UNITED STATES v. MEXICO: THE FIRST
TELECOMMUNICATIONS CHALLENGE CONFRONTING
THE WORLD TRADE ORGANIZATION

Rachel Rosenthal

I. INTRODUCTION

When sixty-nine\(^1\) members of the World Trade Organization (“WTO”)\(^2\) signed the Basic Telecom Agreement in 1997,\(^3\) they agreed to open some or all of their basic telecommunications services markets to foreign competition for the first time. The WTO signatories hoped that the Basic Telecom Agreement would ensure that national telecommunications monopolies became a thing of the past. Just a few years after its adoption, the Basic Telecom Agreement faced its first real test.

This test was the challenge by the United States to the practices of the Government of Mexico and its main telecommunications carrier, Teléfonos de Mexico DA de CV (“Telmex”).\(^4\) The United States alleges that Cofetel, the Mexican communications agency, has adopted regulatory measures that are anti-competitive and tolerated established trade barriers contrary to the Basic Telecom Agreement.\(^5\) This is the first formal WTO dispute concerning the Basic Telecom Agreement.

The U.S. decided to challenge the Mexican policies in the WTO both because of the legal issues involved and because of the commercial significance of the Mexican market to American-based telecommunications providers.\(^6\) To date, long distance calls between the United States and Mexico amount to nearly three billion minutes annually; Americans spent $1.2 billion calling Mexico in 1999.\(^7\) After three years in the supposedly competitive Mexican market, however, the combined market share for U.S. companies and subsidiaries was less than 30 percent.\(^8\) Not only does Telmex control 81 percent of the Mexican long distance market and monopolize the local telecommunications market, it also has the highest profit return

\(^1\) Fourth Protocol to the General Agreement on Trade in Services, Feb. 15, 1997, 36 I.L.M. 354 at 357 [hereinafter Basic Telecom Agreement]. Actually, the 69 WTO Members represent 70 contracting parties, as the European Union is bound in addition to its 15 Member states. The 60 WTO Members represent governments or separate customs territories with full autonomy in the conduct of their external commercial relations. Of the parties to the WTO Basic Telecom Agreement, Hong Kong remains a WTO Member by virtue of its status as a separate customs territory of the People’s Republic of China and may participate in relevant international organizations and international trade agreements, such as the WTO. Id.

\(^2\) See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994; The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 2 (GATT Secretariat 1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. The WTO was created by the Marrakesh Agreement Establishing the World Trade Organization.

\(^3\) Basic Telecom Agreement, supra note 1, at 366. As described below, the commitments undertaken as a result of the WTO Basic Telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS. These commitments are colloquially referred to as the WTO Basic Telecom Agreement. Id.

\(^4\) See generally, Telmex, at http://www.telmex.com (last visited Oct. 12, 2001). Telmex is a telecommunications company located in Mexico City, Mexico that was formerly owned by the Mexican Government but privatized in 1990. The company provides telecommunications services that include local and long-distance wire service, wireless communications, audio and data, digital wireless network access and Internet. Id.

\(^5\) Mary Greczyn, U.S. Taking Mexican Interconnection Concerns to WTO, COMM. DAILY, July 31, 2000. The decision to seek involvement of the WTO came after Deputy U.S. Trade Representative Richard Fisher spoke with Mexican Deputy Trade Minister for Commercial & International Negotiations Luis de la Calle and Jorge Nicolin, head of Mexican regulatory agency, Cofetel. Id.

\(^6\) See Anthony DePalma, U.S. Taking Mexico Phone Dispute to W.T.O., N.Y. TIMES, Nov. 9, 2000, at C6 [hereinafter DePalma].

\(^7\) Jonathan Kandell, Yo Quiero Todo Bell, WIRED, Jan. 2001, at 134.

\(^8\) Id. at 134. In 1999, Telmex registered profits of $3.9 billion on revenue of $10.2 billion. Id.
per line of any major telecommunications carrier in the world.  

Although this first WTO telecommunications dispute concerns Mexico and the U.S., the outcome of this case could establish an important WTO precedent. As the first challenge under the Basic Telecom Agreement, the dispute may resolve ambiguities over how that agreement is interpreted by the WTO. Moreover, the case signals to other countries that the U.S. government will go to great lengths to enforce WTO agreements against other WTO members. The Mexico–U.S. telecommunications case may, and arguably should, become a prototype for a new type of WTO telecommunications case.

