

**EN EL MARCO DE UN ARBITRAJE CONFORME AL  
TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE**

- y -

**EL REGLAMENTO DE ARBITRAJE DE LA  
COMISIÓN DE LAS NACIONES UNIDAS PARA EL DERECHO MERCANTIL  
INTERNACIONAL (1976)**

- entre -

**JOSHUA DEAN NELSON, POR DERECHO PROPIO Y EN REPRESENTACIÓN DE  
TELE FÁCIL MÉXICO, S.A. DE C.V., Y JORGE LUIS BLANCO**

**(los “Demandantes”)**

y

**LOS ESTADOS UNIDOS MEXICANOS**

**(la “Demandada”)**

**Caso CIADI No. UNCT/17/1**

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**RESOLUCIÓN PROCESAL No. 5**

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*Tribunal*

Dr. Eduardo Zuleta (Presidente)  
Sr. V.V. Veeder, QC (Árbitro)  
Sr. Mariano Gomezperalta Casali (Árbitro)

*Secretaria del Tribunal*

Sra. Sara Marzal Yetano

**13 de febrero de 2018**

## I. INTRODUCCIÓN

1. El 12 de diciembre de 2017, la Demandada envió a los Demandantes sus solicitudes de exhibición de documentos.
2. El 29 de diciembre de 2017, los Demandantes presentaron sus respuestas a las solicitudes de exhibición de documentos de la Demandada.
3. El 5 de enero de 2018, la Demandada presentó su réplica a las respuestas de los Demandantes y un Cronograma Redfern ante el Tribunal.
4. El Tribunal examinó las solicitudes de exhibición de documentos de la Demandada, las respuestas y objeciones de los Demandantes y las réplicas de la Demandada a dichas respuestas y objeciones, todo lo cual se expone en el Cronograma Redfern adjunto a esta Resolución Procesal.
5. Dado que los Demandantes objetaron un número de solicitudes de documentos de la Demandada sobre la base del Artículo 9(2)(b) de las Reglas de la IBA (*International Bar Association*) del 2010 sobre la Práctica de Prueba en el Arbitraje Internacional (“Reglas IBA”), e invocaron las disposiciones sobre privilegio tanto del derecho estadounidense como del derecho mexicano, el Tribunal invitó a los Demandantes a que presentaran, a más tardar, el 17 de enero de 2018, un escrito con sus comentarios sobre (1) el criterio para elegir el derecho aplicable a la cuestión del privilegio (derecho mexicano o estadounidense); y (2) la interpretación de la Demandada del derecho mexicano y estadounidense. El Tribunal, asimismo, invitó a la Demandada a que remitiera sus comentarios sobre el escrito de los Demandantes, a más tardar, el 23 de enero de 2018.
6. El Tribunal también solicitó a los Demandantes que prepararan un registro de privilegio (“*privilege log*”) para cada uno de los documentos sobre los que alegaran privilegio y que la compartieran con la Demandada, a más tardar, el 24 de enero de 2018. También se concedió a la Demandada la oportunidad de responder a ese *privilege log*, a más tardar, el 29 de enero de 2018.
7. El 29 de enero de 2018, la Demandada presentó sus comentarios sobre el *privilege log* de los Demandantes. El 2 de febrero de 2018, el Tribunal recibió el *privilege log* de los Demandantes, que también se adjunta a esta Resolución Procesal.

## II. CONSIDERACIONES GENERALES PARA DECIDIR SOBRE LAS SOLICITUDES DE EXHIBICIÓN DE DOCUMENTOS OBJETADAS

8. Los Demandantes no objetaron las solicitudes de la Demandada Nos. 16, 17, 20, 22, 23, 24, 25, 26, 27, 29, 30, 31 y 32 del Cronograma Redfern. Además, la Demandada consideró que las explicaciones brindadas por los Demandantes respecto de las solicitudes Nos. 14 y 19 del Cronograma Redfern eran satisfactorias. Por lo tanto, no resulta necesario que el Tribunal emita una decisión respecto de las solicitudes que anteceden y sólo lo hará respecto de las solicitudes Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 18, 21 y 28 (las “Solicitudes de Exhibición de Documentos Objetadas”).
9. Las Solicitudes de Exhibición de Documentos Objetadas conciernen básicamente dos tipos de objeciones.
  - a. En primer lugar, solicitudes objetadas sobre la base del Artículo 3(3) de las Reglas IBA (“Primera Categoría”). La Primera Categoría comprende las Solicitudes Nos. 4, 6 y 28.
  - b. En segundo lugar, solicitudes objetadas sobre la base del Artículo 9(2)(b) de las Reglas IBA 2010 (“Segunda Categoría”). La Segunda Categoría comprende las Solicitudes Nos. 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 15, 18 y 21.
10. Estas dos categorías serán dirimidas de forma separada.
  - a. **Decisión sobre la Primera Categoría**
11. De conformidad con el Artículo 3(3) de las Reglas IBA, una Solicitud de Exhibición de Documentos deberá contener:
  - (a) (i) una descripción de cada Documento cuya exhibición se solicite que sea suficiente para identificarlo, o  
(ii) una descripción suficientemente detallada (incluyendo el asunto de que se trate) de la concreta y específica categoría de Documentos requeridos que razonablemente se crea que existen; en el caso de Documentos conservados en formato electrónico, la Parte solicitante puede ó el Tribunal Arbitral puede requerirle que proceda a, identificar archivos específicos, términos de búsqueda, individuos o cualquier otro medio de búsqueda para esos Documentos en una forma eficiente y económica;
  - (b) una declaración de por qué los Documentos requeridos son relevantes para el caso y sustanciales para su resolución; y
  - (c) (i) una declaración de que los Documentos requeridos no se encuentran en poder, custodia o control de la Parte que los solicita o una declaración de las razones por las cuales sería irrazonablemente gravoso para la Parte solicitante exhibir tales Documentos, y  
(ii) una declaración sobre las razones por las cuales la Parte solicitante supone que los Documentos requeridos están en poder, custodia o control de otra Parte<sup>1</sup>.

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<sup>1</sup> Reglas IBA, Artículo 3(3).

12. La solicitud No. 28 de la Demandada cumple con estos requisitos y se concede tal como se establece en el Cronograma Redfern.
13. Las Solicitudes Nos. 4 y 6 se conceden con el alcance y extensión indicados en el Cronograma Redfern adjunto.

**b. Decisión sobre la Segunda Categoría**

14. El Artículo 9(2)(b) de las Reglas de la IBA establece que el Tribunal excluirá la exhibición de cualquier documento respecto del que exista “impedimento legal o privilegio bajo las normas jurídicas o éticas determinadas como aplicables por el Tribunal Arbitral”.
15. Además, el Artículo 9(3) establece ciertos criterios que pueden ser tomados en cuenta por el Tribunal Arbitral para analizar cuestiones de impedimento legal o privilegio. Estos incluyen:

“(a) cualquier necesidad de proteger la confidencialidad de un Documento creado o de una declaración o comunicación oral realizada en relación con o al efecto de proporcionar u obtener asesoramiento jurídico; [...] (c) las expectativas de las Partes y de sus asesores el tiempo en que se alega que ha surgido el impedimento o privilegio legal; [...] y (e) la necesidad de mantener la equidad e igualdad entre las Partes, particularmente si ellas estuvieran sujetas a normas jurídicas o éticas diferentes”<sup>2</sup>.
16. Los Demandantes alegan privilegio en virtud de dos estándares legales diferentes: (i) el privilegio abogado-cliente y la doctrina del producto del trabajo de EE.UU. y; (ii) el secreto profesional de México. Las presentaciones de las Partes indican que estos estándares tienen diferentes alcances.
17. El Comentario de las Reglas IBA sugiere que la necesidad de garantizar la justicia y la equidad entre las partes puede surgir cuando el régimen del privilegio difiere en sus respectivas jurisdicciones. En este caso, el Tribunal teme que la aplicación de estándares diferentes sobre cuestiones de privilegio podría afectar el equilibrio y trato equitativo de las Partes. Dicha diferencia de trato podría resultar, por un lado, en que los Demandantes no tengan que exhibir sus comunicaciones entre ellos y sus asesores legales estadounidenses mientras que la Demandada, en una ronda posterior de solicitudes de exhibición de documentos de los Demandantes, se vea obligada a exhibir sus comunicaciones con sus asesores legales mexicanos; pero, por otro lado, podría resultar en que los Demandantes tengan que exhibir documentos que no están sujetos a confidencialidad en México, pero cuya exhibición podría resultar en una violación del derecho estadounidense aplicable. Esto causaría un claro desequilibrio en el trato a las Partes en este procedimiento.

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<sup>2</sup> Reglas IBA, Artículo 9(3).

18. El Comentario de las Reglas IBA también señala que, al considerar un alegato de privilegio, el Tribunal debería tener en cuenta las expectativas de las partes y sus asesores al momento en que surgió el privilegio. El Tribunal observa que, en este caso, el Sr. Joshua Dean Nelson y el Sr. Jorge Luis Blanco son ciudadanos de los Estados Unidos de América y, como tales, sus expectativas de privilegio podrían haberse originado conforme al régimen del privilegio que rige en su país de origen. Si ese fuera el caso, sus expectativas no deberían ser frustradas.
19. Sobre la base del Artículo 9(3) y el Comentario de las Reglas IBA, el Tribunal considera que el equilibrio adecuado se consigue mediante la aplicación, entre las reglas que están en juego, de los más altos estándares de protección que, a los fines de este caso, son las reglas de EE.UU. sobre el privilegio abogado-cliente y la doctrina del producto del trabajo (“derecho estadounidense”). El Tribunal no aplicará la legislación mexicana sobre el secreto profesional porque aplicar este estándar podría afectar la justicia y equidad entre las Partes e ignorar las expectativas de los Sres. Joshua Dean Nelson y Jorge Luis Blanco al momento en que recibieron asesoría legal.
20. Para determinar si un documento está protegido por el derecho estadounidense, el Tribunal analizó aquellos elementos que fueron presentados en el marco de este caso, y que no se objetaron, como los elementos del privilegio abogado-cliente y la doctrina del producto del trabajo en los EE.UU. Los elementos del privilegio abogado-cliente conforme al derecho estadounidense son los siguientes: (i) una comunicación entre un abogado y su cliente; (ii) efectuada con carácter confidencial; y (iii) que esté comprendida en la asesoría legal que el abogado brinda al cliente<sup>3</sup>. Los elementos de la doctrina del producto del trabajo conforme al derecho estadounidense son: (i) un documento u otra cosa tangible; (ii) preparado en anticipación a un litigio; (ii) por o para una parte o su representante<sup>4</sup>.
21. Por lo tanto, de conformidad con los criterios contenidos en los párrafos 19 y 20 *supra*, no se puede conceder la solicitud de la Demandada de exhibir documentos que se consideran privilegiados en virtud del derecho estadounidense sobre el privilegio abogado-cliente o la doctrina del producto del trabajo.
22. Sin embargo, el Tribunal considera que los Demandantes no pueden sostener el privilegio abogado-cliente o la doctrina del producto del trabajo bajo el derecho estadounidense respecto de una asesoría legal cuando no sólo han hecho referencia a ésta varias veces en sus

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<sup>3</sup> Véase Opinión de los Demandantes sobre el derecho aplicable a cuestiones de privilegio y Comentarios sobre las Respuestas de México sobre la interpretación del derecho mexicano y estadounidense sobre privilegio (17 de enero de 2018).

