Mexico – Measures Affecting Telecommunications Services

(WT/DS204)

Answers of the United States to the Panel's Questions to the Parties

February 5, 2003

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Section 2 of the Reference Paper

Mexico's Commitments

1. **Section 2.1 of the Reference Paper as scheduled by Mexico states that interconnection applies *"respecto de los cuales se contraigan compromisos especificos"* (on the basis of specific commitments undertaken).**

   (a) **Are there specific commitments undertaken by Mexico in modes 1 and 3 of its schedule with respect to the supply of basic telecommunications?**

1. Yes. As discussed in paragraphs 49-58 of the United States' First Written Submission, Mexico's Schedule includes a broad range of market access and national treatment commitments for basic telecommunications services. The services covered include local, domestic and international long distance voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, facsimile services, and private leased circuit services. Mexico inscribed its commitments based on whether the service supplier owns telecommunications facilities or leases such facilities from another operator. Subject to certain limitations, Mexico's Schedule permits the supply of these services on a cross-border (mode 1) basis and locally, through a commercial presence (mode 3).

   (b) **If Mexico is arguing that it does not have such commitments (paragraphs 134 and 146 of its submission), why did it not schedule these sectors and modes as "unbound"?**

2. As the United States noted in paragraphs 11-16 of its Oral Statement at the First Meeting of the Panel, in both modes 1 and 3, Mexico listed "None" in the market access column of its Schedule, subject to certain narrow limitations. As the Panel's question suggests, under Mexico's interpretation of its Schedule, its commitment would more properly be listed as "unbound."

3. Recognizing that its interpretation voids its commitment of "None" altogether, Mexico asserts, in paragraph 129 and footnote 89 of its First Written Submission, that it substituted "None" for "unbound" at the behest of a Secretariat scheduling note.

4. The Secretariat note does not support Mexico's interpretation, however. The note states that "in some cases there is advantage in inscribing a particular limitation (e.g. a residency requirement or a commercial presence requirement) instead of the term 'unbound' in that trading

partners have the certainty that there are no other limitations with respect to the cross-border mode." This statement is provided in response to the following question:

> How relevant is a reservation for a residence requirement, nationality condition or commercial presence requirement under cross-border trade: does that not rather imply that cross-border trade is not allowed and therefore the correct entry should be 'unbound'?

5. The limitations included in Mexico's Schedule are not "residence requirement[s], nationality condition[s] or commercial presence requirement[s]." The mode 1 limitation is instead a routing requirement, and the mode 3 limitation is a regulatory permit requirement. By its own terms, therefore, the Secretariat note is not applicable. Mexico cannot rely on the note to justify the interpretation it offers of its Schedule.

6. As noted in paragraph 13 of the United States' Oral Statement at the First Panel Meeting, Mexico's mode 1 and mode 3 limitations are not market access limitations at all, since they are not the types of limitations found in Article XVI:2 of the GATS. A Secretariat scheduling note confirms that "a Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI."[1] Therefore, Mexico's mode 1 and mode 3 limitations are superfluous and without legal effect for purposes of Article XVI; Mexico need not have included those limitations in its Schedule to maintain them.

(c) Does Section 2 of the Reference Paper apply *fully* to a service sector or subsector once *any* level of commitment in market access or national treatment is made in *any* of the modes of supply?

7. As provided in Section 2.1 of the Reference Paper, which was inscribed in Mexico's schedule, Section 2 applies "on the basis of the specific commitments undertaken." Thus, Section 2 of the Reference Paper applies only to modes of supply for service sectors or subsectors in which market access or national treatment commitments have been undertaken, subject to any limitations scheduled. Once any level of commitment is undertaken, however, Section 2 applies fully within the modes of supply in which commitments have been undertaken, unless the limitation scheduled specifically limits the applicability of the Reference Paper. For example, unlike Mexico, the United States specifically excluded applicability of Section 2.2 of the Reference Paper to rural carriers. Mexico's routing requirement is not a specific limitation on the applicability of the Reference Paper, nor is it inconsistent with the provisions of Section 2 of the Reference Paper.

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[1] MTN.GNS/W/164 (September 3, 1993), para. 4.

2. The explanatory note containing Guidelines for the Scheduling of Commitments (MTN.GNS/W/164) requires in paragraph 25 that in scheduling limitations "the entry should describe each measure concisely, indicating the elements which make it inconsistent with Articles XVI or XVII".

(a) What are the elements of inconsistency with Articles XVI contained in the Mexican law referred to in relation to the establishment of enterprises eligible for a concession?

8. As noted in paragraphs 14 and 18 of its Oral Statement at the First Meeting of the Panel, the United States is not claiming in this dispute that Mexico has failed to honor its market access commitments under GATS Article XVI. Specifically, the United States has not in this dispute claimed that the requirement to route international traffic through the facilities of a concessionaire, or that the requirement that a concessionaire be a Mexican entity, constitute violations of Article XVI. Nor does the United States in this dispute argue that its service suppliers should not have to comply with these requirements.

(b) Which of the categories of limitations defined in Article XVI:2 are relevant to the inscriptions, including the traffic routing requirement, which Mexico has inscribed in its schedule?

9. None of the categories of limitations defined in GATS Article XVI:2 are relevant either to the routing requirement included as a mode 1 limitation in Mexico's Schedule, or to the requirement that Mexico issue regulations before granting permits for the establishment of mode 3 commercial agencies.

3. 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 supplier of facilities-based telecommunications services can only supply these services cross-border, if that supplier 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 supplier can take place *only if* that supplier terminates its cross border services on the facilities of the concessionaire owned or controlled by the same supplier? Does Mexico therefore consider that an international telecommunications service terminated on facilities of any other concessionaire cannot be considered a *service* supplied through mode 1?

10. As the Panel's question suggests, Mexico appears to argue, in paragraph 234 of its First Written Submission, 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, and that termination of

services by that same supplier on the facilities of any other concessionaire is not a service supplied through mode 1, or is not a service supplied by a service supplier operating in mode 1. This argument is untenable, for several reasons.

11. First, Mexico's Schedule specifically permits market access in mode 1 as long as traffic is routed through the facilities of "an enterprise that has a concession. . . ." 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. Thus, Mexico's own Schedule anticipates that a "service" can be supplied on a cross border basis as long as traffic is routed through the facilities of *any* Mexican concessionaire.

12. Second, although U.S. and Mexican basic telecommunications suppliers currently interconnect at the border, 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.[2]

13. Third, 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 is supported by the context of mode 1. The other modes of supply (modes 3 - commercial presence and mode 4 - natural persons) capture situations where the service supplier is present in the territory of the other Member. As noted in an explanatory scheduling note, "international transport, the 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, *since the service supplier is not present within the territory of the Member where the service is delivered*."[3]

(b) Similarly, does this mean that a foreign service supplier located outside Mexico which terminates its services with any other concessionaire is not a *service supplier* supplying a service under mode 1?

14. Please see the United States' response to Question 3(a).

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[2] The Appellate Body has condemned interpreting a treaty in a manner that reduces certain provisions to inutility: "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted May 20, 1996), pg. 22. *See also Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (adopted October 27, 1999), para. 133.

[3] MTN.GNS/W/164 (September 3, 1993), para. 19(a) (emphasis added).

4. Mexico would appear to consider the routing requirement to constitute a limitation on cross-border supply.

(a) How does the routing of traffic restrict the ability to supply telecommunications (defined as "transmission of signals by any electromagnetic means" in para 3(a) of the *Annex on Telecommunications* services into the territory of Mexico? In particular, does Mexico's interpretation of this requirement mean that it does not consider it possible for the foreign service supplier to transmit signals across the border?

15. The routing of traffic does not physically or legally restrict the ability to supply telecommunications services into the territory of Mexico. As noted in paragraph 13 of the United States' Oral Statement at the First Panel Meeting, the routing restriction contained in Mexico's Schedule is not a limitation on market access as defined in Article XVI:2 of the GATS. In the view of the United States, Mexico did not need to schedule the requirement that cross-border suppliers route traffic through the facilities of a concessionaire to maintain that requirement for Article XVI purposes.

16. Additionally, any interpretation of Mexico's routing requirement must recognize that in order for scheduled services to be provided on a cross-border basis, signals generated in the foreign countries must be transmitted across Mexico's border. Such an interpretation (that signals are indeed transmitted across the border) is confirmed by the undisputed fact that billions of calls are actually transmitted between the United States and Mexico annually. U.S. suppliers now transmit billions of calls annually into Mexico. This typically requires Mexican carriers to receive and complete the calls but U.S. suppliers are clearly responsible for the transmission into Mexico. That right is addressed in Mexico's mode 1 commitments. Mexico's requirement that the signal be routed over the facilities of a concessionaire cannot be interpreted as a denial that the signal is, in fact, transmitted across the border.

