

10-1-2002

Antitrust in the International Telecommunications Sector: The United States Challenges Mexico's Telmex Monopoly

Luz Estella Ortiz Nagle

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ARTICLE

ANTITRUST IN THE INTERNATIONAL TELECOMMUNICATIONS SECTOR: THE UNITED STATES CHALLENGES MEXICO'S TELMEX MONOPOLY

LUZ ESTELLA ORTIZ NAGLE*

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* Associate Professor of Law, Stetson University College of Law. J.D., College of William and Mary; LL.D., Universidad Pontificia Bolivariana (Colombia); LL.M., UCLA Law School; M.A. University of California, Los Angeles. Funding for research on this article was made possible by a Faculty Research Grant from the Stetson University College of Law. I would like to thank research assistants Myra Calo and Eddie Jimenez for their invaluable assistance on this paper, and especially Law Librarians Sally Waters and Dorothy Clark for their indispensable resourcefulness and good cheer. This article is warmly dedicated to Charles Koch, Dudley Warner, Woodbridge Professor of Law at the College of William and Mary, a bright light in my legal education.

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I. INTRODUCTION

In 1997 the United States Trade Representative, Charlene Barshefsky, announced that the United States would move aggressively against Telefonos de Mexico ("Telmex")¹ in an effort to pry open its monopolistic hold on the telecommunications sector in Mexico. The action was in response to what Barshefsky saw as Telmex intentionally hindering two U.S.-backed telecommunications rivals, Alestra and Avantel, from competing in the Mexican marketplace for long-distance telephone service. This marked the first time a telecommunications trade dispute was brought before a multilateral regulatory body.² The two companies, with the backing of Barshefsky, accused Telmex of charging exorbitant interconnection fees (the charge for completing long-distance calls), tacking on local service charges for calls made on competitors' calling cards, and providing substandard connection quality. The dispute arose primarily because as long-distance intercity providers, the two companies had no choice but to pay Telmex for access to its local copper-wire³ telephone network.⁴

The telecommunications industry in Mexico offers an excep-

1. Telefonos de Mexico maintains a very sophisticated webpage at <http://www.telmex.com.mx/> (last visited Sept. 1, 2001) [hereinafter Telmex].

2. Vineeta Shetty, *Fight Club: The Telecoms market in Mexico*, COMM. INT'L, Jan. 1, 2001, at 48.

3. Copper-wire refers to "conventional" telephone lines other than wireless or microwave networks.

4. Brendan M. Case, *Mexico Lowers Telephone Rate*, DALLAS MORNING NEWS, Oct. 7, 2000, at 1F.

tionally lucrative new frontier for telecommunications companies looking to expand into Latin America. During the 1990's, the number of telephone lines doubled and the sector grew four times faster than the rest of the economy.⁵ Noting that only eleven percent of the Mexican population have fixed line telephones⁶ (about ten lines for each one hundred people⁷), a number of telecom analysts projected outstanding growth over the next decade, spearheaded by advances in telephone network technologies and the rapid expansion of wireless services and electronic commerce ventures. Many analysts compare the Mexican and Latin American markets to the United States market of more than a dozen years ago; the earning potential is staggering.

The world of international telecommunications is one of endless maneuvering among rivals to protect market share, out-positioning competition through the making and breaking of international alliances and joint-ventures, and threatening legal action in order to gain leverage and/or force concessions. Telmex epitomizes how powerful corporate entities in Mexico have been protected by the government and used to enrich and protect the personal wealth and political ambitions of the ruling elite. In exchange, the government, which from 1929 until 1990 was the embodiment of the National Revolutionary Party ("PRI"),⁸ protected the interests of Telmex. The challenge that Mexico now confronts is how the symbiotic relationship between the government and its large businesses will give way to the global trade and commerce regimes to which Mexico has become a signatory, namely, the North American Free Trade Agreement ("NAFTA") and the World Trade Organization ("WTO"). Even after its privatization in 1990, Telmex continued to enjoy the protection of the Mexican government by a routine of passive enforcement of Mexican laws that were intended to stimulate competition and foreign investment. The new presidency of opposition party leader Vicente Fox,⁹ however, has signaled a sea of change in how Mexico will conduct itself in the world of multinational corporations and

5. Shetty, *supra* note 2, at 48.

6. *Id.*

7. Anthony DePalma, *Once a Monopoly and Still a Threat*, N.Y. TIMES, Oct. 26, 2000, at W1. That number is compared to about 60 per 100 people in the United States.

8. Rafael X. Zahralddin & C.Todd Jones, *Venture Capital Opportunities and Mexican Telecommunications after the Passage of the NAFTA and the Ley de Inversión Extranjera*, 20 DEL. J. CORP. L. 899, 904 (1995).

9. Vicente Fox ousted the PRI on a reform ticket to become President of Mexico on July 2, 2000.

business, beginning with moves by President Fox to shake up the Telmex strangle hold on the telecommunications sector and lay the groundwork for bringing foreign competition into Mexico. Massing on the border is any number of United States-based telecommunications companies, anxious to establish a foothold on Mexican soil.

This article will delve into how Telmex, with the tacit collusion of the Mexican government, has been able to protect its de facto monopoly in the face of concerted efforts by international telecommunications companies to establish a substantial competitive foothold on Mexican soil. We will examine, by example of the Telmex case, the anti-competition obstacles U.S. ventures must overcome in order to expand into foreign markets, and how the U.S. government can bring pressure to bear on foreign governments to open domestic markets to foreign competition. We will also look at how Telmex has tried to defend itself from antitrust charges brought by the United States before the WTO, and how privatization may proceed in the telecom sector in Mexico under the Fox administration.

II. THE TELECOMMUNICATIONS SECTOR IN MEXICO

The International Telecommunications Union published the following summation of the international telecommunications sector:

The international telecommunications environment has historically been based on a framework of bilateral relations: between countries and latterly between operators. This regime is enshrined in the International Telecommunication Regulations, an international treaty which dates back to the early days of telegraph communications between sovereign states. What is now emerging is a multilateral regime, based on trade principles and captured in the WTO trade in services regime. As a result of this paradigm shift, traditional arrangements for carrying international calls and settling accounts are coming under increasing pressure.¹⁰

According to the Union's report, international telephone calls in 1998 amounted to over ninety billion minutes, with a projected

10. International Telecommunication Union, *Direction of Traffic: Trading Telecom Minutes* (1999), at http://www.itu.int/ITU-D/ict/publications/dot/1999/page4_dot.html (last visited Dec. 15, 2001).

growth to over one hundred billion minutes in 1999.¹¹ Of the calls placed, about seventy-five percent of outgoing international traffic was from twenty-three developed countries, while incoming international calls to the same developed countries accounted for only fifty-seven percent of international traffic.¹² For most of the twentieth century, the service utilities were a cash cow for government insiders, a means for politicians and their family relations to gain wealth and status in the Latin American hierarchy. Because the utilities had a monopoly over the market, there was little concern for providing services and procuring innovation in the vacuum of any competition. But the age of large government bureaucracies running and prospering from huge entities in the service sector is quickly drawing to a close. The end of the large government bureaucracy is due mainly to the inability of the bureaucracy to (1) keep pace with the rapidly changing technologies that drive innovation and efficiency in the market place, and (2) to provide considerable working capital, in an efficient and decisive manner, as a means of holding off competitors flush with money and backed by aggressive foreign investors. Telmex is a case study of how the traditional government-owned or controlled monopolies in Latin America are grudgingly yielding to the new economic and business reality taking hold in the region. Mexico is the second largest trading partner of the United States after Canada, having surpassed Japan in 1999.¹³ The telecommunications battle in Mexico is of particular importance because it is the foundation of a global business infrastructure. Whomever captures market dominance over local phone lines, long-distance and international providers, and Internet and wireless services will be in a position to exert enormous influence over international trade and commerce in the formative years of the new century.

The long-distance telecommunications corridor between the United States and Mexico is one of the busiest and most lucrative in the world,¹⁴ and Telmex has long enjoyed the lion's share of revenues generated from that traffic. But with about twice the number of calls between both countries originating in the United

11. *Id.*

12. *Id.*

13. The U.S. export market to Mexico has been growing at a double-digit rate over the last six years. See Office of the United States Trade Representative, *2000 National Trade Estimate Report on Foreign Trade Barriers*, at http://www.ustr.gov/pdf/2000_mexico.pdf (last visited Dec. 10, 2001).

14. Elliot Blair Smith, *Mexican Phone Company Sets Sights on "Telepirates"*, USA TODAY, June 19, 2001, at 6B.

States, domestic American carriers were anxious for Telmex to lower its connection fees or force Mexican telecommunications regulators to pry open the long distance market to foreign competition.¹⁵ When the Mexican government opened the market to foreign competition in 1997, Telmex reduced connection fees by half. But the rate was still so significantly higher that Barshefsky threatened to file a complaint against Telmex with the WTO on behalf of U.S. companies venturing into the Mexican market.¹⁶

III. TELMEX: THE 800 POUND GORILLA

After ten years of negotiation, Telmex¹⁷ was formed on December 23, 1947, from the fusion of Empresas Teléfonos Ericsson and Compañía Telefónica y Telegráfica Mexicana, S.A. The shares in the new company were divided between Corporación Continental (with capital from investors in the United States holding 51.24 %, and Ericsson, holding 48.75 %), and three Mexican businesses holding 0.05 %.¹⁸ In 1950, there was a move to try to capitalize Telmex with Mexican investors only. In 1956, a regulation was issued requiring Telmex customers to buy shares in the company in exchange for priority in installation of services. That regulation remained in effect until 1990.¹⁹ In 1958, two Mexican businessmen met with Ericsson officials to buy out Ericsson's shares.²⁰ Ericsson's involvement with Telmex ended on August 19, 1958. By 1960, Telmex had close ties with the Mexican presidency, which allowed the company to receive major governmental, financial and technological support, and to become a *de facto*

15. *Id.*

16. *Id.*

17. MELISSA TOMLINSON, *LATIN AMERICAN TELECOMMUNICATIONS: A STUDY OF DEREGULATION AND PRIVATIZATION IN ARGENTINA, CHILE AND MEXICO* 113-115 (1995). As for the early manifestations of telephone and telegraph services in Mexico, the first telephone concession was awarded in 1881. A year later Compañía Telefónica Mexicana S.A. was formed and assumed the license. In 1908, Compañía Telefónica was renamed S.A. A Swedish consortium had been granted an operating license in 1905. While there were smaller local companies operating in the country, these two companies were the only national telephone companies in Mexico. In 1925, International Telephone and Telegraph ITT, from the United States, won a license to take over La Compañía Telefónica y Telegráfica Mexicana. By 1932, ITT "had linked the Mexican system to AT&T in the United States and to other ITT operations in Latin America." Telmex was formed in 1947 when Empresa de Telefonos Ericsson was acquired by a foreign venture. *Id.* For an excellent source written in Spanish on the history and development of Telmex, see RAFAEL RODRÍGUEZ CASTAÑEDA, *OPERACIÓN TELMEX: CONTACTO EN EL PODER* 56 (1995).

18. CASTAÑEDA, *supra* note 17, at 56.

19. *Id.*

20. *Id.*

monopoly.²¹ In fact, public financing was never denied to Telmex and no labor strikes against it were ever successful. A milestone in the technological development of Telmex further entrenched its relationship with the federal government when Mexico hosted the 1968 Olympic Games in Mexico City.²² At that time, the Secretariat of Communications and Transportation ("SCT") overhauled the Telmex infrastructure with the installation of subterranean lines and transmission towers, and built a corporate headquarters for the utility. In 1972, President Echeverría's government acquired fifty-one percent of Telmex's capital stock.²³ In March 1976, the SCT renewed the Telmex concession for thirty years and the company was incorporated into the Communications and Transportation branch of the government.²⁴ The growth of Telmex moved along at a slow rate under the Mexican bureaucracy, until 1985 when the disastrous earthquakes in Mexico City caused more than twenty-five million dollars in damage to the Telmex infrastructure.²⁵ The earthquakes severed 1,060 long distance lines and 14,500 local lines, and destroyed twenty-six Telmex facilities.²⁶ The disaster, however, presented the opportunity for Telmex to modernize its networks and build a new telephone system incorporating fiber-optic and digital microwave technologies.²⁷

When Carlos Salinas came to power in the 1980's, one of his goals was to clean up the poor image of Telmex in order to make Telmex attractive enough to potential investors to privatize it.²⁸ To accomplish this makeover, Telmex's internal organization was split into five operational divisions and four administrative divisions,²⁹ contracts were renegotiated, labor leaders were offered larger stakes in the company,³⁰ and great efforts were made to polish Telmex's reputation.³¹ "As part of the dis-incorporation plan during 1990, authorities took a series of actions of cleaning and decoration that in reality constituted the cherry on the cake

21. *Id.* at 57.

22. *Id.*

23. *Id.* at 58.

24. *Id.*

25. For a concise history of telecommunications in Mexico, see TOMLINSON, *supra* note 17, at 114.

26. CASTAÑEDA, *supra* note 17, at 59.

27. TOMLINSON, *supra* note 17, at 114.

28. CASTAÑEDA, *supra* note 17, at 60.

29. TOMLINSON, *supra* note 17, at 114.

30. Telmex eliminated fifty-seven labor agreements and job categories were cut back from 1000 to 140. Is it possible that the offer of large stakes to labor leaders was intended to keep them quiet?

31. CASTAÑEDA, *supra* note 17, at 62.

destined for future buyers."³² Moreover, tariff schedules were restructured, but in order to do so, the government transferred Telmex from the SCT to the Ministry of Public Finance.

In 1990, the government repealed the tax on consumption, which then allowed Telmex to increase its earnings by sixty-eight percent for local service and one hundred percent for long distance service.³³ More importantly, the Ministry of Public Finance created a new service tax (Impuesto por Prestación de Servicios Telefónicos) ("IPST") equivalent to twenty-nine percent of the company's income. There was a clause initiated that during the five years beginning in 1991, Telmex could retain, and credit, sixty-five percent of that tax as an investment. With another advantage, the company preserved the right to deduct the totality of that twenty-nine percent tax. The revenues from this arrangement made Telmex extremely profitable in subsequent years. Some argue that "the conditions of this IPST violated the Constitution, which expressly established that income obtained by the state through taxes has to be applied for public expenditures. In the case of Telmex, the Ministry of Public Finance, practically gifted to Telmex the money in cash."³⁴ Complimentary to this, a great part of Telmex's debt with foreign investors was shifted to the Mexican government.³⁵

By the time Telmex was ready for the auction block in 1990, Telmex assets had reached 28.5 billion pesos, with profits of 3.3 billion pesos, an eighty-two percent increase from 1989.³⁶ The privatization went through when the Salinas government awarded fifty-one percent control³⁷ to a group comprised of strategic alliances with international entities, including Carso Global Telecom, France Telecom, Williams Communications, and Texas-based SBC Communications (formerly Southwestern Bell), which still holds a 7.6% share.³⁸ The concession was awarded for fifty-one years and granted a virtual monopoly for six years.³⁹ The partnerships provided Telmex with the capital to undertake an additional U.S. \$2.6 billion modernization of its service infrastruc-

32. *Id.* at 61.

33. *Id.* at 62.

34. *Id.* at 63.

35. *Id.*

36. *Id.* at 76-78.

37. TOMLINSON, *supra* note 17, at 115.

38. See the SBC webpage at http://www.sbc.com/International/Global_Investments/0,2951,4,00.html (last visited Dec. 4, 2001).

39. CASTAÑEDA, *supra* note 17, at 67. For a more complete explanation of the terms, see CASTAÑEDA, *supra* note 17, at 82.

ture and helped establish Telmex's primacy in preparation for the entry of competition in the Mexican telecommunications market, when restrictions were lifted by the Mexican government in 1997. An additional sixteen to eighteen billion was spent in 1999 to further modernize Telmex's infrastructure.⁴⁰ Improvements included a nearly complete conversion to a digital network and a drop in the waiting period for installing phone lines from up to two years in 1990, to about twenty-seven days in 1999.⁴¹

As of the first trimester 2001, Telmex had 12,379,667 telephone lines and over 1.1 million data lines⁴² in service nationwide, with an annual service line growth rate of 10.5 percent.⁴³ The Mexican telecommunications market is estimated to be worth in the order of U.S. \$5.7 billion a year.⁴⁴ Telmex's financial performance places it among the top technology companies in the world, with Telmex controlling "58% of the market for international calls originating in Mexico, 68% of the domestic long-distance market, and 97% of the local market,"⁴⁵ including "last-mile" connections in both the residential and business sectors.⁴⁶ More than 6.2 billion calls were made over Telmex lines in 2000, with coverage in more than 105 thousand towns representing approximately 98.6% of Mexico's inhabitants.⁴⁷

According to its 2000 Annual Report, Telmex's assets totaled \$156,886,061,000 pesos.⁴⁸ The booming wireless market in Mexico has also increased Telmex's revenues because wireless providers must pay fees to Telmex in order to complete calls over the Telmex network. Telmex trades on the New York Stock Exchange and has proven to be a consistent and popular stock for telecommuni-

40. See Mensaje de Director, available at http://www.telmex.com/internos/estoes/esto_mensaje.htm (last visited Dec. 1, 2001). See also Shetty, *supra* note 2, at 48.

41. Shetty, *supra* note 2, at 48.

42. *Telmex Announces Agreement to Reduce Mexico-U.S. Settlement Rates*, BUSINESS WIRE, May 30, 2001, at 1.

43. See Telmex, *Que es Telmex*, available at <http://www.telmex.com/internos/estoes/quees.htm> (last visited Dec. 1, 2001).