<sup>4</sup> Véase Opinión de los Demandantes sobre el derecho aplicable a cuestiones de privilegio y Comentarios sobre las Respuestas de México sobre la interpretación del derecho mexicano y estadounidense sobre privilegio (17 de enero de 2018).

escritos principales a lo largo de este arbitraje, sino que también presentaron el testimonio de un abogado que brindó asesoría legal haciendo referencia expresa a la misma. Los Demandantes han divulgado en sus escritos el contenido de la asesoría legal que han solicitado y recibido del despacho mexicano BGBG y su socio fundador, Carlos Bello, y han presentado el testimonio del Sr. Bello sobre las siguientes cuestiones: (i) la estructura corporativa de la inversión<sup>5</sup>; (ii) la interconexión indirecta con Telmex<sup>6</sup>; (iii) la posibilidad de ofrecer servicios tándem<sup>7</sup>; (iv) los plazos para iniciar las negociaciones con Telmex;<sup>8</sup> (v) la respuesta a una nueva controversia iniciada por Telmex ante el IFT;<sup>9</sup> (vi) la presentación de una acción de amparo en representación de Tele Fácil;<sup>10</sup> y (vii) la modificación de la concesión de los Demandantes para obtener una simplificada<sup>11</sup>. Por lo tanto, los documentos relativos a la asesoría legal sobre estas cuestiones (ya sea bajo la doctrina del producto del trabajo o el privilegio abogado-cliente) y todos los otros documentos respecto de los que el Tribunal no haya aceptado el privilegio (conjuntamente, "Documentos sin Privilegio") ahora no están sujetos al privilegio y los Demandantes deben exhibirlos a la Demandada.

### III. LA DECISIÓN DEL TRIBUNAL

23. A la luz de lo que antecede, luego de haber examinado cuidadosamente las observaciones formuladas por las Partes y habiendo considerado cada una de las solicitudes de la Demandada en consideración del interés legítimo de los Demandantes y la razonabilidad de la carga impuesta sobre estos últimos, teniendo en cuenta todas las circunstancias relevantes, con inclusión del principio fundamental de integridad del procedimiento arbitral, el Tribunal resuelve, por unanimidad:
24. Aceptar, de conformidad con los motivos que anteceden, las solicitudes de exhibición de documentos de la Demandada Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 18, 21 y 28, con el alcance indicado en el Cronograma Redfern adjunto.
25. Rechazar las solicitudes de la Demandada Nos. 3 y 11 con el alcance indicado en el Cronograma Redfern adjunto.
26. Los Demandantes tendrán hasta el 20 de febrero de 2018 para exhibir a la Demandada los documentos que se indican en esta Resolución Procesal.

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<sup>5</sup> Declaración Testimonial de Carlos Bello, ¶¶ 17-18.

<sup>6</sup> Declaración Testimonial de Carlos Bello, ¶¶ 49-50.

<sup>7</sup> Declaración Testimonial de Carlos Bello, ¶¶ 72-73.

<sup>8</sup> Declaración Testimonial de Carlos Bello, ¶ 75.

<sup>9</sup> Declaración Testimonial de Carlos Bello, ¶¶ 130-131.

<sup>10</sup> Declaración Testimonial de Carlos Bello, ¶ 135.

<sup>11</sup> Declaración Testimonial de Carlos Bello, ¶ 150.

27. El calendario procesal para la etapa siguiente a esta exhibición de documentos será el establecido en el Calendario Procesal y el Cronograma de Exhibición de Documentos en los Anexos 1 y 2 de la Resolución Procesal No. 1, tal como los modificaron las Partes.

[ *Firmado* ]

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Sr. Eduardo Zuleta Jaramillo  
(Presidente)

En representación del Tribunal

***Joshua Dean Nelson, in his own right and on behalf of Tele Fácil México S.A. de C.V. and  
Jorge Luis Blanco v. the United Mexican States***

**ICSID Case No. UNCT/17/1**

**Mexico's first request for production of documents**

**I. Introduction**

This request for production of documents is submitted pursuant to section 18 and Annex 2 of the Procedural Order No. 1 (PO1) dated 18 July 2017.

Section V of this request for documents (RFD) is divided into 6 subsections, each dealing with a specific issue. Many of the sections include a general justification for the documents covered therein which should be read together with the justification offered for each specific request for documents or category of documents.

This RFD seeks documents in possession or control of the Claimants or any associated third parties, such as lawyers, representatives, accountants or notaries, who may be in possession of the requested documents due to their current or previous professional business relationship with the Claimants.

Finally, nothing in this request for production of documents shall be interpreted as an admission of any kind on the part of the Respondent.

**II. Definitions**

In this request for documents:

Claimants	Refers to Joshua Dean Nelson, Jorge Luis Blanco and Tele Fácil.
Constitutional Reform of 2013	Refers to the constitutional amendment of 11 June 2013, which modified certain provisions of the Mexican Constitution focused on the telecommunications sector.
Decree 77	Refers to Decree P/IFT/EXT/080415/77 issued by the IFT on 8 April 2015.
Document	Means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.
FTBL	Refers to the Federal Telecommunications and Broadcasting Law that entered into force on 13 August 2014 ( <i>i.e.</i> , the current Telecommunications Law).

FTL	Refers to Mexico's Federal Telecommunications and Broadcasting Law in force between 7 June 1995 and 12 August 2014 (i.e., the former Telecommunications Law).
Internal documents	Means any Document, such as notes, memoranda, opinions and reports, prepared by Tele Fácil's senior management, directors, shareholders or any third party at their behest (e.g., external advisors/consultants).
MoU	Refers to Memorandum of Understanding executed by Tele Fácil's shareholders on 20 July 2009.
NoA	Refers to the Notice of Arbitration filed on 26 September 2016.
NoI	Refers to the Notice of Intent filed on 27 April 2016.
PEA	Means "Preponderant Economic Agent".
PEA Declaration	Refers to Resolution P/IFT/EXT/060314/76 issued on 6 March 2014.
Records of communications	Means any Document recording a communication between two or more identified or identifiable parties, such as letters, email, memoranda, notes and like documents.
Resolution 127	Refers to Resolution P/IFT/EXT/071 015/127 issued by the IFT on 7 October 2015.
Resolution 381	Refers to Resolution P/IFT/261114/381 issued by the IFT on 26 November 2014.
SoC	Refers to the Statement of Claim filed on 7 November 2017.
Tele Fácil	Tele Fácil México, S.A. de C.V.
Telmex	Refers to Telefonos de Mexico, S.A.B. de C.V. and/or Telefonos del Noroeste, S.A. de C.V.
Telmex Offer	Refers to Telmex's standard framework agreement for interconnection sent to Tele Fácil on 26 August 2013.

### **III. Claimants' Responses and Objections to Respondent's First Request for Production of Documents (RFD)**

#### **Introduction**

Pursuant to Article 18.9 of PO 1, Respondent's RFDs are objectionable if they seek information excluded from production under Article 9(2) of the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules). Of particular relevance is Article 9(2)(b), which provides the following grounds for objection: "(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable ...."

In this case, relevant legal impediments and privileges are found and well established under both Mexican and United States law: in Mexico, the Professional Secret Privilege, and in the United States, the attorney-client privilege and the work product doctrine. Claimants make appropriate objections on these bases, as indicated below, pursuant to Article 9(2)(b) of the IBA Rules.

In addition, as a general matter, Claimants object to the Respondent's definition of "Internal documents" insofar as that term is defined to extend to documents reviewed and advised on by "external advisors/consultants" without excluding legal counsel. To the extent that the use of the term "Internal documents" is intended to encompass documents reflecting the communications with, or the advice of, legal counsel, the request is objectionable on the basis of Article 9(2)(b) of the IBA Rules which, as noted protects documents covered by the Professional Secret Privilege in Mexico, and the work product doctrine and/or the attorney-client privilege in the United States.

Further, pursuant to Article 18.5 of Procedural Order No. 1 (PO 1), Respondent's RFDs must comply with the requisites established in Article 3(3) of the IBA Rules. Claimants also include objections below to Respondent's requests for documents already submitted with the Statement of Claim or in the public domain.

### **IV. Respondent's Reply to the Claimants' General Responses and Objections**

The Respondent submits that any party seeking to exclude certain documents from production on the grounds of privilege or legal impediment under Article 9(2)(b) bears the burden of proving that the exclusion applies. This position is supported by various NAFTA tribunals, such as *Apotex Holdings Inc. v. United States*:

[33] [...] the Tribunal observes that the factual burden of proof under both the IBA Rules and US law lies with the party asserting attorney-client privilege so as to exclude (third-party) communications from the rule otherwise favouring disclosure.

[...]

[42] As with attorney-client privilege, the Tribunal recognises that the responding party bears the burden, under the IBA Rules and US law, of showing that the withheld documents fall within the work product doctrine's protection.<sup>12</sup> [Emphasis added]

Similarly, in *Clayton/Bilcon v. Canada*:

[25] To be clear, a party's own conclusion after carrying out a balancing of interests is not binding on the Tribunal. The burden of establishing the validity of a claim is on the party asserting it, and the Tribunal will make the final decision with respect to determining a party's privilege claims within the framework of the legal issues particular to the case, the evidence otherwise available, and in light of the applicable law...<sup>13</sup> [Emphasis added]

In order to meet its burden, the party asserting privilege/legal impediment must identify the rule on which it relies for its objection and provide enough information about the withheld documents so that the opposing party and the tribunal have the means to assess it. The Claimants have failed in these two important respects.

The Claimants do not point to any specific rule supporting their various claims of privilege/legal impediment. Instead they refer generally to Mexico's "Professional Secret Privilege" and the attorney-client privilege and work product doctrine of the U.S., for the proposition that "relevant legal impediments and privileges are found and well established under both Mexican and United States law". They do not elaborate on which specific domestic law provisions should apply or to whom such legal provisions should apply.

