within the first 15 calendar days of the month fol wing the month during which the traffic was originated, on the basis of the information furnished by the international gateway operators in accordance with Rule 42 of these Rules. Where the Committee fails to arrive at a recommendation by consensus within the aforementioned period, the Auditor shall have an additional several calendar days in which to recommend the percentages to be applied.

As of the first calendar day of the calendar month following the recommendation of the Committee or Auditor, as applicable, international gateway operators shall adjust the percentages by which international incoming and outgoing traffic is to be distributed.

Rule 38. In calculating the percentages to which the above Rule refers, all settlements for the types of traffic indicated in Rule 8(IV), except for country-direct services and services provided via international non-geographical reversed-charge (800) numbers, shall be taken into account.

In the case of collect-call traffic, for the calculation of the percentages applicable to international outgoing traffic, settlements for collect-call traffic originated abroad and 0 minated within Mexican 0 ritory shall be excluded. In calculating the percentages for international incoming traffic, settlements for colle ct-call traffic originated within Mexican 0 ritory and 0 minated abroad shall be excluded.

Rule 39. Traffic sent to a country with which Mexico does not share a border may be routed either directly or through an intermediate country. For the purposes of calculating the percentage arrangement in the latter case, the traffic in question shall be counted as if it were traffic destined for the intermediate country.

Rule 40. The proportionate return system established in these Rules may not be modified prior to the third anniversary of its entry into effect.

Notwithstanding the foregoing, after reviewing the competition and reciprocity conditions in effect for the operation of Mexico's telecommunications services with other countries, as well as the trends in international references for interconnection rates and settlement rates for Mexico's traffic with its principal trading partners and he growth and development of telecommunications markets in Mexico, the Commission may decide to modify the proportionate return system established in these Rules prior to the above-mentioned third anniversary.

Information

Rule 41. Within the 15 calendar days following the end of each calendar month, and for each of the international gateways, the international gateway operators shall make the following information, *inter alia*, available to the Committee and he Commission:

Seventh. International gateway operators providing services during the month of January 1997, shall, for the first time, make available to the Committee and Commission the information to which Rules 41 and 42 refer, within the first 15 working days of February 1997. For international gateways that are not in operation during the month of January 1997, the said 15-day period shall begin on the first day of the calendar month immediately following the date on which the said international gateway commences operations.

Eighth. Prior to 14 February 1997, and on the basis of the information which the international gateway operators make available to the Committee under Transitional Provision Seven above, the Auditor shall establish the percentages applicable to the distribution of international incoming and outgoing traffic for the month of March 1997. These percentages shall be determined by the Auditor on the basis of information concerning international outgoing traffic generated during the month of January. For international gateways that are not in operation during the month of January 1997, the percentages shall be determined based on information concerning the calendar month following the commencement of operations of the said international gateway.

Mexico, D.F., 4 December 1996. Carlos Casasús López Hermosa, Chairman of the Federal Telecommunications Commission. Initialled.

Wednesday, 11 December 1996.

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