

MEXICO – MEASURES AFFECTING TELECOMMUNICATIONS SERVICES

Request for the Establishment of a Panel by the United States

The following communication, dated 13 February 2002, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The United States respectfully requests the Dispute Settlement Body (DSB) to establish a panel pursuant to Article 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) in the dispute *Mexico - Measures Affecting Telecommunications Services* (WT/DS204) to examine the matter described in this document. The United States further requests that this panel have the standard terms of reference set out in Article 7.1 of the DSU.

On 17 August 2000, the United States requested consultations with the Government of Mexico pursuant to Article 4 of the DSU and Article XXIII of the *General Agreement on Trade in Services* (GATS) regarding a wide range of measures affecting telecommunications services (WT/DS204/1). The United States and Mexico held these consultations on 10 October 2000. The consultations provided helpful clarifications but did not resolve the dispute.

On 10 November 2000, the United States requested the establishment of a panel pursuant to Article 6 of the DSU. The DSB considered this request at its meeting on 12 December 2000, at which time the Government of Mexico objected to the establishment of a panel. On 10 November 2000, the United States also requested additional consultations with the Government of Mexico pursuant to Article 4 of the DSU and Article XXIII of the GATS regarding additional measures affecting telecommunications services (WT/DS204/1/Add.1). These consultations, held on 16 January 2001, provided additional clarifications but did not resolve the dispute.

Since the United States initially requested consultations, the Government of Mexico has taken steps to address several of the issues on which the United States and Mexico consulted. However, certain measures subject to consultations between the United States and Mexico remain in place. Moreover, Mexico's measures fail to provide for certain action called for by Mexico's GATS commitments and obligations. The United States considers such measures to be inconsistent with Mexico's commitments and obligations under the GATS with respect to trade in basic telecommunications ("basic telecom") services.

In particular, the United States is concerned with the following four categories of issues.

(1) Mexico's Measures Fail to Ensure that Telmex Provides Interconnection to US Cross-Border Basic Telecom Suppliers on Reasonable Rates, Terms and Conditions

Mexico has inscribed specific market access and national treatment commitments for basic telecom services in its GATS Schedule of Commitments, *GATS/SC/56/Suppl.2* (Schedule). Mexico has also incorporated the basic telecom "Reference Paper" into its Schedule as an additional commitment pursuant to GATS Article XVIII.

Sections 2.1 and 2.2 of the Reference Paper require Mexico to impose certain disciplines on its major supplier of basic telecom services (Telmex) in its dealings with other suppliers of basic telecom services that seek to interconnect with its network. In particular, Sections 2.1 and 2.2 require Mexico to ensure that Telmex provides interconnection: at any technically feasible point in the network; under non-discriminatory terms, conditions, and rates; and on terms, conditions and cost-oriented rates that are transparent, reasonable, and sufficiently "unbundled" so that suppliers need not pay for network components or facilities they do not require.

The United States considers that Mexico has not complied with Sections 2.1 and 2.2 of the Reference Paper in connection with the basic telecom commitments that Mexico has undertaken in the GATS, in particular Mexico's commitment to permit foreign basic telecom service suppliers to provide cross-border "facilities-based" voice telephony, circuit-switched data transmission, and facsimile services ("facilities-based services")¹ and cross-border "commercial agency" services.² Specifically:

- The exorbitant 13.5 (US) cents per minute rate – approved by Mexico's telecommunications regulatory body (Cofetel) – that Telmex charges basic telecom service suppliers in the United States for interconnecting their calls to Mexico is neither cost-oriented nor reasonable, currently exceeding cost by 9-10 cents per minute. Telmex's US-Mexico interconnection charge is close to twice as high as the maximum rate it charges Mexican basic telecom service suppliers for interconnecting long-distance domestic calls, including those made from Mexican cities at the US-Mexico border.
- Moreover, the rate that Telmex charges is not sufficiently unbundled since it includes charges for network components and facilities that US basic telecom suppliers do not need to provide cross-border facilities-based or commercial agency services.

Not only has Mexico failed to ensure that Telmex provides interconnection consistent with Sections 2.1 and 2.2 of the Reference Paper, it has adopted measures that either require or empower Telmex to act in a manner incompatible with those provisions.

