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## **1 ANNEX ON TELECOMMUNICATIONS**

### **1.1 Text on the Annex on Telecommunications**

#### **Annex on Telecommunications**

##### *1. Objectives*

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

##### *2. Scope*

(a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.<sup>14</sup>

*(footnote original)*<sup>14</sup> This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.

(b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

(c) Nothing in this Annex shall be construed:

- (i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or
- (ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. *Definitions*

For the purposes of this Annex:

(a) 'Telecommunications' means the transmission and reception of signals by any electromagnetic means.

(b) 'Public telecommunications transport service' means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) 'Public telecommunications transport network' means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) 'Intra-corporate communications' means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, 'subsidiaries', 'branches' and, where applicable, 'affiliates' shall be as defined by each Member. 'Intra-corporate communications' in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. *Transparency*

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. *Access to and use of Public Telecommunications Transport Networks and Services*

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).<sup>15</sup>

(footnote original)<sup>15</sup> The term 'non-discriminatory' is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean 'terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances'

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

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

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

- (i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;
- (ii) to protect the technical integrity of public telecommunications transport networks or services; or
- (iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

- (i) restrictions on resale or shared use of such services;
- (ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;
- (iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

- (iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;
- (v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or
- (vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

#### 6. *Technical Cooperation*

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

#### 7. *Relation to International Organizations and Agreements*

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

### **1.2 Application to access and use by scheduled suppliers of basic telecommunications services**

1. In examining which suppliers and services are entitled to access and use public telecommunications transport networks and services, the Panel in *Mexico – Telecoms* observed that:

"[T]he wording of Section 2(a) does not specify that the provision is limited to measures affecting access to and use of public telecommunications transport networks and services by only *certain* services or service sectors. The ordinary meaning of the words in Section 2(a) suggests therefore that the scope of the Annex includes *all* measures that affect access to or use of public telecommunications transport networks and services with regard to *all* services, including basic telecommunications services."<sup>1</sup>

2. Likewise, referring to Section 5(a) of the Annex, the Panel in *Mexico – Telecoms* stated that:

"Section 5 (a) of the Annex states that the obligation to ensure access to and use of public telecommunications transport networks and services shall apply for the benefit of 'any service supplier of any other Member' for the supply of 'a service included in its schedule'. This language does not explicitly exclude suppliers of basic telecommunications services. On the contrary, Section 5(a) speaks of 'any' service supplier. It also speaks of a 'service included' in a Member's schedule which, in the case of any Member, can, and for many Members does, include basic telecommunications services. We consider this to be a further indication that the Annex is not limited in its application to exclude measures ensuring the access to and use of public telecommunications transport networks and services for the supply of any service, including basic telecommunications services."<sup>2</sup>

3. The Panel in *Mexico – Telecoms* observed further that it would be "unreasonable to suppose that the access and use of public telecommunications transport networks and services that is essential to the international supply of basic telecommunications services was not intended to be covered by the Annex." The Panel noted:

"If the Annex did not apply to measures affecting access to and use of public telecommunications transport networks and services for basic telecommunications services, Members could effectively prohibit any supply other than that which originated and terminated within the same suppliers' network, even where commitments were undertaken, thereby rendering most basic telecommunications commitments without economic value."<sup>3</sup>

### 1.3 Section 5(a)

#### 1.3.1 Relationship of paragraph (a) to the other parts of Section 5

4. The Panel in *Mexico – Telecoms*, in assessing the relationship between paragraph (a) and the other paragraphs of Section 5, stated:

"We note that the obligation in paragraph (a) 'shall be applied, *inter alia*, through paragraphs (b) through (f)'. ... An obligation cannot be applied 'through' another provision if that obligation is read in isolation from that provision. For an obligation in one provision to be applied 'through' another provision, it is evident that the two provisions must be interrelated and must inform each other. We read paragraph (a), in other words, as containing an obligation that *informs* paragraphs (b) through (f), and must be read taking into account paragraphs (b) through (f)."<sup>4</sup>

5. In examining further the relationship between paragraph (a) and the other paragraphs of Section 5, the Panel in *Mexico – Telecoms* determined that the "reasonable and non-discriminatory" standard in paragraph (a) applies only to measures that are permissible under paragraph (e):

"We determined earlier that paragraph (a) should be read together with the other paragraphs of Section 5. We note that paragraph (a) addresses 'terms and conditions' for access to public telecommunications transport networks and services, which must

<sup>1</sup> Panel Report, *Mexico – Telecoms*, para. 7.278.