44. Simeon Tegel, *Cease Fire*, LATIN TRADE, Sept. 2001, available at LEXIS, News File.

45. Elizabeth Malkin, *Mexico's 800-pound Gorilla*, BUS. WK., June 18, 2001, at 113.

46. James F. Smith, *Telmex, Rivals Reach Accord to Cut Phone Fees*, L.A. TIMES, Jan. 3, 2001, at C1.

47. In 1990, when Telmex was privatized, there were only 5.35 million lines in service with coverage to only some 10,200 towns.

48. See Telmex, Annual Report 2000, available at <http://www.telmex.com/internos/inversionistas/finanzas/pdf/cbs00.pdf> (last visited Dec. 1, 2001).

cations investors.⁴⁹ Telmex represented about twenty-nine percent of the Mexican stock exchange's "market weight" in year 2000.⁵⁰

Telmex has a number of subsidiaries spanning much of the telecommunications sector. Anuncios Directorios Sección Amarilla ("ADSA") has been the primary yellow pages publisher in Mexico for more than seventy years, and "is the only company in Mexico that offers the option to advertise in a nationwide telephone directory, the Internet, and in any telephone directory in the world."⁵¹ Red Uno is Mexico's leading telecommunications company for providing voice, data, and video solutions to the corporate market in Mexico. Telnor provides telecommunications services to the states of Baja and northwestern Sonora. Uninet is Telmex's data network subsidiary responsible for transporting data and files over a secure network, and Telbip provides paging services to thirty-three cities and five hundred towns in Mexico.⁵² Telmex has also invested in foreign telecommunications markets, expanding into telecommunications and Internet services in Puerto Rico, Guatemala, Brazil, and the United States.⁵³

Even with the growth of the Telmex network in the last decade, Telmex continues to struggle with the challenge of how to expand its market share in a nation where consumer income is low. In 2000, for example, Telmex charged \$115 to install a residential phone line, and one fifteen-minute call to the United States cost about six dollars.⁵⁴ In a country where the average daily wage is eleven dollars, phone service for most of Mexico is still an unattainable luxury.⁵⁵

49. See the New York Stock Exchange financial analysis page for Telmex, available at <http://www.nyse.com/marketinfo/marketinfo.html?sym=tmx&x=13&y=9> (last visited Dec. 11, 2001). The value of Telmex shares rose ten percent in 2001 as the Standard & Poor's Telecom Index dropped fifty percent. See Malkin, *supra* note 45, at 113.

50. Camila Castellanos, *Off the Hook?*, BUS. MEX., Aug. 1, 2000, available at LEXIS, News File.

51. See Telmex webpage for subsidiary information, at <http://www.telmex.com/internos/english/about/subsidiaries.html> (last visited Dec. 1, 2001).

52. *Id.*

53. See generally Castellanos, *supra* note 50.

54. Traci Carl, Callers, *U.S. Phone Carriers in Common Cause Against High Mexican Rates*, ASS'D PRESS, Aug. 18, 2000, available at LEXIS, News File.

55. *Id.*

IV. THE MEXICAN GOVERNMENT'S REGULATION OF THE TELECOMMUNICATIONS SECTOR

A) *The Mexican Constitution*

Article 28 of the Constitution of Mexico provides that monopolies and monopolistic practices shall be prohibited.⁵⁶

In the United Mexican States there shall be no monopolies or estancos of any kind; nor exemption from taxes; nor prohibitions under the guise of protection to industry; excepting only those relating to the coinage of money, the mails, telegraph, and radiotelegraphy, to the issuance of paper money by a single bank to be controlled by the Federal Government, and to the privileges which for a specified time are granted to authors and artists for the reproduction of their works, and to those which, for the exclusive use of their inventions, may be granted to inventors and those who perfect some improvement.

Consequently, the law shall punish severely and the authorities shall effectively prosecute every concentration or cornering in one or a few hands of articles of prime necessity for the purpose of obtaining a rise in prices; every act or proceeding which prevents or tends to prevent free competition in production, industry or commerce, or services to the public; every agreement or combination, in whatever manner it may be made, of producers, industrialists, merchants, and common carriers, or those engaged in any other service, to prevent competition among themselves and to compel consumers to pay exaggerated prices; and in general, whatever constitutes an exclusive and undue advantage in favor of one or more specified persons and to the prejudice of the public in general or of any social class.⁵⁷

Under the Mexican Constitution, any foreigners who desire to pursue business in Mexico must waive their right to assert their status as foreign citizens, and prior approval of the Secretariat of Foreign Affairs is required before a company may incorporate in Mexico.⁵⁸

Mexico has enacted a number of laws to regulate the telecommunications sector during the last century. Two laws enacted in

56. MEX. CONST. art. 28 (1917) am. 1988. For a Spanish version of the Constitution available on the Internet, *available at* <http://mexico.udg.mx/politica/constitucion/t1cap1.html> (last visited Dec. 10, 2001).

57. *Id.*

58. *Id.*

the middle of the century were the Law of General Routes of Communications of 1939,⁵⁹ followed the next year by the Communications Law of 1940. Together with the Telecommunications Regulations, adopted in 1990, the three laws "provide the general framework for the regulations of telecommunications services in Mexico,"⁶⁰ along with other telecommunications regulations adopted in 1990 with the Federal Telecommunications Law.⁶¹ According to the Telecommunications Regulations of 1990 a supplier of public telecommunications services would "operate under a license granted by the Communications Ministry."⁶² The licenses were only granted to Mexican corporations or citizens, and prior approval of the Communications Ministry was required in order to transfer the licenses.⁶³

The Secretariat of Communications and Transport ("SCT") was the regulatory agency tasked with monitoring and regulating the growing telecommunications sector.⁶⁴ SCT oversight was accomplished through the Undersecretariat for Communications and Technological Development.⁶⁵ That ministry was responsible for overseeing growth in the telecommunications sector, regulating changes in service infrastructure by providers and reviewing quarterly reports by telecommunications businesses for compliance and expansion agendas.⁶⁶

The SCT has plenary authority for regulation of the telecommunications industry. It is empowered to formulate and conduct the policies and programs to promote modern and efficient telecommunications. Coverage, quality and rates are to be "adequate to the country's needs."⁶⁷

The SCT has exclusive power to issue permits and concessions to install, establish, operate and exploit networks, stations and telecommunications services.⁶⁸

59. Law of General Routes of Communications, D.O., Feb. 19, 1940. For the most current version of the law see *Ultima Reforma Aplicada*, April 1, 1999, at <http://www.cddhcu.gob.mx/leyinfo/73/1.htm> (last visited Jan. 4, 2002).

60. TOMLINSON, *supra* note 17, at 115.

61. Federal Telecommunications Law, D.O., 7 Junio 1995.

62. TOMLINSON, *supra* note 17, at 115.

63. *Id.*

64. STEVEN HARPER, *INSIDE LATIN AMERICAN TELECOMMUNICATIONS: A STUDY OF PRIVATIZATION AND COMPETITION IN ARGENTINA, BRAZIL, CHILE, AND MEXICO* 194 (1997).

65. *Id.*

66. TOMLINSON, *supra* note 17, at 116.

67. Paul J. Berman & Theodore Hirsch, *Foreign Telecommunications Participation in Mexico*, 653 PLI/COMM 369, 372 (1993).

68. *Id.*

B) *The Mexican Foreign Investment Law*

Another important law affecting the telecommunications sector is the Mexican Foreign Investment Law of 1993⁶⁹ ("FIL"), which governs how foreign companies and entities can do business in Mexico. This law was passed as Mexico became a full participant in NAFTA under the Salinas administration. Prior to enactment of the FIL, foreign investment was tightly controlled and limited⁷⁰ by the Law to Promote Mexican Investment and to Regulate Foreign Investment of 1973⁷¹ ("LPMI"). The LPMI's primary intent was to protect Mexican interests by placing restrictions on direct foreign investment in the country.⁷² The darker side to the LPMI, according to some opinions, is that the law facilitated power grabbing by bureaucrats and increased institutional corruption.⁷³

Throughout much of the 1970's, the Mexican economy was performing poorly, due in significant part to the protectionist policies of the government. When the oil boom ended in 1982, the underpinnings of the protectionist strategy were destroyed because the government no longer had the luxury of surviving on revenues from high oil prices. The government then determined that resolving the economic crisis required new policies to stimulate investment from foreign sources. The government was prodded toward that realization in part from external pressures by the International Monetary Fund ("IMF"), which recommended economic liberalization.⁷⁴ The de la Madrid administration, however, resisted the IMF recommendations. When the situation worsened in 1985, Mexico again entered into talks with the IMF. The Mexican strategy was to accede to some liberalization, but to stand firm over demands for austerity regarding how much more auster-

69. Foreign Investment Law, D.O., December 27, 1993, art. 1, translated in DOING BUSINESS IN MEXICO, A.2-3 to A.2-27 (Andrea Bonime-Blanc & William E. Mooz, Jr. eds. 1994) [hereinafter FIL].

70. "The era of restrictive policies was largely the result of nationalistic tendencies and a desire for industrialization." David J. Drez, *Direct Foreign Investment in Mexico's Telecommunications Market*, 3-WTR NAFTA: L. & BUS. REV. AM. 112, 116 (1997).

71. For an excellent annotated version of the law see, Lionel Pereznieto C., *Comentarios a la ley para promover la inversion Mexicana y regular la inversion extranjera*, EL FORO, Apr-Junio, 1973, available at <http://www.bma.org.mx/publicaciones/elforo/1973/abril-junio/comentarios.html> (last visited Jan. 5, 2002).

72. Drez, *supra* note 70, at 116.

73. Zahralddin & Jones, *supra* note 8, at 907.

74. JUDITH A. TEICHMAN, *PRIVATIZATION AND POLITICAL CHANGE IN MEXICO* 79 (1995).

ity Mexico could absorb.⁷⁵ The IMF continued to pressure Mexico throughout 1985 and 1986 to liberalize the markets, but most importantly to tighten the government's belt. Finally, in 1987 trade liberalization measures moved forward. By 1988, ninety-six percent of imports no longer required import permits.⁷⁶ By 1989, the Salinas administration was firmly committed to trade liberalization and an agreement was negotiated under the Brady Plan in early 1990.⁷⁷ The Brady Plan offered debt reduction in exchange for reforms that included foreign investment, privatization, and trade liberalization.⁷⁸ A letter of intent was drafted between Mexico and the IMF emphasizing Mexico's achievement in opening the economy and pledging Mexico's willingness to continue trade liberalization.⁷⁹ The World Bank, too, "had been pressuring Mexico to accelerate and extend its economic liberalization drive."⁸⁰

A few months after the Brady Plan was unveiled, the Salinas

75. *Id.* at 82.

76. *Id.* at 88.

77. The Brady Plan was named after U.S. Treasury Secretary Nicolas Brady, who formulated a plan in 1989 for Latin American nations willing to reform their economies to reduce a collective \$400 billion foreign commercial bank debt by converting the debt into long-term bonds backed by American Treasury bills. Mexico was the first Latin nation to negotiate a Brady arrangement, signed on February 4, 1990, in which "U.S. and other money center banks agreed to accept a roughly 18 percent reduction in the face value of their Mexican debt, in return for secured bonds paying a discounted rate of interest." Two years later in 1991, the bonds were trading at fifty-six cents, up from forty cents, and headed higher. This in turn resulted in the creation of a large bond market trading what became known as Brady Bonds. In 1991 the Washington Times reported:

President Carlos Salinas de Gortari has ended most capital controls, privatized half of Mexico's socialist industrial sector, cut tax rates on both individuals and business, denationalized banks, extended private property rights, and now pursues a free trade agreement with the United States. Suddenly, capital that had been hemorrhaging out of Mexico is surging the other way. In 1989 and 1990, some \$11 billion in Mexican flight capital was repatriated. Since May, Mexican companies have successfully floated bond and equity issues in foreign markets. Its newly privatized phone company Telmex issued \$2 billion in shares overseas that were immediately grabbed.

See Warren Brookes, *Fueling Latin Recovery*, WASH. TIMES, September 11, 1991, at F1. See also, Larry Rohter, *Mexico's Recovery: Is It in Peril?* N.Y. TIMES, February 3, 1990, at Sec. 1, p. 37.

78. TEICHMAN, *supra* note 74, at 90.

79. *Id.* at 91.

80. *Id.* It is interesting to consider that another economic crisis occurred in 1995 and 1996, due in large part to the Mexican government's unwillingness to embrace the austerity measure the IMF recommendations made for public deficit reduction. Mexico has yet to implement this part of the IMF plan.

administration promulgated the Regulations to the LPMI⁸¹ ("RLPMI"). The RLPMI "expanded the use of trust in the control of enterprises."⁸² Through the trust, foreign interests could now control industries that had once been restricted only to Mexican ownership.⁸³ As it pertained to the telecommunications sector, the RLPMI regulations now allowed up to a forty-nine percent foreign ownership in Mexican telecommunications entities and eventually "precipitated the purchase of a 20.4% controlling share in Telmex by an international consortium consisting of the Grupo Carso, Southwestern Bell,⁸⁴ and France Telecom."⁸⁵

The FIL followed on the heels of the changes brought about by the RLPMI by further opening the door to foreign investment in the telecommunications sector. The FIL established the rules "by which foreign investment can be channeled to the country and to ensure that such investments contribute to the national development."⁸⁶ Moreover, the FIL abolished "all performance requirements (except where certain investment incentives are involved and those that are not prejudicial to international trade); expand[ed] the scope of the neutral investment provisions introduced in the regulations; and reduce[d] or eliminate[d] many of the notifications and authorizations previously required for foreign investments under the LPMI."⁸⁷

Article 15 of the FIL mandated that before a company could incorporate in Mexico, prior approval of the Secretariat of Foreign Affairs would be required.⁸⁸ The Law also allowed for one hundred percent direct foreign investment of ownership without the prior authorization of the National Foreign Investment Commission ("CNIE") on behalf of the Ministry of Trade and Industrial Development ("SECOFI").⁸⁹ That one hundred percent was in the industrial sectors not specifically addressed in the law, telecom-

81. RLPMI, D.O., May 16, 1989 (Mex.), *translated in* DOING BUSINESS IN MEXICO, A.4-3 (1994). For an in depth discussion of the regulations, see Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 5-6 (1989).

82. Zahralddin & Jones, *supra* note 8, at 913.

83. *Id.* at 914.

84. Southwestern Bell has since become SBC Communications in the Telmex partnership.

85. Zahralddin & Jones, *supra* note 8, at 924.

86. FIL, D.O., December 27, 1993, art. 1.

87. Timon L. Marshall, *Foreign Investment in Mexico*, Intertrade & Investment, Nov. 1999, available at <http://www.aimlink.com/I&I/archives/mexinv.html> (last visited Jan. 16, 2002).

88. FIL, D.O., Dec. 27, 1993, art. 15.

89. See generally Marshall, *supra* note 87. See also Drez, *supra* note 70, at 117.

munications being one of the sectors specifically regulated by the FIL.⁹⁰ Before a company can proceed with incorporation, however, it must seek prior approval from the Secretariat of Foreign Affairs,⁹¹ and such companies must have "a foreign exclusion clause or comply with Article 27, sec. 1 of the Mexican Constitution."⁹² One must appreciate the drastic departure in the course of less than two decades away from a protectionist policy that in many ways defined the PRI party and the Mexican state for most of the twentieth century.

The FIL identified foreign investment as being:

- Foreign investment in any percentage of the capital stock of a Mexican company;
- A Mexican corporation's investment, if the majority of that corporation is owned by foreign investors;
- Foreign investment in any of the activities or actions covered by the FIL;⁹³
- Investment by foreign entities with no legal status.⁹⁴

Interestingly, the new law also allowed, for the first time, foreign corporate entities to own land for setting up business operations in previously restricted zones.⁹⁵ "Previous restrictions on land ownership within 100 kilometers of the border and within 50 kilometers of the seashore were dropped."⁹⁶ Also, the law gave to non-North American investors many rights acquired by United States and Canadian companies under NAFTA.⁹⁷

Even though the FIL repealed the entrenched nationalistic and protectionist policies in many sectors, the law also curtailed or severely limited foreign equity participation in at least four industries and commerce activities:

1. Oil and petrochemical industries, satellite communications,⁹⁸ telegraph services, and radiotelegraphy remain under the exclusive control of the Mexican state—done to comply with Mexican Constitutional requirements;⁹⁹

90. Drez, *supra* note 70, at 117.

91. FIL, D.O., Dec. 27, 1993, art. 15.

92. Drez, *supra* note 70, at 120.

93. *Id.* at 117, citing FIL, D.O., June 7, 1996, art. 2.

94. See generally Marshall, *supra* note 87.

95. TOMLINSON, *supra* note 17, at 117.

96. *Id.*

97. *Id.*

98. The Federal Telecommunications Law of 1995 amended art. 5 of the FIL to exclude satellite communications from this restriction. See FTL, D.O., June 7, 1995, Chapter IV, sec. 4, art. 56.

99. *Id.* at art. 5.