(b) Explain which forms of service supply under mode 1 are allowed and which are precluded by Mexico's scheduled commitment. Include also examples, if any, that do not use circuit-switched network structures, and provide network diagrams illustrating each case.

17. The United States considers that Mexico has undertaken a commitment to allow all forms of supply and technology. The United States maintains that, to the extent that a scheduled service utilizes a network switching function, Mexico's Schedule does not contain a requirement for the supplier to utilize circuit-switched network structures. For example, Mexico scheduled an offer for "Servicios de telefonia" (or telephone service), identified by CPC code 75212. Neither Mexico's Schedule nor the CPC code identifying the service limits the service to any particular form of supply or network switching structure. Likewise, the routing restriction contained in Mexico's Schedule does not require mode 1 suppliers to use any particular network component, such as the international port, to provide the scheduled service. Mexican law appears to reflect

the technological neutrality of Mexico's WTO commitments, imposing no restriction of which we are aware on the switching architecture used to supply services. The United States believes that Mexican concessionaires presently utilize other than circuit switched technology in their networks.[4]

18. The United States' view is supported by the language of Mexico's Schedule (services supplied "through any existing technological medium"), paragraph 3(a) of the GATS Annex (defining telecommunications as "the transmission and reception of signals by any electromagnetic means"), and a Chairman's Scheduling Note explaining that unless otherwise noted in the sector column, "any basic service listed in the sector column . . . (c) may be provided through any means of technology."[5] The United States notes that the use of the term "any" in the above documents must be read in an inclusive manner and cannot be interpreted to exclude a particular form of supply.[6]

19. As stated in the United States' First Written Submission at paragraph 49, Mexico undertook a wide array of market access commitments for basic telecommunications services. These services include local, domestic and international long distance voice telephone services, packet switched data transmission services, circuit switched data transmission services, facsimile services, and private leased circuit services. Mexico made no limitations on the form of supply of such services, beyond the requirement in its Schedule that traffic be routed through the facilities of a concessionaire.

20. As an alternative to its assertion that its Schedule did not undertake any commitments to permit suppliers of another Member to provide services on a cross-border basis,[7] Mexico has argued that its scheduled routing restriction should be read to as a requirement that "all international traffic must be routed through an international port belonging to a concessionaire."[8]

21. Mexico's Schedule requires all international services, even non-switched private leased circuit services, to be routed over the facilities of a concessionaire. Mexico's attempt to further restrict routing of all scheduled international services by equating "facilities" of a concessionaire with an "international port" is inconsistent with the plain language of Mexico's Schedule, unsupported by Mexico's laws and regulations, and contradicted by the routing pattern of private leased circuit services included in Mexico's Schedule. As such, Mexico's attempt to show that

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[4] Mexico's Schedule lists both "packet-switched" and "circuit-switched" data transmission services, both identified as CPC 7523. The CPC code itself does not specify a particular type of switching technology. Mexico's Schedule does not further distinguish between packet switched and circuit switched services and includes the same routing restriction (through the facilities of a concessionaire) for both packet switched and circuit switched data transmission services.

[5] S/GBT/W/2/Rev.1 (January 16, 1997).

[6] The ordinary meaning of the term "any" is "every one of (the sort named)." THE NEW SHORTER OXFORD ENGLISH DICTIONARY (Fourth Ed. 1993), pg. 91.

[7] First Written Submission of Mexico, para. 127.

[8] *Id.*, para. 235. *See also* Oral Statement of Mexico at the First Panel Meeting, para. 31.

its scheduled mode 1 routing restriction requires all mode 1 supplied services to be routed through an international port (or switch) cannot be sustained.

22. Mexico's 1994 Federal Law on Telecommunications (Article 47) requires a concession to install "telecommunications equipment and means of transmission," a category of facilities broader than merely international ports. Mexico's ILD Rule 2 defines an international port as a "switching exchange interconnected to incoming and outgoing circuits. . . ." The fact that private leased circuits use the *facilities* of a Mexican concessionaire, but do not require the switching function of the *international port*, further confirms that the term "facilities" is broader than switching. ILD Rule 4 also 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." Moreover, the WTO's Telecommunications Glossary of Services defines "networks or facilities" to include "the ensemble of equipment, sites, switches, lines, circuits, software and other transmission apparatus used to provide telecommunications services," making clear that "facilities" is a much broader concept than merely switched "ports" and also includes private lines or circuits.

23. The diagram attached to these answers contains a high level pictorial representation of the facilities utilized to provide several of the services offered in Mexico's Schedule. All facilities portrayed as being on the Mexican side of the international border are owned and operated by Mexican concessionaires. As such, the routing requirement in Mexico's Schedule (providing that all international services be routed over the facilities of a concessionaire) has been met. The diagram demonstrates that the provisioning of dedicated network services *via* private lines (CPC code 75222), as well as packet switched data services over packet switching facilities (CPC code 75231), need not be, nor are, routed through the International Port Switch. The diagram demonstrates that the "facilities of a concessionaire" are restricted neither to the international port switch, nor to the use of circuit switched technology.

(c) In what way could the routing restriction be understood to mean that *only* the accounting rates regime may be used to "route through the facilities" of a concessionaire?

24. In the United States' view, the routing restriction included in Mexico's Schedule cannot be interpreted to mean that only the "accounting rate regime" (as defined by Mexico at paragraph 24 of its First Written Submission) may be used to "route through the facilities" of a concessionaire. The ordinary meaning of the routing restriction does not suggest any requirement to use any particular regulatory regime, including the "accounting rate regime" as defined by Mexico. All that is required is that international traffic "be routed through the facilities of a" concessionaire. As discussed in paragraphs 255 and 260 of the United States' First Written Submission, this could include the supply of scheduled basic telecommunications services over leased capacity.

5. Mexico argues that the limitation set out under mode 1 read together with the limitation set out under mode 3 of Mexico's Schedule must be interpreted to mean that Mexico has not committed to the cross-border supply of basic telecommunications.

(a) Do you consider this argument to be supported by the entry restricting foreign participation in a Mexican concessionaire to 49 percent?

25. No. Mexico's argument is not supported by the entry restricting foreign investment in a Mexican concessionaire to 49 percent, because the level of foreign ownership in a Mexican concessionaire does not affect the ordinary meaning of the terms used in Mexico's Schedule. Those terms state that mode 1 or cross-border supply of basic telecommunications services for facilities-based operators is subject to no limitations ("None"), except for the requirement to route international traffic through the facilities of a Mexican concessionaire. Moreover, Mexico's Schedule states that "[a] concession from the SCT is required" for mode 3 or commercial presence supply, but does not state that "[a] concession from the SCT is required" for mode 1 or cross-border supply. Rather, suppliers in the cross-border mode may "route[] through the facilities of an enterprise that has a concession granted by" the SCT. The contrast between these two commitments demonstrates that Mexico did indeed commit to the provision of facilities-based telecommunications services on a cross-border basis.

26. The United States acknowledged, at paragraph 55 of its first written submission, that "[b]ecause Mexican law prevents [U.S. suppliers of telecommunications services] from owning facilities in Mexico, they must interconnect their networks with that of Telmex (or another Mexican supplier) at the border in order to ensure delivery of their service to the final user in Mexico." The way in which U.S. suppliers currently complete calls into Mexico is by "rout[ing] through the facilities of an enterprise that has a concession" -- an option specifically provided in Mexico's Schedule. Mexico ignores this aspect of its commitment in asserting that it has made no commitment for the provision of telecommunications services on a cross-border basis.

(b) Is it accurate to say that Mexico does not have a limitation in its schedule restricting a foreign minority partner in a concessionaire from assuming *control* of that concessionaire?

27. Yes. However, Mexican law, at Section 2.4.1.2.4 of the SCT Agreement for the Procedure to Issue Long Distance Concessions, restricts the acquisition of such control, stating that "at least 51 percent of capital stock and the company's effective control shall fall into Mexican investors' hands at all times."[9]

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[9] Mexican Official Gazette (September 4, 1995) (Exhibit US-64).

(c) If so, can a concessionaire which is controlled by a foreign minority partner be a service supplier of another Member under the definitions in Article XXVIII of the GATS?

28. Yes. A concessionaire controlled by a foreign minority partner can be a service supplier of another Member pursuant to Article XXVIII (m) and (n).

6. 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".

(a) What is the scope of Mexico's commitment under mode 1 and mode 3 for commercial agencies?

29. As discussed in response to Question 4(c), Mexico's mode 1 commitment for commercial agencies is to permit a foreign, non-facilities-based supplier to offer scheduled basic telecommunications services from the territory of the United States into the territory of Mexico, as long as the foreign supplier routes its traffic over the facilities of a Mexican concessionaire, including over capacity leased from the concessionaire. The United States notes that the limitation quoted by the Panel in the chapeau to question 6 does not apply to Mexico's mode 1 commitment for commercial agencies.