Mexico will observe that the disputing parties have not previously agreed on the rules that are to be used to determine exclusions from document production based on privilege/legal impediment, and neither the NAFTA nor the UNCITRAL Rules provide any guidance to deal with this issue. It, therefore, falls on the Tribunal to make a determination in this respect.

The Respondent further observes that Mexico has no doctrine of legal privilege *per se*. The Claimants' allusion to Mexico's "Professional Secret Privilege" appears to be a reference to article 36 of Mexico's *Ley Reglamentaria del artículo 5º Constitucional, Relativo al Ejercicio de las Profesiones en el Distrito Federal*,<sup>14</sup> which provides that "all professionals are obliged to strictly keep the secrecy of the matters entrusted to them by their clients, except for the mandatory reports

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<sup>12</sup> *Apotex Holdings Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs, 5 July 2013.

<sup>13</sup> *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04 Procedural Order 13, 11 July 2012.

<sup>14</sup> Regulatory Law of Article 5<sup>th</sup> of the Constitution, Related to Professional Practices in Mexico City.

established by the respective laws”.<sup>15</sup> This is not equivalent to the U.S. attorney-client privilege and, in any event, it would only apply to the Claimants’ lawyers, not the Claimants themselves.

Mexico submits that attorney-client privilege rules must be the same for both disputing parties, in order to maintain “fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules” as stated in Article 9.3(e) of the IBA Rules.

As noted in recent commentary, “investment treaty arbitration tends to follow the common law approach to disclosure and therefore evidentiary privileges are relevant”.<sup>16</sup> The Respondent submits that, in cases involving common law and civil law parties, the appropriate rules to apply are the basic rules applicable to attorney-client privilege and attorney work product, also known as lawyer-client privilege or solicitor-client privilege.

The Respondent generally agrees with the approach taken by the tribunal in *Vito G. Gallo v. Canada*, pursuant to which, a document is protected by attorney-client privilege if it meets the following criteria:

- The document [is] drafted by a lawyer acting in his or her capacity as lawyer;
- A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;
- The document [is] elaborated for the purpose of obtaining or giving legal advice;
- The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.<sup>17</sup>

To this, Mexico would add that a party cannot claim to have relied on specific legal advice as support for its conduct and then claim privilege over that advice.<sup>18</sup> Such is the case here, where the Claimants contend that their due diligence included obtaining advice from the law firm Bello, Gallardo, Bonequi y Garcia, S.C. (“BGBG”) on “the legal and regulatory requirements necessary

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<sup>15</sup> The original text in Spanish reads: “ARTICULO 36.- Todo profesionista estará obligado a guardar estrictamente el secreto de los asuntos que se le confíen por sus clientes, salvo los informes que obligatoriamente establezcan las leyes respectivas.”

<sup>16</sup> Audley Sheppard, QC; “The Approach of Investment Treaty Tribunals to Evidentiary Privileges”; ICSID Review, Vol. 31, No. 3 (2016), pp. 670-689; p. 670.

<sup>17</sup> *Vito G. Gallo v. Canada*, Procedural Order No. 3, dated April 8, 2009, ¶ 47.

<sup>18</sup> See, e.g., *United States v. Berkeley Heartlab, Inc.*, 2017 U.S. Dist. LEXIS 51691 (D.S.C. April 5, 2017) (both attorney-client and attorney work product privileges deemed waived by reliance on counsel argument); *Smith v. Scottsdale Ins. Co.*, 40 F. Supp. 3d 704 (N.D.W. Va. 2014); *XYZ Corp. v. United States*, 348 F. 3d 16, 24 (1<sup>st</sup> Cir. 2003) (“Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.”); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (“The privilege which protects attorney-client communications may not be used both as a sword and a shield.”)

to undertake the various lines of business that were being considered” which they claim to have relied on in planning and structuring their investment.<sup>19</sup>

This takes us to Mexico’s second point, which is that any attempt to assess the Claimants’ objections in the light of the criteria cited above is impossible on account of: (i) their failure to identify the specific documents over which they assert privilege/legal impediment, and (ii) their failure to provide basic information to assess their objections, such as: the author/sender, the intended recipient(s), the date and a description of their contents (*i.e.*, the information typically included in a privilege log).

Under these circumstances, the Respondent respectfully submits that the Claimants have failed to meet their burden of establishing that certain unidentified documents are subject to privilege/legal impediment and requests the Tribunal to dismiss the Claimants’ objections based Article 9(2)(b) of the IBA Rules.

If the Tribunal decides that this issue should be further explored, the Respondent respectfully submits that the Claimants should be required to produce a privilege log identifying each document over which they assert privilege/legal impediment and containing the necessary information to assess their objection.

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<sup>19</sup> See Statement of Claim, ¶¶ 55, 59.

V. Redfern Schedule

**Business plans / due diligence documents**

<b>Request No.</b>	1.
<b>Document / Category of Documents:</b>	<p>Internal documents* containing an assessment, analysis, opinion or discussion of the regulatory framework governing the Claimants' investment in Mexico, including any such documents addressing the following:</p> <ul style="list-style-type: none"> <li>a) the FTL (the former Telecommunications Law);</li> <li>b) the Constitutional Reform of 2013;</li> <li>c) the PEA Declaration;</li> <li>d) the FTBL (the current Telecommunications Law);</li> <li>e) the mechanism for the resolution of interconnection disputes.</li> </ul> <p>* Please note, for this and other requests, that "Internal documents" is a defined term. Please refer to the glossary for the definition.</p>
<b>Justifications:</b>	<p>At paragraph 55 of the SoC, the Claimants state that "in considering the formation of a telecommunications company, Messrs. Blanco, Nelson, and Sacasa hired the law firm Bello, Gallardo, Bonequi y Garcia, S.C. ("BGBG"), in Mexico City, to [<i>inter alia</i>] develop a clear understanding of the legal and regulatory requirements necessary to undertake the various lines of business that were being considered."</p> <p>At paragraph 151 the Claimants further state that "[...] Tele Fácil's founders, together with their legal counsel, continued to keep a close eye on the regulatory reforms, and how those reforms might impact their business."</p> <p>The Respondent submits that the requested documents are relevant to the case and material to its outcome. The requested documents are needed to determine the impact of the very substantial reform that occurred in the years following the incorporation of Tele Fácil, in particular, the impact over the intended scope of the Claimant's operations in Mexico (the Claimants contend that their business plan was amended to take advantage of the new business opportunities that the reform offered – see section II.E); the Claimant's understanding of IFT's role and powers concerning the resolution of interconnection disputes between operators, such as the one that ensued with Telmex; and the decision to submit the disagreement with Telmex to IFT for resolution in July 2014 shortly after the PEA Declaration.</p>

	<p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the documents exist and are in the possession, custody or control of the Claimants as would have been prepared as part of the due diligence prior to their investment in Mexico and in response to the extensive reform of the Telecommunications regulations in Mexico in 2013-2014. Moreover, as stated at ¶¶ 55 and 151 quoted above, the Claimants acknowledge that it was their interest to develop a clear understanding of the legal framework and “to keep a close eye on regulatory reforms”.</p>
<b>Objections:</b>	<p>Claimants state that the vast majority of the Internal Documents containing an assessment, analysis, opinion or discussion of the regulatory framework governing the Claimants’ investment were prepared by Claimants’ Mexican legal counsel and are privileged communications under Mexico’s Professional Secret Privilege. These materials are thus excluded from production by Article 9(2)(b) of the IBA Rules.</p> <p>Claimants object to the production of privileged documents excluded from production. However, Claimants will produce responsive materials in their possession that is not privileged.</p>
<b>Reply:</b>	<p>See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p> <p>Mexico will further observe that the fact that a document was prepared by the Claimants’ Mexican legal counsel does not, in and of itself, qualify them as privileged documents.</p>
<b>Tribunal’s decision:</b>	<p><b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.</p>

<b>Request No.</b>	2.
<b>Document / Category of Documents:</b>	<p>Internal documents containing any of the following analysis prepared in connection with the original business plan and /or the decision to invest in México:</p> <p>a) financial projections (in excel if available);</p>

	<p>b) economic viability analysis (e.g., net present value) (in excel if available);</p> <p>b) market/industry analysis;</p> <p>c) risk analysis;</p> <p>d) competition analysis;</p> <p>e) any other supporting documents for the original business plan</p>
<p><b>Justifications:</b></p>	<p>The Claimant relies on its original business plan to argue, <i>inter alia</i>, that “Tele Fácil’s business plan permitted it to thrive at whatever price Telmex offered” and that “part of Tele Fácil’s plan involved establishing a platform for offering innovative telecom services such as free conferencing”. (SoC, ¶ 10)</p> <p>This original business plan was allegedly prepared by Mr. Sacasa in February 2010 shortly after the company was incorporated and was submitted as Exhibit C-015. However, the document does not include many of the typical components of a business plan, such as: financial projections, economic viability analysis, market/industry analysis, risk analysis, among others.</p> <p>The requested documents are relevant to the case and material to its outcome. They are needed to evaluate and corroborate the claim for damages (such as the planned capital and operating expenditures) and to corroborate / dispute assertions about the original scope of the intended operations in the Mexico in Mr. Sacasa’s witness statement. They are also needed to determine and assess the validity of the Claimants’ expectations regarding, <i>inter alia</i>, the intended scope of operations / business opportunities, the expected amount of the investment, required funding and the expected return on the investment. Finally, they are needed to dispute the assertion that the alleged wrongdoing prevented Tele Fácil from launching services in Mexico (see ¶ 11 of Dr. Dippon’s expert report.)</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the documents exist and are in the possession, custody or control of the Claimants because they would have been necessary to make an informed decision on whether to invest in the intended project in Mexico.</p>
<p><b>Objections:</b></p>	<p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent’s Request and will produce other responsive materials in its possession.</p>

<b>Reply:</b>	See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i> , on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.
<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.