2. Radio broadcasting and land transportation reserved exclusively for Mexican nationals and Mexican companies without foreign equity participation;¹⁰⁰
3. Specific industries in which foreign entities could hold only minority stakes;
 - (a) production cooperatives—up to 10 percent ownership,
 - (b) domestic and specialized air transportation services—up to twenty percent,
 - (c) financial holdings companies, commercial banks, securities firms and financial specialists—up to 30 percent,
 - (d) insurance, financial, leasing, telephone services, publications, newspapers—up to 49 percent.¹⁰¹
4. Activities in maritime transportation and port services for which foreign investors must obtain prior approval from the Foreign Investment Commission in order to own more than a 40 percent stake.¹⁰²

In December 1996 sweeping and unusually progressive amendments to the law took effect, which were intended to achieve a number of important changes to the FIL, including changes to:

- Eliminate unnecessary delays in the processing of many government business requirements;
- Promote foreign investment in Mexico;
- Give added security to foreign investors investing in Mexico; and
- Simplify procedures for investment in Mexico.¹⁰³

The Amendments also established percentages and limitations foreign entities could hold in business sectors that the Mexican government considered “strategic or essential to the national interest.”¹⁰⁴

1. Only the Mexican Government may own or engage in activities involving the production and sale of petroleum and other hydrocarbon products, basic petrochemicals, electricity (including the generation of nuclear energy), telegraph

100. *Id.* at art. 6.

101. *Id.* at art. 7.

102. *Id.* at art. 8.

103. Fernando Garcia, *Amendments to Foreign Investment Law Simplify Investment in Mexico*, InterAm. Database, National Center for Inter-American Free Trade (1997), available at <http://www.natlaw.com/pubs/spmxfi1.htm> (last visited Dec. 11, 2001).

104. *Id.*

communications, mail processing and delivery, and similar public services.

2. Economic activities reserved exclusively to Mexicans or to Mexican companies include the operation of credit unions, retail trade in gasoline and liquid petroleum gas, national surface transportation of passengers, tourism and transportation of freight.
3. Certain investments may be made by foreigners, but only in restricted ownership percentage amounts. For example, foreign investment in "cooperative companies or production" is limited to ten percent, and investment in domestic air transportation, air taxi transportation and specialized air transportation generally, is limited to twenty-five percent. However, under the new changes to the Foreign Investment Law, foreign ownership interest is not taken into account if the foreign investment is made in a Mexican corporation and if fifty-one percent of the capital of such corporation is held by Mexicans. In addition, foreign investors may now hold up to forty-nine percent in companies in almost all aspects of the Mexican financial system, including holding companies for financial groups, commercial banks, credit institutions, securities brokerage firms and securities market specialists. Prior to the changes in the FIL, the maximum percentage for foreign investors in these corporations was thirty percent. Also, prior to the amendments, foreign investment in cable television and basic telephonic services was limited to forty-nine percent. Now this limitation has been replaced with a forty-nine percent limitation on all telecommunications for which a government concession is required.
4. The amended FIL provides that foreign investors may hold an interest in excess of forty-nine percent in certain businesses, but only with authorization from the special commission or representative committee with jurisdiction under the law. Authorization is required for the activities of credit information companies, insurance agents, cellular telephone operators, and oil and gas drillers.

*C) Federal Telecommunications Law of 1995*¹⁰⁵

The Federal Telecommunications Law ("FTL") was enacted on

105. FTL, D.O., June 7, 1995, available at <http://info4.juridicas.unam.mx/ijure/fed/114/default.htm?s=> (last visited Dec. 23, 2001).

June 7, 1995, and superceded nearly all laws and regulations formerly governing the telecommunications sector. The promulgation of the FTL coincided with Mexico's entrance into full participation in NAFTA and established the telecommunications sector as a high government priority.¹⁰⁶ The FTL was intended to embrace the spirit of social responsibility for the national good by protecting public access to the nation's telecommunications infrastructure.¹⁰⁷

The FTL includes almost all aspects of the telecommunications industry. The law describes telecommunications as "all emission, transmissions, or reception of signs, signals, written documents, images, voice sounds or information, of any nature, via cables, radioelectricity, optical or physical means, or other electromagnetic systems."¹⁰⁸ The FTL deems satellite communications systems, radio spectrums, and telecommunications networks as "general paths of communication."¹⁰⁹

The FTL also includes the following objectives:

- Promote an efficient development of telecommunications;
- Carry out the state directives on this subject in order to guarantee the national sovereignty;
- Promote healthy competition among the different telecommunication service providers so that they will offer better prices, diversity, and quality of services in benefit of the consumer; and
- Promote adequate social coverage.¹¹⁰

The SCT is tasked with achieving the objectives of the law.¹¹¹

In order to do so, the SCT has several responsibilities, including:

- To plan, formulate and guide policies and programs;
- Regulate the development of the telecommunications;
- Promote and oversee the efficiency of the interconnection of the various equipments of telecommunication;
- Issue official rulings;

106. Drez, *supra* note 70, at 122.

107. FTL, D.O., June 7, 1995, art. 50, available at <http://info4.juridicas.unam.mx/ijure/fed/114/default.htm?s=> (last visited Dec. 23, 2001).

108. *Id.* at art. 3.

109. *Id.* at art. 4.

110. *Id.* at art. 7. "La presente ley tiene como objetivos promover un desarrollo eficiente de las telecomunicaciones; ejercer la rectoria del estado en la materia, para garantizar la soberania nacional; fomentar una sana competencia entre los diferentes prestadores de servicios de telecomunicaciones a fin de que estos se presten con mejores precios, diversidad y calidad en beneficio de los usuarios, y promover una adecuada cobertura social."

111. *Id.*

- Participate in the negotiation of international treaties;
- Promote and strengthen cultural values and national identity;
- Promote research and technological development in telecommunications; and,
- Interpret the FTL for administrative effects.¹¹²

The law establishes some limitations on foreign ownership, reserves certain services for the Mexican state,¹¹³ and protects other activities for Mexican nationals or corporations with a foreign exclusion clause.¹¹⁴ Any entity interested in installing or

112. *Id.*

Para el logro de estos objetivos, corresponde a la secretaria, sin perjuicio de las que se confieran a otras dependencias del ejecutivo federal, el ejercicio de las atribuciones siguientes:

- I. Planear, formular y conducir las políticas y programas, así como regular el desarrollo de las telecomunicaciones, con base en el plan nacional de desarrollo y los programas sectoriales correspondientes;
- II. Promover y vigilar la eficiente interconexion de los diferentes equipos y redes de telecomunicación;
- III. Expedir las normas oficiales mexicanas en materia de telecomunicaciones y otras disposiciones administrativas;
- IV. Acreditar peritos en materia de telecomunicaciones;
- V. Establecer procedimientos para homologación de equipos;
- VI. Elaborar y mantener actualizado el cuadro nacional de atribución de frecuencias;
- VII. Gestionar la obtencion de las posiciones orbitales geoestacionarias con sus respectivas bandas de frecuencias, así como las orbitas satelitales para satelites mexicanos, y coordinar su uso y operación con organismos y entidades internacionales y con otros países;
- VIII. Participar en la negociación de tratados y convenios internacionales en materia de telecomunicaciones, considerando, entre otros factores las diferencias existentes del sector con respecto al de los países con que se negocie, y vigilar su observancia;
- IX. Adquirir, establecer y operar, en su caso, por si o a traves de terceros, redes de telecomunicaciones;
- X. Promover el fortalecimiento de los valores culturales y de la identidad nacional;
- XI. Promover la investigación y el desarrollo tecnológico en materia de telecomunicaciones, la capacitación y el empleo de mexicanos cuyas relaciones laborales se sujetaran a la legislación de la materia;
- XII. Interpretar esta ley para efectos administrativos, y
- XIII. Las demás que esta ley y otros ordenamientos legales le confieran en la materia.

113. Public telegraph services and radiotelegraphs, *see id.* at art. 9. *See also* FIL, D.O., December 27, 1993, art. 5.

114. Under art. 6 of FIL, radio broadcasting and other radio and television services are excluded from direct foreign investment.

operating a public telecommunications network in Mexico must apply with the SCT for a license.¹¹⁵

The FTL is divided into nine chapters setting out the government's role in the telecommunications sector to protect the public interest, assign frequencies, grant licenses, establish regulatory principles, set the standards for the levy of tariffs, establish the oversight by the SCT, and set forth the expropriation of telecommunications entities during a national crisis.¹¹⁶ Chapter 4 of the FTL establishes new provisions for privatizing the satellite network,¹¹⁷ in keeping with a 1995 amendment to Article 28 of the Constitution, which removed satellites from the exclusive control of the Mexican federal government.¹¹⁸ The Chapters are followed by a section of transitory provisions.

Under the transitory provisions, foreign competition could enter the telecommunications market after August 10, 1996. In addition, long-distance service providers were authorized to begin operations as of January 1, 1997. Under Article 4 of the provisions, the SCT can issue concessions and permits to third parties to offer networks and services that had formerly been under the control of the state. The state, however, would still control telegraphy and radiotelegraphy.¹¹⁹

In addition to the promulgation of laws to open foreign competition in the telecommunications sectors in the 1990's, the government also established two executive agencies to monitor and regulate the anticipated growth in the sector. The Mexican government formed the Federal Competition Commission ("CFC"), which has oversight over companies that may be engaging in monopolistic practices, and the Federal Telecommunications Commission ("Cofetel"), which was established under Mexico's Federal Telecommunications Law of 1995. Also, Cofetel assumed much of the duties previously assigned to the SCT.

115. FTL, D.O., at art. 24, *available at* <http://info4.juridicas.unam.mx/ijure/fed/114/default.htm?s=> (last visited Dec. 23, 2001).

116. *Id.* The National Law Center for Inter-American Free Trade has an English translation available for purchase, *available at* <http://www.natlaw.com/mexico/topical/communications/stmxcm.htm> (last visited Jan. 10, 2002).

117. *Id.* at arts. 55-59.

118. ANA LUZ RUELAS, *MÉXICO Y ESTADOS UNIDOS EN LA REVOLUCIÓN MUNDIAL DE LAS TELECOMUNICACIONES* 233 (1996). According to Ruelas, modification to make the satellite network non-strategic resulted in protests against the government by both legislative representatives and academicians.

119. FTL, D.O., at art. 4 (describing transitory provisions).

V. FEDERAL COMPETITION COMMISSION (CFC)

Established on June 23, 1993, the Federal Competition Commission ("CFC") was tasked with protecting "the competition process and free-market access by preventing monopolies, monopolistic practices and other restrictions that deter the efficient operation of the goods and services markets."¹²⁰ The enabling legislation for the CFC was the Federal Law on Economic Competition.¹²¹ Under Article 35, the CFC was authorized to bring the following sanctions against business entities determined to be engaged in monopolistic practices:

I. Order to suspend, correct or eliminate the concentration practice in question;

II. Order the partial or total de-concentration of what has been unduly concentrated notwithstanding the applicable fine, as the case may be;

III. Fine of up to the equivalent of seven thousand times the general minimum wage in the Federal district for having declared falsely or submitting false information to the Commission, regardless of any criminal liability incurred therein;

IV. Fine of up to the equivalent of 375 times the general minimum wage in the Federal district for having incurred in absolute monopoly practices;

V. Fine for the equivalent of up to 225 times the general minimum wage in the Federal District, for having engaged in relative monopoly practices and up to the equivalent of 100 thousand times the general minimum wage in the Federal District, in the event of the provision under Section 10 of this Law;

VI. Fine up to the equivalent to 225 thousand times the general minimum wage in the Federal District, for having incurred in concentrations forbidden by this Law; and a fine up to the equivalent of 100 thousand times the general minimum wage in the Federal District for failing to notify a concentration when it should legally be done; and

VII. Fine up to the equivalent of seven thousand five hundred times the general minimum wage in the Federal Dis-

120. See CFC's Mission Statement, *available at* <http://cfc.gob.mx/cfc99e/comision/> (last visited Dec. 2, 2001).

121. The Ley Federal de Competencia Económica was enacted December 24, 1992. Under Article 2, "The purpose of this law is to protect the competition process, and the free market access, by preventing monopolies, monopolistic practices and other restrictions that deter the efficient operation of the goods and services market." Ley Federal de Competencia Económica, December 24, 1992, art. 2 [hereinafter L.C.E.].

strict to individuals who directly participate in forbidden monopoly practices or concentrations, on behalf of or on account of corporations.

In the event of repeated offense, an additional fine may be assessed up to twice the initial amount.¹²²

Under Article 37, particularly egregious actions could be sanctioned by fines "up to ten percent of the annual sales of the infringer during the previous fiscal year or up to ten percent of the value of the assets of the infringer, whichever is higher."¹²³ Article 38 established that, "the economic agents that have proven to have suffered damages during the proceeding resulting from the monopoly practice or illicit concentration, may file a legal claim to obtain compensation for the damages. In that event, the court may take into consideration the damages estimated by the Commission."¹²⁴

In its first few years of existence, the CFC was rife with political corruption; its administrators were fat with money given to them by power brokers that had close ties to the PRI in order to keep the CFC out of the business of Mexican big business.¹²⁵ The first chink in the armor of corruption, however, occurred in the mid-1990's when former President Ernesto Zedillo, himself risking the ire of his PRI colleagues, moved to prevent Coca-Cola from taking over Cadbury-Schweppes operations in Mexico. According to one analyst, "that move effectively froze the soft drink giant's U.S. \$1.85 billion worldwide takeover bid when other countries followed CFC's lead."¹²⁶ Later, when Vicente Fox came to power in 2000, one of his priorities was to follow through on his pledge to clean up the government. In doing so, he placed new faces in the CFC and gave them a regulatory mandate and the independent authority to move against antitrust violators.

The first bold move against monopolies by the CFC under the new Fox administration occurred in early 2001 when the agency prevented Grupo Televisa, the Mexican entertainment and television production powerhouse, from buying Mexico's second largest radio entity, Grupo Acir.¹²⁷ In a style not unfamiliar in the world

122. *Id.* at art. 35.

123. *Id.* at art. 37.

124. *Id.* at art. 38.

125. See Camila Castellanos, *Trust Buster: Mexico's Federal Competition Commission Gains Clout and the Wrath of Big Business—As it Lays Down One Tough Ruling after Another*, BUS. MEX., March 1, 2001, available at LEXIS, News File.

126. *Id.*

127. *Id.*

of Mexican business practices, Televisa retaliated by attempting to discredit CFC President Fernando Sanchez Ugarte when it ran news stories alleging that Sanchez "was partial to favoring his own family's business ties."¹²⁸ One reporter describes how Sanchez quickly responded to the attack:

While it would have been easy for Sanchez Ugarte to strike back personally against the powerful Televisa family, the CFC head instead rattled off a laundry list of facts about his family's business and proof of his absence from their dealings.¹²⁹

The CFC has also taken steps to dissolve monopolistic practices among Mexico's consumer products producers and moved to split up Cintra, the holding company for Mexico's major air carriers, Mexicana and Aeromexico.¹³⁰

When CFC moved against Telmex in 1998, the agency's intention was to address Telmex's monopolistic and anti-competitive practices, "such as price fixing and exclusivity agreements, in the local and long-distance telephone market, as well as the wireless telephone service sector."¹³¹ In doing so, the CFC was keeping with one of its stated goals of "[d]efending and promoting Mexico's interests in the international sphere and avoid monopolistic practices of international scope,"¹³² while promoting another CFC goal of establishing greater international cooperation by promoting competition and investment, combating cartels "harmful to consumers and society in general," and reducing "the costs of transactions to notify mergers to different agencies."¹³³

The CFC issued a ruling in March 1998 declaring that Telmex was engaged in monopolistic practices because it was a dominant carrier in the local and long-distance markets. Upon issuing its findings and rulings, it then became the job of Cofetel to issue guidelines to curtail Telmex's monopolistic practices so that its business practices conformed to the spirit of healthy competition in the global telecommunications marketplace.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See Fernando Sanchez Ugarte, *Annual Encounter on Competition, Federal Commission on Competition presentation for 2001*, at <http://cfc.gob.mx/cfc99i/Current/index.htm> (last visited Dec. 1, 2001).

133. See *id.*

VI. FEDERAL TELECOMMUNICATIONS COMMISSION ("COFETEL")

Cofetel was established by decree¹³⁴ in 1996 following enactment of the Federal Telecommunications Law of 1995, which superceded the Law of General Routes of Communications of 1939. Cofetel is an administrative unit of the SCT, but it enjoys technical and operational autonomy.¹³⁵ In 1996, various articles of the FTL established Cofetel's authority and procedures for regulating tariffs in the telecommunications sector.¹³⁶ Cofetel assumed many of the SCT's regulatory functions. SCT, however, still remained the main player for issuing government policy, concessions, and permits.¹³⁷

For the first few years of its existence, many considered Cofetel a toothless tiger that more often than not looked the other way when Telmex was establishing its domination in the telecommunications sector following Mexico's move to open the sector to market competition.¹³⁸ Cofetel inherited the SCT's dubious reputation for moving too slowly in order to discourage potential Telmex competitors and for allowing Telmex to strengthen its position in the face of oncoming foreign competition.¹³⁹ In fact, it is noted that one former president of Cofetel, Carlos Cassasús, was a former director of finances at Telmex.¹⁴⁰

Nevertheless, Cofetel did make attempts to curb Telmex's power by issuing significant rulings. Each time Telmex promptly responded to these rulings by challenging Cofetel in court. Once in the court system, Telmex officials knew the cases would not proceed quickly in a court system prevalent with ineffectiveness, inefficiency and indifference.¹⁴¹ Moreover, Cofetel's dubious reputation as a regulator, and its lack of success in the courts, were largely due to the political structure of the PRI. For decades, PRI's structure enabled politicians and businessmen to intrinsi-

134. "Decreto por el que se crea la Comisión Federal de Telecomunicaciones," D.O., 9 de agosto de 1996.

135. HARPER, *supra* note 64, at 195.

136. "Acuerdo por el que se establece el procedimiento para el registro de tarifas de los servicios de telecomunicaciones," D. O., Nov. 15, 1996, specifically following arts. 7, 60, 61, and 64 of the Law., available at http://www.cft.gob.mx/frame_quienes_somos.html (last visited Dec. 20, 2001) [hereinafter *Acuerdo*].