<sup>2</sup> Panel Report, *Mexico – Telecoms*, para. 7.281.

<sup>3</sup> Panel Report, *Mexico – Telecoms*, para. 7.286.

<sup>4</sup> Panel Report, *Mexico – Telecoms*, para. 7.302.

be 'reasonable and non-discriminatory'. Paragraph (e) requires that no condition other than as necessary to achieve any of three policy objectives contained in subparagraphs (e)(i) to (iii) shall be imposed by a Member. We infer that whenever a condition is 'necessary' under paragraph (e), it must, in addition, be 'reasonable and non-discriminatory' under paragraph (a). Conversely, if a condition is not 'necessary' to fulfil at least one of the three policy objectives set out under subparagraphs (i) to (iii), paragraph (e) *prohibits* the imposition of such a condition, which suggests that there may be no need to analyse in that case whether that condition would otherwise be 'reasonable and non-discriminatory'.

...

We conclude that the obligation contained in Section 5(a) informs the other paragraphs of Section 5, and is likewise informed by elements of these paragraphs. We cannot therefore examine what constitutes 'reasonable terms and conditions' for access to and use of public telecommunications transport networks and services in isolation from the question of whether or not a particular condition may be imposed, an issue that is addressed in paragraph (e)."<sup>5</sup>

### 1.3.2 Access and use "on reasonable ... terms and conditions"

#### 1.3.2.1 Whether rates for access and use constitute "terms"

6. The Panel in *Mexico – Telecoms* stated that "the ordinary meaning of the word 'terms' suggests that it would include pricing elements, including rates charged for access to and use of public telecommunications transport networks and services."<sup>6</sup>

#### 1.3.2.2 Whether rates for access and use are subject to examination as "reasonable" terms

7. The Panel in *Mexico – Telecoms* found that rates for access and use can be examined under Section 5 to establish whether or not they constitute "reasonable" terms. The Panel also found that "access to and use of public telecommunications transport networks and services on 'reasonable' terms includes questions of *pricing* of that access and use".<sup>7</sup>

#### 1.3.2.3 Rates for access and use that are "reasonable"

8. The Panel in *Mexico – Telecoms*, in examining when rates for access and use are "reasonable", and applying the criterion to the facts of the case, stated:

"We have previously noted that Mexico's Reference Paper contains obligations additional to those in the Annex. We consider therefore that rates charged for access to and use of public telecommunications transport networks and services may still be 'reasonable', even if generally higher than rates for interconnection that are cost-oriented in terms of Section 2.2(b) of Mexico's Reference Paper. ...

We have already determined in part B of these findings that the rates charged to interconnect United States suppliers of the services at issue to public telecommunications transport networks and services in Mexico exceed cost-oriented rates by a substantial margin. We find that rates which exceed cost-based rates to this extent, and whose uniform nature excludes price competition in the relevant market of the telecommunications services bound under Mexico's Schedule, do not provide access to and use of public telecommunications transport networks and services in Mexico 'on reasonable ... terms'. "<sup>8</sup>

<sup>5</sup> Panel Report, *Mexico – Telecoms*, paras. 7.306 and 7.309.

<sup>6</sup> Panel Report, *Mexico – Telecoms*, para. 7.325.

<sup>7</sup> Panel Report, *Mexico – Telecoms*, para. 7.333, see also paras. 7.331-7.332.

<sup>8</sup> Panel Report, *Mexico – Telecoms*, paras. 7.334-7.335.