30. As discussed in paragraph 256 of the United States' First Written Submission, Mexico's mode 3 commitment for commercial agencies permits a locally-established non-facilities-based supplier to offer scheduled basic telecommunications services over leased capacity. This would include allowing a foreign service supplier to acquire a 100 percent interest in a non-facilities-based carrier for the purpose of offering any scheduled service (*e.g.*, between Mexico and the United States) over capacity leased from a Mexican concessionaire (*i.e.*, private leased circuits).

(b) Mexico asserts that international simple resale is prohibited. Please explain how this follows from its scheduled commitments.

31. This asserted prohibition does not follow from Mexico's scheduled commitments. 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.[10] As explained in response to Question 4, Mexico's routing requirement does not equate to a prohibition on the use of private leased circuits. 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.

(c) Does Mexico's mode 3 commitment regarding commercial agencies include an obligation, at present, to issue permits for the establishment and operation of such agencies?

32. As the United States has previously explained, Mexico's refusal – five years after having finalized its commitments – to adopt regulations necessary to issue commercial agency permits violates Mexico's obligation under Section 5(b) of the Annex on Telecommunications to ensure that service suppliers[11] have access to and use of private leased circuits.

33. A contrary interpretation would be inconsistent with statements by Telmex interpreting Mexico's commitments. Just two months after Mexico expanded the scope of its offer, in January 1997, to include this mode 3 commitment, Telmex's U.S. subsidiary, Telmex/Sprint Communications, Inc. ("TSC"), made the following statement to the FCC:

> TSC understands that Cofetel intends to issue its resale regulations and award resale permits by the end of this year – a period of time that clearly constitutes the 'the near future' under any definition of the phrase. The commencement of resale in this timeframe is further assured by Mexico's WTO commitments, which specifically include a commitment to competition in all market segments of public telecommunications on a facilities *and a resale basis by January 1, 1998.*[12]

34. As noted in paragraph 17 of the United States' Oral Statement at the First Meeting of the Panel, in December 1997, Telmex's U.S. subsidiary further informed the FCC that "[s]ince Mexico is bound by an international agreement to fulfil its commitments, *there is no basis for assuming that Mexico does not intend to comply fully with its WTO commitments and thus*

[10] The glossary of telecommunications terms maintained on the WTO website defines a "resale-based service supplier" as "a company that leases bulk-rated plant (e.g. transmission) capacity from a facilities-based carrier and uses that capacity to provide a service to individual customers." *See* http://www.wto.org/wto/services/te112.htm. *See also* the definition of international simple resale, available at http://www.itu.int/newsarchive/press/WTPF98/Glossarytechnterms.html.

[11] In this context, the "service suppliers" at issue are locally-established commercial agencies acquired by a foreign supplier for the purpose of offering international (*e.g.*, Mexico to United States) telecommunications services over private circuits leased from a Mexican concessionaire.

[12] Telmex/Sprint Communications, L.L.C., Consolidated Opposition of Telmex/Sprint Communications, L.L.C. (filed April 25, 1997), pg. 9 (emphasis in original) (Exhibit US-53).

promptly adopt regulations allowing switched resale and grant permits to resellers."[13] Telmex, through its U.S. subsidiary, thus assured the FCC that Mexico's WTO commitments required Mexico "promptly" to adopt the relevant regulations and issue reseller permits.

(d) Why has Mexico not issued the regulations on the establishment and operation of commercial agencies?

35. Not applicable to the United States.

(e) When does Mexico intend to issue these regulations?

36. Not applicable to the United States.

Interconnection/Cost-oriented

7. Article I of the GATS states that the agreement covers all measures affecting trade in services, including the cross border supply of services. Mexico claims that the Reference Paper applies only to matters relating to domestic regulation *within* the borders of each WTO Member. Please explain.

37. Mexico's argument that the Reference Paper applies only to matters relating to domestic competition between suppliers within the borders of a WTO Member is without support. As noted by the Panel, Article I of the GATS states that the Agreement covers all measures affecting trade in services, including the cross border supply of services. Moreover, as noted in paragraph 22 of the United States' Oral Statement at the First Meeting of the Panel, there is nothing in the Reference Paper to support Mexico's argument that the only goal of the Reference Paper is to promote domestic competition. It is undoubtedly true, as Mexico states at paragraph 142 of its First Written Submission, that the Reference Paper "governs matters relating to domestic regulation." This does not mean, however, that foreign service suppliers are "outside the scope of application of" the Reference Paper, as Mexico asserts at paragraph 144 of its First Written Submission, or that the Reference Paper governs *only* matters relating to domestic regulation. Mexico committed to provide market access to foreign service suppliers; domestic regulation affects the ability of those mode 1 suppliers to enjoy the full benefit of Mexico's commitments.

38. At paragraph 154 of its First Written Submission, Mexico asserts that the Reference Paper must apply solely to domestic interconnection, because some of the requirements in Section 2 "have no meaning" for international interconnection arrangements. That some of the requirements in Section 2 of the Reference Paper only apply to interconnection between mode 3 suppliers, however, does not exclude that other of those requirements also apply to

[13] Telmex/Sprint Communications, L.L.C., Consolidated Opposition of Telmex/Sprint Communications, L.L.C. to Applications for Review (filed December 30, 1997), pg. 7 (emphasis added) (Exhibit US-54).

interconnection between mode 3 and mode 1 suppliers (*e.g.*, reasonableness, cost-orientation, non-discrimination, unbundling).

8. What are the main differences and similarities between an accounting rate regime and an interconnection regime from commercial, contractual, technical, and regulatory viewpoints.

39. As explained in paragraphs 39-41 of the United States' First Written Submission, interconnection comprises the linking of the networks of two different suppliers of telecommunications to allow the users of one supplier to communicate with users of another. Section 2.1 of the Reference Paper defines interconnection in this manner. Where specific commitments are made, Section 2 of the Reference Paper governs all arrangements with major suppliers for "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." This definition applies to interconnection arrangements for suppliers using all modes of supply, and supplying all basic telecommunications services including, but not limited to, local, mobile and both domestic and international long-distance services. Accordingly, interconnection arrangements cover a wide variety of different commercial, contractual and technical situations and, therefore, may be subject to different regulatory requirements to address those different situations. Notwithstanding any such differences, all of these arrangements are "interconnection" under Section 2.1 of the Reference Paper.

40. The traditional accounting rate regime is one type of interconnection regime between operators in different countries under which an agreed accounting rate is divided in half and applied to traffic flows in both directions. The ITU regulations define an "accounting rate" as "[t]he rate agreed between Administrations in a given relation that is used for the establishment of international accounts."[14] The ITU's informal note to the Council on Trade in Services, dated May 26, 2000, states that:

> [t]he accounting rate regime contains a number of different methodologies, but in most recent years the most common system of remuneration has been the "accounting rate revenue division procedure". Under this system, a net settlement payment is made on the basis of excess traffic minutes, multiplied by half the accounting rate (the accounting rate share, or settlement rate).[15]

[14] International Telecommunication Regulations, Art. 2.8. Article 2.7 of the ITU regulations defines "relation" as "[e]xchange of traffic between two terminal countries, always referring to a specific service if there is between their administrations: a) a means for the exchange of traffic in that specific service: - over direct circuits (direct relation), or – via a point of transit in a third country (indirect relation), and b) normally, the settlement of accounts."

[15] ITU, *Accounting Rate Reform undertaken by ITU-T Study Group 3*, para. 2, available at http://www/itu.int/ITU-T/studygroups/com03/accounting-rate/index.html.

41. Other types of interconnection rates also exist between operators in different countries. Agreements between such operators frequently include provisions for non-50/50 shares of the accounting rate, asymmetric one-way rates, tiered rates depending on volumes of traffic, sender-keep-all arrangements where no payments are made, or payment guarantees independent of whether traffic is actually sent. Similarly, the ITU's informal note also refers to new procedures for remunerating parties terminating international traffic "which better reflect the new telecommunication environment."[16] The ITU informal note also states that "[i]n more liberal countries, the accounting rate regime has been superseded by a regime of facilities-based interconnection on many routes."[17]

42. Mexico contends in paragraph 24 of its First Written Submission that the "term 'accounting rate regime' refers to bilateral relationships between two carriers in two countries whereby they agree to compensate one another for transporting and terminating traffic that originates in the other country." Mexico provides no citation for this definition, and no definition – nor any reference to accounting rates – is included in Mexico's Schedule. In any event, Mexico's definition confirms that accounting rates are interconnection rates between carriers located in two different countries, and fails to show that these terms are mutually exclusive. The United States also notes that Mexico's laws and regulations, and longstanding agreements between U.S. carriers and Telmex, treat the linking of international networks as interconnection. Indeed, Mexico's ILD rules make no reference to accounting rates, and refer throughout to "interconnection" and "international interconnection" agreements.[18]

43. From a *commercial* viewpoint, interconnection is a key wholesale input in supplying a basic telecommunications service, as the United States described in paragraphs 39-40 of its First Written Submission, 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

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[16] *Id.*, para. 8. These new procedures are "*the termination charge procedure*" ("a single charge for terminating traffic . . . provided the charge meets certain multilaterally agreed criteria"), "*the settlement rate procedure*" (allowing negotiation of "cost-orientated and asymmetric settlement rates, better suited to the new market situation"), and "any other bilaterally negotiated *commercial arrangement*, which is more suited to the nature of correspondent relations." Emphasis in original.