137. HARPER, *supra* note 64, at 195.

138. *See id.*

139. *See id.* at 195-96.

140. *Id.* at 196.

141. Smith, *supra* note 46, at C1.

cally place their interest in complex relationships, family ties and mutual endeavors with the ruling class of Mexico in an effort to acquire wealth and power through the Mexican government.

When opposition candidate Vicente Fox captured the presidency, Mexicans hoped that the new leadership would lead to widespread changes in the way regulatory agencies conducted business. President Fox promptly cleaned house at Cofetel and set out to reestablish independence and accountability within the agency. Among other things, this meant redefining how the government would deal with the depredations of Telmex in the business world. The challenge to the government, however, is that Telmex is less a corporate entity and more the strong personality of Telmex chairman, Carlos Slim. Slim is Mexico's wealthiest and arguably Mexico's most tenacious businessman. Slim's influence runs deep in the fabric of Mexican politics and the country's financial sector.

Fox's first attempts to reign in Telmex through Cofetel occurred in early 2000. In keeping with its new executive mandate, Cofetel declared that Telmex was a dominant carrier in several telecommunications markets, including local and long-distance service.¹⁴² As a result, Cofetel levied a ten million-peso fine against Telmex and moved to establish a regulatory strategy for Telmex under the terms of the Telecommunication Act. Telmex immediately took Cofetel to court, seeking an injunction to prevent the regulations from taking effect and arguing that the rate scheme and other regulations established by Cofetel violated the terms of Telmex's operating license.¹⁴³

On September 11, 2000, Cofetel issued new rules intended to prevent Telmex from engaging in monopolistic practices. While comprehensive in scope, the rules, if enforced, would "prevent the operator from charging different rates for local services in diverse areas within the country."¹⁴⁴ Also, the regulation would stabilize unit rates and prevent Telmex from blocking competitor operators from access to the Telmex network. The regulations would be effective until 2003, at which time Telmex would be allowed to apply to Cofetel for changes to its service rates.¹⁴⁵

142. Case, *supra* note 4, at 1F.

143. *Telmex Future Seen Hinging On Court Rulings*, REFORMA, May 3, 2001, available at LEXIS, News File.

144. *Telmex Loses Its Grip on Power*, BROADBAND NETWORKING NEWS, Sept. 26, 2000, available at LEXIS, News File.

145. Shetty, *supra* note 2, at 48.

The Cofetel regulations were "designed to prohibit Telmex from charging lower rates in densely populated urban areas where there is likely to be competition."¹⁴⁶ Cofetel also sought to prevent Telmex from undercutting the service rates of its competitors in order to "squeeze the margins of its competitors in the areas where there is competition and . . . higher margins in the rest of the country."¹⁴⁷ In addition, Telmex was ordered by Cofetel to "provide quality billing and collection services, fast service to competitors seeking interconnection and accurate technical data regarding the basic elements of the network to ensure adequate interoperability of interconnected public networks as well as to allow unbundled access."¹⁴⁸

Telmex would, however, be allowed to raise rates before 2003, but only if the rates were the same across the board in every Mexican state.¹⁴⁹ The regulations, according to Cofetel President, Jorge Nicolin, were also designed to prevent Telmex "from charging different local rates in the five markets—local, domestic long-distance, international calls, interurban access and local carrier services."¹⁵⁰

As for the competition, the rules would prevent Telmex from arbitrarily charging other service providers more than it costs Telmex to provide connections to the providers.¹⁵¹ According to one analyst, however, "the rules [were] based on Telmex's costs, which is problematic, as it gives the operator an incentive to inflate its costs in the future."¹⁵²

Other regulations promulgated by Cofetel included:

- Lowering access fees for service providers using the Telmex network from an average of 3.2 cents per minute to about 1 cent per minute;
- Introducing quality of service indices to monitor Telmex on a region-to-region basis, offering the same quality of service to its competitors as it offers to its own subsidiaries, including billing and collection services;
- Using a single service provisioning system based on "first come, first served" process, for both internal and external customers;

146. See generally *Telmex Loses Its Grip on Power*, *supra* note 144.

147. *Id.*

148. Shetty, *supra* note 2, at 48.

149. See generally *Telmex Loses Its Grip on Power*, *supra* note 144.

150. *Id.*

151. *Id.*

152. *Id.*

- Cofetel and a third party will have real-time access to this provisioning system;
- Telmex will have to allow unbundled access to its services, capacity and network functions.¹⁵³

Telmex's competitors cautiously praised the Cofetel regulations pending review of the enforceability of the rules, after initially complaining that the regulations against Telmex did not go far enough.¹⁵⁴ What Cofetel did not address in its rules were continuing disputes over "future interconnection rates, past due payments, WTO resolution and proportionate returns."¹⁵⁵ Moreover, despite the Fox administration's goal to give Cofetel legal due process, the regulator still lacks the legal and autonomous authority to enforce its rulings, including the power to "impose tougher rules on incumbents and enjoy fixed terms for commissioners."¹⁵⁶ In the words of Cofetel's Nicolin, the regulatory agency needs "a big fat stick."¹⁵⁷

VII. IMPACT OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA") ON THE TELECOMMUNICATIONS SECTOR

Applying NAFTA trade provisions to the telecommunications sector was a high priority for the Mexican government as early as 1988, when the Salinas administration set about to privatize some of its struggling government-controlled industries in the face of a growing economic crisis. The Mexican government considered Telmex as Mexico's crown jewel. By signing onto NAFTA, the Mexican government was in part hoping to buy time for Telmex by shielding it from the onslaught of foreign competition into the telecommunications marketplace, at least until such time that Telmex could adequately confront challengers in the market place.¹⁵⁸ Furthermore, the government had agreements to honor with Telmex's new ownership under a joint venture arrangement headed up by Carlos Slim and other Mexican businessmen with close ties to the ruling PRI by protecting its monopoly of certain services in the telecommunications market.¹⁵⁹

153. *Id.*

154. *Id.*

155. *Id.*

156. Shetty, *supra* note 2, at 48.

157. *Id.*

158. Ivan H. Shefrin, *The North American Free Trade Agreement: Telecommunications in Perspective*, 17 TELECOMMUNICATIONS POL'Y 14, 17 (1993).

159. *Id.*

With the passage of NAFTA, the inertia toward privatization was placed permanently in motion.¹⁶⁰ NAFTA not only opened the Mexican market per se, but the telecommunications sector, specifically, was finally exposed to the influence of market competition and consumer choice. Essentially, NAFTA allowed the camel's nose under the tent for competitors waiting on the sidelines of the Mexican telecommunications sector. Moreover, foreign investors could now control certain enterprises that prior to NAFTA were completely prohibited to non-Mexicans. "NAFTA reversed decades of Mexican foreign policy to the extent that it forbids any party to require the maintenance of minimum levels of equity held by nationals of the country."¹⁶¹ NAFTA also allowed the transfer across borders of monetary gains made in Mexico.¹⁶²

The provisions for telecommunications under NAFTA are set out in lengthy detail in Chapter XIII of the treaty. NAFTA presented a significant challenge for the Mexican government, because if the PRI wanted to play with the "big boys" it had to implement liberalized policies, which in many regards went against the thinking of the PRI's long domination over the affairs and policies of the nation. Whereas the telecommunications markets of the United States and Canada had long been driven by liberalization policies, Mexico's telecommunications sector was driven by protectionist legislation and regulation. Indeed, NAFTA's telecommunications provisions were quite alien to Mexico's provisions because the focus of the trade agreement was first and foremost to open the Mexican telecommunications market to foreign participation. Mexico wanted and needed NAFTA badly if the nation was to overcome the cyclical economic downturns caused by the nation's reliance on its oil industry. The changes the Mexican government made to its Constitution and many of its laws in regard to its telecommunications sector in order to "get" NAFTA are said by some to have constituted a telecommunications revolution.¹⁶³

Mexico relinquished much in order to gain much. For instance, NAFTA's section on the national treatment for investments effectively prevented the Mexican government from regressing to its former nationalistic tendencies by requiring that

160. Zahralddin & Jones, *supra* note 8, at 916.

161. *Id.* at 917.

162. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1109, 32 I.L.M. 296 [hereinafter NAFTA]. Spanish version available at <http://www.natlaw.com/treaties/tlc/tlcd.htm> (last visited Jan. 14, 2002).

163. Zahralddin & Jones, *supra* note 8, at 920.

the NAFTA signatories treat foreign investors as they will treat their own citizens.¹⁶⁴ NAFTA also established procedural safeguards for foreign companies trying to compete in the Mexican market that were intended to prevent discrimination by dominant national entities.

As monopolies characterized much of Mexico's big business throughout the century, the government had to tread carefully toward compliance with the NAFTA provisions regarding monopolies. Under Article 1305, a country may allow a monopoly provider of public networks or services.¹⁶⁵ It does, however, require that the country protect against the abuse of a monopoly power. When the United States Trade Representative, Barshefsky, finally became actively involved in the telecommunications dispute between Telmex and its U.S.-backed competitors, a primary contention was that Mexico had utterly failed to prevent this monopolistic abuse.

Under NAFTA, access to networks and services must be provided under the two standards of reasonableness and non-discrimination. This implies that signatories treat foreign competitors the same as domestic entities are treated.¹⁶⁶ "National treatment still allows heavy restrictions to be placed on foreign industry so long as the same restrictions are placed on domestic industry."¹⁶⁷ The entity interested in the use of the public networks and services must not be hindered from leasing or buying private lines, constructing a telecommunications infrastructure, and accessing the dominant entity's network in order to conduct business.¹⁶⁸ The operation and provision of public networks and services, however, are not subject to NAFTA.¹⁶⁹

In order to achieve parity, or at least a balanced playing field in the market place, certain monopolistic abuses had to be cur-

164. NAFTA, art. 1102.

165. NAFTA art. 1305.

166. Richard McKenna, *The Challenge of Assuring Universal Service in a Competitive Environment: What the Experience of the United States Might Suggest to Mexico*, 3-WTR NAFTA: L. & BUS. REV. AM. 5, 16 (1997).

167. *Id.*

168. NAFTA art. 1302. See also, Stephen I. Glover and JoEllen Lotvedt, *The Mexican Telecommunications Market: The Interplay of Internal Reform and NAFTA*, 3-WTR NAFTA: L. & BUS. REV. AM. 23, 35 (1997).

169. Glover & Lotvedt, *supra* note 168, at 35. The authors cite as an example that "NAFTA doesn't require member countries to provide public network access if public networks do not exist, nor does it require that member countries make private networks available for public access and use." *Id.*

tailed;¹⁷⁰ in particular, “engaging in anticompetitive conduct adversely affecting entities of another NAFTA member in [a] market segment not sheltered by the government’s monopoly.”¹⁷¹ Other conduct discouraged under the provisions could include “cross-subsidization, predatory conduct and the discriminatory provision of access to public telecommunications transport networks or services.”¹⁷² The restrictions extrapolated under Article 1305 should have prohibited Telmex from misusing its monopoly privileges. The fact that the Mexican government appears to have made no challenge to Telmex’s behavior covered under this provision became a major issue in the dispute between Telmex and its foreign competitors, which eventually led to charges brought against the Mexican government before the World Trade Organization.

VIII. WORLD TRADE ORGANIZATION AND ITS ROLE IN RESOLVING TRADE DISPUTES

The World Trade Organization (“WTO”)¹⁷³ is an international treaty opened for signature April 15, 1994 and entered into force January 1, 1995.¹⁷⁴ The WTO Agreement is actually a collection of individual trade-related treaties that were negotiated together. One of these agreements, known as the “Marrakesh Agreement,” instituted what became the World Trade Organization. Today, the WTO has replaced the General Agreement on Tariffs and Trade (“GATT”) as being the main organization dealing with intergovernmental trade relations at the international level.¹⁷⁵

170. NAFTA, art. 1305.

171. Zahraiddin & Jones, *supra* note 8, at 928-29.

172. NAFTA art. 1305.

173. See the WTO web page at <http://www.wto.org> (last visited Jan. 17, 2002).

174. See Marrakesh Agreement, Apr. 15, 1994, 1867-9 U.N.T.S. 1 and 1867 U.N.T.S. 154. See also General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125 and 33 I.L.M. 1144 [hereinafter GATT].

175. GATT opened for signature on October 30, 1947, and entered into force provisionally on January 1, 1948. Participants in GATT’s discussions negotiated the agreement as a temporary measure to promote and guard tariff reductions. See Proposal of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30 1947, 55 U.N.T.S. 308. The WTO, as a permanent institution, overcame the temporality status of GATT to embody a permanent, proper institutional framework with detailed rules. For an excellent discussion on the evolution of GATT and WTO, see Jeffrey Waincymer, *Transparency Of Dispute Settlement Within The World Trade Organization*, 24 MELB. U. L. REV. 797, 798 (2000).

A) *WTO Dispute Settlement Mechanism*

The WTO is the primary body for resolving international trade disputes between members. The dispute settlement system developed from a combination of Article 23 of the 1994 GATT, some provisions pertaining to the specialized agreements¹⁷⁶ and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").¹⁷⁷ According to Article 3 of the DSU, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."¹⁷⁸

The DSU sets forth the mechanisms and procedures for dispute settlement. The WTO's General Council functions as a separate Dispute Settlement Body ("DSB") to administer all stages of the process. The first phase entails consultation between the disputing parties.¹⁷⁹ The complaining party may request the convening of a dispute resolution panel if consultation fails within 60 days after the date of receipt of the request for consultation.¹⁸⁰ If there is no agreement on the selection of panelists, the Director General in consultation with the Chairman of the DSB and the Chairman of the relevant committee selects the panelists.¹⁸¹ The panel hears written and oral arguments from the parties and third-party members who have signified an interest in the mat-

176. Some of these provisions are: Agreement on Agriculture, art. 19, 1867 U.N.T.S. 410; Agreement on the Application of Sanitary and Phytosanitary Measures, art. 11, 1867 U.N.T.S. 493; Agreement on Textiles and Clothing, art. 8 (10), 1868 U.N.T.S. 14; Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, art. 14; Agreement on Trade-Related Investment Measures (TRIMS), art. 8, 1869 UNTS 299; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17, 1868 UNTS 201; Agreement on Preshipment Inspection, art. 8, 1868 UNTS 368; Agreement on Rules of Origin, art. 8, 1868 UNTS 397; Agreement on Import Licensing Procedures, art. 6, 1868 UNTS 436; Agreement on Subsidies and Countervailing Measures, art. 30, 1869 UNTS 14; Agreement on Safeguards, art. 14, 1869 UNTS 154; General Agreement on Trade in Services, art. 23, 1869 UNTS 183; and, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 63, 1869 UNTS 299.

177. See ATT, art. 3, 1869 U.N.T.S. 401, 33 I.L.M. 1125.

178. *Id.*

179. See GATT, art. 4(2), 1869 U.N.T.S. 401, 33 ILM 1226.

180. See GATT, art. 4(7), 1869 U.N.T.S. 401, 33 ILM 1226.

181. See GATT, art. 8(7), 1869 UNTS 401, 33 ILM 1226, 1232.

ter.¹⁸² The panel sets deadlines for written submission by the parties.¹⁸³ Following consideration of the rebuttal submissions and oral arguments, the panel issues descriptive sections (factual and argument) of its draft report to the parties. The parties then submit comments in writing within the time set by the panel. The panel issues an interim report, including the descriptive sections and the findings and conclusions. If no comments are received from any party within the comment period, the interim report becomes the final report and is circulated to the members.¹⁸⁴ The final report is then adopted at the DSB meeting if the parties give no formal notification to the DSB of their desire to appeal. The DSB may also decide by consensus not to adopt the report.¹⁸⁵ An appellate body formed by the DSB hears appeals from panel cases. Only parties to the dispute can appeal a panel report. The appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.¹⁸⁶

The WTO and the Telecommunications Sector

The WTO also has its own agreement regarding the telecommunications sector, called the WTO Telecom Agreement, which went into effect February 5, 1998.¹⁸⁷ The Telecom Agreement is an attempt to aid signatories in determining "if reciprocal competitive opportunities exist in foreign markets"¹⁸⁸ for expanding basic telecommunications services, including "local, long-distance and international voice and data transmission service."¹⁸⁹ The agreement represents the first multilateral telecommunications agreement ever reached. The Agreement encompasses seventy-seven countries that "comprise the world's major telecom service markets and account for more than ninety percent of world telecom

182. See GATT, app 3, arts 4-6, 1869 U.N.T.S. 401, 33 ILM 1226, 1245.

183. See GATT, art. 12 (5), 1869 U.N.T.S. 401, 33 I.L.M. 1126,1233.

184. See GATT, art. 15 (1) (2), 1869 U.N.T.S. 401, 33 I.L.M. 1126, 1235.

185. See GATT, art. 16(4), 1869 U.N.T.S. 401, 33 I.L.M. 1126, 1235.

186. GATT, art. 17, 1869 U.N.T.S. 401, 33 I.L.M. 1126,1236.

187. See http://www.fcc.gov/Bureaus/International/News_Releases/1998/nrin8001.txt (last visited Feb. 25, 2002).

188. Krista Schwarting Rose, Note, *Changing Frequencies: The Federal Communications Commission Globalizes the Telecommunications Industry with the Adoption of the WTO Agreements*, 8 MINN. J. GLOBAL TRADE 161, 190 (1999).