This Note explores the implications of the first telecommunications case to be brought to the WTO for dispute resolution. Part I of this note explains the history and practical implications of the General Agreement on Trade in Services ("GATS") and the Basic Telecom Agreement. In particular, this Note explains why WTO countries decided to regulate telecommunications in this way. Part II charts the course of the Mexico–United States dispute. Part III discusses the issues in this dispute that have already been resolved. Part IV analyzes the issues still confronting the WTO in this dispute. Finally, Part IV of this Note suggests how the WTO Dispute Settlement Body might resolve the issues raised in this dispute.

II. HISTORY

A. The General Agreement on Trade in Services

The 1947 General Agreement on Tariffs and Trade ("GATT") dealt almost exclusively with trade in goods. The GATT was both an organization of sovereign states and an agreement. For the first fifty years of GATT’s existence, parties worked to reduce barriers to international trade in goods but largely ignored trading in services. As a result of the Uruguay Round, the WTO inherited the GATT’s functions in 1995. The WTO is an international body that administers trade laws and provides a forum for settling trade disputes between member countries. Although the WTO now operates a dispute resolution process, it has more power to enforce agreements among member countries than did the GATT. These enforcement powers include the authority to impose sanctions on a country that refuses to comply with a WTO-sponsored agreement.

Although trade in goods had been the principal focus of the GATT prior to the Uruguay Round, developed countries had previously decided that it would be useful to negotiate an agreement governing trade in services given that they enjoyed a comparative advantage in that sector. Overall, trade in services, including the telecommunications and financial services, represented a substantial portion of total world trade. Liberalized trade in services between countries would provide advantages to overall international trading. Ultimately, trade in services was added to the Uruguay Round agenda and an agreement called the

See DePalma, supra note 6, at C6.


Id. at 28. By that time the service sector had taken over manufacturing as the most important part of developed countries’ economies. Services industries accounted for sixty-one percent of GDP and over one-half of employment in developed countries. The Manufacturing Myth, Economist, Mar. 19, 1994, at 91.


Id. at 28. By that time the service sector had taken over manufacturing as the most important part of developed countries’ economies. Services industries accounted for sixty-one percent of GDP and over one-half of employment in developed countries. The Manufacturing Myth, Economist, Mar. 19, 1994, at 91.


In extending the President's fast-track negotiating authority under the Omnibus Trade and Competitiveness Act of 1988, Congress identified liberalization of trade in services as a principle negotiating objective. Section 1101(b)(9) of the 1998 Act provides in part:

the principle trade negotiating objectives of the United States regarding trade in services are: to reduce or to

at http://www.wto.org/english/res_e/focus_e/focus28_e.pdf [hereinafter FOCUS]. The WTO estimates that world trade in commercial services exceeded $1.3 trillion in 1997. Id. Jobs in the service sector provide nearly eighty percent of U.S. employment. That figure is expected to increase to approximately eighty-eight percent by 2005. Id.
General Agreement on Trade in Services (GATS) was signed after the Uruguay Round.¹⁸

In adopting the GATS, countries agreed for the first time to rules governing trade and investment in services.¹⁹ The GATS encompasses multilateral rules concerning treatment of foreign service and service suppliers as well as government regulations of trade in services.²⁰ The GATS agreement is divided into three main sections: (1) basic obligations, (2) market access and national treatment commitment and (3) annexes to the general rules on market access.²¹ First, the agreement establishes basic obligations governing trade in services applicable to all WTO members, which include eliminate barriers to, or other distortions of, international trade in services, including barriers that deny national treatments and restrictions on establishment and operations in such markets; and to develop internationally agreed rules, including dispute settlement procedures which: are consistent with the commercial policies of the United States and will reduce or eliminate such barriers or distortions, and help ensure fair, equitable opportunities for foreign markets.


¹⁹ Kennedy, supra note 10, at 32.

²⁰ See GATS, supra note 18.

²¹ Id. The GATS is divided into seven parts, consisting of twenty-nine articles, eight annexes and one appendix. Id.

²² GATS, supra note 18, at art. XVII. This is a nondiscriminatory rule that requires a WTO Member to treat like services and service suppliers from other WTO Members no less favorably than it treats its own services and suppliers. Article XVII states that:

[I]n the sectors inscribed in its schedule and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.

Id.

