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## **1 ARTICLE XVIII**

### **1.1 Text of Article XVIII**

#### ***Article XVIII***

##### *Additional Commitments*

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

### **1.2 Function of Article XVIII**

1. In *US – Gambling*, the Panel observed the following with respect to the function of Article XVIII of the GATS:

"In drafting Part III of the GATS, the aim seems to have been to capture all types of trade restrictions and to establish a mechanism for scheduling specific commitments in relation to them. In Articles XVI and XVII, specific commitments are defined in a way that allows the identification of trade restrictions (in other words, limitations). Therefore, if a Member undertakes a full market access or a full national treatment commitment, it must not apply any measure that would be inconsistent with the provisions of those articles. Nonetheless, the drafters seem to have realized that there may be other types of restrictions that would not be covered by the disciplines of Articles XVI and XVII. In other words, there could be restrictions that would not be

discriminatory and, therefore, would escape the provisions of Article XVII; nor would they be one of the six types of measures referred to in subparagraphs 2(a) to (f) of Article XVI. Apparently, it was considered that such measures would mainly, but not exclusively, relate to qualifications, standards and licensing matters. At the same time, it appears that it may not have been possible to arrive at a clear definition of the restrictive nature of such measures so that disciplines similar to those of Articles XVI and XVII could be established. It seems, therefore, that it was considered best to simply provide a legal framework for Members to negotiate and schedule specific commitments that they would define, on a case-by-case basis, in relation to any measures that do not fall within the scope of Article XVI or XVII. That framework appears to have been provided in Article XVIII."<sup>1</sup>

### 1.3 Relationship between Article XVIII and other provisions of the GATS

2. In *Mexico – Telecoms*, the Panel rejected the view that a limitation inscribed in either the market access or the national treatment column in a Member's schedule cannot limit the applicability of an additional commitment under Article XVIII. The Panel found:

"Section 2.1 [of the Reference Paper] requires that the interconnection obligation be 'on the basis' of these specific commitments undertaken (*'respecto de los cuales se contraigan compromisos específicos'*). The wording of this phrase suggests that the specific commitments should in some way 'justify' or 'provide the scope for' the interconnection obligation. This conclusion is supported by an examination of the phrase in its context. The wording of Section 2 of the Reference Paper as a whole suggests that the purpose of the interconnection obligation is to enable suppliers supplying a basic telecommunications service committed by a Member in its schedule not to be restricted by unduly onerous interconnection terms, conditions and rates imposed by a major supplier. It would not appear to be the purpose of Section 2 to provide the benefits of the interconnection to a supplier in *any* telecommunications subsector or mode of supply, simply because *other* subsectors and modes of supply have been committed. It would seem reasonable to conclude, therefore, that the right to interconnect accorded by Section 2.2 should apply where, *with respect to a particular subsector and mode of supply*, a Member's market access and national treatment commitments specifically accords the right to supply that service. We therefore do not agree with the United States argument that a limitation inscribed in either the market access or the national treatment column cannot limit the applicability of an additional commitment under Article XVIII.

We have found in previous sections that Mexico has undertaken specific commitments – national treatment and market access – with respect to the supply of services on a facilities basis (not over capacity leased by an operator) in Mexico. We therefore find that these specific commitments form the 'basis' on which Section 2.1 of Mexico's Reference Paper applies to the services at issue supplied on a *facilities* basis in Mexico."<sup>2</sup>

3. In *Mexico – Telecoms*, the Panel also rejected the view that commitments to take future actions should be scheduled as additional commitments under Article XVIII. The Panel stated:

"In addressing Mexico's argument, we recall first that Article XX:1(d) relates to time-frames for implementation of commitments under *either* Articles XVI, XVII, or XVIII. We therefore cannot subscribe to Mexico's view that *any* future actions should be scheduled only as additional commitments; we described earlier how Members have, in fact, consistently inscribed time-frames in the market access column of their schedules. Second, Mexico has inscribed its commitment in the market access column, and not in the column relating to additional commitments. This difference indicates Mexico's intention to make a commitment on market access (that is, to permit the commercial presence of 'commercial agencies'), and not an additional commitment 'with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII'. Third, the Secretariat note mentioned by Mexico merely contains

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<sup>1</sup> Panel Report, *US – Gambling*, para. 6.311.

<sup>2</sup> Panel Report, *Mexico – Telecoms*, paras. 7.94-7.95.