<b>Request No.</b>	3.
<b>Document / Category of Documents:</b>	<p>The amended business plan referred to in section II.E (“Tele Fácil Adapts Its Business Plan to the Changed Regulatory Environment”), including annexes and any internal documents containing any of the following analysis prepared in connection with the amended business plan:</p> <ul style="list-style-type: none"><li>a) financial projections (in excel if available) of all 4 proposed lines of business (i.e., DID/Conferencing Project; International Traffic Termination Project; Competitive Tandem Services Project; Retail Service Offering);</li><li>b) economic viability analysis (e.g., net present value) (in excel if available) of the 4 proposed lines of business;</li><li>b) market/industry analysis;</li><li>c) risk analysis;</li><li>d) competition analysis.</li></ul>
<b>Justifications:</b>	<p>The Claimant contends that:</p> <p>“152. [w]hen the IFT resolved the interconnection dispute and issued Resolution 381, Tele Fácil’s founders understood and appreciated the opportunity presented by the reforms. Most importantly, they realized that the penalties imposed on Telmex as a predominant economic agent, coupled with the rate offered by Telmex and accepted by Tele Fácil, combined to enhance Tele Fácil’s business prospects.</p> <p>153. Tele Fácil’s founders <u>revised their business strategy to pursue four distinct lines of business.</u> [...]”</p> <p>The requested documents are relevant to the case and material to its outcome. The Respondent observes that the revised business plan was not submitted into evidence and it is necessary to the defense of the claim for damages. The requested documents are also relevant as they provide</p>

	<p>contemporaneous evidence of the Claimants’ expectations regarding, <i>inter alia</i>, the viability of the intended projects and will allow the Respondent to corroborate/contest allegations of fact made in the SoC and witness statements regarding the intended scope of operations in Mexico. Finally, they are needed to dispute the assertion that the alleged wrongdoing prevented Tele Fácil from launching services in Mexico (see ¶ 11 of Dr. Dippon’s expert report.)</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the documents exist and are in the possession, custody or control of the Claimants because they refer to the revised business plan in section II.E and because the requested documents would have been necessary to make an informed decision on which projects to pursue.</p>
<b>Objections:</b>	<p>Claimants object to Respondent’s Request which wrongly assumes that the original written plan was replaced by a revised written business plan. The statement quoted by Respondent to justify this request states that “Tele Fácil’s founders revised their <u>business strategy</u> to pursue four distinct lines of business. [...]” This quote does not convey that a written revised business plan was prepared by Claimants when they revised their business strategy in response to the reforms aimed at curbing Telmex’s continued abuses. Rather, the quoted language refers to the fact that the founders revised their strategy in the wake of the reforms to pursue an additional line of business—the Competitive Tandem Services Project—and to benefit from new market liberalization based on advice provided by Tele Fácil’s Mexican counsel. That advice is privileged under Mexico’s Professional Secret Privilege and thus is excluded from production in this case.</p>
<b>Reply:</b>	<p>The Respondent observes that Section II.E of the Claimants’ Statement of Claim is entitled “Tele Fácil Adapts Its <u>Business Plan</u> to the Changed Regulatory Environment” [emphasis added]. Whether the Claimants wish to refer to this as a revised business strategy or a revised business plan makes no difference to the request. Mexico thus reiterates its request for the revised business strategy/business plan and related documents, such as those identified in items (a) through (d).</p> <p>As for the claim of privilege, please refer to Mexico’s general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p>

<b>Tribunal's decision:</b>	<b>Denied</b> , subject to the exception mentioned in Section II.b, ¶ 22 of Procedural Order No. 5.
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<b>Request No.</b>	4.
<b>Document / Category of Documents:</b>	<p>Minutes of the Board of Directors discussing any change to the original business plan and/or any the 4 projects identified in section II.E (DID/Conferencing Project; International Traffic Termination Project; Competitive Tandem Services Project; Retail Service Offering) comprising the Claimants' intended business. This request includes any presentations made to the Board and/or any documents circulated at the sessions.</p> <p>This request refers to documents prepared between 11 July 2014 and 8 April 2015.</p>
<b>Justifications:</b>	<p>The Respondent submits that the requested documents are relevant to the case and material to its outcome because they contain contemporaneous evidence of the Claimants' intended businesses and will allow the Respondent to corroborate/contest several allegations of fact made in the SoC and witness statements regarding the intended scope of operations in Mexico, including the 4 projects comprising the claim for damages that the Claimants' contend would have been pursued but for the measures.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the documents exist and are in the possession, custody or control of the Claimants because it is reasonable to assume that any material change in the business plan would have been discussed and would be subject to the approval of the Board.</p>
<b>Objections:</b>	<p>There are no documents responsive to this Request. Claimants further object to this Request on the basis that it fails to comply with Article 3(c)(ii) of the IBA Rules. Respondent's statement explaining its belief about why the Documents exist and are in the custody, possession, or control is pure conjecture. It is not reasonable to assume that a closely-held company, in which one individual possesses majority control, would make decisions only, or even primarily, through highly formalized board meetings. Insisting on the formality of decision-making only at recorded, official board meetings is neither legally required nor the custom and practice of Mr. Nelson.</p>
<b>Reply:</b>	<p>It is inconsistent for the Claimants to contend that there are no responsive documents and, at the same time, object to the request on the basis of an alleged failure with Article 3(c)(ii). The Respondent respectfully request</p>

	<p>the Tribunal to order the Claimants to clarify whether there are any responsive documents to this request.</p> <p>Mexico further submits that it is entirely reasonable to assume, even in the case of a closely held company, that major decisions be made by the company's governing bodies –such as the board of directors– and memorialized in corporate records –such as the minutes of the meetings of the board of directors.</p>
<b>Tribunal's decision:</b>	<p><b>Granted.</b></p> <p>Claimants are requested to clarify whether or not there are documents responsive to this request.</p>

<b>Request No.</b>	5.
<b>Document / Category of Documents:</b>	<p>Internal documents and records of communications between Tele Fácil's senior management, directors, shareholders and/or external advisors, discussing the revised business plan and/or any of the 4 projects identified in section II.E (DID/Conferencing Project; International Traffic Termination Project; Competitive Tandem Services Project; Retail Service Offering).</p> <p>This request refers to documents prepared between 11 July 2014 and 8 April 2015</p>
<b>Justifications:</b>	<p>Same justification as in previous request.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the documents exist and are in the possession, custody or control of the Claimants because it is reasonable to assume that any material change in the business plan would have been discussed internally.</p>
<b>Objections:</b>	<p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	<p>See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p>

<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.
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### Alleged agreement between Tele Fácil and Telmex

#### General justification

The Claimants allege that it was essential for Tele Fácil to interconnect with Telmex in order to access the Mexican telecom market.<sup>20</sup> Hence, on 7 August 2013, Tele Fácil formally requested interconnection with Telmex.<sup>21</sup> Shortly thereafter, on 26 August 2013, Telmex responded by offering Tele Fácil its standard framework agreement for interconnection (Telmex Offer) which included symmetrical rates at USD 0.00975 per minute.<sup>22</sup>

The Claimants allege that after extensive negotiations<sup>23</sup>, Tele Fácil and Telmex reached an agreement on all terms for interconnection except two: local number portability charges and indirect interconnection.<sup>24</sup> This agreement was allegedly struck when Tele Fácil partially accepted the Telmex Offer in early July 2014, some 10 months after it was made.<sup>25</sup>

The SoC glosses over the details and timing of these supposedly extensive negotiations and avoids any discussion of the impact on the negotiations of two important events that occurred between the Telmex Offer and Tele Fácil's purported acceptance: *first* on 6 March 2014, Telmex was declared a Predominant Economic Agent (PEA Declaration)<sup>26</sup>, and *second*, on 26 March 2014, IFT set the interconnection rate for the PEA at approximately USD \$0.00172 (the PEA Rate), which was significantly lower than the symmetrical rate included in Telmex Offer.<sup>27</sup>

The significance of these two events is that Telmex would no longer be able to charge Tele Fácil the rate included in the Telmex Offer (i.e., a reciprocal rate of USD \$0.00975), which raises the question of whether the offer was still valid and capable of being accepted by Tele Fácil.

The Claimants rely on the existence of the alleged agreement on rates to argue that IFT incorporated that agreement in Resolution 381 and later failed to enforce that resolution. The

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<sup>20</sup> Statement of Claim, ¶ 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, ¶ 12. The term “symmetrical” in this context means that Tele Fácil would pay the same rate it received from Telmex.

<sup>23</sup> Notice of Arbitration, ¶ 23.

<sup>24</sup> Statement of Claim, ¶¶ 12, 14. At ¶ 14 the Claimants state: “Thus, an agreement was reached between the two companies on all terms, including interconnection rates, except for indirect interconnection and number portability charges.”

<sup>25</sup> Statement of Claim, ¶¶ 85, 152, 165, 216.

<sup>26</sup> Statement of Claim, ¶ 135.

<sup>27</sup> In addition, shortly after Tele Fácil submitted the dispute to IFT for resolution around 11 July 2014, the new Federal Telecommunications and Broadcasting Law (FTBL) was published in the Official Gazette (on 14 July 2014). Importantly, under the newly enacted FTBL, the PEA would not be able to charge for interconnection (zero rate).

negotiations that led to that alleged agreement, the operators' positions, and whether the Telmex Offer survived the PEA Declaration are thus very important facts in this case.

The documents requested under this section are relevant and material for the outcome of the case, because they are necessary to determine the scope of the initial disagreement with Telmex, the extent to which Telmex and Tele Fácil were in agreement on the interconnection rates, the impact of the PEA Declaration and the PEA Rate decision on the negotiations and/or the alleged agreement; whether the alleged agreement between Telmex and Tele Fácil existed; and to determine the scope of the interconnection dispute that IFT was later called upon to decide. These facts are crucial to a good understanding of Resolution 381 and Decree 77.

<b>Request No.</b>	6.
<b>Document / Category of Documents:</b>	Proposals and counter-proposals exchanged by Tele Fácil and Telmex between 1 August 2013 and 11 July 2014 regarding any of the terms for interconnection between the two operators.
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exist and are in the possession, custody or control of the Claimants because they would have been prepared and kept in the ordinary course of business given the importance attributed to the negotiations and interconnection agreement with Telmex.</p>
<b>Objections:</b>	<p>Claimants object on the basis that the Request fails to comply with Article 3(c)(ii) of the IBA Rules. Respondent's representation that the requested documents are not in its possession, custody, or control is not accurate. The materials were previously provided to the IFT as evidence in connection with Tele Fácil's request for resolution of the interconnection dispute between Tele Fácil and Telmex. Further, these documents were attached as C-021 and C-024 to the Statement of Claim.</p>
<b>Reply:</b>	<p>The Respondent has provided the statement required by Article 3(3)(c)(ii) of the IBA Rules.</p> <p>To the extent that the Claimants' objection is based on the alleged inaccuracy of the Respondent's statement that the requested documents are not in its possession, custody or control (Article 3(3)(c)(i)), the Respondent respectfully submits that the objection would only apply to Exhibits C-021 and C-024.</p> <p>The Respondent further observes that the Claimants allege to have engaged in "extensive negotiations" (see general justification) with</p>