## 1.4 Section 5(b)

### 1.4.1 Relationship of paragraph (b) to the other parts of Section 5

9. Recognizing that the relationship of paragraph (b) with the other parts of Section 5 was more "straightforward" than that of paragraph (a)<sup>9</sup>, the Panel in *Mexico – Telecoms* stated:

"The obligations in paragraph (b) apply 'subject to paragraphs (e) and (f)'. We understand this to mean that the obligations in paragraph (b) are *subordinated to*, and are, therefore, *qualified by*, paragraphs (e) and (f). The obligations in paragraph (b) are therefore *subject to* any condition that a Member may impose that is necessary to achieve one of the policy objectives set out in paragraph (e)(i) to (iii).<sup>10</sup> We recall that paragraph (b) is informed also by paragraph (a), and that the obligation in the latter provision to ensure reasonable and non-discriminatory access also applies to paragraph (b).

... We conclude that an obligation arises for a Member under paragraph 5(b) subject to any term or condition that a Member may impose in a manner consistent with the provisions of paragraphs (a) and (e)."<sup>11</sup>

### 1.4.2 Obligation to provide access to and use of private leased circuits

10. The Panel in *Mexico – Telecoms* stated that:

"Whether a supplier is entitled under Section 5(b) to *access to and use of services*, such as private leased circuits, that are offered to the public generally is determined by a Member's scheduled commitments on the service to be supplied. In this respect, the fact that a particular service is restricted under domestic law cannot be invoked under Section 2(c)(ii), since the obligations under Section 5 refer not to domestic law but to scheduled GATS commitments.

The Panel notes that the United States presents evidence that 'private leased circuits' are in fact 'offered to the public generally' in Mexico. Further, the Panel recalls that it has found that, although Mexico has not committed to allow commercial agencies to use leased capacity for cross border supply, it has committed to allow commercial agencies to use leased capacity for the supply of the services at issue. We also recall that Mexico indicates no restriction on the geographic market (i.e. local, long distance, international) for the services that may be supplied by the commercial agencies established in Mexico. Mexico has inscribed no routing restriction – as it did for cross border supply – for supply through commercial presence. Therefore, the Panel considers Mexico to have undertaken commitments on the supply of the services at issue by commercial agencies through commercial presence, for which access to and use of private leased circuits is not only relevant but, by Mexico's own definition in its schedule, is essential. Therefore, we find that Mexico has failed to ensure access to and use of private leased circuits for the supply of the committed services in a manner consistent with the Section 5(b) of the Annex on Telecommunications."<sup>12</sup>

## 1.5 Sections 5(e) and (f)

### 1.5.1 Whether rates for access and use constitute "conditions"

11. The Panel in *Mexico – Telecoms* noted Section 5 (f), which lists examples of "conditions," does not refer to specific pricing measures.<sup>13</sup> It concluded that, since "whether or not to charge, or the existence of a price, does not appear to fit within the meaning of the language of 5(f) and

<sup>9</sup> Panel Report, *Mexico – Telecoms*, para. 7.307.

<sup>10</sup> (*footnote original*) For an interpretation of the words subject to, see also: Appellate Body Report, *Canada – Dairy*, paragraph 134.

<sup>11</sup> Panel Report, *Mexico – Telecoms*, paras. 7.308-7.309.

<sup>12</sup> Panel Report, *Mexico – Telecoms*, paras. 7.380-7.381.

<sup>13</sup> Panel Report, *Mexico – Telecoms*, para. 7.326.

its subparagraphs", pricing measures such as rates are not "conditions" within the meaning of Section 5(e)."<sup>14</sup>

### 1.5.2 Meaning of "necessary" in paragraph (e)

12. The Panel in *Mexico – Telecoms*, in considering the alternative case that rates for access and use were "conditions" as well as "terms", examined the meaning of the term "necessary". It noted that the meaning of "necessary" could range from "indispensable" to achieving a policy goal, to merely "making a contribution" to that policy goal.<sup>15</sup> The Panel found:

"The interpretation of the word 'necessary' in Section 5(e) as meaning 'indispensable' would however leave no room for an analysis of whether terms were 'reasonable'. If cost-based rates were 'indispensable' to reach the policy objective, then these rates surely could not also be unreasonable. Such an interpretation would empty the 'reasonable' standard in Section 5(a) of much of its meaning."<sup>16</sup>