²³ GATS, supra note 18, at art. II. Members must accord equal treatment (i.e., most-favored-nation treatment) to all other Members (Section 1 for Most-Favored-Nation Treatment). Trade in services spans a wide range of fields, however, and these contain many measures that cannot be subject to most-favored-nation treatment for various historical or other reasons. Accordingly, the GATS stipulates that if such measures are registered at the time the GATS enters into force, those measures may be exempted from the obligation of most-favored-nation treatment. The Council for Trade in Services shall review all exemptions granted for a period of more than five years. The first such review shall take place no more than five years after the entry into force of the WTO Agreement. In principle, such exemptions should not exceed a period of ten years. These exemptions are subject to negotia-
service suppliers that are supplying the service “in the exercise of governmental authority.”

1. Basic Obligations

For basic obligations, Article II of the GATS requires that Members “accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favorable than that it accords to like services and service suppliers of any other country.” This obligation is referred to as the “most favored nation” requirement. Under the MFN obligation, all countries must allow service providers from different countries non-discriminatory access to their markets. For instance, MFN requires the U.S. to be country-neutral to all WTO members that want to provide services in the U.S. market, regardless of the level of openness of those countries’ markets to U.S. service providers. Countries violate MFN principles for telecommunications if, for instance, they act discriminatorily when granting interconnection rights. Thus, all WTO members that made basic telecommunications commitments must confer the benefits of those commitments on an MFN basis to all other WTO members regardless of those members’ participation in basic telecommunications negotiations. The MFN provision in GATS can be exempted. All countries must guarantee MFN treatment in all service sectors, but they are authorized to accord particular countries less than MFN treatment as long as they list these exemptions in their MFN Article II Schedule in accordance with the requirements of the Annex on Article II Exceptions.

Another basic obligation and a core principle...
of the GATS is transparency.\textsuperscript{39} Article III requires that each Member publish all international agreements that affect trade in services as well as “all relevant [domestic] measures of general application, which pertains to or affect” the provision of services.\textsuperscript{40} The Members must also notify the Council for Trade in Services about any new measures that “significantly affect trade in services.”\textsuperscript{41} Members, however, are not obligated to publish any information that is confidential, and this loophole is taken advantage of at any possible point.\textsuperscript{42}

Article VI set out the specifications for Members to identify and negotiate the reduction of specific service sector non-tariff barriers, such as criteria for licensing,\textsuperscript{43} anti-competitive business practices\textsuperscript{44} and activities of monopoly providers.\textsuperscript{45} Article VI requires Members to ensure that “measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”\textsuperscript{46} In addition, it requires that licensing schemes or other such qualification requirements are administered in a manner fair to the applicants\textsuperscript{47} and puts in place, when practicable, a mechanism for review of administrative decisions that affect a provider’s ability to supply services.\textsuperscript{48}

As part of the basic obligations, “granting a monopoly share of a service market to a domestic supplier is generally inconsistent with the goal of market liberalization, but such practice is common for the basic telecommunications service sector.”\textsuperscript{49} Although the signatories to the GATS recognized that the “elimination of monopoly suppliers in these sectors is a decision that individual countries should have the right to make based on their national objectives and their domestic anti-competition policy, they committed not to let these monopolies become an additional barrier.”\textsuperscript{50} Therefore, the GATS permits monopolies to stay in place, but subjects their operation to certain obligations.\textsuperscript{51} Any monopoly supplier of a service\textsuperscript{52} must, within its relevant market of monopolization, comply with the Members’ general obligations and specific sector commitments.\textsuperscript{53} Outside its monopolized market, the monopoly supplier must not abuse its monopoly position or act inconsistently with any of the Members’ commitments.\textsuperscript{54}

2. Market Access and National Treatment

For the General Obligations discussed above, Members are bound by the principles for all service sectors, unless otherwise accepted within their Schedules, which is not commonly performed.\textsuperscript{55} By contrast, with GATS Specific Commitments—market access and national treatment—Members are bound only if they make an affirmative commitment in their Schedule to be bound.\textsuperscript{56}

The market access commitment compliments as well as the disciplines on standards that are established by bodies of the Council on Trade in Services. Id. at paras. 4, 5(b).