	<p>Telmex. Yet, in response to the Respondent’s request for evidence of the proposals and counter-proposals exchanged between the operators during those extensive negotiations, the Claimants appear to be taking the position that said evidence is limited to Exhibits C-021 (Telmex’s original proposal dated 26 August 2013) and C-024 (Tele Facil’s comments to Telmex’s proposal dated 7 July 2013 –i.e., predating Telmex’s proposal by more than a month and half).</p> <p>The Respondent finds it unconvincing that these two exhibits are the only documents with the proposals and counter-proposals made during the “extensive negotiations” between Telmex and Tele Fácil.</p> <p>The Respondent respectfully requests the Tribunal to order the Claimants to (i) confirm whether there are any documents, other than Exhibits C-021 and C-024, that would fall within this request, and (ii) confirm the date of the document submitted as Exhibit C-024.</p>
<p><b>Tribunal’s decision:</b></p>	<p><b>Granted.</b></p> <p>The Tribunal directs Claimants to (i) confirm whether there are any Non-Privileged Documents, other than Exhibits C-021 and C-024, that would fall within this request, and (ii) confirm the date of the document submitted as Exhibit C-024.</p>

<p><b>Request No.</b></p>	<p>7.</p>
<p><b>Document / Category of Documents:</b></p>	<p>Records of communications between Tele Fácil (or any person or entity acting on its behalf) and Telmex (or any person or entity acting on its behalf) between 1 August 2013 and 11 July 2014 regarding:</p> <ul style="list-style-type: none"> <li>a) interconnection with Telmex;</li> <li>b) the Telmex Offer or any other proposal on the terms for interconnection;</li> <li>c) the PEA Declaration and/or the PEA Rate Decision;</li> </ul>
<p><b>Justifications:</b></p>	<p>See general justification. In addition, the requested documents will show whether there were ongoing negotiations between the operators and, in particular, whether there was any contact between them to discuss the Telmex Offer or any alternative after the PEA Declaration.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the requested documents exist and are in the possession, custody or control of the Claimants because the</p>

	<p>Claimants have referred to “extensive negotiations” (¶ 23 of the Notice of Arbitration) with Telmex. The documents would have been prepared and kept in the ordinary course of business given the importance attributed to the negotiations and interconnection agreement with Telmex.</p>
<b>Objections:</b>	<p>Claimants object on the basis that the Request fails to comply with Article 3(c)(ii) of the IBA Rules. Claimants state that portions of the responsive communications between Tele Fácil and Telmex have already been provided by Claimants as part of its Statement of Claim as Exhibits C-021, C-024, and C-058.</p> <p>Claimants also state that other portions of the records of communications are contained in written analyses that constitute privileged communications under Mexico’s Professional Secret Privilege, which would be excluded from production under Article 9(2)(b) of the IBA Rules.</p> <p>With the exception of previously-produced or privileged documents, Claimants do not object to Respondent’s Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	<p>The Respondent has provided the statement required by Article 3(3)(c)(ii) of the IBA Rules.</p> <p>To the extent that the Claimants’ objection is based on the alleged inaccuracy of the Respondent’s statement that the requested documents are not in its possession, custody or control (Article 3(3)(c)(i)), the Respondent respectfully submits that it had no way of knowing whether <i>all</i> the document falling within this request were submitted as exhibits to the SoF. The Respondent respectfully requests the Tribunal to order the Claimants to confirm whether there are any documents, other than Exhibits C-021, C-024 and C-058, that would fall within this request.</p> <p>As for the claim of privilege, please refer to Mexico’s general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p>
<b>Tribunal’s decision:</b>	<p><b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.</p>

<b>Request No.</b>	8.
<b>Document / Category of Documents:</b>	Minutes, notes, memoranda and records of communications, discussing or memorializing meetings between Telmex and Tele Fácil between 1 August 2013 and 11 July 2014 regarding terms for interconnection.
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the requested documents exist and are in the possession, custody or control of the Claimants because they would have been prepared and kept in the ordinary course of business given the importance attributed to the negotiations and interconnection agreement with Telmex.</p>
<b>Objections:</b>	<p>Claimants object on the basis that the Request fails to comply with Article 3(c)(ii) of the IBA Rules. At least one document has already been provided by Claimants as part of its Statement of Claim as Exhibit C-058.</p> <p>Claimants also state that portions of the records of communications are contained in written analysis that constitute privileged communications under Mexico's Professional Secret Privilege, which is excluded from production by Article 9(2)(b) of the IBA Rules.</p> <p>With the exception of previously-produced or privileged documents, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i> , on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.
<b>Tribunal's decision:</b>	<p><b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.</p> <p>Claimants are requested to confirm whether there are any Non-Privileged Documents, other than Exhibits C-058 that would fall within this request.</p>

<b>Request No.</b>	9.
<b>Document / Category of Documents:</b>	Internal documents and records of communications between Tele Fácil's senior management, directors, shareholders and/or external advisors, discussing:

	<p>a) the PEA Declaration; and/or</p> <p>b) the PEA Rate decision; and/or</p> <p>c) the impact of the PEA Declaration and/or the PEA Rate Decision on: the negotiations with Telmex, the Telmex Offer (or any aspect thereof) or any other proposed terms for interconnection.</p> <p>This request refers to documents prepared between 6 March 2014 and 11 July 2014.</p>
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the requested documents exist and are in the possession, custody or control of the Claimants because they would have been prepared and kept in the ordinary course of business given the importance attributed to the negotiations and interconnection agreement with Telmex.</p>
<b>Objections:</b>	<p>Claimants state that the vast majority of the Internal Documents containing an assessment, analysis, opinion or discussion of the PEA Declaration, PEA Rate decision, and the impact of the PEA Declaration and/or Rate Decision on negotiations were prepared by Claimants' Mexican counsel and thus constitute privileged communications under Mexico's Professional Secret Privilege. These materials are thus excluded from production under Article 9(2)(b) of the IBA Rules.</p> <p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	<p>See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p> <p>The Respondent further notes that the fact the documents were prepared by the Claimants' legal counsel does not necessarily mean that the documents are subject to privilege.</p> <p>Finally, the Respondent will observe that Mexico's Professional Secret applies to Tele Fácil's counsel but not to Tele Fácil. In other words, Mexico's Professional Secret does not impede the Claimants from</p>

	disclosing documents prepared by their lawyers. It prohibits lawyers to disclose documents prepared for their clients without the client's consent.
<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.

<b>Request No.</b>	10.
<b>Document / Category of Documents:</b>	<p>Internal documents, records of communication between Tele Fácil's senior management, directors, shareholders and/or external advisors, and minutes of the Board of Directors concerning:</p> <ul style="list-style-type: none"> <li>a) the decision to accept the Telmex Offer;</li> <li>b) the decision to seek IFT's intervention to resolve the interconnection dispute with Telmex.</li> </ul> <p>This request refers to documents prepared between 26 August 2013 and 11 July 2014.</p>
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the requested documents exist and are in the possession, custody or control of the Claimants because they would have been prepared and kept in the ordinary course of business given the importance attributed to the negotiations and interconnection agreement with Telmex.</p>
<b>Objections:</b>	<p>Claimants state that the vast majority of the Internal Documents containing an assessment, analysis, opinion or discussion of the regarding the decision to seek the IFT's intervention to resolve the interconnection dispute were prepared by Claimants' Mexican counsel and thus constitute privileged communications under Mexico's Professional Secret Privilege. These materials are thus excluded from production by Article 9(2)(b) of the IBA Rules.</p> <p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i> , on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.

<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.
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### Aftermath of Resolution 381 and Decree 77

#### General Justification

The Claimants contend that upon the issuance of Resolution 381, Tele Fácil did all that it could to secure Telmex’s compliance with the provisions of the IFT’s resolution [Resolution 381]”. Hence:

- On 9 December 2014, Telmex presented Tele Fácil a “drastically altered version of the agreement that had been ordered by IFT”. (SoC, ¶ 20)
- On 10 December 2014, Telmex sent to Tele Fácil a second interconnection agreement (SoC, ¶ 21)
- Tele Fácil “immediately follows up by sending Telmex for signature and signed, notarized and certified copy of the interconnection agreement as ordered by the IFT in Resolution 381” (SoC, ¶ 21)
- Tele Fácil sought and secured a meeting with the Chief of IFT’s Compliance Unit (SoC, ¶ 22);
- Shortly thereafter, a meeting was convened in mid January 2015 in the office of the IFT Chairman to discuss Telmex’s concerns about enforcement of the interconnection agreement between Telmex and Tele Fácil. (SoC, ¶ 23)
- “During this period [early 2015], representatives of Tele Fácil met with Telmex several times. Two of these meetings included Mr. Javier Mondragón, Telmex’s top litigation and regulatory counsel, who was also known to be personal counsel to the Slim family.” (SoC, ¶ 26)

The documents sought by the Respondent in this section are relevant to the case and material to its outcome because they will establish: (i) that there was an unresolved disagreement between the operators as to the scope of Resolution 381 and the terms that were to be included in the interconnection agreement pursuant to Resolution 381 –particularly whether it encompassed the interconnection rates that were allegedly agreed upon by the operators– and (ii) that IFT’s interpretation of Resolution 381 (which resulted in Decree 77) was warranted and appropriate in the circumstances.

<b>Request No.</b>	11.
<b>Document / Category of Documents:</b>	Internal documents and records of communications between Tele Fácil’s senior management, directors, shareholders and/or external advisors discussing or analyzing any of the following: <ul style="list-style-type: none"><li>a. Telmex’s draft agreement presented to Tele Fácil on 9 December 2014 (referenced at ¶ 20)</li><li>b. Telmex’s second draft interconnection agreement presented to Tele Fácil on 10 December 2014 (referenced at ¶ 21);</li></ul>

	<p>c. Tele Fácil's draft interconnection agreement referred to in ¶ 21 of the Memorial;</p> <p>d. meeting with the Chief of IFT's Compliance Unit (referenced at ¶ 22);</p> <p>e. The alleged meeting in mid January 2015 in the office of the IFT Chairman to discuss Telmex's concerns about enforcement of the interconnection agreement between Telmex and Tele Fácil (referred to at ¶ 23)</p> <p>f. The meetings between representatives of Tele Fácil and Telmex referenced at ¶ 26 of the Memorial.</p>
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent reasonably believes that the requested documents exist and are in the possession, custody or control of the Claimants because they would have been prepared and kept in the ordinary course of business given the importance attributed to the events surrounding the preparation of the documents.</p>
<b>Objections:</b>	<p>Claimants state that many of the Internal Documents discussing or analyzing the draft agreements were prepared by Claimants' Mexican counsel and thus constitute privileged communications under Mexico's Professional Secret Privilege. These materials are thus excluded from production by Article 9(2)(b) of the IBA Rules.</p> <p>Claimants also assert that information regarding the meeting that occurred in mid-January 2015 in the office of the IFT Chairman is in the possession, custody, or control of the IFT or has been unlawfully destroyed by the IFT because of its failure to comply with the Archive Law and the IFT's Guidelines regarding the preservation of electronic evidence. Further, Claimants have been informed that further evidence of the meeting has been prevented from disclosure based on overt acts of intimidation by employees or agents of the Respondent, which caused an anticipated witness to withdraw his cooperation.</p> <p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p>

<b>Reply:</b>	<p>See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p> <p>As for the Claimants’ assertion that “information” regarding the meeting that occurred in mid-January 2015 is in the possession, custody or control of the IFT, the Respondent observes that the request is for “<i>internal documents</i>” and “<i>records of communications between Tele Fácil’s senior management, directors, shareholders and/or external advisors</i>”. These documents are <i>not</i> in the possession, custody or control of the IFT.</p>
<b>Tribunal’s decision:</b>	<b>Denied</b> , subject to the exception mentioned in section II.b, ¶ 22 of Procedural Order No. 5.