[17] *Id.*, para. 7.

[18] *See* Rule 1 ("The purpose of these 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.") (emphasis added). *See also* 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 calls.") (emphasis added); Rule 20 ("Such payments [between Mexican operators shall be paid] . . . in the currency in which the settlement rate is to be paid pursuant to the *interconnection* agreement concluded with the foreign correspondent.") (emphasis added); Rule 23 ("Long-distance service licensees seeking to establish *interconnection* agreements with foreign operators must submit such [interconnection] agreements to the Commission for approval.") (emphasis added); Rule 24 ("Any international *interconnection* agreement between a long-distance service licensee and a foreign operator shall be recorded.") (emphasis added); Fourth Transitory Provision (The Commission shall publish settlement rates for countries "with which any long-distance service licensee has international *interconnection* agreements.") (emphasis added).

telecommunications supplier has a world-wide, ubiquitous network, all telecommunications suppliers must interconnect with other telecommunications suppliers to complete phone calls to receiving parties that use different networks. Similarly, telecommunications suppliers without their own local networks also must interconnect with other telecommunications suppliers to originate calls. 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. As described above, the definition of interconnection set forth in Section 2.1 of the Reference Paper includes all such "linking" between the networks of different suppliers.

44. 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. 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.

45. As described above, under a traditional accounting rate regime, an agreed accounting rate is divided in half and applied to traffic flows in both directions. However, 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 U.S. 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"). As described in paragraph 106 of the U.S. First Written Submission, U.S. suppliers are currently charged different rates for each of three rate zones in Mexico. Additionally, under that arrangement, another rate applies to Mexico-U.S. traffic.[19]

46. Furthermore, 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.

[19] *See WorldCom Petition for Waiver of the International Settlements Policy* (filed with the FCC on March 21, 2002), File No. ISP-WAV-20020322-00012 (Exhibit US-29).

47. From a *technical* viewpoint, interconnection, by definition, involves the "linking" of networks of different suppliers, and the technical characteristics of the networks of different suppliers vary. Consequently, there may be technical differences between interconnection arrangements depending on the technologies used by the interconnecting supplier networks, or on whether the interconnection arrangement is between two fixed line carriers; between a fixed line and a wireless carrier; between local and long distance carriers; or between two local carriers. For all interconnection arrangements, including interconnection arrangements involving cross-border suppliers, technical issues are generally resolved through the use of protocols and standards and through joint coordination and planning. Also, to the extent that interconnection at a particular point in the network of the major supplier is not "technically feasible," Section 2.2 of the Reference Paper does not apply.

48. As described in paragraph 42 of the U.S. First Written Submission, because U.S. suppliers interconnect with the network of Telmex at the border, the border is a "technically feasible point."[20] That Mexico prohibits interconnection at other technically feasible points, and refuses to provide other interconnection arrangements, does not change the nature of this activity.[21]

49. 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.[22] 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. Meet-point arrangements are "arrangement[s] by which each telecommunications carrier builds and maintains its network to a meet point."[23] The FCC found in 1996 that meet-point arrangements for interconnection between carrier facilities, also known as "mid-span meets," were "commonly used between neighboring LECs [local exchange carriers] for the mutual exchange of traffic."[24]

50. From a *regulatory* viewpoint, as noted above, interconnection arrangements, including accounting rate arrangements, may be subject to different regulatory requirements to address

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[20] For example, under FCC rules, "[a] previously successful method of obtaining interconnection or access to unbundled elements at a particular premises or point on any incumbent [local exchange carrier's] network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points." 47 C.F.R. § 51.321(c), available at http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=47&PART=51&SECTION=321&YEAR=2002&TYPE=TEXT.

[21] Oral Statement of the United States at the First Panel Meeting, para. 29.

[22] First Written Submission of Mexico, para. 155.

[23] 47 C.F.R. § 51.5, available at http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=47&PART=5&YEAR=2002&TYPE=TEXT. *See id.* (Defining a "meet point" as "a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.").

[24] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, paras. 546, 553 (1996) (Exhibit US-55).

different commercial, contractual and technical situations. Any such regulatory differences, however, do not alter the status of all of these arrangements as "interconnection" under Section 2.1 of the Reference Paper. As stated by the European Communities in paragraph 26 of its Replies to the Questions of the Panel, "from a regulatory point of view, accounting rates are just one form of interconnection."

51. Mexico wrongly seeks to imply, in paragraph 37 of its First Written Submission, that the regulation of interconnection rates is necessary only where interconnecting suppliers compete with each other. Mexico goes on to acknowledge (at paragraph 41) 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, the domestic long-distance carrier must interconnect with local carriers for both call termination *and* call origination. Mexico further acknowledges (again at paragraph 41) 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, 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."

52. Mexico is also wrong to contend, at paragraph 157 of its First Written Submission, 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.

53. Mexico also draws the irrelevant distinction in paragraph 36 of its First Written Submission between "interconnection rates" and "charges for use of a network for transport and termination of traffic that originates on another network." The requirements of the Reference Paper apply to all interconnection services – particularly call termination. Section 2.1 of the Reference Paper defines interconnection as "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*."[25] Call termination – allowing calls originated on the network of one supplier to be terminated on the network of another supplier falls squarely within Mexico's definition of "interconnection" in Section 2.1.

[25] Emphasis added.

54. The European Communities' Interconnection Directive similarly defines "interconnection" as "the physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same or another organization, or to access services provided by another organization."[26] The European Commission has explained that "[t]he most basic interconnection service provided is that of *call termination* (i.e. delivering a call which originates on one network to its destination on another network)."[27]

55. Mexico's argument, in paragraph 36 of its First Written Submission, that U.S. law makes a "clear distinction" between interconnection and call termination, is also irrelevant. 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 FCC 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, *thereby lowering the competing carriers costs of, among other things, transport and termination of traffic*."[28] U.S. law defines "transport and termination" separately from interconnection because U.S. local exchange carriers have *additional* obligations with respect to the transport and termination of calls, including the requirement to establish "reciprocal compensation arrangements" for the termination of calls originated on other local networks.[29] As described above, the Reference Paper definition of interconnection includes both interconnection and transport and termination as these are defined under U.S. law.

56. As explained by the United States in its Oral Statement at the First Meeting of the Panel, Mexico's argument in paragraphs 155-163 of its First Written Submission that Section 2 of the Reference Paper does not apply to interconnection provided to cross-border suppliers merely because some provisions of Section 2 do not apply is mistaken, for at least two reasons. First, the fact that some of the requirements of Section 2 may not apply to cross-border interconnection does not mean that other requirements of Section 2 do not apply. Second, many of these requirements do apply to such interconnection. The border is clearly a "technically feasible point" of interconnection under Section 2.2, in addition to other technically feasible points in the major carrier's network where cross-border suppliers might wish to interconnect. Requirements

[26] Directive 97/33/EC, Interconnection in Telecommunications, Art. 2(1)(a), available at http://europa.eu.int/ispo/infosoc/telecompolicy/en/dir97-33en.htm.

[27] *Commission Recommendation on Interconnection in a Liberalised Market, Part 1 – Interconnection Pricing*, Explanatory Memorandum (January 8, 1998), Sect. 3.1 (emphasis in original), available at http://www.europa.eu.int/ISPO/infosoc/telecompolicy/en/r3148-en.htm.

[28] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, para. 172 (1996) (emphasis added) (Exhibit US-55).

[29] *See* 47 U.S.C. § 251(b)(5) (Exhibit US-56). Traffic terminated under reciprocal compensation arrangements is subject to the same "forward-looking economic cost-based pricing standard" that governs other interconnection services provided by incumbent local carriers. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, para. 1054 (1996) (Exhibit US-55).

for non-discrimination and unbundling are equally relevant to the interconnection of international traffic as they are to the interconnection of domestic traffic.

9. (a) Do you consider that the phrases 'basadas en costos' and 'cost oriented' in the Spanish and English language versions of the Reference Paper, respectively, have the same meaning?