189. U.S. Dept. of Commerce, Office of Telecommunications Technologies, WTO: Q's & A's on the Basic Telecommunications Services Agreement, Dec. 22, 1999, *available at* <http://infoserv2.ita.doc.gov/ot/home.nsf/504ca249c786e20f85256284006da7ab/>

15186ade3990859b852565a300221791!OpenDocument (last visited Jan. 14, 2002).

revenues.”¹⁹⁰ Countries are to open monopoly markets to competition by pledging to a set of regulatory principles and making explicit commitments to open their telecommunications services markets. Measures to open markets include access to public telecommunications transport networks of existing suppliers “under non-discriminatory terms and at cost-oriented rates. These non-discriminatory terms include a competitive provider’s technical ability to interconnect to the public network using standardized, open interfaces.”¹⁹¹

B) Telecommunications Integration into the General Agreement on Trade in Services

The Telecommunications Integration into the General Agreement on Trade in Services (“GATS”) came about in conjunction with the creation of the WTO.¹⁹² Under the GATS, trade in services was brought within the international trading regime created for trade in goods by the GATT. The GATS set forth the general obligations and disciplines members must follow. It also contains Members Schedules, a listing of commitments in specific services areas each country agrees to under the GATS.

Undertaking a specific service commitment on a Member Schedule constitutes an agreement “to provide market access and national treatment for service activity in question on the terms and conditions specified in the schedule.”¹⁹³ By placing a specific service on the schedule, the Member government commits itself to “the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service.”¹⁹⁴ In order to see which services sectors and what conditions the basic principles of the GATS apply within a country’s jurisdiction, one must refer to that country’s schedule and its Most Favored Nation

190. *Id.*

191. See Telecommunications Industry Association Report, *WTO Agreement on Basic Telecommunications Services*, available at http://www.tiaonline.org/international/global/wto/wto_agreement.cfm (last visited Jan. 14, 2002).

192. See GATS, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), 33 I.L.M. 1167 (1994).

193. See World Trade Organization, Guide to Reading the GATS Schedule of Specific Commitments and List of Article II (MFN) Exemptions, available at http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Jan. 20, 2002).

194. See *id.*

("MFN") exemption list.¹⁹⁵ In the case of Mexico, its Member Schedule includes telecommunications as one of its commitments under the GATS,¹⁹⁶ but also specifies in the schedule some limitations that Mexico maintains on market access.¹⁹⁷

The GATS imposes some essential obligations and commitments on all WTO members.¹⁹⁸ One of the most important obligations is MFN treatment to services providers from other WTO members, in spite of the commitments assumed by any individual member.¹⁹⁹ Accordingly, a WTO member is precluded from discriminating among other members. Additionally, WTO members assume transparency obligations whereby member countries must promptly make public all laws and regulations affecting trade and services.²⁰⁰ Transparency promotes stability and predictability since service suppliers know the rules under which they can do business.

Market access is another critical obligation imposed by the GATS. WTO members are to refrain from imposing certain types of quotas and other quantitative restrictions, or local incorporation requirements, in services sectors listed by the members in their GATS schedules.²⁰¹ Under the national treatment tenet, WTO members are precluded from treating foreign services, or service providers, differently than national services or service providers. The application of the market access provision and national treatment are subject to negotiation on a sector-by-sector basis.²⁰² Handling of domestic and foreign service suppliers under

195. The basic principles of GATS are market access, national treatment and Most Favored Nation (MFN) treatment.

196. See World Trade Organization, GATS Commitments on Telecommunications, available at http://www.wto.org/english/tratop_e/servte_e/tel08_e.htm (last visited Jan. 20, 2002).

197. Some of the limitations Mexico identifies are: the international traffic must go through installations of a company with concessions issued by the Secretariat of Communications and Transportation; only companies constituted under Mexican laws can obtain concessions; foreign governments can not participate in a company formed under the Mexican laws and cannot obtain authorization to offer telecommunication services; foreign investment in a Mexican company is allowed only up to 49 percent. See Organización Mundial del Comercio: Comercio de Servicios, Mexico, GATS/SC/56/Suppl.2, April 11, 1997, available at http://www.wto.org/english/tratop_e/servte_e/gbtoff_e.htm (last visited Jan. 20, 2002).

198. See GATS, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), 33 I.L.M. 1167 (1994).

199. GATS art. I, 33 I.L.M. 1125, 1169 (1994).

200. See GATS art. III, 33 I.L.M. 1125, 1170 (1994).

201. See GATS art. XV, 33 I.L.M. 1125, 1179 (1994).

202. According to GATS Article XX, each WTO member negotiates a schedule of

the GATS national treatment and MFN need not be identical to accord MFN or national treatment. The vital aspect of a MFN or national treatment scrutiny is "whether the treatment accorded modifies the conditions of competition in favor of certain foreign or domestic suppliers. Thus, dissimilar treatment can be consistent with MFN or national treatment obligations if it does not put the foreign supplier at a competitive disadvantage to another foreign supplier or a domestic supplier."²⁰³

C) *Telecommunications Under GATS*

Globalization, the desire to become more competitive in the market, and the need for fast and reliable fields of communications, pressures many countries to consider opening their borders to various services excluded under the GATS. One of the service sectors left unsettled has been basic telecommunications services.²⁰⁴

At the creation of the WTO in 1994, WTO members pledged to allow market access for a wide variety of services including the telecommunications services. The importance of this service was highlighted by the creation of a separate sector-specific negotiation scheduled to conclude by April 30, 1996. This deadline was extended to February 15, 1997 due to the insufficient progress made.²⁰⁵ This extended negotiation in turn produced the February Accord.²⁰⁶

Several countries undertook additional specific commitments as a result of the negotiations,²⁰⁷ specifically, market access com-

commitments dealing with the various services sectors. A member must list quantitative restrictions and discriminations in favor of domestic industries that the country wishes to maintain, if the country agrees to make market access commitments in any particular service. Under GATS Article XIX, that discrimination is put through negotiations during the original negotiations or subsequent rounds. See GATS III, 1869 U.N.T.S. 401, 33 I.L.M. 1125, 1181 (1994).

203. Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1998*, 51 FED. COMM. L.J. 111, 169 (1998).

204. Kenneth Freiberg, *World Trade Organizations: Second Protocol to the General Agreement on Trading in Services (GATS) and Related Decisions*, 35 I.L.M. 199 (1996); Introductory Note to the Second Protocol to the General Agreement on Trade in Services.

205. During the negotiations countries had many sharp confrontations on this important issue. For an extensive report on this political topic, see generally CYNTHIA A. BELTZ, *THE BORDERLESS ECONOMY: GLOBAL TRADE RULES AND THE INTERNET* (1999).

206. Spiwak, *supra* note 203, at 169.

207. See GATS, art. 18, 33 I.L.M. 1125, 1180 (1994).

mitments in basic telecommunications services. This action also subjected these countries to the GATS requirements relating to domestic regulation of the services included in Article VI. Under this article, domestic regulation must be "administered in a reasonable, objective and impartial manner."²⁰⁸ The commitments undertaken are included in the Reference Paper of February 15, 1997 which are in favor of competitive regulatory principles.²⁰⁹

D) The Reference Paper

The Reference Paper created within the 1997 Basic Telecommunications Agreement ("BTA") established a broad range of "pro-competitive" market access commitments for services in the telecommunications industry service sector.²¹⁰ The Reference Paper contains six sections. Under Section 1, WTO members are committed to preventing anti-competitive practices in telecommunications by instituting, "competitive safeguards." The Paper describes the following as anti-competitive practices:

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results;
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.²¹¹

According to Section 2, interconnection with a major supplier is provided:

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favorable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the

208. See GATS, art. 6, 33 I.L.M. 1125, 1146 (1994), para.1.

209. See Laura B. Sherman, *World Trade Organization: Agreement of Telecommunications Services* (Fourth Protocol to the General Agreement on Trade in Services) 36 I.L.M. 354, 367 (1997).

210. See *id.*

211. *Id.*

- supplier need not pay for network components or facilities that it does not require for the service to be provided; and
- (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.²¹²

Moreover, the Paper requires major suppliers to make publicly available, "procedures applicable for interconnection"²¹³ and "its interconnection agreements or a reference interconnection offer."²¹⁴ The Paper also contains its own section for dispute settlement²¹⁵ and establishes the right of members to define the type of universal service obligation they wish to maintain. According to the Paper, those obligations are not anti-competitive per se if "they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member."²¹⁶ If a license is required, the Paper expects publicity on the terms and conditions of individual licenses within the time required to decide on the license. The regulatory body is required to be independent and impartial.²¹⁷

Among the schedule of services commitments Mexico submitted to the WTO was a commitment to the Reference Paper on regulatory principles.²¹⁸ Like the GATT tariff schedules on goods, the services commitments to provide specified levels of access to trade in each Member's market are an integral and legally binding component of the Agreement.²¹⁹

E) February Accord: Basic Telecommunications Agreement ("BTA")

The February Accord is not a regulatory agreement; it is a

212. See Sherman, *supra* note 209, at 368.

213. See *id.*

214. See *id.*

215. See *id.*

216. See *id.*

217. See Sherman, *supra* note 209, at 369.

218. See World Trade Organization, *Highlights of Commitments and M.F.N. Exemptions Resulting from the Negotiations*, available at http://www.wto.org/english/tratop_e/servte_e/tel13_e.htm (last visited Jan. 21, 2002) [hereinafter *Highlights of Commitments*].

219. See World Trade Organization, *Schedules of Specific Commitments*, available at http://www.wto.org/english/tratop_e/servte_e/tel06_e.htm (last visited Jan. 21, 2002).

trade agreement that entered into force on January 1, 1998.²²⁰ This agreement became the fourth protocol, and was accepted by the Mexican government.²²¹ Moreover, the Mexican government committed to improvements in "raising the foreign equity limitation to forty-nine percent for all telecommunications service suppliers (from the forty percent listed in an earlier revision) and ending the exclusivity of regional duopolies in cellular telephony."²²² The Mexican government also committed "to competition in all market segments of public telecommunications services on a facilities and a resale basis."²²³ The segments included voice telephone services, data transmission, private leased circuit services, paging and certain cellular telephone services.²²⁴ Foreign investment in excess of forty-nine percent for cellular telephony would be allowed, subject to prior government authorization. Finally, the Mexican government also committed to the Reference Paper on regulatory principles.²²⁵ All are binding responsibilities undertaken by the Mexican government, which were to be "progressively expanded and liberalized."²²⁶

The BTA has unparalleled bearing in opening basic telecommunications markets to worldwide competition and encouraging deregulation of the telecommunication industry globally.²²⁷ The parties to this agreement commit themselves to opening their basic telecommunications market to competition by providing a viable regulatory environment, and to allow foreign ownership and control of entities providing telecommunications services. As a party to the BTA, Mexico agreed to comply with these pro-competition regulatory principles.²²⁸

The BTA also covers "basic telecommunications," a term of art that includes international services, local and long distance ser-

220. See Sherman, *supra* note 209, at 369.

221. See World Trade Organization, *Status of Acceptances of the Fourth Protocol to the General Agreement on Trade in Services*, available at http://www.wto.org/english/tratop_e/servte_e/telpro4_e.htm (last visited Jan. 19, 2002).

222. See generally *Highlights of Commitments*, *supra* note 218.

223. See *id.*

224. See *id.*

225. See *id.*

226. See *id.*

227. See Sherman, *supra* note 209, at 366.

228. Following its adoption in 1998 and even though not all WTO members have signed on to the BTA, the Agreement successfully opened 95 percent of the world telecommunications market to competition and coverage "of nearly one trillion in telecommunications trade." See also Charlene Barshefsky, *Information Technology and Trade Policy: A Look Back, A Look Ahead* (June 5, 2000) available at http://www.ustr.gov/speech-test/barshefsky/barshefsky_90.pdf (last visited Jan. 16, 2002).

vices for public and non-public uses, and services that are accessible through any technology (cable, wireless, or satellite), on a facilities or resale basis.²²⁹ Specific technologies included in basic service were to be outlined in Mexico's schedule as an itemized compilation of trade terms that countries filed with the WTO and agreed to maintain.²³⁰

F) Reason for the U.S.-Mexico Dispute Being in the WTO

The agreement is fully enforceable under the WTO dispute mechanism to those who commit to be bound by its principles.²³¹ Mexico's behavior seems to show that as a WTO member, it has failed to fulfill its commitments under the Reference Paper and the BTA.²³² The United States can then enforce those commitments through the WTO's dispute settlement process. Were the United States to prevail, the remedies available to it would include, first and foremost, an obligation by Mexico to fulfill its market access commitments or implement the necessary regulatory principles. If Mexico fails to fulfill its commitment, it must then compensate the United States in trade terms.

IX. THE UNITED STATES AND THE MEXICAN
TELECOMMUNICATIONS SECTOR

When the Mexican government opened the telecommunications sector to foreign competition in 1997, U.S.-based telecom companies were quick to respond by entering into joint ventures with Mexican entrepreneurs and emerging Telmex competitors. The United States government's "point person" for promoting United States interests in foreign markets is the Office of the United States Trade Representative ("USTR"). The USTR draws much of its authority to act on behalf of United States companies from the Omnibus Trade and Competitiveness Act of 1988.²³³

229. See Sherman, *supra* note 209, at 367, 371.

230. See *id.* at 371. Negotiating Group on Basic Telecommunications, Note by the Chairman, Revision, Notes for Scheduling Basic Telecom Services Commitments, S/GBT/W/2/Rev.1 (Jan. 16, 1997).

231. Reference Paper of the Basic Telecommunications Agreement. See also Spiwak, *supra* note 203, at 169.

232. See Mexico, Schedule of Commitments and Lists of Article II Exemptions, available at http://www.wto.org/english/tratop_eservte_e/gbtoff_e.htm.

233. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1, 102 Stat. 1107, 1107 (1988); *codified at* 19 U.S.C. sec. 3101 et seq.

A) Omnibus Trade and Competitiveness Act of 1988

Section 1371 et seq., known as the Telecommunications Trade Act of 1988, established the protocols by which the United States Trade Representative would pursue the export of telecommunications products with the goal of establishing an open world market for United States telecommunications products. Even in 1988, Congress recognized that "most foreign markets for telecommunications products, services, and investment are characterized by extensive government intervention (including restrictive import practices and discriminatory procurement practices) which adversely affect United States exports of telecommunications products and services and United States investment in telecommunications."²³⁴

Congress also recognized the need to establish a domestic policy that would offset a growing trade imbalance due to a liberalization of the domestic marketplace,²³⁵ while at the same time creating "mutually advantageous opportunities for trade in telecommunications products and services between the United States and foreign countries."²³⁶ If such parity could not be achieved, the United States would move to "avoid granting continued open access to the telecommunications products and services of such foreign countries in the United States market."²³⁷ Moreover, the Congress acknowledged that:

The unique business conditions in the worldwide market for telecommunications products and services caused by the combination of deregulation and divestiture in the United States, which represents a unilateral liberalizations of United States trade with the rest of the world, and continuing government intervention in the domestic industries of many other countries create a need to make an exception in the case of telecommunications products and services that should not necessarily be a precedent for legislating specific sectoral priorities in combating the closed markets or unfair foreign trade practices of other countries.²³⁸

The intended purpose of the Act was to focus efforts by the United States to level the playing field in the telecommunications

234. Telecommunications Trade Act of 1988, Pub. L. No. 100-418, § 1372(a)(3), 102 Stat. 1216, 1216-17 (1988) [hereinafter Telecommunications Trade Act].

235. *Id.* at § 1372(a)(4).

236. *Id.* at § 1372(a)(5).

237. *Id.*

238. *Id.* at § 1372(a)(6).

sector, which in 1988 was entering a new era of technological innovation and growth.

Specifically, the Act was meant:

- (1) to foster the economic and technological growth of, and employment in, the United States telecommunications industry;
- (2) to secure a high quality telecommunications network for the benefit of the people of the United States;
- (3) to develop an international consensus in favor of open trade and competition in telecommunications products and services;
- (4) to ensure that countries which have made commitments to open telecommunications trade fully abide by those commitments; and
- (5) to achieve a more open world trading system for telecommunications products and services through negotiation and provision of mutually advantageous market opportunities for United States telecommunications exporters and their subsidiaries in those markets in which barriers exist to free international trade.²³⁹

The task Congress assigned to the USTR under the Act was a clear mandate that the investigation of foreign telecommunications trade barriers and the resolution of the challenges in the telecommunications sector were to be given a high priority. The marching orders for the USTR under the Act were as follows:

The Trade Representative shall conduct an investigation to identify priority foreign countries. Such investigation shall be conducted no later than the date that is 5 months after the date of enactment of this Act.²⁴⁰

The investigation by the Trade Representative was to focus on:

1. the nature and significance of the acts, policies, and practices that deny mutually advantageous market opportunities to telecommunications products and services of United States firms;
2. the economic benefits (actual and potential) accruing to foreign firms from open access to the United States market; telecommunications products and services of United States firms;
3. the potential size of the market of a foreign country for

239. *Id.* at § 1372(b).