13. The Panel therefore concluded that the meaning of "necessary" in paragraph (e) was closer to "making a contribution" to a policy goal, since then "an examination under paragraph (a) of whether that rate was also "reasonable" would still have meaning."<sup>17</sup>

### 1.5.3 Measures to prevent supply of an unscheduled service in paragraph (e)

14. The Panel in *Mexico – Telecoms* found that paragraph (e)(iii), permitting conditions to be imposed "to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Members' Schedule", does not apply to a measure that simply prevents the supply of a service on which a scheduled commitment has been made.<sup>18</sup>

## 1.6 Section 5(g)

15. In response to the argument that Section 5(g) allowed Mexico as a developing country to place reasonable conditions on access and use, the Panel in *Mexico – Telecoms* observed:

"Section 5(g) recognizes the *right* of developing countries to *inscribe* limitations in their schedules for the objectives recognized in Section 5(g). The Panel notes that Mexico's Schedule of Specific Commitments does not include any limitations referring to Section 5(g) or to the development objectives mentioned therein. Without such limitations in Mexico's Schedule, Section 5(g) does not permit a departure from specific commitments which Mexico has voluntarily and explicitly scheduled."<sup>19</sup>

## 1.7 Relationship between Annex obligations and Reference Paper commitments

16. The Panel in *Mexico – Telecoms* compared Annex obligations and Reference paper commitments in the following terms:

"The Panel noted that, although the obligations in the Annex and the Reference Paper may overlap in certain respects, there are clear differences between the two instruments. First, the Annex sets out general obligations for access to and use of public telecommunications transport networks and services, applicable to *all* Members and *all* sectors in which specific commitments have been undertaken. Reference Paper obligations, as additional commitments, are applicable only by Members that have included them in their schedules, and they apply only to basic telecommunications. Second, while the Annex applies to all operators of public telecommunications transport networks and services within a Member, regardless of their competitive situation, the Reference Paper obligations on interconnection apply only with respect to 'major suppliers'. Third, the Annex broadly deals with 'access to and use of' public

<sup>14</sup> Panel Report, *Mexico – Telecoms*, para. 7.327.

<sup>15</sup> Panel Report, *Mexico – Telecoms*, para. 7.338.

<sup>16</sup> Panel Report, *Mexico – Telecoms*, para. 7.341.

<sup>17</sup> Panel Report, *Mexico – Telecoms*, para. 7.342.

<sup>18</sup> Panel Report, *Mexico – Telecoms*, para. 7.385.

<sup>19</sup> Panel Report, *Mexico – Telecoms*, para. 7.388.

telecommunications transport networks and services, while the Reference Paper focuses on specific 'competitive safeguards' and on 'interconnection'.<sup>20</sup>

In spite of these differences, the Annex recognizes that its provisions relate to and build upon the obligations and disciplines contained in the Articles of the GATS – the Annex states expressly that it 'provides notes and supplementary provisions to the Agreement'.<sup>21</sup> Similarly, many of the provisions of the Reference Paper also draw from and add to existing obligations of the GATS, such as Articles III, VI, VIII and IX and the Annex on Telecommunications. Accordingly, there is a degree of overlap between the obligations of the Annex and the Reference Paper, despite their differences in scope, level of obligations, and specific detail provided. To the extent that the Reference Paper requires cost-oriented interconnection on reasonable terms and conditions, it supplements Annex Section 5, requiring additional obligations as regards 'major suppliers'. The Reference Paper commitments do not in this sense subtract from the Annex or render it redundant.<sup>22</sup>

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<sup>20</sup> Panel Report, *Mexico – Telecoms*, para. 7.331.

<sup>21</sup> (*footnote original*) For example, footnote 2 of the Annex expressly refers to most favoured nation treatment (Article II) and national treatment (Article XVII). Section 4 (Transparency) builds upon Article III (Transparency). The Annex further elaborates on concepts contained in Articles VI (Domestic Regulation), VIII (Monopolies and exclusive service suppliers), and IX (Business Practices).

<sup>22</sup> Panel Report, *Mexico – Telecoms*, paras. 7.331-7.332.