57. The United States notes that this dispute only involves the interpretation of the term "*basadas en costos*," which is the term used in Mexico's Reference Paper commitment. Nonetheless, the United States does not consider that there is a meaningful difference between the terms "*basadas en costos*" and "cost oriented" as used in the Reference Paper. Both terms require a relationship between rates and the cost incurred in providing interconnection, as captured by the glossary of terms included on the WTO website, which defines "cost-based pricing" as "the general principle of charging for services in relation to the cost of providing these services."[30] Cost "orientation" similarly entails the concept of charging for services "in relation to" the cost of providing those services.[31]

58. As noted by the European Communities at paragraph 10 of its Oral Statement, the entire purpose of introducing a common Reference Paper as an additional commitment was to ensure that Members undertook identical obligations, except where expressly intended otherwise. Interpreting "*basadas en costos*" and "cost oriented" differently would undermine this purpose.

(b) If they do not, what are the differences, and what may be the practical implications for this case?

59. Not applicable.

10. (a) Does Mexico consider that the rates that Mexican companies currently charge for terminating incoming traffic from the United States are cost-oriented?

60. Not applicable to the United States.

(b) If so, what are the methodological basis and cost standards that support this conclusions?

61. Not applicable to the United States.

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[30] *See* http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel12_e.htm.

[31] The ordinary meaning of "orientation" includes "[p]osition . . . *relative to* . . . defined data." THE NEW SHORTER OXFORD ENGLISH DICTIONARY (Fourth Ed. 1993), pg. 2022 (emphasis added).

11. (a) Does Mexico consider that the estimates of the cost of terminating incoming international calls in Mexico given in the US submission are roughly correct?

62. Not applicable to the United States. We note, however, that the various methodologies proposed by the United States should not be regarded as estimates of the cost of terminating incoming international calls in Mexico. For the reasons explained in our First Written Submission, the methodologies presented show a maximum cost or a ceiling on the costs incurred and, as such, exceed the actual cost. As noted by the United States at paragraph 121 of its First Written Submission, U.S. suppliers have negotiated cost-oriented interconnection rates as low as 1.5 cents per minute with carriers in countries where competitive conditions are allowed to govern rate negotiations.

(b) If not, please give reasons and outline how more satisfactory figures might be obtained.

63. Not applicable to the United States.

12. Which ITU instruments, if any, are relevant for the interpretation of Section 2 of the Reference Paper? Why?

64. Mexico's Schedule – including its Reference Paper commitments – must be interpreted on its own terms, according to the rules of interpretation included in the *Vienna Convention.* ITU instruments, developed for a different organization, of different members, for different purposes, are not relevant for the interpretation of the requirements of Section 2 of the Reference Paper.

65. Mexico cites no binding ITU resolutions that would be violated by Mexico's compliance with its WTO obligations as claimed by the United States. Indeed, there are none. Mexico cites to a variety of ITU instruments that it argues limit its WTO commitments. Mexico principally uses ITU documents to support its argument that the accounting rate regime is not included within the scope of the Reference Paper. At paragraphs 21 *et seq.* of its First Written Submission, Mexico cites to a variety of ITU documents to distinguish between the terms "accounting rates" and "interconnection." Mexico neglects to discuss the definition of "interconnection" included in Section 2.1 of its Reference Paper, or to present any justification for its view that the arrangements in question do not meet that unambiguous definition. Mexico's Reference Paper definition includes all means of "linking" for the purpose of enabling users – whether domestic or international – to communicate. The "rates" that must be "*basadas en costos*" under Section 2.2, therefore, include any rates associated with "linking" for the purpose of enabling users to communicate. Accounting rates fall within the scope of this definition, and are not exempt from the interconnection obligations of the Reference Paper.[32] (In

[32] As noted in response to Question 8, the definition of "accounting rates" maintained by the ITU is consistent with the definition of interconnection included in Section 2.1 of the Reference Paper. Mexico neglects to mention that the ITU has recognized that competition has changed the ways that international carriers compensate one

its response to Question 8, the United States provides additional information demonstrating that accounting rates are a particular type of interconnection rate.)

66. Nor is the scope of the definition of "interconnection" included in the Reference Paper altered by the fact that accounting rates continue to be the subject of study by the ITU, despite Mexico's argument to the contrary notes at paragraph 170 of its First Written Submission. 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.

67. In paragraphs 191-193 of its First Written Submission, Mexico also argues that its accounting rates are consistent with ITU recommendations on benchmark rates. Neither ITU recommendations nor ITU benchmarks are relevant to Mexico's WTO obligations, however. In any event, 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."

13. (a) What elements should be included in determining whether cost-oriented interconnection prices are 'reasonable'?

68. The United States clarifies that it has not made a claim that Mexico has failed to ensure that interconnection rates are "*razonables*." Rather, its claims are that Mexico has failed to ensure that the "terms and conditions" of interconnection are "*razonables*," and that interconnection rates are "*basadas en costos*."

69. In claiming that Mexico has failed to ensure that the terms and conditions of interconnection are reasonable, the United States argued, at paragraphs 158-166 of its First Written Submission, that terms and conditions imposed by a major supplier on interconnection are unreasonable if they restrict the supply of scheduled services. This definition is based on the ordinary meaning of the term "*razonable*," in its context and according to the object and purpose of the treaty. Although the United States considers that the term "*razonable*" is most relevant

another for interconnection and that accounting rates are one, and only one, type of alternative charging mechanisms that are available for use between carriers in different countries to interconnect their networks. ITU recommendations and numerous other publications have long recognized the validity of alternatives to the accounting rate system. *See* ITU, *Accounting Rate Reform undertaken by ITU-T Study Group 3*, para. 6 ("Perhaps as much as half of all international traffic now passes outside the accounting rate system."), available at http://www.itu.int/ITU-T/studygroups/com03/accounting-rate/index.html. *See also* ITU, *World Telecommunication Development Report 1996/7* Section 6.2.3 (describing "alternative calling procedures," including international simple resale (ISR), international virtual private network services (IVPNS), and voice over data networks), available at http://www.itu.int/osg/spu/intset/whatare/wtdr/chap 6.pdf. Recently, the ITU issued a recommendation specifically listing some of the new systems for accounting in international telephony, including but not limited to a flat rate procedure, traffic unit price procedure, accounting revenue division procedure, settlement rate procedure and termination rate procedure. *See* ITU-T Recommendation D.150, *New System for Accounting in International Telephony* (June 1999) (Exhibit US-57).

when applied to "terms and conditions" of interconnection rather than to interconnection "rates," to the extent "*razonable*" does modify the term "rates," the same definition applies. Thus, under Section 2.2(b) of the Reference Paper, interconnection rates are unreasonable if they restrict the supply of scheduled services (as would be the case for interconnection rates that are not cost-oriented).

(b) Does the answer depend on the technology used?

70. No. Nothing in the text of Section 2.2(b) alters the meaning of the term "reasonable" according to the technology used.

14. (a) What is the meaning of ' having regard to economic feasibility ' in para 2.2. of the Reference Paper?

71. The phrase "having regard to economic feasibility" must be read in the context of subparagraph 2.2(b) of the Reference Paper in its entirety, which requires "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 and facilities that it does not require for the service to be provided." 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.

72. The ordinary meaning of "economic" includes "relating to monetary considerations, financial," "concerned with economics" and "[m]aintained for profit, on a business footing; paying (at least) the expenses of its operation or use."[33] The ordinary meaning of "feasible" is "[p]ractical, possible; manageable, convenient, serviceable."[34] The inclusion of the phrase "having regard to economic feasibility" therefore makes clear that a term or condition for interconnection may not restrict the supply of a scheduled telecommunications service where such interconnection is economically practical or possible – that is, as long as the resulting revenues are sufficient to cover "the expenses of its operation or use."

73. The phrase "with regard to economic feasibility" limits the obligation to provide interconnection 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

[33] THE NEW SHORTER OXFORD ENGLISH DICTIONARY (Fourth Ed. 1993), pg. 871. The ordinary meaning of "profit" is "the excess of returns over outlay; the surplus of a company or a business after declining wages, cost of raw materials, interest and other expenses." *Id.*, pg. 2369.

[34] *Id.*, pg. 926.

network components or facilities where more rapid installation would entail very high costs that could not be recovered from interconnecting suppliers.[35]

74. The United States has shown that "basadas en costos" means interconnection rates that are based in the cost that the major supplier incurs in providing interconnection.[36] To the extent that the phrase "having regard to economic feasibility" also applies to "cost-oriented rates," it means that 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.[37]

75. Significantly, common costs, like direct costs, are already included in the long-run average incremental cost methodology used by Mexico to develop its interconnection rates. Mexico informed the OECD in October 2001 that its interconnection rates "are meant to allow the supplier to recover long term total incremental costs *as well as the imputable common costs*."[38] Thus, the rates set out by the United States at paragraphs 121-140 of its First Written Submission as benchmarks for the determination whether Mexico's interconnection rates are *basadas en costos* already take account of the direct and common costs that Mexican operators are entitled to under the "having regard to economic feasibility" language in Section 2.2(b) of the Reference Paper.