240. *Id.* at § 1374(a).

telecommunications products and services of United States firms;

4. the potential to increase United States exports of telecommunications products and services, either directly or through the establishment of a beneficial precedent; and
5. measurable progress being made to eliminate the objectionable acts, policies, or practices.²⁴¹

Were the USTR to determine that targeted countries were impeding trade in the telecommunications sector, Congress authorized the USTR to take steps against any foreign country determined to be conducting unfair trade practices in the telecommunications sector.²⁴² The findings of the USTR were to be submitted in a report to the Congress no later than "30 days after the date on which the investigation conducted under subsection (a) is completed."²⁴³

The Act further set out the general and specific agendas to follow for negotiating with countries found to be engaging in unfair trade practices:

The general negotiating objectives of the United States under this section are—

- (1) to obtain multilateral or bilateral agreements (or the modification of existing agreements) that provide mutually advantageous market opportunities for trade in telecommunications products and services between the United States and foreign countries;
- (2) to correct the imbalances in market opportunities accruing from reductions in barriers to the access of telecommunications products and services of foreign firms to the United States market; and
- (3) to facilitate the increase in United States exports of telecommunications products and services to a level of exports that reflects the competitiveness of the United States telecommunications industry.²⁴⁴

The specific negotiating objectives of the United States under

241. Telecommunications Trade Act, § 1374(b), 102 Stat. 1216, 1218.

242. Under the Telecommunications Trade Act § 1374(c)(1), the trade representative may at any time, after taking into account the factors described in subsection (b)(A) revoke the identification of any priority foreign country that was made under this section, or (B) identify any foreign country as a priority foreign country under this section, if information available to the trade representative indicated that such action is appropriate.

243. *Id.* at § 1374(d).

244. Telecommunications Trade Act, § 1375(c), 102 Stat. 1216, 1219.

this section regarding telecommunications products and services are to obtain—

- (1) national treatment for telecommunications products and services that are provided by United States firms;
- (2) most-favored-nation treatment for such products and services;
- (3) nondiscriminatory procurement policies with respect to such products and services and the inclusion under the Agreement on Government Procurement of the procurement (by sale or lease by government-owned or controlled entities) of all telecommunications products and services
- (4) the reduction or elimination of customs duties on telecommunications products;
- (5) the elimination of subsidies, violations of intellectual property rights, and other unfair trade practices that distort international trade in telecommunications products and services;
- (6) the elimination of investment barriers that restrict the establishment of foreign-owned business entities which market such products and services;
- (7) assurances that any requirement for the registration of telecommunications products, which are to be located on customer premises, for the purposes of
 - (A) attachment to a telecommunications network in a foreign country, and
 - (B) the marketing of the products in a foreign country, be limited to the certification by the manufacturer that the products meet the standards established by the foreign country
- (8) transparency or, and open participation in, the standards-setting processes used in foreign countries with respect to telecommunications products;
- (9) the ability to have telecommunications products, which are to be located on customer premises, approved and registered by type, and, if appropriate, the establishment of procedures between the United States and foreign countries for the mutual recognition of type approvals;
- (10) access to the basic telecommunications network in foreign countries on reasonable and nondiscriminatory terms and conditions (including nondiscriminatory

- prices) for the provision of value-added services by United States suppliers;
- (11) the nondiscriminatory procurement of telecommunications products and services by foreign entities that provide local exchange telecommunications services which are owned, controlled, or, if appropriate, regulated by foreign governments; and
 - (12) monitoring and effective dispute settlement mechanisms to facilitate compliance with matters referred to in the preceding paragraphs of this subsection.²⁴⁵

The time period set for negotiation with foreign countries to resolve trade disputes in the telecommunications sector was established at one year from the date on which identification of the foreign country was made.²⁴⁶ If little or no improvement resulted from negotiations, Congress extended authority to the President to take appropriate punitive actions. Such actions included, "termination, withdrawal, or suspension of any portion of any trade act entered into with such country"²⁴⁷ under various United States trade acts, to prohibit the federal government from purchasing telecommunications products from such country,²⁴⁸ and to establish other penalties under the law involving suspension of business between the United States and the foreign country.²⁴⁹

Furthermore, the conditions established under the Act set the foundation upon which the United States would pursue sanctions and punitive actions against Telmex before the WTO when, in the 1990s, the trade dispute over access to the telecommunications markets in Mexico became a front-burner issue for the USTR.

X. THE USTR ISSUES WITH TELMEX

The USTR has identified a number of key issues with regard to the Telmex monopoly in the Mexican telecommunications sector. The first concerns the interconnection fees Telmex charges United States long distance carriers for completing calls originating in the United States. The international connection traffic between the United States and Mexico is the highest in the world

245. Telecommunications Trade Act, § 1375(d), 102 Stat. 1216, 1219-20.

246. Telecommunications Trade Act, § 1376(c)(1)(B), 102 Stat. 1216, 1220-21. The period from the date of enactment of the Act was set at 18 months (sec. 1736(c)(1)(A)).

247. *Id.* at § 1376(b)(1)(A).

248. *Id.* at § 1376(b)(1)(C).

249. *See id.* at § 1376(b)(1), subsections (D) through (G).

and worth billions annually in revenues to the service providers.²⁵⁰ Cofetel initially established a fifty-eight percent surcharge²⁵¹ for Telmex to complete international calls carried by its competitors.²⁵² Although the surcharge was removed in 1999, competitors accused Telmex of charging fifteen cents per minute above cost to complete international calls from the United States into Mexico.²⁵³ The USTR was seeking a ten cents per minute rate for U.S. carriers, and also argued that market competition should allow for "alternatives to Telmex for terminating international calls."²⁵⁴

The second key issue concerns the settlement rate Telmex charges foreign long-distance providers to complete calls to the dialed party in Mexico. The United States argues that both U.S. carriers and U.S.-backed telecommunications companies in Mexico are victimized by the protectionist practices of Telmex, which charges exceptionally high rates that most Mexicans cannot afford. Moreover, Telmex has charged higher rates still for completion of calls into remote areas of Mexico where the Telmex network is less well established.²⁵⁵

The third key issue argued by the USTR is that Mexican lawmakers ignored the convention that international calling fees are set by international agreements by allowing Telmex to negotiate its own fees—another factor that the USTR claims hurts competition.²⁵⁶

The fourth key issue concerns the perception by the USTR that Cofetel is not moving quickly or aggressively enough to reduce Telmex's market dominance.

Finally, the USTR believes that since the long distance services sector was opened to competition in 1997, Telmex has gone from controlling seventy percent of long distance customers to controlling eighty-one percent, while it still controls ninety-five percent of the local telephone service market.²⁵⁷ In the eyes of the USTR, that makes Telmex a monopoly in the telecommunications sector capable of effectively preventing U.S.-backed competitors from competing fairly in the Mexican market.

250. Shetty, *supra* note 2, at 48.

251. This would represent the amount Telmex could add to the total charge for completing an international call.

252. Shetty, *supra* note 2, at 48.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Mexican Rates Anger U.S. Phone Giants*, ARIZ. REPUBLIC, Aug. 19, 2000, at D1.

257. DePalma, *supra* note 7, at W1.

At the time the USTR entered the fray, Telmex was charging a long distance settlement rate of nineteen cents per minute to competitors for completing connections in Mexico,²⁵⁸ and about 4.6 cents per minute for originating and terminating calls within Mexico. Competitors argued that the nineteen cents per minute rate was too high—as much as two to three times higher than the rates charged in most developed countries,²⁵⁹ such as the six cents per minute connection rate for calls between the United States and Canada and the United States and Great Britain.²⁶⁰ Moreover, argued U.S. carriers, the balance was heavily skewed in favor of Telmex because the phone traffic of Mexicans calling home to Mexico from the United States was much greater than the number of calls placed to the United States from Mexico.²⁶¹ The nineteen cents per minute rate brought some \$500 million into Telmex coffers in 2000. AT&T and MCI WorldCom and their subsidiaries in Mexico wanted Telmex to cut the rate to five cents per minute, but Telmex refused to go lower than fifteen cents per minute.²⁶² Telmex countered that the nineteen cents per minute rate was the same rate dominant U.S. operators were charging in their own market in 1984 when the new competitors were entering the race for market share.²⁶³ One can only wonder about the argumentative logic of Telmex's comparison to the situation in the United States eighteen years ago.

Regardless, the USTR's primary concern with Telmex appears to have more to do with Mexican government complicity in protecting Telmex in the past from the competition and enforcement of the steps its regulatory agencies have taken to unravel Telmex's monopolistic practices, than with how Telmex will proceed to do business in the telecommunications sector. The USTR also took issue that the regulatory agencies in Mexico are toothless, unresponsive to the concerns of foreign competitors, and are moving too slowly to suit U.S. business interests, especially at a

258. *Telmex Negotiates ILD Termination Fee with AT&T, WorldCOM-Mexico*, GLOBAL NEWS WIRE, Jan. 8, 2001, available at LEXIS, News File.

259. Chris Kraul, *U.S. To File WTO Complaint Against Telmex*, L.A. TIMES, July 29, 2000, at C1.

260. *Mexican Rates Anger U.S. Phone Giants*, *supra* note 256, at D1. Some examples of connection costs during peak calling periods for domestic long-distance service: Argentina: 1.1 cents per minute, Brazil: 2.0 cents per minute, Chile: 1.7 cents per minute, Mexico: 3.2 cents per minute, Peru: 1.732 cents per minute. See Kraul, *supra* note 259, at C1.

261. Smith, *supra* note 46, at C1.

262. *Id.*

263. Shetty, *supra* note 2, at 48.

time, following NAFTA, when technological advances in telecommunications are occurring at a dizzying rate and international competition in the sector is rapidly increasing.

The USTR warned the Mexican government that unless Telmex was brought into line, the United States would proceed with legal action before the WTO. On July 28, 2000, less than a month after Vicente Fox captured the Mexican presidency, the USTR made good its threat and filed a complaint against Mexico at the WTO,²⁶⁴ charging that "Mexico has adopted or maintained

264. See Summary of the Secretariat, Overview of the State-Of-Play of WTO Disputes, July 13, 2001. The summary of the complaint appears in Ch. VII Pending Consultations, at 41-42. The summary is reproduced in full as follows:

Mexico – Measures Affecting Telecommunications Services, complaint by the United States (WT/DS204/1). This request, dated August 17, 2000, is in respect of Mexico's commitments and obligations under the GATS with respect to basic and value-added telecommunications services. According to the United States, since the entry into force of the GATS, Mexico has adopted or maintained anti-competitive and discriminatory regulatory measures, tolerated certain privately-established market access barriers, and failed to take needed regulatory action in Mexico's basic and value-added telecommunications sectors. In the view of the United States, Mexico has, for example: (i) enacted and maintained laws, regulations, rules, and other measures that deny or limit market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico; (ii) failed to issue and enact regulations, permits, or other measures to ensure implementation of Mexico's market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico; (iii) failed to enforce regulations and other measures to ensure compliance with Mexico's market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico; (iv) failed to regulate, control and prevent its major supplier, Teléfonos de México ("Telmex"), from engaging in activity that denies or limits Mexico's market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico; and (v) failed to administer measures of general application governing basic and value-added telecommunications services in a reasonable, objective, and impartial manner, ensure that decisions and procedures used by Mexico's telecommunications regulator are impartial with respect to all market participants, and ensure access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for the supply of basic and value-added telecommunications services. The United States considers that the alleged action and inaction on the part of Mexico may be

anti-competitive and discriminatory regulatory measures, tolerated certain privately-established market access barriers, and failed to take needed regulatory action in Mexico's basic and value-added telecommunications sectors."²⁶⁵ The main grounds for the complaint were that the termination rates "adversely affect U.S. interests and deprive Mexican citizens of the benefits of competition."²⁶⁶ In this action, the USTR sought the resolution of three related issues: (1) lack of effective disciplines over the former monopoly, Telmex, which is able to use its dominant position in the market to thwart competition; (2) failure to ensure timely, cost-oriented interconnection that would permit competing carriers to connect to Telmex customers to provide local, long-distance, and international service; and (3) failure to permit alternatives to an outmoded system of charging U.S. carriers above-cost rates for completing international calls into Mexico.²⁶⁷

The USTR believed that failure to resolve the issues would place Mexico "at an enormous disadvantage," and noted as part of its argument that "Mexico has fewer phone lines per capita than almost every other major Latin American country, and the growth in adding new lines over the past few years is far less than that of Guatemala, Chile, Brazil, and many other countries in Central

inconsistent with Mexico's GATS commitments and obligations, including Articles VI, XVI, and XVII; Mexico's additional commitments under Article XVIII as set forth in the Reference Paper inscribed in Mexico's Schedule of Specific Commitments, including Sections 1, 2, 3, and 5; and the GATS Annex on Telecommunications, including Sections 4 and 5. On November 10, 2000, the United States requested the establishment of a panel. On the same date, the United States notified the Dispute Settlement Board "DSB" of a request for consultations concerning several recent measures adopted by Mexico affecting trade in telecommunication services. At its meeting on December 12, 2000, the DSB deferred establishment of a panel.

See also Office of the United States Trade Representative, WTO Consultations Regarding Telecommunications Trade Barriers in Mexico, 65 Fed. Reg. 52369 (Aug. 29, 2000).

265. Press Release, Office of the United States Trade Representative, Complaint to the WTO (Aug. 17, 2000). See also, Camila Castellanos, *Trust Buster: Mexico's Federal Competition Commission Gains Clout and the Wrath of Big Business—As it Lays Down One Tough Ruling after Another*, BUS. MEX., March 1, 2001, available at LEXIS, News File.

266. Press Release 00-57, Office of the United States Trade Representative, U.S. to Request WTO Consultations With Mexico Regarding Telecommunications Trade Barriers (July 28, 2000). See also Chris Kraul, *U.S. To File WTO Complaint Against Telmex*, L.A. TIMES, July 29, 2000, at C1, available at LEXIS, News File.

267. Press Release 00-57, Office of the United States Trade Representative, U.S. to Request WTO Consultations With Mexico Regarding Telecommunications Trade Barriers (July 28, 2000) (on file with author).

and South America."²⁶⁸ Moreover, argued the USTR, "barriers to competition also undermine Mexico's ability to attract investment and develop Internet services and electronic commerce, all of which require a competitive telecommunications market."²⁶⁹ The USTR sought WTO mediation. The USTR complaint also included a request for binding sanctions if mediation did not lead to a settlement of the issues within sixty days.²⁷⁰

No agreement was reached at first, and following the sixty day waiting period following the filing of the complaint, the USTR announced on October 10, 2000, that the United States would request the establishment of a WTO dispute settlement panel "to examine U.S. claims that Mexico has failed to comply with its WTO commitments in its \$12 billion telecommunications services sector."²⁷¹ The request for the panel represented "the next step in the WTO dispute settlement process."²⁷²

According to the new USTR complaint, the United States asserted that Mexico continued to allow Telmex to maintain a "de facto monopoly to negotiate settlement rates, which prevents other Mexican carriers from negotiating lower rates."²⁷³ A statement released by the USTR declared that:

The policy of the Mexican Government not to permit resale, i.e., the reselling of the long-distance public network in Mexico, continues to reinforce Telmex's market dominance and erode the basis for effective competition in Mexico's telecommunications market. In addition, the regulatory agency has been unable to implement regulations to restrict market abuses by Telmex.²⁷⁴

A) Who Does the USTR Represent?

Telmex's primary long distance competitors are two telecommunications companies, Alestra and Avantel. Both companies are the product of joint ventures between Mexican investors and telecommunications start-ups and U.S.-based telecommunications

268. *Id.*

269. *Id.*

270. Kraul, *supra* note 259, at C1. See also Smith, *supra* note 46, at C1.

271. Press Release, Office of the United States Trade Representative, United States to Request WTO Panel on Mexico Telecommunications (Oct. 10, 2000).

272. *Id.*

273. Press Release, Office of the United States Trade Representative, 2000 *National Trade Estimate Report on Foreign Trade Barriers*, available at http://www.ustr.gov/pdf/2000_mexico.pdf (last visited December 10, 2001).

274. *Id.*

companies. With the forty-nine percent ownership limitation by foreign companies on all telecommunications entities in force,²⁷⁵ AT&T holds a forty-nine percent stake in Alestra²⁷⁶ and MCI WorldCom has a forty-five percent holding in Avantel.²⁷⁷ Mexican banks and other investment groups hold the balance of shares in both companies. The entities FEMSA, VISA, and ALFA hold fifty-one percent shares in Alestra, and Banamex bank controls fifty-one percent of Avantel.²⁷⁸ Since the two companies entered the long-distance market in 1996, Alestra and Avantel have taken over about thirty percent of the long-distance market from Telmex, having done so by capitalizing on Telmex's horrendous corporate image and high customer dissatisfaction.²⁷⁹

Telmex officials point out that deregulation in the 1990's allowed more than twenty companies to enter the telecommunications market and take over one third of that market in the first year of competition.²⁸⁰ During that same time, Telmex claims that the interconnection cost actually dropped fifty-eight percent due to the entry of competition into the sector.²⁸¹

Avantel and Alestra crossed swords with Telmex over network access prior to the USTR getting involved in the dispute. In May 1998, Avantel and Alestra filed a complaint with the CFC alleging that Telmex was interfering with Avantel's ability to establish toll-free "800" numbers for commercial clients.²⁸² Under the suit, Telmex competitors alleged that the company was deducting fifty centavos per call from users' pre-paid phone card for calls made to what were supposed to be toll free numbers.²⁸³ Telmex responded that the problems the two rivals were having breaking into the sector were the result of "poor management and

275. See Amendments to the Foreign Investment Law, D.O, Dec. 24, 1996.

276. Peter J. Howe, *Sonus Lands Multi-Billion Dollar Deal*, BOSTON GLOBE, Nov. 12, 2001, at C5.

277. Avantel is also Mexico's leading Internet provider. See International Markets Fuel Record Growth at Frequency Marketing, Inc. See *Loyalty Marketing Company Celebrates 20th Anniversary*, BUS. WIRE, Oct. 29, 2001, available at LEXIS, News File.

278. *Telmex Eyes Hispanic Market, Emerging Markets*, DATAFILE THE NEWS, Feb. 5, 2001, (E-media account number 200102051651.m50), available at LEXIS, News File.