<b>Request No.</b>	12.
<b>Document / Category of Documents:</b>	<p>Records of communications between Tele Fácil (or any person or entity acting on its behalf) and Telmex (or any person or entity acting on its behalf) between 26 November 2014 and 8 April 2015 regarding:</p> <ul style="list-style-type: none"> <li>a) compliance with Resolution 381;</li> <li>b) the terms to be included in the interconnection agreement pursuant to Resolution 381;</li> <li>c) any potential request to IFT to intervene;</li> <li>d) interconnection rates.</li> </ul>
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exist and are in possession custody or control of the Claimants because would have been prepared and kept in the ordinary course of business given the importance attributed to the events surrounding the preparation of the documents.</p>
<b>Objections:</b>	<p>With the exception of privileged materials excluded from production, as explained, Claimants do not object to Respondent’s Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	<p>See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p>

	The Respondent further notes that there is no basis for the assertion of privilege over records of communications between Tele Facil and Telmex.
<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.

### Domestic court proceedings

#### General justification

The Claimants have submitted a claim for breach of article 1105 based (*inter alia*) on the alleged denial of justice by the Mexican courts (see, for example, SoC, ¶¶ 466 *et seq.*).

The SoC refers to various domestic legal proceedings initiated by Tele Fácil to challenge the measures at the center of this dispute and/or appeal the decisions issued by Mexico's specialized courts. However, the *amparo*<sup>28</sup> proceedings, such as those described in the SoC, are complex legal proceedings with different types of appeals.

A full understanding of Tele Fácil's legal strategy to seek enforcement of Resolution 381 and challenge Decree 77 and Resolution 127 before domestic courts requires knowledge of all legal challenges filed by the Claimants (e.g., whether they filed additional appeals other than those referred to in the SoC or other forms of legal challenges).

The Claimants assert that Tele Fácil filed *amparos* against Decree 77 and Resolution 127, respectively. However, it is unclear whether the Claimants have pursued any other legal action, such as a civil or commercial complaint against Telmex or other *amparos*, appeals, annulment actions or any other legal recourse to enforce Resolution 381 and challenge Decree 77 and Resolution 127.

The documents are relevant to the case and material to its outcome as they are necessary to the defense of the alleged breach of Article 1105. Particularly, to assess the alleged misconduct of IFT and the specialized telecommunication courts in Mexico.

<b>Request No.</b>	13.
<b>Document / Category of Documents:</b>	Internal documents and records of communications regarding any legal proceeding seeking enforcement of Resolution 381 or challenging Decree 77 and/or Resolution 127,

<sup>28</sup> Amparo proceedings are similar to injunctions.

	This request excludes internal documents and records of communications related to <i>amparo</i> proceedings 1381/2015 and 1694/2015 and the related appeals.
<b>Justifications:</b>	<p>See general justification.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested document exists and is in the possession, custody or control of the Claimants because it is reasonable to assume that Tele Fácil's legal strategy encompassed other legal proceedings to seek enforcement of Resolution 381 and to challenge Decree 77 and Resolution 127, respectively.</p>
<b>Objections:</b>	<p>Claimants state that many of the Internal Documents discussing or analyzing any legal proceeding seeking enforcement of Resolution 381 or challenging Decree 77 and/or Resolution 127 were prepared by Claimants' Mexican and/or U.S. counsel, and thus constitute privileged communications under Mexican and/or U.S. law. These materials are thus excluded from production pursuant to Article 9(2)(b) of the IBA Rules.</p> <p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p>
<b>Reply:</b>	See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i> , on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.
<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.

<b>Request No.</b>	14.
<b>Document / Category of Documents:</b>	<p>Submissions made in any mercantile or civil litigation against Telmex regarding the alleged interconnection agreement reached in 2014 upon Tele Fácil's acceptance of Telmex's Offer.</p> <p>For further clarity, this request includes the memorial and counter-memorial (or analogous documents) filed by Tele Fácil and/or Telmex in mercantile or civil litigation involving the alleged agreement.</p>
<b>Justifications:</b>	See general justification.

	<p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested document exists and is in the possession, custody or control of the Claimants because it is reasonable to assume that Tele Fácil would have pursued civil and/or mercantile action against Telmex for breach of the alleged agreement.</p>
<b>Objections:</b>	<p>Claimants have not pursued mercantile or civil litigation against Telmex. Therefore, no such documents are in Claimants' possession that meet the description of Respondent's Request.</p>
<b>Reply:</b>	<p>The Respondent takes note of the Claimants' assertion that there are no documents falling within this request.</p>
<b>Tribunal's decision:</b>	<p>Considering Respondent's Reply, no decision from the Tribunal is required.</p>

## Corporate restructuring

### General justification

According to the Claimants:

- On 7 January 2010, Tele Fácil was incorporated by Messrs. Nelson, Blanco and Sacasa. The Claimants claim that due to restrictions established in Mexico’s Constitution, Mr. Nelson held 40%, Mr. Blanco 9% and Mr. Sacasa 51%.
- On 11 June 2013, the Mexican constitution was amended and eliminated the restrictions on foreign ownership and control in the telecommunications sector.<sup>29</sup>
- On 29 March 2016, almost three years after the Constitution was amended and after most of the measures at the centre of this dispute occurred, Tele Fácil held a Shareholder’s Meeting that records a transfer of shares between Tele Facil’s shareholders.

The documents filed by the Claimants are not clear on whether the shares were simply transferred to Mr. Nelson or whether they were purchased at a price. Indeed, the only documentation provided by Tele Fácil is a public deed (“*escritura pública*”) of 19 April 2016, which states that the shareholders concluded share purchase agreements, and a draft version of a document named “Shareholder Agreement of Tele Fácil, S.A. de C.V.” (“*Convenio de Accionistas*”) concluded on 1<sup>st</sup> April 2016.<sup>30</sup>

The Respondent intends to argue that the timing of the transfer of shares is suspect (it was done almost three years after the constitutional reform was concluded and shortly before the submission of the NoI) and was done for the purpose of gaining standing to bring a claim on behalf of Tele Facil in these proceedings. The Respondent submits that the requested documents are relevant to the case and material to its outcome because they will establish whether or not the Claimants engaged in subterfuge in order to maximize the damages claim.

<b>Request No.</b>	15.
<b>Document / Category of Documents:</b>	Records of communications between Tele Fácil’s senior management, directors, shareholders and/or external advisors discussing any of the following: <ul style="list-style-type: none"><li>• The decision to transfer shares to Messrs. Nelson and Blanco;</li><li>• Amendments to Tele Fácil’s bylaws to allow for the transfer of the shares.</li></ul>
<b>Justifications:</b>	See general justification.  The Respondent is not in possession of the requested documents.

<sup>29</sup> SoC ¶ 63.

<sup>30</sup> See C-072, p. 7 ¶ I.1 and C-073, respectively.

	<p>The Respondent believes that the requested Documents exist considering the relevance of the Mexican constitutional amendment and the Claimant’s repeated assertions regarding the intended corporate structure. Moreover, the documents would have been prepared and kept in the ordinary course of business.</p>
<b>Objections:</b>	<p>Claimants state that many of the communications regarding the transfer of shares and amendments to the by-laws were prepared by or directed to Claimants’ Mexican and/or U.S. counsel, and thus constitute privileged communications under Mexican and/or U.S. law. These materials are thus excluded from production under Article 9(2)(b) of the IBA Rules.</p> <p>With the exception of privileged materials excluded from production, Claimants do not object to Respondent’s Request and will produce responsive materials in their possession.</p> <p>In addition, Claimants reject Respondent’s assertion that “the timing of the transfer of shares is suspect (it was done almost three years after the constitutional reform was concluded and shortly before the submission of the NoI) and was done for the purpose of gaining standing to bring a claim on behalf of Tele Fácil in these proceedings.”. Respondent does not rely on the transfer of shares as a basis to support Mr. Nelson’s standing to bring claims on behalf of Tele Fácil. Mr. Nelson possessed sufficient control over Tele Fácil well in advance of the transfer of shares to justify his ability to claim on behalf of the company.</p>
<b>Reply:</b>	<p>See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i>, on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.</p> <p>In regard to the Claimants’ rejection of the assertion made in the justification of this request, the Respondent disagrees that Mr. Nelson “possessed sufficient control over Tele Fácil well in advance of the transfer of shares”. Mexico intends to elaborate on this point in its Counter-Memorial and requires the requested documents to support its position.</p>
<b>Tribunal’s decision:</b>	<p><b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.</p>

<b>Request No.</b>	16.
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<b>Document / Category of Documents:</b>	The concluded version of the “Shareholder Agreement of Tele Fácil, S.A. de C.V.” (“ <i>Convenio de Accionistas</i> ”) executed on 1 <sup>st</sup> April 2016.
<b>Justifications:</b>	See general justification.  The Respondent is not in possession of the requested document.  The Respondent believes that the requested Document exists and is in the Claimants’ possession because a draft version of this document was submitted as exhibit C-073.
<b>Objections:</b>	Claimants do not object to Respondent’s request and will produce the requested document.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal’s decision:</b>	Considering Respondent’s Reply, no decision from the Tribunal is required.

<b>Request No.</b>	17.
<b>Document / Category of Documents:</b>	Copies of the share purchase agreements (“ <i>contratos de compraventa</i> ”) mentioned in the public deed of 19 April 2016 submitted by the Claimants as Exhibit C-072.
<b>Justifications:</b>	See general justification.  The Respondent is not in possession of the requested document.  The Respondent believes that the requested Documents exist and are in Claimants’ possession because the public deed submitted by Claimants as Exhibit C-072 mentions that during the shareholders’ meeting held on 29 March 2016 the transfer of shares was supported on share purchase agreements (“ <i>contratos de compraventa</i> ”).
<b>Objections:</b>	Claimants do not object to Respondent’s request and will produce the requested document.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal’s decision:</b>	Considering Respondent’s Reply, no decision from the Tribunal is required.