\textsuperscript{39} GATS, supra note 18, at art. III.
\textsuperscript{40} Id. at art. III, para. 1. See McLarty, supra note 12, at 25.
\textsuperscript{41} GATS, supra note 18, at para. 3.
\textsuperscript{42} Id. at art. III.
\textsuperscript{43} Id. at art. VII.
\textsuperscript{44} Id. at art. IX.
\textsuperscript{45} Id. at art. VIII, para. 2. A “monopoly supplier of a service” is “any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service.” Id. at art. XXVIII (h). Also, the obligations on any “monopoly supplier of a service” apply as well to those “exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.” Id. at art. VIII, para. 5.
\textsuperscript{46} GATS, supra note 18, at art. VI, para. 1.
\textsuperscript{47} Id. at paras. 3, 5(a). When determining whether a Member’s licensing and qualification requirements or technical standards are being used to nullify a commitment, standards of international organizations will be considered, as
MFN and national treatment obligations within the GATS Specific Commitments in several ways.\textsuperscript{57} The principle states that a country should allow the highest possible access to the telecommunications market, for instance, by not imposing certain quotas or quantitative restrictions.\textsuperscript{58} Members do not have to open their service markets to foreign service suppliers within Article XVI.\textsuperscript{59} Article XVI only states that when a “Member undertakes sector-specific market access commitments in its Schedule, they must be within certain parameters.”\textsuperscript{60} For instance, when a Member undertakes market access for a service, it will be assumed that there will not be any limits on the ability of a foreign service supplier to enter the domestic service market.\textsuperscript{61}

The principle of national treatment requires a country to grant foreign service-providers treatment no less favorable than it grants to its own domestic service suppliers.\textsuperscript{62} For basic telecommunications, this means that foreign suppliers must have the opportunity to receive the same access to the public networks as a national provider, regardless of whether that provider is public or private.\textsuperscript{63} In GATS, unlike in GATT, the national treatment requirements are not mandatory.\textsuperscript{64} A country has to undertake the national treatment commitments in its Schedule in order to be bound and a Member can specify conditions or qualifications to such commitments.\textsuperscript{65}

If there are problems with any of the obligations within the GATS, Articles XXII and XXIII within the GATS provide consultation and dispute settlement provisions.\textsuperscript{66} If a Member believes that another Member is violating one of its obligations in the GATS framework, one of the Annexes or in its Schedule of Commitments, then that Member can invoke the dispute settlement procedure narrow for the telecommunications sector. [But], market access for basic telecommunications is now required for those Members that made February 15, 1997 offers.” \textit{Id.}; \textit{see} GATS, supra note 18, at art. XVI.

\textsuperscript{57} Id. at 28-29.

The market access principle applies to services differently than it does to goods. Under GATT, market access encourages tariffication, which is the transfer of non-tariff barriers into tariff barriers, and then it requires the overall reduction or phasing out of tariffs. This principle applies easily to goods, and specifically to telecommunications equipment, as unreasonable packing requirements, content requirements, technical standards, and so on, may be set up by a country as trade barriers. These barriers can be quantified in tariff schedules, and as the country’s market becomes more competitive, the tariffs can be reduced. Market access, as applied to services, includes allowing a country to provide services through four modes of supply in Article I, such as cross-border supply and commercial presence abroad. Thus, market access is one of the most important and pervasive issues facing service providers.

\textsuperscript{58} Id. at 28-29.

This principle applies easily to goods, and specifically to telecommunications equipment, as unreasonable packaging requirements, content requirements, technical standards, and so on, may be set up by a country as trade barriers. These barriers . . . can be quantified in tariff schedules, and as the country’s market becomes more competitive, the tariffs can be reduced. Market access, as applied to services, includes allowing a country to provide services through four modes of supply in Article I, such as cross-border supply and commercial presence abroad. Thus, market access is one of the most important and pervasive issues facing service providers.

\textsuperscript{59} McLarty, supra note 12, at 29.

\textsuperscript{60} Id. “Before the conclusion of the 1997 Negotiations, Members’ individual market access concessions were fairly
under the WTO. Article XXIII, however, only provides a basic outline of authority; it does not establish the procedural formalities for dispute settlement. The current rights and obligations are set out in the Dispute Settlement Understanding (DSU) of the WTO, which is referenced by GATS, Article XXIII.

Over many years, Members have made changes to the dispute resolution process that indicate their willingness to take more of a legal rather than diplomatic approach. Some of the changes included the right for Members have recourse to the Dispute Settlement Body ("DSB") without the ability of one party to block panel formation, without the consensus requirement that applied before 1994, with strict time limitations, with the right to appeal, with the possibility of a cross-retaliation remedy, and with the option of arbitration on the issue of retaliation.