279. See generally Tegel, *supra* note 44.

280. Traci Carl, Callers, *U.S. Phone Carriers in Common Cause Against High Mexican Rates*, ASS'D PRESS, Aug. 18, 2000, available at LEXIS, News File.

281. *Id.*

282. Presunta comisión de practicas monopólicas en el cobro de llamadas de larga distancia a través de números 800, Denuncia Expediente: DE-07-1998 y RA-33-2000.

283. *Telmex Fined By Antitrust Agency Over Toll-Free Access Charges*, EL UNIVERSAL, Apr. 6, 2001, available at LEXIS, News File.

flawed strategies,"²⁸⁴ including the waste of resources on expensive office construction and furnishings,²⁸⁵ and the U.S. \$1.6 billion spent to install a long-distance network that Telmex insists became obsolete during year 2001.²⁸⁶ Telmex also countered that nearly ninety percent of copper wire lines were available to handle competitor traffic. Moreover, Telmex claimed that consumers changed carriers twice a year on average—proof that the market was competitive²⁸⁷ and that Telmex did not control a monopoly. Strategies and consumer vagaries notwithstanding, the CFC ruled in favor of the Telmex competitors, fining Telmex 7.7 million pesos for engaging in monopolistic practices by charging to dial 800 numbers from public booths.²⁸⁸

Avantel and Alestra have also taken issue with Telmex's practice of call bypassing, "a practice whereby Mexican operators re-route incoming calls from the U.S. to give the impression that they are national calls."²⁸⁹ Bypassing, the complaint claimed, allowed Telmex to collect a nineteen-cent per minute call termination fee—far above the four cent per minute rate that Avantel and Alestra convinced the USTR to promote before the WTO.²⁹⁰

Moreover, Avantel and Alestra both accused Telmex of "slamming," a practice whereby a long-distance provider continues to charge for service even after the consumer has switched to another service provider.²⁹¹ Finally, Avantel charged that Telmex had not honored its connection charge agreement, had hindered access to the Telmex network, "levied arbitrary charges, and . . . had not met the targets for allowing competitors a share of the national telecom business."²⁹²

B) The FCC Gets Involved

The USTR was not the only United States agency to go after

284. Smith, *supra* note 46, at C1. According to one industry operator, "AT&T and MCI came into the market with the assumption that Telmex would continue to provide poor service and they invested with a view to capture 45 percent of the market." See Shetty, *supra* note 2, at 48.

285. Case, *supra* note 4, at 1F.

286. Shetty, *supra* note 2, at 48.

287. See generally Carl, *supra* note 280.

288. *Telmex Fined By Antitrust Agency Over Toll-Free Access Charges*, *supra* note 283.

289. *Telmex Negotiates ILD Termination Fee with AT&T*, WorldCOM-Mexico, *supra* note 258.

290. *Id.*

291. See generally Castellanos, *supra* note 50.

292. Carl, *supra* note 280.

Telmex. The Federal Communications Commission has taken an aggressive role in the Mexican telecommunications dispute. Not only does the FCC have a say in how Telmex has treated U.S.-backed competitors in Mexico, but the Commission also has a strong hand to play in how Telmex may do business in the United States. Established by the Communications Act of 1934, the Federal Communications Commission ("FCC") is an independent government agency, directly responsible to Congress. The FCC "is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions."²⁹³ The FCC organization structure includes seven operating bureaus devoted to different sectors of the communications universe. "The Bureaus' responsibilities include: processing applications for licenses and other filings; analyzing complaints; conducting investigations; developing and implementing regulatory programs; and taking part in hearings."²⁹⁴ One of the bureaus, the International Bureau, represents the FCC in satellite and international matters. This bureau has been chiefly responsible for FCC actions regarding Telmex and the United States/Mexico telecommunications corridor.

The FCC has been aggressive in the dispute with Telmex, armed with the power to use considerable leverage in a quid pro quo fashion in order to advance United States interests under NAFTA and the WTO. In other words, if Telmex resists opening the Mexican telecommunications sector to foreign competition, the FCC has the capacity to delay or deny Telmex's ventures into the United States telecommunications market.

In 1998, the FCC took action against Telmex's resistance to negotiating fair settlement rates for the U.S.-Mexico long-distance corridor. On November 24, the International Bureau issued two show cause orders regarding the Telmex/Sprint Communications ("TSC") joint venture for providing international switched resale services between the United States and all international points, including Mexico. The FCC action arose when competitors AT&T and MCI WorldCom "filed information with the Commission indicating that TSC and Telmex [were] not in compliance with specified conditions and expectations,"²⁹⁵ following the 1997 approval

293. See generally Federal Communications Commission, *Statement of the FCC*, at <http://www.fcc.gov/aboutus.html> (last visited Jan. 18, 2002).

294. *Id.*

295. International Action Report No. IN 98-62, available at <http://ftp.fcc.gov/>

by the FCC to allow TSC to provide long distance services in the United States market. The International Bureau found in one of the orders that:

Telmex appears to be failing to comply with its commitment related to the provisioning of private lines and private circuits to competitors in violation of TSC's authorization. This commitment was a condition of TSC's Section 214 authorization. The Bureau also has serious concerns about: (1) the lack of progress in opening Mexico's market to "pure" switched resale; (2) the lack of progress on negotiations between Telmex and U.S. carriers for acceptable interim settlement rates for 1998 and 1999; (3) the continuation of Mexico's discriminatory 58 percent surcharge for inbound international calls; (4) the inability of Telmex and U.S. carriers to reach an agreement for "true up" arrangements relating to the inclusion of Paid-800 service in proportionate return (Paid-800 service allows callers in Mexico to initiate an international call to a U.S. toll-free number); and (5) the apparent discriminatory conduct by Telmex with respect to "received collect" traffic (collect calls made from Mexico to the United States for which the recipient is billed).²⁹⁶

In a press release following the issuance of the orders, FCC Chairman William Kennard stated:

Because settlement rates on the U.S.-Mexico route continue to be significantly above cost, U.S. consumers have to pay much more than they should to talk to relatives and friends or to conduct business in Mexico. Lower settlement rates would mean consumers pay less. Mexican carriers are the recipients of by far the largest settlement payment subsidies from U.S. carriers, with payments to Mexican carriers exceeding \$700 million in 1997. A subsidy by U.S. consumers on this order of magnitude is unacceptable. Carriers from several other countries in the Americas, such as the Dominican Republic, Guatemala and Venezuela, have agreed to more significant annual reductions in their settlement rates than Telmex. Moreover, Mexico is one of only a few members of the Organization for Economic Cooperation and Development ("OECD") that have not *already* reduced settlement rates to the relevant benchmark.

Bureaus/International/News_Releases/1998/nrin8040.html (last visited Jan. 18, 2002).

296. *Id.* The full order is available at <http://www.fcc.gov/Bureaus/International/Orders/1998/da982400.txt> (last visited Jan. 18, 2002).

The Bureau denied Sprint's settlement rate modification request for 1998 and 1999 because it entailed reductions of a mere two cents in 1998 and three cents in 1999, and would have delayed seventy-five percent (15.5 cents) of the aggregate reductions required to achieve the benchmark rate of nineteen cents until 2000, forcing American consumers to pay higher calling rates until January 2000. I hope the International Bureau's Order will encourage Sprint and other U.S. carriers to negotiate expeditiously settlement rates with Telmex for 1998 and 1999 that are closer to cost-based rates and that will lead to lower calling prices for U.S. consumers.

I am also concerned by recent reports that Telmex may be failing to meet its commitments that the Bureau set as a condition of granting Telmex entry into the United States through the TSC venture. The allegations that Telmex may be stifling competition on the U.S.-Mexico route by denying facilities to, or discriminating against, U.S. carriers is a potentially serious development. I am also disappointed that Mexican carriers and the Mexican Government have yet to successfully conclude an agreement to resolve a number of key interconnection issues that stand in the way of increased competition.²⁹⁷

More recently, in January 1999, the FCC levied a \$100,000 fine against Telmex International Ventures USA, a U.S.-based Telmex entity, claiming that Telmex violated an international operations agreement by refusing to provide switched resale services to destinations including Mexico.²⁹⁸ The fine, called a Notice of Apparent Liability, was aimed at pressuring the Mexican government through Telmex to adhere to its liberalization commitments under the GATT, NAFTA, and the WTO. The FCC, however, found itself on shaky legal ground and later dropped the fine when the FCC's Enforcement Bureau concluded that "the law in this area was not clear enough to justify the imposition of a forfeiture."²⁹⁹

Nevertheless, the FCC, in concert with the USTR, continues

297. Statement of FCC Chairman William E. Kennard on the International Bureau's Actions Concerning Accounting Rates on the United States/Mexico Route and Potential Violations of Telmex/Sprint Communications' Authorization to Serve Mexico (Nov. 24, 1988), available at <http://ftp.fcc.gov/Speeches/Kennard/Statements/stwek887.html> (last visited Jan. 18, 2002).

298. See generally *Today's Key FCC Actions*, WASH. TELECOM NEWSWIRE, July 25, 2001. See also Castellanos, *supra* note 50.

299. Enforcement Bureau Ruling, EB-00-IH-0040, available at LEXIS, News File.

to aggressively pursue making the Mexican/United States corridor a more fair and level playing field for market competition.

XI. MEXICO'S RESPONSE TO UNITED STATES PRESSURE

Given that the international long-distance market between the United States and Mexico is reported to be the second largest market in the world,³⁰⁰ the stakes are very high for whichever service entity can capture and retain the most customers. Resolving some, if not all, of the trade issues over Telmex has given the Fox administration a prime opportunity to promote itself as an administration that favors competition as a prime component to growing a new, modern, and progressive economy that encourages global trade and investment. At the same time, the Mexican government has vigorously defended itself over the USTR charges before the WTO, arguing that at least a dozen competitors are vying for market share in the Mexican telecommunications sector and that most are backed by foreign entities.³⁰¹ Moreover, Mexico charges that the USTR action before the WTO is nothing more than government collusion with U.S.-backed competitors of Telmex to grab more market-share.³⁰²

The USTR has perhaps felt pressure from MCI WorldCom and AT&T to distract Telmex from its own ambitions for international expansion into the United States market, as would be allowed under NAFTA agreements and under the WTO. By bringing an action to the WTO, the USTR would appear to support WorldCom and AT&T contentions that Telmex has not lived up to its commitments to the WTO and therefore should not be allowed into the long-distance resale market in the United States.³⁰³

Mexico's perspective is that the USTR improperly invoked the adjudicatory capacity of the WTO because the United States FCC "is applying old bilateral rules of reciprocity, which should have been replaced by the WTO multilateral regime."³⁰⁴

As for the role of the Mexican government in the telecommunications sector, analysts claim that the Fox administration is hoping to amend laws and regulations over the sector in order to curtail the lawsuits filed by Telmex and its competitors that have

300. See generally Carl, *supra* note 280.

301. *Mexican Rates Anger U.S. Phone Giants*, *supra* note 256, at D1.

302. *Id.*

303. Shetty, *supra* note 2, at 48.

304. *Id.*

blocked CFC regulatory decisions from being implemented.³⁰⁵

A) *Telmex's Position*

Telmex director, Carlos Slim, has maintained that the USTR's involvement is little more than an effort to protect an AT&T/MCIWorldCom duopoly at the cost of Telmex market share.³⁰⁶ Telmex legal representatives further argue that the Cofetel rulings have put Telmex at a tremendous disadvantage for competing in the marketplace. Javier Mondragon, Telmex's general counsel, asserted that Telmex's connection rates to competitors are actually lower than similar rates in the United States. He noted that, "The volume of traffic per line is higher in the United States, so not only are we equivalent in cost, but with more traffic on the line, U.S. carriers are realizing more revenues, which has a direct impact on cost."³⁰⁷

Telmex also wants to recover costs it says it must absorb in order to compete in the sector, including a demand to levy a five cents per minute surcharge to pay for

- adapting its central offices for interconnection to meet the conditions demanded by new entrants for carrier pre-selection;
- a new numbering plan;
- advanced signaling protocols;
- U.S.-style billing procedures.³⁰⁸

As a test to Telmex claims that the costs for such upgrades would run \$1.5 billion, Telecordia Technologies, a Bell-owned venture, put the estimate for its own similar upgrades at \$423 million, while other competitors argued the upgrades could be done for less than \$250 million.³⁰⁹

Looking ahead, however, the growth of the wireless telecommunications market in Mexico may render some of the arguments less effective as the issue of provision of services to fix lines shifts to the costs for providing mobile services at competitive rates.

XII. THE JANUARY ACCORDS

On January 2, 2001, Telmex finally reached an agreement

305. *Id.*

306. *U.S. Threatens to Take Telmex to WTO; Mexico Telco Accuses US of Imperialism*, LATIN AM. REGIONAL REP.: MEX. AND NAFTA, Aug. 15, 2000, at 2.

307. Shetty, *supra* note 2, at 48.

308. *Id.*

309. *Id.*

with Avantel and Alestra in which Telmex would open the local service market to the two competitors in exchange for the remission of more than \$137 million in unpaid connection fees owed by the two companies.³¹⁰ All parties also agreed to curtail legal proceedings brought by each side in the dispute.³¹¹ Even with such an arrangement, Telmex would still get a portion of the \$12 billion growth in the telecommunications market.³¹² At the same time, Telmex owed Avantel and Alestra nearly \$200 million in refunds and compensation that the CFC ordered Telmex to pay out in December 2000.³¹³ Avantel said that it was never notified of the CFC ruling until sitting down to sign the agreement in January, 2001. In addition, Telmex agreed to cut the interconnection fees it charged the U.S.-backed long distance competitors from 3.36 cents per minute to 1.25 cents per minute until 2003,³¹⁴ following Cofetel's regulatory ruling during Summer 2000. That rate made it the second lowest rate in Latin America; Chile had the lowest rate of 0.5 cents per minute.³¹⁵ Cofetel did not publish the fee rates until October, however, because the agency was awaiting the outcome of a Telmex injunction seeking to invalidate special control rules issued by Cofetel on September 12, 2000.³¹⁶

The court uncharacteristically rejected the injunction request in October, at which point Cofetel was able to announce the rate on October 6. Telmex promptly cried foul and again went to court in Mexico to have the rate regulation overturned. Telmex argued that the rule enables regulators "to treat dominant companies like Telmex differently from smaller companies to foster competition,"³¹⁷ essentially creating an uneven playing field for Telmex. According to a statement released by Telmex following the Cofetel ruling, the new regulations "would result in higher prices for consumers while depriving them of the benefits of Telmex's increased productivity. . . . The only beneficiaries will be the competing companies, which will be able to increase profits because of undeserved advantages that actually harm the national interests."³¹⁸

310. See generally Tegel, *supra* note 44.

311. Smith, *supra* note 46, at C1.

312. Malkin, *supra* note 45, at 113.

313. *Three-Way Deal Shields Telmex From Avantel, Alestra Refund Order*, EL ECONOMISTA, May 16, 2001, available at LEXIS, News File.

314. Smith, *supra* note 46, at C1.

315. *Cofetel Sets Telmex, Avantel Interconnection Rate-Mexico*, BUS. NEWS AM., Oct. 10, 2000, available at LEXIS, News File.

316. *Id.*

317. DePalma, *supra* note 7, at W1.

318. *Id.*

Another Telmex executive claimed that the low rate would result in "disinvestments, not investment, in our network."³¹⁹ The Cofetel ruling did not, however, cover "the cost of 'special projects' to facilitate interconnection or co-location, which is the cause of friction between Telmex and Avantel."³²⁰ Not coincidentally, the release of the rate by Cofetel occurred just three days before USTR Barshefsky was due to arrive in Mexico City to discuss the dispute with Mexican officials.³²¹

A further setback was dealt to Telmex when in March 2001, the Federal Competition Commission ("CFC") found that Telmex maintained a monopoly over local network access for its long-distance competitors by charging long-distance carriers both a resale fee and an interconnection fee, as well as restricting the competitors' access to Telmex networks.³²² The CFC ordered Telmex to pay a 33.2 million peso penalty.³²³ The ruling apparently was made December 13, 2000, but some of the parties were not notified until four months later. Telmex harshly criticized the CFC decision as having been reached in an ad hoc manner without regard to current Mexican law, and argued that Telmex was doing nothing different than is done "all over the world," in the words of one Telmex executive.³²⁴

On May 30, 2001, Avantel's parent company, MCI WorldCom, and Telmex agreed to a settlement rate of 15.5 cents per minute rate from the United States to Mexico for 2001, retroactive to January 1, 2001.³²⁵ The rate would go down further in 2002, to 13.5 cents per minute, and down again to ten cents per minute in 2003.³²⁶ The agreement was seen by some analysts as a tangible sign the Fox administration was fulfilling its pledge to stimulate competition in key Mexican industries where the "dominant players have long called the tune."³²⁷ Moreover, Communications Min-

319. Case, *supra* note 4, at 1F.

320. Cofetel Sets Telmex, Avantel Interconnection Rate-Mexico, *supra* note 315.

321. Case, *supra* note 4, at 1F.

322. Telmex Fined By Antitrust Agency Over Toll-Free Access Charges, EL UNIVERSAL, Apr. 6, 2001, available at LEXIS, News File.

323. *Telmex to Appeal 33-Million-Peso Penalty*, REFORMA (Mexico), May 21, 2001, available at LEXIS, News File.

324. *Id.*, quoting Telmex Communications and Institutional Relations head Arturo Elias Ayub.

325. *WorldCom Confident On FCC Approval for Telmex Rate Deal*, COMM. DAILY, June 25, 2001, available at LEXIS, News File.