- For example, Mexico's "International Long Distance Rules", which the Secretariat of Communications and Transportation ("SCT") published in the *Diario Oficial* on 11 December 1996 ("ILD rules") give Telmex, alone among Mexican basic telecom service suppliers, the authority to negotiate the charge that foreign basic telecom suppliers must pay their Mexican

¹ In its Schedule, Mexico made market access and national treatment commitments for "telecommunications services supplied by a *facilities based* public telecommunications network . . . included in subparagraphs (a) [Voice telephony] . . . (c) [Circuit-switched data transmission services] . . . (d) [Facsimile service] . . ." (Emphasis supplied).

² In its Schedule, Mexico made market access and national treatment commitments for "commercial agencies," which it defined as "[a]gencies which, without owning transmission means, provide third parties with telecommunications services by using capacity leased from a public network concessionaire".

counterparts to interconnect telephone calls originating abroad. By law, all Mexican basic telecom suppliers must incorporate this rate in their interconnection agreements with foreign cross-border basic telecom service suppliers and therefore cannot make independent decisions on the rates they charge.

- Moreover, the Government of Mexico, particularly Cofetel, has ignored or rejected alternative rates, terms and conditions for interconnection that US and affiliated Mexican basic telecom suppliers have proposed for cross-border services and instead has approved Telmex's exorbitant 13.5 (US) cents per minute rate and permitted Telmex otherwise to act in a manner that is inconsistent with Mexico's Reference Paper commitments.

For these reasons, the United States considers that Mexico has failed to honour its commitments under Sections 2.1 and 2.2 of the Reference Paper.

(2) Mexico's Measures Fail to Ensure US Basic Telecom Suppliers Reasonable and Non-Discriminatory Access to and Use of Public Telecom Networks and Services

Section 5(a) of the GATS Annex on Telecommunications (Annex) requires Mexico to ensure that service suppliers of other Members can access and use public telecommunications transport networks and services ("public networks and services") on reasonable and non-discriminatory terms and conditions to provide a scheduled service. To this end, Section 5(b) of the Annex requires Mexico to ensure that suppliers can access and use private leased circuits within and across Mexico's border and interconnect those circuits with public networks and services.

Mexico has made cross-border (mode 1) and commercial presence (mode 3) ("domestic") market access and national treatment commitments for basic telecom services provided by both "facilities-based" suppliers (companies that provide basic telecom services over facilities that they own) and "commercial agencies" (companies that provide basic telecom services over lines they lease from "facilities-based" suppliers, such as Telmex).

The United States considers that Mexico has fulfilled its commitments under neither Section 5(a) nor (b) of the Annex for the provision of these scheduled services. Specifically:

(A) Cross-Border Facilities-Based Services

- As described above, Telmex and other Mexican basic telecom services suppliers uniformly impose an exorbitant rate – namely a charge of 13.5 (US) cents per minute – in their contracts with US suppliers for interconnecting their calls from abroad. Moreover, this rate includes "bundled" charges for network components and facilities that foreign basic telecom service suppliers do not need. The excessive, bundled interconnection rate that Mexican suppliers must include in their contracts are not reasonable terms and conditions for accessing and using public networks and services to provide cross-border facilities-based services.
- Mexican basic telecom service suppliers will not make private leased circuits available to their foreign counterparts to provide cross-border facilities-based services into Mexico. Indeed, the ILD rules, together with other Mexican law and regulations,³ prevent Mexican firms from doing so. Mexico's failure to ensure that private leased circuits are available for

³ These include the Federal Telecommunications Law of 18 May 1995, the "Agreement of the SCT establishing the procedure to obtain concessions for the installation, operation or exploitation of interstate public telecommunications networks, pursuant to the Federal Telecommunications Law," published in the *Diario Oficial* on 4 September 1995, Rules for Long Distance Service, published by the SCT in the *Diario Oficial* on 21 June 1996.

cross-border facilities-based services is a further instance in which foreign basic telecom suppliers do not have access to and use of public networks and services on reasonable terms and conditions to provide scheduled cross-border basic telecom services.

- Even if they could lease private lines from Mexican facilities-based suppliers, foreign facilities-based suppliers could not connect those circuits directly into a foreign network, thus preventing them from providing cross-border services over such lines. That is because the ILD rules, together with other Mexican law and regulations,⁴ preclude foreign suppliers from connecting private leased lines to a foreign network. This preclusion is not a reasonable term or condition for providing cross-border facilities-based services. Moreover, the ILD rules do not prevent Mexican facilities-based service suppliers, such as Telmex, from freely connecting the private lines they lease from each other to foreign networks. Because Mexico gives less favorable treatment to foreign facilities-based basic telecom suppliers than to Mexican facilities-based suppliers for purposes of connecting leased lines to foreign networks, Mexico does not ensure that foreign facilities-based suppliers can use public networks and services on non-discriminatory terms and conditions to provide scheduled services.