3. GATS Annex on Telecommunications

Within the area of services, telecommunications is a sector with a dual function, because it is a means of economic activity and the means of delivery for other economic activity. Due to this complex role of the telecommunications sector, the GATS Annex on Telecommunications was established as a way to ensure that the telecommunications sector would not become a non-tariff barrier to trade and instead serve as a means of services delivery. The Annex gives service providers reasonable and nondiscriminatory access to, and use of, telecommunications services within the borders of WTO members that have made commitments for value-added services. This translates into the ability of foreign value-added service providers to enter a country and interconnect to the public telecommunications network.

---

67 Id. at art. XXIII, para. 1 "If any Member should consider that any other Member fails to carry out its obligations or specific commitments under . . . [GATS], it may with a view to reaching a mutually satisfactory resolution of the matter, have recourse to the. . . [Dispute Settlemet Understanding]." Id.
68 Id. at art. XXIII.
71 1994 Dispute Settlement Understanding, supra note 69, at art. IV. The DSB must establish a panel no later than the second time it considers a panel request, unless there is consensus against establishment. Id.
72 Id. at art. XXI. A Member can no longer block adoption of a panel report, authorization of retaliation or time limitations for each step. The panel report has to be adopted by the DSB between 20 and 60 days after circulation to Parties unless a Party appeals or there is a consensus not to adopt the report. Parties can state in writing their objections to the report, but this will not have the effect of unilaterally blocking the report. Id.
73 Id. Overall, it is now possible to adopt a panel report within 14 months or less. Id.
74 1994 Dispute Settlement Understanding, supra note 69, at art. 17. Either party is authorized to make an appeal to the Appellate Body. The appeal is limited to issues of law covered in the panel report, and the DSB must adopt the Appellate Report within 30 days unless there is a consensus not to adopt the report. The total time for the appeal is not to exceed 90 days. Id.
75 Id. This is a significant addition to the 1994 agreement. The Multilateral Trade Agreements have been "packaged," and a Member that accedes to the WTO must accede to each agreement, including GATS. The preferred retaliatory action is within the same agreement and the same sector, such as among types of telecommunications services. If this is not possible, then retaliation may be effected within the same agreement but in a different sector, such as between telecommunications and financial services. Then, if those two alternatives are not possible, retaliation can be authorized within a different agreement, such as between telecommunications services and goods. Id.
76 1994 Dispute Settlement Understanding, supra note 69, at art. 25. The findings of arbitration are to be adopted by the DSB and implemented unless the DSB rejects by consensus the arbitration findings. The arbitration process is available only for the issue of when a Party must comply with panel and DSB recommendations. It is not for the issue of whether the Party is ultimately liable to comply with the recommendations because "liability," or noncompliance under the terms of the GATT, is locked in by adoption of an unfavorable panel or appellate report. Id.
77 Kennedy, supra note 10, at 33.
78 Id at 34. The Annex applies to all measures that affect access to and use of public telecommunication transport networks and services. It does not apply to measures affecting cable or broadcast distribution of radio or television programming. Public telecommunications transport service means service that a member requires to be offered to the public generally (thus, they may be privately owned), and includes telegraph, telephone, telex and data transmission. Public telecommunication transport network means the infrastructure, which permits telecommunications between defined network termination points. GATS Annex, supra note 58 at 3(a), (c).
for the purpose of offering value-added services to the public in that market. Any sector-specific commitments on market access or national treatment must be in a member's Schedule. By listing a service sector in its Schedule, a member makes a commitment to allow foreign suppliers into its market and to treat them as its domestic suppliers. Once a member makes a commitment in its Schedule, it cannot be withdrawn unless the commitment was one that did not benefit any other member or the withdrawing member gives a compensatory adjustment. This process is seen where there is a benefit withdrawn under Article XXI, the Modification of Schedules.

B. Specific Commitments

All the commitments described above were made as part of the Uruguay Round negotiations officially concluded in 1994. Unfortunately, the Uruguay Round was unable to resolve certain differences over basic telecommunications services. As stated earlier, service trade accounts for a substantial portion of world trade today. Within this market, basic telecommunications account for about eighty-five percent of the trade in telecommunications services altogether and enhanced services account for the rest. Basic services are "voice and non-voice services consisting of the transmission of information between points specified by a user in which the information delivered by the telecommunications agency to the recipient is identical in form and content to the information received by the telecommunications agency from the user." Enhanced services are under like conditions. This language strongly suggests that no derogations from the MFN or national treatment obligations may be listed in a Member's schedule of commitments regarding access to or use of public telecommunications networks or services.