326. *Id.*

327. Smith, *supra* note 46, at C1.

ister Pedro Cerisola was actively involved in bringing the two sides to an agreement.

While the agreement lowers the rate from nineteen cents per minute prior to the settlement, AT&T balked at the new rate, saying it was still too high,³²⁸ citing an industry study that indicated the actual cost to complete calls from the United States to Mexico is less than four cents per minute.³²⁹ On June 20, 2001, AT&T, along with Concert, an international joint venture with British Telecom,³³⁰ filed a complaint with the United States FCC contending that the agreement between WorldCom and Telmex did not meet Mexico's WTO commitments,³³¹ and would result in consumers in the United States paying Telmex and other Mexican carriers almost a billion dollars more than necessary over the subsequent three years.³³² AT&T asked the International Bureau of the FCC to reject the WorldCom settlement rate proposal on the following additional grounds:

- (1) The proposed rates were far above cost-based levels, which would be less than 4 cents. The rates also exceeded what Mexican carriers paid Telmex for facilities and services needed to terminate calls from the U.S., which are under 4.5 cents.
- (2) The agreement isn't in the public interest because the reductions are insufficient and Telmex would be able to "whipsaw" other U.S. carriers into similar rates, barring the negotiation of deeper reductions.
- (3) There is no justification for this massive, above-cost out-payment to a neighboring country that supposedly opened its telecommunications market to competition more than four years ago, or for such blatant discrimination against U.S. carriers.³³³

328. Tegel, *supra* note 44.

329. *Telmex Calls AT&T Statement a Lie - Mexico*, BUS. NEW AM., June 26, 2001, available at LEXIS, News Library.

330. The joint venture between AT&T and British Telecom began in January 2000, after MCI WorldCom backed out of the project with British Telecom. Although initially billed as one of the most ambitious global telecommunications alliances ever attempted, high debt and management troubles at a time when the tech companies were suffering through share devaluation undermined the venture causing its collapse in October, 2001. See Todd Jatras, *AT&T, British Telecom Hang Up On Joint Venture*, FORBES.COM, Oct. 16, 2001, available at http://biz.yahoo.com/fo/011016/1016concert_2.html (last visited Jan. 10, 2002).

331. *AT&T Hits Telmex Settlement Rates*, LONG-DISTANCE COMPETITION REP., June 25, 2001, available at LEXIS, News File.

332. *WorldCom Confident on FCC Approval for Telmex Rate Deal*, *supra* note 326.

333. *AT&T Hits Telmex Settlement Rates*, *supra* note 331.

Moreover, AT&T took issue with Telmex's negotiating style, claiming that "Telmex's consistent strategy is to negotiate only with the U.S. carrier from which it believes it may obtain the most advantageous agreement, and then to pressure other U.S. carriers to accept the same agreement."³³⁴ Telmex responded that its policy was indeed to negotiate with the foreign carrier having the highest volume of calls, assuming the other carriers would then follow suit with whatever was agreed to.³³⁵ MCIWorldCom overtook AT&T in long-distance traffic between the United States and Mexico in 2000 and therefore had proprietary negotiating rights. Arturo Elias, Telmex's corporate director, explained in an interview that rules by Cofetel and the FCC are explicit: "The rules say that the carrier which has the largest traffic negotiates the tariffs[,] and that was WorldCom."³³⁶

Nevertheless, Telmex and U.S. competitors subsequently agreed on an international connection fee in the neighborhood of fourteen cents per minute.³³⁷ Telmex was still not satisfied with the agreement because the pressure brought by international and domestic competitors, telepirates, and lower international tariffs elsewhere has resulted in significantly lower revenues for Telmex, from \$1.9 billion in 1995 to about \$1 billion in 2001.³³⁸

By April 2001, Alestra was reporting a thirty to forty percent increase in profitability after Telmex's lowered connection charges following the December decision.³³⁹ Alestra also benefited from focusing market growth on servicing business customers. Alestra projects that by year-end 2001, the company would have signed service contracts with approximately four hundred businesses using about fifty thousand newly installed local business lines.³⁴⁰ Alestra was poised to invest U.S. \$70 million in its infrastructure in 2001, while Avantel committed about U.S. \$180 million to network development.³⁴¹ Telmex still holds sway over the competition, however, because it "can choose when and where to allow Avantel and Alestra access to its local network, a crucial lever until the two smaller companies complete their own networks, if

334. *Id.*

335. *Telmex Calls AT&T Statement a Lie*, *supra* note 330.

336. *Mexico's Telmex Says Cross-Border Tariff Negotiations Closed*, BLOOMBERG NEWS, June 15, 2001, available at LEXIS, News File.

337. Smith, *supra* note 14, at 6B.

338. *Id.*

339. *Report on Alestra, NAFTA Business Briefs*; LATIN AM. REGIONAL REP.: MEX. & NAFTA RM-01-04, at 4 (April 10, 2001), available at LEXIS, News File.

340. *Id.*

341. Tegel, *supra* note 44.

they ever do."³⁴² Analysts note, too, that Telmex will resist opening access to the competition and that Telmex will retain some eighty-five percent of the local calls market into 2005.³⁴³

In the mean time, since Avantel and Alestra have gained badly needed concessions from Telmex, the competition strategy appears to be shifting away from disputes in the regulatory forum and into the market forum. One reporter following the current state of affairs in the Mexican telecommunications sectors wrote in Fall 2001 that the vitriol has yielded, at least for the time being, to letting the market determine the future, although much frustration still remains.

"We are going to battle in the marketplace instead of at the regulatory level over practices which were not legal," says Rodrigo Martinez, Avantel's deputy head of product marketing. "We are now going to square up and see who is actually the best at winning customers."³⁴⁴

For its part, the USTR appears to remain skeptical and has challenged the Fox administration to decide once and for all if Mexico will enforce its own laws and monitor more aggressively its regulations against monopolistic practices within its borders.

XIII. LOOKING AHEAD: WHERE TO FROM HERE?

The settlement rate finally agreed to between Telmex and its rivals for the 2001 to 2003 period is significant in that the parties involved hope to use the agreement as an opportunity to turn the corner away from regulated rate determination and toward rate setting agendas determined by market-based international termination rates beginning in 2004.³⁴⁵

Still, Telmex has attempted to fight the Cofetel rulings in court, arguing among other things that capping its tariffs until 2003, during a time when inflation has struck hard in Mexico, is in effect protecting the U.S.-backed competitors while going against the public interest of Mexico.³⁴⁶ Telmex is also fighting in court the success its competitors achieved in folding into the cost-oriented interconnection regime Telmex's high charges for completing calls into remote areas of Mexico where network infra-

342. *Id.*

343. *Id.*

344. *Id.*

345. *Telmex Announces Agreement to Reduce Mexico-U.S. Settlement Rates*, BUS. WIRE, May 30, 2001, available at LEXIS, News File.

346. See Shetty, *supra* note 2, at 48.

structure is underdeveloped.³⁴⁷ There is no denying, however, that the fees Telmex charged the competition for access to the Telmex network were monopolistic in appearance. In addition to the 3.36 cents per minute Telmex was charging long-distance competitors to originate and terminate calls on its network, Telmex was also charging an additional 3.36 cents per minute if the call terminated in a Telmex local-service area.³⁴⁸

Alestra and Avantel continue to hammer away at both Telmex and the Mexican government. They accuse Telmex of intentionally ignoring international conventions signed by the Mexican government to encourage competition, and Mexican officials for not enforcing its regulations in the sector generally, and rulings against Telmex in particular.³⁴⁹

A) *Others Entering the Fray*

Telmex's antitrust problems will not go away following settlements with Avantel and Alestra. Other telecommunications companies are growing restless for more market share. In May 2001, the Mexican telecom company Miditel considered filing a complaint against Telmex with the CFC alleging that Telmex and other domestic competitors were colluding against Miditel to keep the company out of the long-distance market.³⁵⁰ The allegations arose over a letter sent by Telmex and other telecom companies to CFC requesting that Miditel's long-distance license be revoked because the company was providing illegal long-distance services.³⁵¹ Telmex also requested "that rights held by subsidiary Miditel to wireless transmission frequencies be cancelled."³⁵²

In an interesting twist to the dispute, another Telmex competitor, Axtel, a provider of wireless services in Monterey and Mexico City, accused Telmex, as well as Avantel and Alestra, of causing their squabble to stifle other local competition. Axtel claims that the lower interconnection fees brought about by the Avantel/Alestra fight against Telmex negatively impacted Axtel's ability to generate the resources needed to expand its own market.³⁵³ Axtel claims it needed at least a five cents per minute

347. *Id.*

348. DePalma, *supra* note 7, at W1.

349. *See id.*

350. *Miditel Threatens Telmex, Others With Antitrust Suit*, EL UNIVERSAL, May 14, 2001, available at LEXIS, News File.

351. *Id.*

352. *Id.*

353. DePalma, *supra* note 7, at W1.

interconnection rate to pay for growing its network.³⁵⁴ Axtel also claims that Alestra and Avantel declined to sign interconnection contracts with its network.³⁵⁵ In a statement released by Axtel in March 2000, the company accused Alestra and Avantel of impeding competition: "Instead of encouragement, Axtel and other independent telcos now face interconnection obstacles that have been thrown up by the very carriers that have unfurled the banner of competition in Mexico."³⁵⁶

Alestra countered that Axtel, other domestic competitors, and the U.S.-backed ventures were all in the same situation because the Mexican government had done little since 1997 to stimulate competition. Moreover, Alestra pointed out, Axtel is itself part of a joint venture with Bell Canada International, which, not coincidentally, has a joint-venture agreement with Telmex.³⁵⁷ Clearly, this serves to demonstrate how confusing are the competition issues and antagonisms in the Mexican telecommunications sector.

Telmex has other problems to contend with that arose while it was distracted by defending itself from the loss of its monopoly; not the least of which is the practice of telepiracy from domestic competitors. The practice, known as bypassing, occurs when a competitor routes thousands of calls through one domestic phone account in order to circumvent paying international connection fees. Telepiracy has robbed Telmex of revenues in excess of \$285 million year—about 1.6 billion minutes in lost charges, according to Telmex officials.³⁵⁸ Interestingly, the practice was employed legally in the United States in the 1980's by WorldCom and Sprint as a means to compete against AT&T's then monopoly over long-distance service.³⁵⁹ While a legitimate practice in the U.S., until late 2001 Cofetel continued to shield Telmex from competition by making it a crime to route calls through Telmex's network without paying the nineteen cents per minute connection fee.³⁶⁰

Even with agreements in the last year between Telmex and U.S. competitors to establish a rate of about fourteen cents per minute, the connection fee is still well above international rates, which will result in continuing efforts by telepirates to tap into the

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. Smith, *supra* note 14, at 6B.

359. *Id.*

360. *Id.*

Telmex long-distance network. Moreover, the penalty for telepiracy is only about \$60,000, hardly a deterrent for companies that stand to make millions through their enterprise, which are largely built on the sale of phone calling cards to low-income Mexican nationals living in the United States.³⁶¹

XIV. CONCLUSION

President Fox must know that foreign investors will become more hesitant to pursue business ventures with Mexican subsidiaries and investment partnerships in Mexico unless monopolistic practices are effectively curtailed. There is a pressing need for his administration to demonstrate that it can move effectively against the large corporate entities in the most important sectors of the economy. Telmex represents a symbolic as much as a practical challenge to overcoming Mexico's historical tolerance of monopolies. One analyst notes that tougher antitrust policymaking and tighter scrutiny by Mexican regulators could have a long-term effect on how Mexico's largest corporations build business models around dominant market share and high margin structures.³⁶²

As long as Telmex continues to control nearly eighty percent of the long-distance market, and nearly all local telephone lines in Mexico, every competitor in the telecommunications sectors will have to pay a toll in order to conduct business over those lines. In that regard, Telmex will still have a de facto monopoly as nearly every customer who dials onto a phone line must dial into the Telmex infrastructure.

The WTO Telecom Agreement significantly accelerated the opening of telecommunications markets to competition in the signatory countries and helped to stimulate "reforms and binding international commitment to the future liberalization of basic telecommunications."³⁶³ The principles embraced in the Agreement allowed countries to choose any way to regulate the market, as long as that regulation was market oriented. "In the telecommunications sector, a government's commitments to free trade may not be strong enough to guarantee real market access for for-

361. *Id.*

362. Camila Castellanos, *Trust Buster: Mexico's Federal Competition Commission Gains Clout and the Wrath of Big Business—As it Lays Down One Tough Ruling after Another*, BUS. MEX., March 1, 2001, available at LEXIS, News File.

363. Peter Cowhey and Mikhail M. Klimenko, *The WTO Agreement and Telecommunications Policy Reforms* (UC San Diego, 2001), at 5, available at http://www1.worldbank.org/wbiep/trade/Russian/cowhey_klimenko1.htm (last visited Jan. 14, 2002).

oreign suppliers of services because of the very high levels of concentration. Monopolistic suppliers could frustrate competition from new foreign entrants despite trade liberalization commitments.³⁶⁴ Mexico thought its privatization of Telmex satisfied its obligations under the WTO to promote the liberalization of competition and trade in the telecommunications sector. But Mexico missed the point that for a good market-oriented policy to succeed, what is important is not whether there is governmental ownership in a company, but whether the market is really opened to competition. The fact that Mexico privatized Telmex alone did not bring Mexico within its obligations under the WTO Agreement. In reality, free trade was inhibited by the way Mexico chose to regulate Telmex.

Mexico has made progress in promoting competition in its telecommunications market by implementing new laws and regulations and creating or fortifying needed administrative agencies. Mexico has not, however, fully addressed its compliance with its WTO commitments. Mexico must ensure competition in its market by enforcing the rules already issued. Its agencies in charge of preventing anti-competitive conduct must enforce the laws. Absent this enforcement, Mexico will not make any progress regardless of the amount of laws in place or the new agencies created.

As of January 2003, Telmex will be allowed to apply for adjustments to its service rates, charging different local service rates in different states, and possibly re-igniting the dispute.³⁶⁵ Changes will be submitted first to Cofetel in 2002, and rates will be established based on volume, distance, and time.³⁶⁶ Much of what happens over the next year as competitors position themselves in the sector will prove crucial to future negotiations.

364. *Id.* at 6.

365. *Telmex Loses Its Grip on Power*, *supra* note 144.

366. *Id.*

CHRONOLOGICAL TABLE OF THE TELMEX DISPUTE

1939	Law of General Routes of Communications enacted
1940	Communications Law of 1940 enacted
1947	Telmex is born from the merger of Empresas Telefonos Ericsson and Campaña Telefónica Y Tegráfica Mexicana
1968	SCT overhauls, expands, and modernizes Telmex infrastructure
1972	Mexican government acquires 51 percent of Telmex capital stock
1973	Law to Promote Mexican Investment and to Regulate Foreign Investment (LPMI) enacted
1976	SCT renews Telmex concession for 30 years; Telmex incorporated into the Communications and Transportation branch of government
1980s	Salinas moves to prepare Telmex for private sale; Telmex reorganizes
1985	Mexico City earthquake cripples Telmex infrastructure; leads to new round of modernization and service expansion
1988	Omnibus Trade and Competitive Act passed in the United States
1988	Telecommunications Trade Act enacted with the Omnibus bill
1989	Regulations to the LPMI (RLPMI) enacted
1990	Mexico signs Brady Plan agreement to restructure national debt and opens the way for privatization of Telmex
1990	Mexican Consumption Tax repealed; Telmex earnings increase 68 percent
1990	Telmex fully privatized
1993	Federal Law on Economic Competition
1993	Foreign Investment Law of 1993 (FIL) enacted
1993	Federal Competition Commission (CFC) established
1994	WTO comes into being, enters into force January 1995
1994	General Agreement on Trade in Services (GATS) takes effect
1995	Federal Telecommunications Law of 1995 enacted
1995	Mexico enters into full participation in NAFTA
1996	Federal Telecommunications Commission (Cofetel) established
1997	February Accord under GATS paves way for opening Mexico's telecommunications market for foreign competition; goes into force January 1, 1998

- 1997 Basic Telecommunications Agreement (BTA) under the WTO established; Reference Paper under the BTA establishes market access commitments for services in the telecommunications service sector and sets forth what constitutes anti-competitive practices by signatory countries
- 1997 Mexican government opens long-distance services to competition
- 1998 CFC determined Telmex was engaged in monopoly practice in the local and long-distance carrier market
- 1998 Avantel and Alestra file complaints against Telmex with CFC for Telmex interference in market access
- 1998 U.S. FCC fines Telmex for unfair practices in the U.S. telecommunications service market
- 1998 WTO Telecom Agreement takes effect
- June 1999 Local judge awards Telmex definitive suspension of the CFC allegation, but allows regulatory action if it could be shown to be in the best interests of consumers
- July 2000 USTR begins to bring charges against Mexico before the WTO
- September 2000 COFETEL issues special antitrust rules against Telmex monopoly and orders a lower interconnection rate fee
- October 2000 USTR requests convening of a WTO dispute settlement panel
- October 2000 Mexican officials lower interconnection rates from 3.36 cents per minute to 1.25 cents following court rejection of Telmex injunction
- December 2000 Decision issued by CFC ordering Telmex to reduce phone access fees charged to its competitors
- January 2001 January Accord in which Telmex and Alestra and Avantel reach agreement on connection fees
- March 2001 CFC declares Telmex engaged in monopoly practice over local network
- May 2001 Telmex and MCIWorldCom agree to 13.5 cents per minute rate and 10 cents per minute in 2003
- November 2001 USTR asks WTO panel to take up U.S. complaint against Mexico for failing to meet its WTO commitments to open its \$12-billion telecommunications market