76. Finally, the United States agrees with the EC that the phrase "having regard to economic feasibility" should permit a return on an operator's investment that is "reasonable." This is consistent with the EC's Interconnection Directive, which served as the model for the "having regard to" phrase in Section 2.2(b) of the Reference Paper. As the EC notes in its response to Question 14(a), its Interconnection Directive suggests that "having regard to economic feasibility" requires that operators be allowed to recover "a reasonable rate of return on investment."[39]

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[35] This is consistent with the concern of New Zealand, which requested the inclusion of this language in the Reference Paper, that major suppliers should not be required to provide equal access interconnection arrangements where it was not economically feasible for them to do so until the interconnecting supplier served a sufficient number of customers.

[36] First Written Submission of the United States, para. 117.

[37] This is consistent with the further concern of New Zealand, which requested the inclusion of this language in the Reference Paper, that interconnection rates should be sufficient to cover common costs, in addition to direct costs.

[38] *Access Pricing (with a focus on telecommunications),* Submission of Mexico to OECD Working Party No. 2 on Competition and Regulation, DAFFE/CLP/WP2/WD(2001)33 (October 5, 2001), pg. 3 (emphasis added) (Exhibit US-65). *See id.*, footnote 7 ("Average long run incremental cost comprises the costs of provide an additional capacity unit of the corresponding service.").

[39] EC response to Questions from the Panel (January 15, 2003), para. 37 and footnote 3, *quoting* Article 7(2) of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ 1997 L 199.

77. However, the rates set out by the United States as benchmarks for the determination whether Mexico's interconnection rates are *basadas en costos* also already take account of a reasonable rate of return. Because the term "long run" in a long run incremental cost methodology refers to a period long enough so that all costs become variable, Mexico's long run average incremental cost methodology necessarily includes the cost of capital to finance interconnection facilities, which includes a reasonable rate of return.[40]

(b) How might this phrase modify in practice the determination of cost-oriented interconnection prices?

78. For several reasons, the phrase "having regard to economic feasibility" does not modify the determination of "*tarifas basadas en costos*":

- First, because the U.S.-Mexico route carries the world's largest one-way volume of international calls, there is no question of insufficient demand for interconnection.

- Second, because U.S. suppliers are already interconnected with Telmex, such interconnection does not require additional switching capabilities or other network components or facilities.

- Third, the United States has shown that the maximum cost Telmex incurs to provide interconnection to U.S. suppliers of basic telecommunications services is economically feasible because this maximum cost is the sum of the *prices* that Mexican domestic suppliers pay for the exact same network components and services.

- Fourth, the prices that Mexican domestic suppliers pay for several of those components (international transmission and switching and terminating interconnection to cities where Telmex and its competitors are allowed to provide long-distance service) are required by Mexican law to recover all relevant costs, which include, as noted above, direct costs, "imputable common costs" and a reasonable rate of return.[41] Other components are furnished in Mexico under tariffs, or at commercially-negotiated rates, that also recover at least their total cost.[42]

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[40] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, para. 677 (1996), *citing* William Baumol, ECONOMIC THEORY AND OPERATIONS ANALYSIS (Fourth Ed. 1977) pg. 290 ("The very long run is a period so long that all of the firm's present contracts will have run out, its present plant and equipment will have been worn out or rendered obsolete and will therefore need replacement, etc.") (Exhibit US-55). *See id.*, para. 700 (cost of capital is equal to a normal profit).

[41] *See* First Written Submission of the United States, para. 124.

[42] *Id.*

(c) Does this provide added pricing flexibility to developing countries that are still rolling out their national telecommunications infrastructures?

79. The phrase "having regard to economic feasibility" provides no "added flexibility" to developing countries that "are still rolling out their national telecommunications infrastructures." Mexico's assertion (at paragraph 181 of its First Written Submission) that the obligation to provide interconnection at cost-oriented rates is "tempered" in this way effectively contends that such countries may impose the costs of new telecommunications infrastructure investment on suppliers that purchase interconnection – which is contrary to the terms "*basadas en costos*" and "cost oriented," These latter terms require a relationship between interconnection rates and the cost incurred in providing *interconnection*, rather than costs incurred in connection with telecommunications infrastructure roll-out.[43] As noted in response to Question 9(a), the WTO web-site defines "cost-based pricing" as "the general principle of charging for services in relation to the cost of providing *these services*."[44]

80. Mexico's argument is also refuted by the further requirement of Section 2.2(b) that the supplier purchasing interconnection "need not pay for network components or facilities that it does not require for the [interconnection] service to be provided." Although referring to the requirement for "sufficiently unbundled" interconnection rates, this language provides relevant context for the interpretation of the phrase "with regard to economic feasibility," 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. Mexico's argument would lead to inconsistent and discriminatory results, by allowing interconnecting suppliers purchasing unbundled interconnection to avoid unrelated costs, while imposing such costs on interconnecting suppliers purchasing bundled interconnection.

81. Mexico's argument is also refuted by Section 3 of the Reference Paper, which provides for separate universal service obligations to fund the requirements of Members seeking to rollout their national telecommunications infrastructure. Section 3 states that "[a]ny Member has the right to define the kind of universal service obligation it wishes to maintain," but requires such obligations to be "administered in a *transparent, non-discriminatory and competitively-neutral* manner and . . . not more burdensome than necessary."[45] The recovery of infrastructure development costs through interconnection rates would be contrary to the Section 3 requirements for non-discrimination and competitive-neutrality, by requiring interconnecting suppliers to pay portions of universal service obligations solely because they were purchasing interconnection. Such an approach would also be contrary to the Section 3 requirement for the transparent administration of universal service obligations, by hiding universal service obligations in interconnection rates paid to the major supplier.

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[43] *See id.*, para. 117.

[44] *See* http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel12_e.htm. (Emphasis added).

[45] Emphasis added.

15. The United States suggests that interconnection terms and conditions are not "reasonable" under Section 2.2 if they permit a major supplier to "restrict the supply of a scheduled basic telecom service." (US submission, para. 165). Please comment.

82. Please see the United States' discussion of this issue at paragraphs 158-166 of its First Written Submission, and in its response to Question 23.

16. At the close of the negotiations on basic telecommunications, an understanding on accounting rates was reached (S/GBT/4, para. 7).

(a) 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?

83. The understanding is concerned with Article II of the GATS, concerning most-favoured-nation treatment, rather than the Reference Paper. The understanding constitutes an informal, non-binding agreement to forego potential challenges to differential accounting rates under Article II. The understanding refers to "differential" accounting rates and the Article II exemptions concerning the application of differential accounting rates actually taken by five Members. Apparently, the Members who took those Article II exemptions, all of which had government-owned monopoly suppliers, were concerned that their accounting rates could be seen as government measures that would as such be subject to possible challenge under Article II. The United States notes that two of the Members who took those exemptions, Bangladesh and Turkey, made no Reference Paper commitments.[46] Another two of these Members, India and Pakistan, made additional commitments concerning modified forms of the Reference Paper that did not include the provision of interconnection at cost-oriented rates and on reasonable terms.[47] The statement in the understanding that it was reached "in order to avoid the submission of further such [*i.e.*, Article II] exemptions" indicates that other Members – including some of those Members that did not participate in the Group on Basic Telecommunications, all or virtually all of which had government-owned monopoly suppliers – may have had similar concerns. As noted by the European Communities in its response to Question 16(a), the understanding did not address the issue of cost-orientation. Similarly, the understanding did not address the issue of reasonable terms.

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[46] *See* Bangladesh, Schedule of Specific Commitments, GATS/SC/8/Suppl.1; Turkey, Schedule of Specific Commitments, GATS/SC/88/Suppl.2.

[47] *See* India, Schedule of Specific Commitments, GATS/SC/42/Suppl.3; Pakistan, Schedule of Specific Commitments, GATS/SC/67/Suppl.2/Rev.1.

(b) What is the significance of the statement in the understanding that "the accounting rate system by it nature involves differential rates"?

84. As noted by the United States in its Oral Statement at the First Meeting of the Panel, the references in the understanding to "differential rates," the subsequent statement that "the application of such [*i.e.*, differential] accounting rates would not give rise to action by Members under dispute settlement," and the Article II exemptions actually taken by the five countries mentioned in S/GBT/4, make clear that the understanding has no application outside of Article II. Because the United States has not brought a claim under Article II, the understanding has no relevance to this dispute.

85. Because accounting rates on different routes are the result of separate, bilateral negotiations, the accounting rate system may result in differential accounting rates. However, the United States does not agree that the accounting rate system necessarily involves differential accounting rates, or that any differential accounting rates would necessarily support a claim under Article II. Nonetheless, the United States recognizes that some Members – principally those that took Article II exemptions or others that considered taking such exemptions – wanted assurances that differential accounting rates would not be subject to challenge under Article II, and thus sought negotiation of the understanding.