(B) Cross-Border and Domestic Commercial Agency Services

- Mexican basic telecom service suppliers also will not make private leased circuits available to US or other foreign-owned suppliers who wish to provide domestic or cross-border basic telecom service as commercial agencies. By definition, commercial agencies provide basic telecom services over lines they lease from facilities-based suppliers. But once again, the ILD rules, together with other Mexican law and regulations,⁵ prevent Mexican facilities-based suppliers from providing those lines. Mexico's failure to ensure that private leased circuits are available to provide domestic and cross-border commercial agency services means that foreign basic telecom suppliers do not have access to and use of public networks and services on reasonable terms and conditions to provide scheduled basic telecom services.
- Even if they could lease private lines from Mexican facilities-based basic telecom suppliers, foreign commercial agencies could not connect those circuits directly into a foreign network, thus precluding them from providing commercial agency services to and from Mexico. The ILD rules, together with other Mexican law and regulations,⁶ preclude foreign-owned commercial agencies from connecting private leased lines to a foreign network. This preclusion is not a reasonable term or condition for the provision of cross-border or domestic commercial agency services.
- Moreover, the ILD rules do not prevent Mexican facilities-based service suppliers, such as Telmex, from freely connecting the private lines they lease from each other to foreign networks. Because Mexico gives less favorable treatment to foreign-owned commercial agencies than to Mexican facilities-based suppliers for purposes of connecting leased lines to foreign networks, Mexico does not ensure that foreign-owned commercial agencies can access and use public networks and services on non-discriminatory terms and conditions to provide commercial agency services to and from Mexico.

For these reasons, the United States considers that Mexico has failed to honour its commitments under Sections 5 (a) and (b) of the Annex.

⁴ Id.

⁵ Id.

⁶ Id.

(3) Mexico's Measures Do Not Provide National Treatment to US-Owned Commercial Agencies

Mexico has scheduled GATS Article XVII national treatment commitments for commercial agencies, whether supplied cross-border (mode 1) or through a commercial presence in Mexico (mode 3). Article XVII requires Mexico to provide suppliers of these services from other WTO Members treatment that is no less favorable than it accords to its own like service suppliers. The United States considers that Mexico's ILD rules are inconsistent with Mexico's obligations under GATS Article XVII, as set out below.

- As previously described, the ILD rules – in combination with other measures⁷ – make it impossible for foreign-owned commercial agencies located in the United States or Mexico to obtain private leased circuits or to connect those circuits to a foreign network. As a result, the ILD rules preclude foreign-owned commercial agencies from providing such services in Mexico or across its borders. By contrast, Mexican facilities-based basic telecom service suppliers may freely lease lines to each other for domestic and cross-border basic telecom services and may connect the lines they lease to foreign networks in order to provide those services. As a result, Mexico does not accord basic telecom service suppliers of the United States seeking to provide cross-border or domestic commercial agency services treatment no less favorable than like Mexican suppliers.

For these reasons, the United States considers the ILD rules to be inconsistent with Mexico's commitments under GATS Articles XVII:1, XVII:2, and XVII:3.

(4) Mexico's Measures Do Not Prevent Telmex from Engaging in Anti-Competitive Practices

Section 1.1 of the Reference Paper requires Mexico to maintain appropriate measures to prevent Telmex from engaging in or continuing anti-competitive practices. The United States considers that Mexico has not fulfilled this commitment. Specifically:

- The ILD rules give Telmex sole authority to negotiate the rate that foreign basic telecom service suppliers must pay to their Mexican counterparts to connect their telephone calls in Mexico. By law, all Mexican basic telecom suppliers, including Telmex, must incorporate that rate in their interconnection contracts with foreign cross-border basic telecom suppliers. The ILD rules also ensure that Telmex receives the greatest share of the revenue generated from this charge, regardless of how many calls it interconnects from abroad.

Far from preventing Telmex from engaging in anti-competitive activities, Mexico's rules empower Telmex to engage in monopolistic practices with respect to interconnection rates for cross-border basic telecom services and to create an effective cartel dominated by Telmex to set rates for international interconnection. For these reasons, the United States considers that Mexico has failed to honour its commitments under Section 1.1 of the Reference Paper.

The United States requests that this panel request be inscribed on the agenda for the next regularly-scheduled meeting of the DSB (currently scheduled for 8 March 2002).

⁷ Id.