<b>Request No.</b>	18.
<b>Document / Category of Documents:</b>	Internal documents discussing the transfer of shares and/or the price paid by Mr. Nelson for the additional 20% of the shares.

<b>Justifications:</b>	See general justification.  The Respondent is not in possession of the requested documents.  The Respondent believes that the requested Documents exist considering the relevance of the transaction and because they would have been kept in the ordinary course of business.
<b>Objections:</b>	With the exception of privileged materials excluded from production, as explained, Claimants do not object to Respondent's Request and will produce responsive materials in their possession.
<b>Reply:</b>	See general reply in Section IV. The Respondent maintains that the objection based on privilege/legal impediment should be dismissed, <i>inter alia</i> , on the grounds that the Claimants: (i) failed to identify the specific documents subject to privilege, (ii) failed to provide sufficient information to assess the objection under Article 9(2)(b) of the IBA Rules.
<b>Tribunal's decision:</b>	<b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.

<b>Request No.</b>	19.
<b>Document / Category of Documents:</b>	Documents recording or evidencing the amount paid by Messrs. Nelson and Blanco for the additional shares transferred to them on a shareholders' meeting held on 29 March 2016.
<b>Justifications:</b>	See general justification.  The Respondent is not in possession of the requested documents.  The Respondent believes that the requested Documents exist considering the relevance of the transaction and because they would have been kept in the regular course of business.
<b>Objections:</b>	Messrs. Nelson and Blanco did not purchase their additional share holdings. Therefore, no such documents are in Claimants' possession that meet the description of Respondent's Request.
<b>Reply:</b>	No reply is necessary, as the Claimants have stated that there are no documents falling within this request.
<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.

**Damages**

<b>Request No.</b>	20.
<b>Document / Category of Documents:</b>	The damages model used by Dr. Christian Dippon to estimate damages in these proceedings in its original file format (e.g., the Excel and Stata source models).
<b>Justifications:</b>	<p>The documents are relevant to the case and material to its outcome because they are necessary to the defense to the claim for damages. In particular, they are necessary to understand, evaluate and verify the calculations performed by the expert. Furthermore, Mexico’s expert has observed that some assumptions in the report cannot be fully understood without the model (e.g., indirect cost calculation at ¶ 98 and equipment capacity at ¶ 29)</p> <p>The Respondent will observe that, pursuant to Article 5(2) of the IBA Rules (which apply in this case pursuant to PO 1, section 20.3) the expert reports <i>shall</i> contain <i>inter alia</i>: the “Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided”. The damages model, in its original file format, constitutes one of such documents.</p> <p>The requested document is not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested document exists and is in the possession, custody or control of the Claimants because it was used by the expert to quantify damages in this case.</p>
<b>Objections:</b>	Claimants do not object to Respondent’s Request and will produce the requested model.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal’s decision:</b>	Considering Respondent’s Reply, no decision from the Tribunal is required.

<b>Request No.</b>	21.
<b>Document / Category of Documents:</b>	<p>All documents relied on by Dr. Christian Dippon in preparation of his report, including, but not limited to:</p> <ol style="list-style-type: none"> <li>1. The “Client Data” documents listed in Appendix B (documents 14-20);</li> </ol>

	<ol style="list-style-type: none"><li>2. “Industry Information” documents listed in Appendix B (documents 32, 33, 36-38, 41, 42);</li><li>3. Notes, minutes and recordings from interviews listed in Appendix B (documents 21-31);</li><li>4. “Country Information” documents listed in Appendix B (documents 49-51);</li><li>5. To the extent that they are not included in previous requests, the documents containing the Wainhouse Research and Euromonitor data referred to at ¶ 32 and footnotes 25, 26 of Mr. Dippon’s report and ¶¶ 691-692 of the SoC;</li><li>6. The “Zenofon Written Questions” (See footnote 39 and 41, on page 24 of Mr. Dippon’s report);</li><li>7. The “confirmation from several parties in the form of memorandums of understanding as well as verbal and written agreements” referred to at ¶ 31 of Mr. Dippon’s report.</li><li>8. GLCC data between 2009 and 2016. In particular, mix of free and paid, and revenue per minute, as well as revenues. Used as benchmark for Business Plan (See ¶ 74, expert report C-010);</li><li>9. Documents containing the data obtained from Future Telecom, including but not limited to international traffic by country and rates for Mexico (referred to at ¶ 82 of Dr. Dippon’s expert report);</li><li>10. The agreement with MobileTalk-Q referred to at ¶ 55 of Mr. Dippon’s expert report and any amendments thereto;</li><li>11. The Memorandum of Understanding between Tele Fácil and Future Telecom referred to at ¶ 54 and fn 49 of Mr. Dippon’s expert report and any amendments thereto;</li><li>12. Any other document relied upon by Dr. Dippon not included as an annex to his expert report or submitted by the Claimants as exhibits to their SoC.</li></ol>
<b>Justifications:</b>	<p>The Respondent submits that all the documents relied on by the Claimants’ experts are <i>ipso facto</i> relevant to the case and material to its outcome. They are necessary to properly understand, evaluate and corroborate assertions made in the expert report and the expert’s assessment of damages.</p> <p>Moreover, pursuant to Article 5(2) of the IBA Rules (which apply in this case as per section 20.3 of Procedural Order No. 1) the expert reports <i>shall</i> contain <i>inter alia</i>: the “[d]ocuments on which the Party-Appointed Expert relies that have not already been submitted shall be provided”. This</p>

	<p>includes all the documents listed in Appendix B entitled “Documents Relied Upon”.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	<p>Claimants object to the request for “notes, minutes and recordings from interviews listed in Appendix B” to the extent such request encompass materials covered by the attorney work product doctrine under U.S. law which protects against the disclosure of the mental impressions, conclusions, and opinions of attorneys for interviews conducted in anticipation of or during litigation.</p> <p>Claimants further object to the production of the Wainhouse Research and Euromonitor reports because the reports are subject to U.S. Copyright protections and are available in the public domain. It would be unduly burdensome under Article 9(2)(b) and a violation of Article 3(3)(c) of the IBA Rules to require Claimants to procure a copy of the report for Respondent’s use when the reports may be purchased by the Respondent directly.</p> <p>Claimants do not object to the balance of Respondent’s Request and subject to these objections, Claimants will produce the documents in the numbered list that it has not already produced with the Statement of Claim, as well as any other materials that Dr. Dippon relied upon in the preparation of his report.</p>
<b>Reply:</b>	<p>The Respondent will start by pointing out that the vast majority of the documents covered in this request are listed in Appendix B to Dr. Dippon’s expert report entitled “DOCUMENTS RELIED UPON”.</p> <p>The Respondent will also observe that the Claimants’ experts are <i>required</i>, under Article 5(2)(e) of the IBA Rules, to submit all the documents on which they relied.</p> <p style="text-align: center;"><b>Article 5 Party-Appointed Experts</b></p> <p style="text-align: center;">[...]</p> <p style="text-align: center;">2. The Expert Report <u>shall contain</u>:</p> <p style="text-align: center;">[...]</p> <p style="text-align: center;">(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information</p>

	<p>used in arriving at the conclusions. <u>Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;</u></p> <p>[...] [Emphasis added]</p> <p>The Respondent’s request for “notes, minutes and recordings from interviews listed in Appendix B” is, therefore, entirely appropriate. Moreover, the Claimants cannot, with a straight face, claim privilege over documents that were provided or obtained by its experts and relied upon in the preparation of their respective reports. As a matter of fairness, if the documents/information were available to the Claimants’ expert they should be made available Respondent’s expert.</p> <p>The documents from Wainhouse Research and Euromonitor are also listed in “Appendix B: Documents Relied Upon” and thus covered by the requirement of Article 5(2)(e) of the IBA Rules. Furthermore, it would be overly onerous for the Respondent to find and purchase the documents that Dr. Dippon relied upon simply to corroborate the assertions made in the expert report in relation to these documents.</p>
<p><b>Tribunal’s decision:</b></p>	<p><b>Granted</b> except for documents deemed privileged according to the standard set by the Tribunal in Section II.b., ¶¶ 19-20 of Procedural Order No. 5.</p>

<p><b>Request No.</b></p>	<p>22.</p>
<p><b>Document / Category of Documents:</b></p>	<p>Damages models used by Dr. Elisa Mariscal to estimate amount of damages in its original file format.</p> <p>This request includes the damages model as well as the econometric model (or models) used to extrapolate trends from the U.S. to Mexico.</p>
<p><b>Justifications:</b></p>	<p>The documents are relevant to the case and material to its outcome because they are necessary to understand and evaluate the Claimants’ expert report, in particular, the calculations performed by the expert. Moreover, some of the assumptions used in the damages calculations cannot be determined without the model, e.g., parameter “C” (¶123 of Ms. Mariscal’s report) and the implication of the soft ramp-up of traffic (See ¶129, C-011), which has not been used nor explained in previous formulas or tables.</p> <p>The Respondent will observe that, pursuant to Article 5(2) of the IBA Rules (which apply in this case pursuant to PO 1, section 20.3) the expert reports <i>shall contain inter alia</i>: the “[d]ocuments on which the Party-Appointed Expert relies that have not already been submitted shall be provided”. The damages model, in its original file format, constitutes one of such documents.</p>

	<p>The requested document is not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested document exists and is in the possession, custody or control of the Claimants because it was used by the expert to quantify damages in this case.</p>
<b>Objections:</b>	Claimants do not object to Respondent's Request and will produce the requested models.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.

<b>Request No.</b>	23.
<b>Document / Category of Documents:</b>	Model used to calculate market share in Table 10 in its original file format.
<b>Justifications:</b>	<p>The requested document is relevant and material to the outcome of the case. It is needed by Mexico's expert to corroborate Ms. Mariscal's calculations, understand the assumptions used in such calculations and how it relates to the rest of the damages hypothesis.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report. (See ¶132 expert report C-011)</p>
<b>Objections:</b>	Claimants do not object to Respondent's Response and will produce the requested model.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.