80 McLarty supra note 12, at 38. Value-added services, or telecommunications for which suppliers "add value" to the customer's information by enhancing its form or content or by providing for its storage and retrieval, were not formally part of the extended negotiations. Nevertheless, a few participants chose to include them in their offers. Examples include on-line data processing, on-line data base storage and retrieval, electronic data interchange, e-mail or voice mail. WTO, Defining Basic Telecommunications, at http://www.wto.org/english/tratop_e/serv_e/te102_e.htm.
81 See GATS Annex, supra note 38.
82 Id. at para. 2.3.1.
83 Id. at para. 2.3.2.
84 Id. at para. 5. A footnote clarifies that the term "non-discriminatory" refers to MFN and national treatment as defined in the GATS. Id. at para. 5.1 n.16. It adds that sector-specific usage of the term means "terms and conditions no less favorable than those accorded to any other user of like public telecommunications transport networks or service
those services in which the voice or non-voice of information being transferred from one point to another undergoes an end-to-end restructuring or format change before it reaches the customer.\textsuperscript{94} During the Uruguay Round negotiations, disputes over regulatory environments and market openings within the basic telecommunication services were key differences between the United States and other members.\textsuperscript{95} While a decision on market openings in the telecommunications sector was unattainable, it was established that Members should postpone a conclusion and negotiations beyond the Uruguay Round.\textsuperscript{96}

As noted, the GATS required each country to announce and adhere to a “Schedule of Commitments.”\textsuperscript{97} In 1997, the GATS signatories finally announced their Schedules of Commitments.\textsuperscript{98} The 1997 Schedules of Commitments on basic services included four basic sections: service sectors covered, limitations on market access, limitations on national treatment and additional comments.\textsuperscript{99}

For example, Mexico committed in its schedule to market access and national treatment for all services except for Mexican satellites in providing domestic services until 2002; one hundred percent foreign ownership for cellular services;\textsuperscript{100} and 49 percent for all other services.\textsuperscript{101}

The United States committed to market access and national treatment for all services except direct-to-home,\textsuperscript{102} direct broadcast satellite\textsuperscript{103} and digital auto transmission services,\textsuperscript{104} with a limit of 20 percent direct foreign investment in radio licenses.\textsuperscript{105} The U.S. also adopted the Reference Paper and MFN exception for one-way satellite transmission of direct-to-home, direct broadcast satellite and digital audio transmission services.\textsuperscript{106}

C. The Reference Paper

Attached to the WTO Basic Telecommunications Agreement are pro-competitive regulatory principles (referred to as the “Reference Paper”).\textsuperscript{107} The Negotiating Group on Basic Telecommunications drafted the Reference Paper in order to formulate the core regulatory obligations that would bring significant changes to trade in telecommunication services.\textsuperscript{108} Based on the U.S.

\textsuperscript{94} WTO Secretariat, The United States of America, Schedule of Specific Commitments, GATS/SC/90, 94-1088, ILC (Apr. 15, 1994). Enhanced services are defined as those that “add value” to the consumer’s transmission or information by upgrading its format or content or by providing for its storage and retrieval. The United States defines enhanced services as: services, offered over common carrier transmission facilities (that is, public telecommunications transport services) which employ computer processing applications that: act on the format, content code, protocol or similar aspects of the subscriber’s transmitted information or; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information. \textit{Id.}

\textsuperscript{95} Kennedy, \textit{supra} note 10, at 36.

\textsuperscript{96} GATS, \textit{supra} note 18, at art. XXIV. The trade ministers for each Member country were given more time and a Decision on Negotiations on Basic Telecommunications was issued at the conclusion of the trading round. The postponement was contained in a Ministerial Decision on Negotiations on Basic Telecommunications, The Results of the Uruguay Round on Multilateral Trade Negotiations: The Legal Texts 461 (GATT Secretariat 1994). Decisions were extended until April 30, 1996 with the sponsorship of the Negotiating Group on Basic Telecommunications and later extended again by the Council on Trade in Services until February 15, 1997. The Council for Trade in Services is composed of all WTO Members and is charged with facilitating the operation of the GATS and furthering its objectives. \textit{Id.}

\textsuperscript{97} GATS, \textit{supra} note 18.

\textsuperscript{98} McLarty, \textit{supra} note 12, at 44.