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

#### **1.4 The "Reference Paper" on Basic Telecommunications<sup>4</sup>**

##### **1.4.1 Section 1.2 – Anti-competitive practices**

###### **1.4.1.1 Concept of "anti-competitive practices"**

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

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

5. The Panel in *Mexico – Telecoms* also supported its reasoning in paragraph 4 above by considering the concept of "major supplier":

"The use of the term 'major supplier' in Section 1, examined in the light of the definition of this term, suggests that the focus of 'anti-competitive practices' is on a supplier's 'ability to materially affect the terms of participation (having regard to price and supply)' – in other words, on monopolization or the abuse of a dominant position in ways that affect prices or supply. The definition of a major supplier in terms of suppliers 'alone or together' and the requirement in Section 1.1 of 'preventing suppliers from engaging in or continuing anti-competitive practices' also suggests that *horizontal coordination* of suppliers may be relevant. This is supported by the requirement in Section 1.1 of 'preventing suppliers from engaging in or continuing anti-competitive practices'. "<sup>7</sup>

6. The Panel in *Mexico – Telecoms* was thus able to find that the term "anti-competitive practices" in Section 1 of Mexico's Reference Paper "includes practices in addition to those listed in Section 1.2, in particular horizontal practices related to price-fixing and market-sharing agreements."<sup>8</sup>

###### **1.4.1.2 Practices required under a Member's law**

7. In determining whether or not the actions by the major supplier of telecommunications services in Mexico constituted "anti-competitive practices" because it was required under national law to act in this way, the Panel in *Mexico – Telecoms* found that Section 1.2 contains an explicit example of an anti-competitive practice, cross-subsidization, which has typically been a government requirement. The Panel stated:

"Cross-subsidization was and is a common practice in monopoly regimes, whereby the monopoly operator is required by a government to cross subsidize, either explicitly or in effect, usually through government determination or approval of rates or rate structures. Once monopoly rights are terminated in particular services sectors, however, such cross-subsidization assumes an anti-competitive character. This provision, therefore, provides an example of a practice, sanctioned by measures of a

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<sup>3</sup> Panel Report, *Mexico – Telecoms*, para. 7.370.

<sup>4</sup> For the text of the "Reference Paper", see the Section on Article XVIII (Practice).

<sup>5</sup> Panel Report, *Mexico – Telecoms*, para. 7.230.

<sup>6</sup> Panel Report, *Mexico – Telecoms*, para. 7.232.

<sup>7</sup> Panel Report, *Mexico – Telecoms*, para. 7.234.

<sup>8</sup> Panel Report, *Mexico – Telecoms*, para. 7.238.

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

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

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

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

"[P]ursuant to doctrines applicable under the competition laws of some Members, a firm complying with a specific legislative requirement of such a Member (e.g. a trade law authorizing private market-sharing agreements) may be immunized from being found in violation of the general domestic competition law. The reason for these doctrines is that, in most jurisdictions, domestic legislatures have the legislative power to limit the scope of competition legislation. International commitments made under the GATS 'for the purpose of preventing suppliers ... from engaging in or continuing anti-competitive practices' are, however, designed to limit the regulatory powers of WTO Members. Reference Paper commitments undertaken by a Member are international obligations owed to all other Members of the WTO in all areas of the relevant GATS commitments. In accordance with the principle established in Article 27 of the Vienna Convention, a requirement imposed by a Member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from 'continuing anti-competitive practices'. The pro-competitive obligations in Section 1 of the Reference Paper do not reserve any such unilateral right of WTO Members to maintain anti-competitive measures."<sup>11</sup>

10. The Panel in *Mexico – Telecoms* emphasized, however, that particular measures addressed in the case were exceptional, and that the autonomy of Members under Section 1 was not unduly circumscribed:

"Although we find that measures required by a Member under its internal laws may fall within the scope of Section 1, the measures addressed in the case before us are exceptional, and require a major supplier to engage in acts which are tantamount to anti-competitive practices which are condemned in domestic competition laws of most WTO Members, and under instruments of international organizations to which both parties are members. Section 1 is a voluntary, additional commitment to maintain certain 'appropriate' measures, which reserves a degree of flexibility for Members in accepting and implementing such an additional commitment."<sup>12</sup>

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<sup>9</sup> Panel Report, *Mexico – Telecoms*, para. 7.242.