Section 1 of the Reference Paper

17. (a) Are Mexican rules that impede price competition among Mexican companies terminating incoming international calls consistent with the GATS and the Reference Paper?

86. No. While the Reference Paper does not itself define the term, the United States demonstrated in paragraphs 193-194 of its First Written Submission that "anti-competitive practices," within the meaning of Section 1 of the Reference Paper, must at least encompass what are generally agreed to be the most egregious examples of anti-competitive behavior, including horizontal "cartel" agreements to fix prices. The United States also demonstrated that Mexico's ILD rules not only fail to prevent this type of anti-competitive behavior, as required by Section 1, but actually mandate a horizontal price-fixing cartel. Telmex is given the exclusive authority to negotiate the international interconnection rate, and all other Mexican carriers must use that rate. These measures perpetuate Telmex's dominant position in interconnection for the origination and termination of international calls, and stifle market challengers by maintaining artificially high rates.

(b) Does Section 1 of the Reference Paper require that markets be opened to competition?

87. No. The United States does not claim that Section 1 of the Reference Paper contains language requiring a market to be opened to competition or that the requirements of the

Reference Paper can only be met by opening a market to competition. Mexico's obligation to open various markets derives from the broad range of market access commitments on basic telecommunications contained in its Schedule.

(c) Can the fixing of a uniform price be an anti-competitive practice in violation of the obligations under the Reference Paper if uniform prices are required by law?

88. Yes. As stated in response to Question 17(a), "anti-competitive practices," within the meaning of Section 1 of the Reference Paper, encompasses at least horizontal "cartel" agreements to fix prices. If price-fixing is anti-competitive, then it is anti-competitive even if required by law. Even if an activity engaged in by Mexico's major supplier, Telmex, is immunized from domestic enforcement action under Mexican law, or is in some sense the act of the Mexican state itself, that does not alter the anti-competitive character of the activity at issue. The United States notes that it is *Mexico's* failure to observe the obligations of Section 1 that is at issue in this dispute – *not Telmex's* failure to observe those obligations. If a WTO Member were able to immunize itself from the obligation incumbent upon it under Section 1 to take measures to prevent anti-competitive conduct by major suppliers by simply *requiring* anti-competitive conduct by major suppliers, the entire purpose of Section 1 would be undermined. Such an 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.

18. Do you agree with Mexico's claim that ILD Rule 13 promotes competition? If so, please explain how, giving illustrative examples of desired and undesired outcomes.

89. No. ILD Rule 13, in combination with other provisions of the ILD rules, affirmatively requires and promotes *per se* anti-competitive conduct. The United States has shown in its First Written Submission that the effect of ILD Rule 13, operating in conjunction with other ILD rule requirements, is to maintain rates for international interconnection that are well in excess of cost. These rules eliminate any competitive incentive to lower international interconnection rates, and such reductions as have occurred cannot be attributed to this anti-competitive scheme.

90. ILD Rule 13 provides that the carrier with the greatest share of outgoing international calls in the last six months is given the exclusive authority to negotiate the interconnection rates with foreign carriers. To date, Telmex has always been the carrier with the largest share of outgoing international calls and thus holds the exclusive negotiating authority. Once Telmex has negotiated a rate, ILD Rule 23 requires all other Mexican long distance basic telecommunications carriers to charge foreign suppliers this same rate. Finally, ILD Rules 16 and 17 establish a "proportional return" scheme, under which Mexican carriers receive a share of above cost payments from interconnection charges associated with inbound international traffic in proportion to their outbound international traffic. In paragraphs 199-206 of its First Written Submission, the United States demonstrates that these Rules mandate a horizontal price fixing

cartel, perpetuate Telmex's dominant positions in both origination and termination of international calls, and allow Telmex to maintain artificially high prices and stifle market challengers. Mexico has not attempted to show, and cannot show, that these Rules have had any logical relationship to the development of such telecommunications competition as exists in Mexico, and its assertions with respect to "competition" and "investment" are speculative, as further discussed in paragraphs 85-91 of the Second Written Submission of the United States. Rather, it is apparent that Mexico has maintained these Rules in order to prevent smaller carriers from taking a larger share of international incoming traffic from Telmex by charging lower prices, as it expects they would do if the rules were lifted.

19. (a) How do you define "anti-competitive practices" in the sense of Section 1.1 of the Reference Paper?

91. Please see the definition provided in paragraphs 193-194 of the United States' First Written Submission, and paragraph 34 of the United States' Oral Statement at the First Meeting of the Panel. Please also see the United States' response to question 17(a).

(b) How do you view the relationship between an "anti-competitive practice" in the sense of Section 1.1 and a practice that is not "reasonable" in the sense of Section 2.2(b)?

92. As discussed in paragraphs 193-194 of the United States' First Written Submission and paragraph 34 of the United States' Oral Statement at the First Meeting of the Panel, an "anti-competitive practice" encompasses at least the most egregious examples of anti-competitive behavior, including horizontal "cartel" agreements to fix prices.

93. The United States established the meaning of the term "*razonables*" in the context of Section 2.2 of the Reference Paper in paragraphs 158-166 of its First Written Submission. Terms and conditions that obstruct or impair access to and use of public telecommunications networks and services are presumptively unreasonable. As discussed in greater detail in response to Question 23, Section 2.2 of the Reference Paper requires that Mexico ensure that interconnection with its major supplier be on reasonable terms, conditions and rates – that is, ensuring that the major supplier not abuse its market power to impose limitations on interconnection, or to extract non-cost-oriented prices for interconnection, that will reduce demand for and restrict the supply of basic telecommunications services.

94. A Member that scheduled the Reference Paper as an additional commitment is required by Section 1 of the Reference Paper to maintain appropriate measures to prevent its major supplier from engaging in or continuing anti-competitive practices, and is also obliged under Section 2.2(b) to ensure interconnection with that major supplier on reasonable terms, conditions and rates. Depending on the facts at issue, conduct could (but need not necessarily) be both anti-competitive and restrict the supply of basic telecommunications services, leading to a violation of both Sections 1 and 2.2(b).

(c) Do you consider that Telmex's ability to negotiate uniform settlement rates is *per se* anti-competitive?

95. Yes. As discussed in response to Question 17(a), Mexico's ILD rules give Telmex the exclusive authority to negotiate the international interconnection rate, and all other Mexican carriers must use that rate. This is, by definition, a horizontal price-fixing cartel that fits within virtually any definition of "anti-competitive practice." The OECD has recommended that its members prevent "hard core cartel" practices such as price-fixing, as noted in the First Written Submission of the United States at footnote 176, and horizontal price fixing is condemned both as a *per se* violation of U.S. law under Section 1 of the Sherman Act and as an absolute monopolistic practice under Article 9 of Mexico's Federal Law of Economic Competition.

(d) Does a proportional return system necessarily constitute an anti-competitive practice?

96. No. The use of a proportionate return system is not an anticompetitive practice where it is used solely to prevent the abuse of market power. For example, the United States 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.[48] The United States applies proportionate return to dominant suppliers with high rates in order to prevent those dominant suppliers from using their control of return traffic to obtain additional concessions from competing U.S. suppliers. Except for dominant suppliers with high rates, cross-border suppliers into the United States are not subject to proportionate return. Thus, all suppliers, from all countries, that do not possess market power at the foreign end of the relevant international route, including all Mexican suppliers except Telmex, are not subject to proportionate return, and may terminate unlimited amounts of U.S.-bound traffic with any U.S. supplier.

97. It is pro-competitive rather than anticompetitive to apply a proportionate return system narrowly in order to prevent dominant suppliers with high settlement rates from using their market power to receive increased above-cost subsidies. However, Mexico does not apply proportionate return in this pro-competitive manner. Rather than use proportionate return to

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[48] *See International Settlements Policy Reform*, IB Docket No. 02-324, Notice of Proposed Rulemaking (rel. October 11, 2002), para. 5 (International Settlements Policy, which requires proportionate return as well as equal division of accounting rates between the U.S. and foreign carrier and availability of rates to all U.S. carriers on a nondiscriminatory basis, does not apply where the foreign carrier lacks market power, and may be removed where settlement rates are 25 percent below FCC benchmarks), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-285A1.pdf. Additionally, the FCC authorizes ISR arrangements, which are exempt from proportionate return, with even dominant foreign carriers (*i.e.*, that possess market power at the foreign end of the international route) from WTO Member countries that have agreed to accept FCC benchmark rates (non-WTO members are also eligible if they provide equivalent treatment for ISR). The FCC has authorized ISR arrangements with dominant foreign carriers in 83 countries. *See* http://www.fcc.gov/ib/pd/pf/isr.html.

prevent the abuse of market power, Mexico requires all suppliers to comply with proportionate return, irrespective of whether they possess market power. As Mexico acknowledges at paragraphs 207-209 of its First Written Submission, its proportionate return requirement operates "in combination with" the Telmex monopoly on rate negotiations and the requirement for uniform rates to prevent one Mexican supplier "undercutting" any other Mexican supplier, or otherwise competing to increase its share of traffic received from U.S. cross-border suppliers. Thus, Mexico applies proportionate return broadly to all suppliers with the purpose of maintaining payment of above-cost subsidies resulting from the abuse of market power by Telmex.