\textsuperscript{99} \textit{Id.} at 46-47.

\textsuperscript{100} Laura B. Sherman, “Wildly Enthusiastic” About the First Multilateral Agreement on Trade in Telecommunications Survives, 51 FED. COMM. L.J 61, 106 [hereinafter Sherman].

\textsuperscript{101} Mexico also adopted the Reference Paper, which will be explained later in Section C of this paper.

\textsuperscript{102} Sherman, \textit{supra} note 100, at 110.

\textsuperscript{103} \textit{Id.} As an alternative to cable television, Direct Broadcast Satellite (DBS) is available. It provides cable-like television programming directly from satellites on small satellite dishes. Today, more than one in eight U.S. households subscribe to DBS programming and that number will likely be one in five in the next few years. Richard R. Peterson, \textit{Satellite Television, A Consumer’s Guide}, Version 4, at http://www.dbsforums.com/dbs/a0.html (July 20, 2000).

\textsuperscript{104} Sherman, \textit{supra} note 100, at 110.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}


\textsuperscript{108} Sherman, \textit{supra} note 100, at n.54.

This group was known as the “Room A Group,” after the room at the WTO where it first met. Subsequent meetings, informally chaired by the chief Japanese delegate to the NGBT, met at the Japanese Embassy. The hospitality of the Japanese and informal leadership of the Japanese “chair” contributed significantly to the successful drafting of the Reference Paper. Initial participants represented the United States, Australia, New Zealand, Japan, Korea, and the European Union. Later sessions were attended by representatives of Brazil, Singapore, Chile, Mexico, and the Philippines, in addition to the
Telecommunications Act of 1996, this paper aimed at ensuring members put in place policies that allow competition, which would permit trading partners to benefit from the negotiated concessions. Member countries believed that a new regulatory approach was desirable because most telecommunication regulations and laws did not foster competitive markets and had been dominated by the state-owned companies. In all, fifty-five Members agreed to adopt the Reference Paper. Ten WTO members committed to adopting either part or all of these principles in the near future. Contained within the Reference Paper are interconnection provisions, competition safeguards, transparency of licensing criteria, universal service policies, independence of the regulator principles and allocation of scarce resource principles. The Reference Paper includes numerous safeguards aimed at preventing national telecommunication monopolies from exploiting their “dominant position to distort market forces and impede the ability of competitors to supply networks or services for which commitments would be made.” Furthermore, the agreement requires the establishment of “independent” regulators removed from the purview of the basic telecommunication operators and assigned to a separate body. The Reference Paper did not decide what entity will carry out the obligations contained within it or how those obligations specifically will be carried out.

According to the Reference Paper, Members are required to take appropriate measures in order to prevent suppliers from engaging in or continuing anti-competitive practices. Members are not required to guarantee that this conduct will not occur or to stop such conduct. The Reference Paper is different from other WTO accords in that failure to adopt measures that would thwart anti-competitive conduct warrants WTO action settlement but failure to enforce these measures does not.

Negotiators also agreed that the section on interconnection should cover all types of telecommunication services. Within this section, members are only obligated to make competitive those services for which they have scheduled WTO commitments. These three obligations are extremely detailed and “will be ensured” only at a “technically feasible point” in the network. First, every major supplier must treat other telecommunications services for which they have scheduled WTO concessions. Members are only obligated to make competitive those services for which they have scheduled WTO commitments. These three obligations are extremely detailed and “will be ensured” only at a “technically feasible point” in the network. First, every major supplier must treat other telecommunications services and suppliers as it treats its own services and affiliated service suppliers, as

---

original participants.

Id.


111 Sherman, supra note 100, at 71.


113 Id.

114 Id.

115 GATS, supra note 18 at art. VI.

116 Id. at art. III.

117 Rebecca Beynon, The FCC’s Implementation of the 1996 Act: Agency Litigation Strategies and Delay, 53 FED. COMM.L.J. 27, 47 n.51 (2000). “The term ‘universal service’ describes the policy that all Americans should have access to affordable basic telephone service, regardless of whether they are low-income, and regardless of whether they live in areas that are expensive to serve (such as rural areas).” Id.

118 See Foreign Participation Order, 12 FCC Rcd. at 24,039 para. 340.

119 Sherman, supra note 100, at 71.

120 Secretariat Note, supra note 110, at para. 16.

121 Sherman, supra note 100, at 73. “Negotiators agreed that the principles needed to be sufficiently flexible to accommodate differences in market structures and regulatory philosophies among various participants... The objective was to ensure certain results, a level playing field for entrants, not to determine the means by which the results would be achieved.” Id.