<sup>10</sup> Panel Report, *Mexico – Telecoms*, para. 7.243.

<sup>11</sup> Panel Report, *Mexico – Telecoms*, para. 7.244.

<sup>12</sup> Panel Report, *Mexico – Telecoms*, para. 7.267.

#### **1.4.1.3 Types of measures constituting "anti-competitive practices"**

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

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

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

#### **1.4.1.4 Maintaining "appropriate measures"**

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

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

### **1.4.2 Section 2.1 – Interconnection**

#### **1.4.2.1 "on the basis of the specific commitments undertaken"**

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

"The wording of Section 2 of the Reference Paper as a whole suggests that the purpose of the interconnection obligation is to enable suppliers supplying a basic telecommunications service committed by a Member in its schedule not to be restricted by unduly onerous interconnection terms, conditions and rates imposed by a major supplier. It would not appear to be the purpose of Section 2 to provide the benefits of the interconnection to a supplier in any telecommunications subsector or mode of supply, simply because other subsectors and modes of supply have been committed. It would seem reasonable to conclude, therefore, that the right to interconnect accorded by Section 2.2 should apply where, *with respect to a particular subsector and mode of supply*, a Member's market access and national treatment commitments specifically accords the right to supply that service."<sup>16</sup>

#### **1.4.2.2 Applicability to cross-border supply**

15. The Panel in *Mexico – Telecoms* found that there was no language in Section 2 to suggest that interconnection obligations did not apply to the cross-border supply of international telecommunications services. The Panel noted that in Section 2 there is:

"[N]o reference to the entity that is entitled to be linked to the public telecommunications transport networks or services; no language thus exists that would circumscribe the scope, geographic or otherwise, of the basic

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<sup>13</sup> Panel Report, *Mexico – Telecoms*, para. 7.262.

<sup>14</sup> Panel Report, *Mexico – Telecoms*, para. 7.264.

<sup>15</sup> Panel Report, *Mexico – Telecoms*, para. 7.266.

<sup>16</sup> Panel Report, *Mexico – Telecoms*, para. 7.94.

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

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

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

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

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

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

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

#### **1.4.2.3 "major supplier"**

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

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

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<sup>17</sup> Panel Report, *Mexico – Telecoms*, para. 7.105.

<sup>18</sup> Panel Report, *Mexico – Telecoms*, para. 7.117.

<sup>19</sup> Panel Report, *Mexico – Telecoms*, para. 7.121.

<sup>20</sup> Panel Report, *Mexico – Telecoms*, para. 7.138.

access commitments specifically in 'termination services'; facilities for the termination and interconnection are *essential* to the supply of the services at issue in this case.

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

#### **1.4.2.4 "the ability to materially affect the terms of participation (having regard to price and supply)"**

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

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

#### **1.4.2.5 "control over essential facilities" or "use of its position in the market"**

21. The Panel in *Mexico – Telecoms* found that "[t]he ability to impose uniform settlement rates on its competitors is the 'use' by Telmex of its special 'position in the market', which is granted to it under the ILD Rules."<sup>23</sup>

### **1.4.3 Section 2.2(b) – Interconnection rates**

#### **1.4.3.1 "cost oriented"**

22. In examining the ordinary meaning of the term "cost-oriented", the Panel in *Mexico – Telecoms* stated:

"Rates that are 'cost-oriented' thus suggest rates that are *brought into a defined relation to known costs or cost principles*. Rates that are 'cost-oriented' would not need to equate exactly to cost, but should be founded on cost. The degree of flexibility inherent in the term 'cost-oriented' suggests, moreover, that more than one *costing methodology* could be used to calculate 'cost-oriented' rates."<sup>24</sup>

23. The Panel in *Mexico – Telecoms* found that the ordinary meaning of the phrase "cost-oriented" was confirmed by its special meaning in the telecommunications sector, in particular as expressed in a key ITU recommendation. The Panel stated:

"In sum, Recommendation D.140 requires in its present form that the cost *elements* and the cost *model* both be clearly related to the cost of delivering the service. This special meaning of 'cost-orientated', in the context of the ITU, is thus consistent with the ordinary meaning of the term as it appears in Section 2.2(b) of Mexico's Reference Paper. As both parties to this dispute as well as most WTO Members are

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<sup>21</sup> Panel Report, *Mexico – Telecoms*, para. 7.151.