20. In evaluating whether the terms, conditions and rates applied by Telmex are reasonable in terms of Section 2.2(b), what is the relevant market and how should it be determined?

98. In the current case, the relevant market is the termination of voice telephony, facsimile, and circuit-switched data transmission services supplied on a cross-border basis between the United States and Mexico, as explained in paragraphs 72-78 of our First Written Submission. Mexico does not contest that this is the relevant market for purposes of this dispute.

Section 5 of the Annex

21. Can Mexico reconcile its argument that the "Annex only addresses telecommunications transport services as the underlying transport means for other economic activities" with the reference, in the GATS Annex, to a "dual" role of the telecommunications service sector?

99. Mexico's argument is without merit. As noted in paragraph 45 of the United States' Oral Statement at the First Meeting of the Panel, 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." As further context, 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 . . ." Finally, Section 5(a) 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, of course, basic telecommunications services scheduled by Mexico).

22. If Section 5 (a) and (b) of the Annex already ensure interconnection at reasonable rates, what is the value-added of Section 2.2 of the Reference Paper?

100. Unlike Section 2.2 of the Reference Paper, the Annex includes no requirement for interconnection at "cost-oriented" rates, or for "unbundled" interconnection.

23. Does the term "reasonable" as set out in Section 5(a) of the Annex on Telecommunications have the same meaning as in Section 2.2 of the Reference Paper?

101. The ordinary meaning of the term "reasonable" is, of course, the same in Section 5(a) of the Annex as it is in Section 2.2 of the Reference Paper. The ordinary meaning of "reasonable" is general[49] and suggests that terms and conditions are reasonable if they are appropriate or sensible or rational. The context and object and purpose infuse concrete meaning into this term. While the meaning of the term in the Annex and the Reference Paper is similar, the differing contexts lead to some distinctions.

102. As discussed in paragraphs 232-234 of the United States' First Written Submission, under the Annex, terms and conditions that obstruct or impair access to and use of public telecommunications networks and services are presumptively unreasonable. "Reasonable" appears in the context of an affirmative obligation placed on all WTO Members to ensure that foreign service suppliers have access to and use of public telecommunications networks and services on *reasonable* terms and conditions. Section 2 of the Annex defines this obligation very broadly, requiring that Members must ensure access by "whatever measures are necessary."[50]

103. Furthermore, Section 5(e) sharply delineates the *only* instances where a condition on access to and use of Mexico's telecommunications networks and services would be reasonable. Such a condition must be *necessary* to: (i) safeguard the public service responsibilities of suppliers of public telecommunications networks and services; (ii) protect the technical integrity of such networks and services; and, (iii) ensure that foreign service suppliers do not supply non-scheduled services. Therefore, conditions imposed on access to or use of public telecommunications networks and services that are not necessary to meet these strict objectives are not reasonable. At paragraphs 109-122 of its Second Written Submission, the United States demonstrates that conditions imposed on access to or use of Mexico's public telecommunications networks and services are not necessary to meet these objectives (although it does not consider that it bears the burden of so demonstrating).

104. Ensuring that foreign suppliers have broad, unrestricted access to and use of Mexico's telecommunications network and services also accords with the object and purpose of the Annex and the GATS. Negotiators drafted the Annex to ensure that suppliers of public telecommunications networks and services could not frustrate the supply of a scheduled service by restricting access to telecommunications transport. Similarly, the preamble to GATS establishes the expansion of trade in services as a goal, providing that:

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[49] The ordinary meaning of "reasonable" is "in accordance with reason; not irrational or absurd . . . having sound judgement; ready to listen to reason, sensible . . . within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate." *New Shorter Oxford English Dictionary* (Fourth Ed. 1993), pg. 2496.

[50] Annex, Section 2, note 14.

> *Recognizing* the growing importance of trade in services for the growth and development of the world economy.
>
> *Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.

105. In short, by obligating Members to take whatever measures necessary to ensure that foreign suppliers have access to and use of telecommunications transport, the Annex prevents domestic operators from obstructing the expansion of trade in scheduled services and realizing the principal liberalizing goal of the GATS.

106. The United States established the meaning of the term "*razonables*" in the context of Section 2.2 of the Reference Paper in paragraphs 158-166 of its First Written Submission. The principal difference between the term "razonables" in Section 2.2 of the Reference Paper and "reasonable" in Section 5(a) of the Annex is that Section 2.2 of the Reference Paper imposes disciplines to prevent *major suppliers* from using interconnection to restrict other suppliers from offering a scheduled service. In markets like Mexico, where foreign service suppliers are barred from owning facilities and must rely on the major supplier to interconnect with end users, the major supplier has the power and incentive to price interconnection at levels that reduce demand for and restrict the cross-border supply of basic telecommunications services. Section 2.2 of the Reference Paper requires that Mexico ensure that interconnection with its major supplier be on reasonable terms, conditions and rates – that is, ensuring that the major supplier not abuse its market power to impose limitations on interconnection, or to extract non-cost-oriented prices for interconnection, that will reduce demand for and restrict the supply of basic telecommunications services.

24. Does "having regard to economic feasibility" add something to the term "reasonable" as it is used in Section 2.2 of the Reference paper?

107. Please see the United States' response to Question 14(a) above.

25. If the Annex were to apply to the services in question, would Mexico consider that the "terms and conditions" it applies on access to and use of Public Telecommunications Transport Networks and Services (PTTNS) are "reasonable"?

108. As demonstrated in paragraphs 216-246 of the United States' First Written Submission, Mexico has not ensured that U.S. suppliers of basic telecommunications services have access to and use of (*i.e.*, interconnection to) public telecommunications networks and services on reasonable terms and conditions for the cross-border supply of scheduled facilities-based services and commercial agencies. Moreover, as discussed at paragraphs 247-296 of the United States' First Written Submission, Mexico has failed to ensure that U.S. service suppliers have *any* access

to or use of private leased circuits for the supply of scheduled basic telecommunications services by facilities-based operators and commercial agencies, let alone access to or use of private leased circuits on reasonable terms and conditions.

26. It is necessary to consider Sections 5 (e) and (f) to establish a claim under Sections 5 (a) and (b)? Please explain.

109. Sections 5(e) and (f) are not elements of a *prima facie* claim under Sections 5(a) or (b) of the Annex. Analogizing to Articles 3.1 and 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, Mexico makes the unsupported assertion, at paragraph 256 of its First Written Submission, that "there is no general rule-exception relationship" between Sections 5(a)-(b) and 5(e)-(f) of the Annex. Mexico's subsequent citation to Article XX(d) of the GATT as context for the interpretation of Sections 5(e) and (f) is telling.[51] Like Section 5(f), Article XX of the GATT includes a list of measures that may fall within the scope of the provision (Articles XX(a)-(j)). Furthermore, like Section 5(e), Article XX(d) requires that to fall within the scope of the provision, a measure must be deemed "necessary" to achieve a particular goal. In the context of Article XX(d), the Appellate Body has expressly found that the burden of satisfying the "necessity" test falls on the Member invoking the provision.[52]

110. In any event, to rebut Mexico's arguments that certain of its measures are consistent with Sections 5(e) and (f) of the Annex, the United States demonstrates, in paragraphs 109-122 of its Second Written Submission, that Mexico has imposed conditions on access to and use of public telecommunications transport networks and services that fall within the meaning of Section 5(f), but that are "other than as necessary" to satisfy the criteria in Sections 5(e)(i)-(iii). Since the conditions do not "satisfy the criteria set out in paragraph [5](e)," Mexico is not permitted to maintain those conditions, pursuant to Section 5(f).

27. How does the routing requirement under mode 1 relate to the obligation in Section 5(b) to ensure access to and use of leased circuits?

111. In the United States' view, it is not inconsistent with the obligation under Section 5(b) of the Annex to require that cross-border service suppliers route traffic through the facilities of a Mexican concessionaire. In fact, the routing requirement is one way in which a Member may satisfy the obligation in Section 5(b). Properly interpreted (according to the rules of interpretation reflected in the Vienna Convention), the routing requirement included in Mexico's Schedule permits U.S. service suppliers to provide basic telecommunications services from the United States into Mexico over capacity leased from a Mexican concessionaire.

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[51] First Written Submission of Mexico, paras. 262-263.
[52] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted January 10, 2001), para. 157.

US – MEXICO SOUTHBOUND TRAFFIC TERMINATION