<b>Request No.</b>	24.
<b>Document / Category of Documents:</b>	<p>All documents relied on by Dr. Elisa Mariscal in her report, including, but not limited to:</p> <ol style="list-style-type: none"> <li>1. Documents containing the examples of successful tandem providers referred to at ¶ 17 of Dr. Mariscal's report;</li> </ol>

	<ol style="list-style-type: none"> <li>2. Document(s) containing Tele Facil’s proposal indicating that the negotiable share was expected to fall between 20-25% (¶ 112-114)</li> <li>3. The data series, documents and models from IFT cited in the Bibliography and Data Sources sections in Dr. Mariscal’s expert report;</li> <li>4. IFT data on net-call recipients (NCR) referred to at ¶ 97 and footnote 14.</li> <li>5. The Interconnection technical layout for Tele Fácil as assumed by expert report C-011.</li> <li>6. Tele Fácil's proposal indicating that the negotiable share was expected to be within 20%-25% which serves as the basis for calibrating the model (See ¶112-114, Dr. Mariscal’s expert report).</li> <li>7. List of successful tandem providers, referred as “several successful tandem providers” without naming any (See ¶ 17, Dr. Mariscal’s expert report).</li> </ol>
<p><b>Justifications:</b></p>	<p>The Respondent submits that all the documents relied on by the Claimants’ experts are <i>ipso facto</i> relevant to the case and material to its outcome. They are necessary to properly understand, evaluate and corroborate assertions made in the expert report and the expert’s assessment of damages.</p> <p>Moreover, pursuant to Article 5(2) of the IBA Rules (which apply in this case pursuant to PO 1, section 20.3) the expert reports <i>shall</i> contain <i>inter alia</i>: the “Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided”.</p> <p>The Respondent further submits that it is entitled to provide its expert with the same information that was provided to the Claimants’ expert to ensure that both reports are in equal footing.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<p><b>Objections:</b></p>	<p>Claimants do not object to Respondent’s Request and will produce the documents in the numbered list and any other materials that Dr. Mariscal intends to discuss at the hearing in this matter.</p>
<p><b>Reply:</b></p>	<p>The Respondent will only observe that if Dr. Mariscal intends to discuss “any other materials” at the hearing, she (or the Claimants) should have submitted them as annexes to her report (or as exhibits to the Claimants’</p>

	pleadings). The Respondent will strenuously object to any discussion of any evidence not in the record, even if the evidence has been produced in response to a request for documents.
<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.

<b>Request No.</b>	25.
<b>Document / Category of Documents:</b>	Records of communications, draft proposals, MoU's and concluded agreements between Tele Fácil and other operators (including Telefonica) regarding the negotiations referred to at ¶ 127 of Dr. Mariscal's expert report.
<b>Justifications:</b>	<p>The requested documents are relevant to the case and material to its outcome. They are required by Mexico's damages expert to evaluate the estimated demand for Competitive Tandem Services and the viability of the project (see ¶ 127 of Dr. Mariscal's expert report).</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	<p>Claimants do not object to Respondent's Request and will produce responsive materials in their possession.</p> <p>Additionally, Claimants refute any suggestion or implication that Dr. Mariscal's conclusions are premised on the existence of "communications, draft proposals, MoU's and concluded agreements between Tele Fácil and other operators."</p>
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.

<b>Request No.</b>	26.
<b>Document / Category of Documents:</b>	Invoices and inventory with cost details of the equipment purchased by Tele Fácil switching facilities in Mexico City, Guadalajara and Monterrey (planned and actually installed).
<b>Justifications:</b>	The documents are relevant to the case and material to its outcome. The Claimant asserts that it had made significant efforts to commence

	<p>operations in Mexico, including “investing in necessary switching and other equipment” (¶ 106 of the SoC)</p> <p>The documents are required by Mexico’s expert to determine the amount invested, Tele Fácil’s expenditure requirements (actual and planned) as well as to assess the equipment’s’ sufficiency for the proposed business operations.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they would have been kept in the regular course of business.</p>
<b>Objections:</b>	Claimants do not object to Respondent’s Request will produce responsive documents in their possession.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal’s decision:</b>	Considering Respondent’s Reply, no decision from the Tribunal is required.

<b>Request No.</b>	27.
<b>Document / Category of Documents:</b>	Draft and final interconnection agreements, including Memoranda of Understanding, letters of intent or like documents, between Tele Fácil and other operators aside from Telmex.
<b>Justifications:</b>	<p>According to the SoC (¶106) Tele Fácil had entered negotiations to interconnect with other relevant carriers in Mexico. Dr. Mariscal’s expert report also refers to this alleged fact at ¶¶ 89 and 127 of her report.</p> <p>The requested documents are relevant to the case and material to its outcome as the Respondent intends to challenge the Claimants’ contention that it was or would have been ready to commence operations shortly after the interconnection dispute with Telmex was resolved.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because the Claimants have alluded to interconnection negotiations with other operators (see references above).</p>
<b>Objections:</b>	Claimants do not object to Respondent’s Request and will produce responsive documents in their possession.

	<p>Claimants refute, however, any suggestion that the status of draft and final interconnection agreements between Tele Fácil and other operators aside from Telmex is indicative of Tele Fácil's ability to commence operations shortly after the interconnection dispute with Telmex was resolved because the process of obtaining interconnection from carriers other than Telmex could be completed rapidly by opting into the terms and conditions contained in a preexisting interconnection agreement. Therefore, it was not necessary for Tele Fácil to have expended the same level of effort on obtaining interconnection agreements from carriers other than Telmex.</p>
<b>Reply:</b>	<p>No reply is necessary, as the Claimants have agreed to produce the requested documents.</p>
<b>Tribunal's decision:</b>	<p>Considering Respondent's Reply, no decision from the Tribunal is required.</p>

<b>Request No.</b>	28.
<b>Document / Category of Documents:</b>	Full interconnection agreement with Nextel with interconnection rates (i.e., prices).
<b>Justifications:</b>	<p>The documents are relevant to the case and material to its outcome. The Claimants have relied on the existence of an interconnection agreement with Nextel (submitted as Exhibit C-032) to contend <i>inter alia</i> that Tele Fácil was ready and able to commence operations (e.g., ¶ 106). However, the agreement provided as Exhibit C-032 is incomplete as it does not specify the interconnection rates (i.e., prices) which is a crucial element of an interconnection agreement. Price information is necessary in order to determine interconnection costs (Nextel presumably would have charged a fee for the service of delivering Tele Fácil's traffic to Telmex), a major cost component in any assessment of damages.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	<p>Claimants object to Respondent's Request, pursuant to Article 3(3)(c) of the IBA Rules, on the basis that the interconnection agreement with Nextel has already been provided by Claimants as Exhibit C-032.</p>

	Claimants do not object to the balance of Respondent’s request and will produce the additional documents containing the rates.
<b>Reply:</b>	<p>As noted in the justification, no interconnection agreement is complete without an agreement on rates. Exhibit C-032 does <i>not</i> include interconnection rates. Instead, it states that “NEXTEL and TELE FACIL agree that the corresponding rates will be negotiated and agreed upon at a later time.” (See Annex A on p. 35). This additional agreement on rates is an integral part of the interconnection agreement (i.e., Exhibit C-032).</p> <p>To be clear, the Respondent is requesting the full agreement with Nextel, <i>including</i> any subsequent agreement on interconnection rates struck between Nextel and Tele Fácil.</p>
<b>Tribunal’s decision:</b>	<p><b>Granted.</b></p> <p>The Tribunal takes note that the interconnection agreement with Nextel has already been provided by Claimants as Exhibit C-032. Claimant shall provide Respondent with the interconnection rates of Exhibit 0-032 as well as any subsequent agreement on interconnection rates struck between Nextel and Tele Fácil.</p>

<b>Request No.</b>	29.
<b>Document / Category of Documents:</b>	Long-term contracts with “various vendors” related to Tele Fácil’s divestiture/exit/salvage efforts referred to at ¶ 25 of Mr. Dippon’s report.
<b>Justifications:</b>	<p>The requested documents are relevant to the case and material to its outcome as they are necessary to determine the amount of revenue arising from the divestiture.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	<p>Claimants do not object to Respondent’s Request and will produce responsive documents in their possession.</p> <p>Additionally, Claimants observe that the request for contracts with vendors referred to in Request No. 29 is subsumed within those requested in Request No. 31.</p>
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.

	<p>The Respondent will observe, however, that request 29 is <i>not</i> necessarily subsumed in request 31. Request 29 is for contracts related to Tele Facil’s divestiture efforts, whereas Request 31 is concerned with invoices and contracts related to the installation of equipment, rent of facilities, payroll and any other incurred costs related to the commencement of operations in Mexico City, Guadalajara and Monterrey.</p> <p>If there are any documents that are responsive to Request 29 <i>and</i> Request 31, the Respondent respectfully requests that those documents be identified and included in the response to Request 29.</p>
<b>Tribunal’s decision:</b>	Considering Respondent’s Reply, no decision from the Tribunal is required.

<b>Request No.</b>	30.
<b>Document / Category of Documents:</b>	Records of communications between the “various vendors” referred to at ¶ 25 of Mr. Dippon’s report with which Tele Fácil had allegedly entered into long-term contracts.
<b>Justifications:</b>	<p>Same justification as previous request.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	Claimants do not object to Respondent’s Request and will produce responsive documents in their possession.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal’s decision:</b>	Considering Respondent’s Reply, no decision from the Tribunal is required.

<b>Request No.</b>	31.
<b>Document / Category of Documents:</b>	Invoices and contracts related to the installation of equipment, rent of facilities, payroll and any other incurred costs related to the commencement of operations in Mexico City, Guadalajara and Monterrey, between the 17 May 2013 and 15 January 2015.
<b>Justifications:</b>	The requested documents are relevant to the case and material to its outcome as they will be used by Mexico’s damages expert to estimate costs for its alternative valuation.

	<p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	Claimants do not object to Respondent's Request and will produce responsive documents in their possession.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.
<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.

<b>Request No.</b>	32.
<b>Document / Category of Documents:</b>	<p>Records of communications between Tele Facil or any of its shareholders (or any person or entity on their behalf) and the following companies identified in Mr. Dippon's expert report regarding business opportunities with Tele Fácil in Mexico:</p> <ul style="list-style-type: none"> <li>a) Zenofón;</li> <li>b) No Cost Conferencing;</li> <li>c) SIP Meeting;</li> <li>d) Alpine Audio Now;</li> <li>e) FreeConferenceCall</li> <li>f) redIt;</li> <li>g) Future Telecom.</li> </ul>
<b>Justifications:</b>	<p>The requested documents are relevant to the case and material to its outcome. The Claimant relies on alleged negotiations and planned business dealings with the aforementioned companies to buttress their claim for damages. Several statements as to the expectations and/or intentions of those entities have been included in Dr. Dippon's expert report (e.g., ¶¶ 41-50). The requested documents are required to corroborate/challenge these assertions.</p> <p>The requested documents are not in the possession, custody or control of the Respondent.</p> <p>The Respondent believes that the requested documents exists and are in the possession, custody or control of the Claimants because they are referred to in the expert report.</p>
<b>Objections:</b>	Claimants do not object to Respondent's request and will produce responsive documents in their possession.
<b>Reply:</b>	No reply is necessary, as the Claimants have agreed to produce the requested documents.

<b>Tribunal's decision:</b>	Considering Respondent's Reply, no decision from the Tribunal is required.
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