<sup>22</sup> Panel Report, *Mexico – Telecoms*, para. 7.155.

<sup>23</sup> Panel Report, *Mexico – Telecoms*, para. 7.159.

<sup>24</sup> Panel Report, *Mexico – Telecoms*, para. 7.168.



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

24. The Panel in *Mexico – Telecoms* further noted that the ITU stated in a report that "incremental cost methodologies are becoming the de facto standard for interconnection pricing around the world". The Panel explained:

"These methods focus on the additional future fixed and variable costs that are attributable to the service. Setting rates in line with long run incremental costs reflects the view that the regulator should require prices from dominant or major suppliers that most closely imitate a fully competitive market, where prices are driven down towards marginal or incremental costs.<sup>26</sup> The increasing use of incremental cost methodologies indicates the special meaning that the term 'cost-oriented' is acquiring among WTO Members."<sup>27</sup>

#### **1.4.3.2 "reasonable"**

25. In examining the further requirement that cost-oriented rates be "reasonable", the Panel in *Mexico – Telecoms* found that this term suggested something "judged to be *appropriate or suitable to the circumstances or purpose*."<sup>28</sup> The Panel explained that this meant that interconnection rates should:

"[R]eflect the overall objectives of the provision that the rates represent the costs incurred in providing the service. The word 'reasonable' thus emphasizes that the application of the cost model chosen by the Member reflects the costs incurred for the interconnection service. Flexibility and balance are also part of the notion of 'reasonable'."<sup>29</sup>

#### **1.4.3.3 "having regard to economic feasibility"**

26. The Panel in *Mexico – Telecoms* found that the phrase "having regard to economic feasibility", which qualifies "cost-oriented rates", "serves merely to underline that the major supplier is entitled to rates that allow it to undertake interconnection on an 'economic' basis, that is, to make a reasonable rate of return."<sup>30</sup>

#### **1.4.3.4 Evaluating whether rates are "costs oriented"**

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

"We think it is justified to presume that the aggregate price charged by Telmex for the use of network components, when used for purely domestic traffic, is an indication of the cost-oriented rate, in the sense of Section 2.2(b) of Mexico's Reference Paper, for the use of these same network components in terminating an international call."<sup>31</sup>

28. Applying this methodology (the difference between the aggregate price charged for the use of network components when used for purely domestic traffic, and the price charged for the use of these same network components in terminating an international call), the Panel in *Mexico – Telecoms* found:

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<sup>25</sup> Panel Report, *Mexico – Telecoms*, para. 7.174.

<sup>27</sup> Panel Report, *Mexico – Telecoms*, para. 7.175.

<sup>28</sup> Panel Report, *Mexico – Telecoms*, para. 7.182.

<sup>29</sup> Panel Report, *Mexico – Telecoms*, para. 7.182.

<sup>30</sup> Panel Report, *Mexico – Telecoms*, para. 7.184.

<sup>31</sup> Panel Report, *Mexico – Telecoms*, para. 7.191.



"The evidence reveals that the blended average difference in costs is in the order of 77%. Mindful of the fact that the cost-ceiling figures used are conservative (since they are based in part on *retail* rates for private lines, and Telmex's interconnection rates to cities without competition in call origination), we find that a difference of over 75% above Telmex's demonstrated cost-ceiling is unlikely to be within the scope of regulatory flexibility allowed by the notion of 'cost-oriented' rates, in the sense of Section 2.2(b) of Mexico's Reference Paper."<sup>32</sup>

29. In examining other methodologies for determining whether interconnection rates were "cost-oriented", the Panel in *Mexico – Telecoms* was not convinced that a comparison of international grey-market rates was "fully warranted". It reasoned that "such capacity may be priced at short-term incremental cost (well below long-term incremental cost as required under Mexican law for calculating interconnection charges) and may also result in lower service reliability and quality", even though any "substantial difference in costs" could go some way to support findings under other methodologies.<sup>33</sup> On the other hand, the Panel found that benchmarking which involved a "comparison of the market for wholesale transportation and termination of international calls" in different countries was a "valid method" for examining whether interconnection rates were cost-oriented.<sup>34</sup>

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<sup>32</sup> Panel Report, *Mexico – Telecoms*, para. 7.203.

<sup>33</sup> Panel Report, *Mexico – Telecoms*, para. 7.207.

<sup>34</sup> Panel Report, *Mexico – Telecoms*, para. 7.208.