122 Reference Paper, supra note 107, at para. 1.1; see also GATS, Annex on Telecommunications, para. 2.1 n.15 (“This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers to public telecommunications transport networks and services by whatever measures are necessary.”); see also North American Free Trade Agreement, Dec. 17, 1992, U.S.—Can.—Mex., ch. 13, art. 1305, 32 I.L.M. 605, 655 (1993).

123 Sherman, supra note 100, at 77.

124 Reference Paper, supra note 107, at para 2.1.

125 Id. As with the definition of “essential facilities,” the interconnection obligation is aimed at providers of “public telecommunications transport networks or services.” Id.

126 Id. at para. 2.2.

well as treat all nonaffiliated telecommunication services equally and without discrimination.\textsuperscript{128} Second, interconnection must be timely, the terms under which it is provided must be transparent and reasonable, and rates must be cost-oriented,\textsuperscript{129} transparent and reasonable.\textsuperscript{130} Negotiators did not try to define the obligations imposed by this section and felt that the meanings would be determined in WTO dispute settlement proceedings.\textsuperscript{131} Finally, interconnection is subject to charges that reflect the cost of construction of additional facilities necessary when such facilities are requested.\textsuperscript{132} Negotiators knew there were customary interconnection points typically available, and as long as service suppliers were willing to pay the supplementary cost, they could obtain interconnection at other points in the network.\textsuperscript{133}

With interconnection dispute settlement at the WTO, negotiators agreed on the need for a domestic enforcement mechanism and a time frame in which interconnection had to be provided by WTO members.\textsuperscript{134} This opportunity is separate from WTO dispute settlement, where governments offer service suppliers an opportunity to appeal administrative decisions made by WTO member governments.\textsuperscript{135} Within the Reference Paper, a dispute settlement can be accomplished by any "independent domestic body"\textsuperscript{136} (not only a regulator).\textsuperscript{137} The domestic body is charged with resolving disputes\textsuperscript{138} regarding conditions, rates and terms. Disputes can be resolved on facts presented to the domestic body or by reference to terms, conditions or rates already established. This must be done within a "reasonable period of time."\textsuperscript{139}

Paragraph five of the Reference Paper addresses regulatory independence and the potential for conflict of interest that might occur when the regulator is also the major telecommunications operator.\textsuperscript{140} The Reference Paper requires that the regulator be detached from, and not accountable to, any telecommunications operator.\textsuperscript{141} In addition, the regulator must be independent of all market participants.

III. \textit{THE UNITED STATES V. MEXICO: THE DEBATE}

A. The Complaint

On July 28, 2000, the United States Trade Representative ("USTR") announced that the "United

\textsuperscript{128} Reference Paper, supra note 107, at para. 2. This paragraph was based on the EU Interconnection Directive, 97/33/EC of the European Parliament and of the Council on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision ("ONP"), 1997 O.J. (L 199) 32, arts. 6(a) and 7, para. 2, but was broadened to define nondiscrimination by inserting the references to treatment provided affiliates and non-affiliates. Id.

\textsuperscript{129} Reference Paper, supra note 107, at para. 2.2(b). Negotiators decided to use "cost-oriented," instead of "cost-based" because of the difficulty of determining actual costs in most countries. United States negotiators also favored "cost-oriented" because it is the term used in section 271 of the Telecommunications Act of 1996. 47 U.S.C. §271 (1998).


\textsuperscript{131} Sherman, supra note 100, at 80. This wording comes directly from article 7, paragraph 4 of the EU Interconnection Directive and also follows the Telecommunications Act, so negotiators felt that interpretation of the words would be precedents for interpretation within the WTO context. Directive 97/33/EC of the European Parliament and of the Council on Interconnection in Telecommunications With Regard to Ensuring Universal Service and Interoperability Through Application of the Principles of Open Network Provision (ONP), 1997 O.J. (L 199) 32 [hereinafter EU Interconnection Directive]. Id.

\textsuperscript{132} Reference Paper, supra note 107, para. 2.2 (c).

\textsuperscript{133} Id.

\textsuperscript{134} EU Interconnection Directive, supra note 131, at art. 9, para. 2.

\textsuperscript{135} Kennedy, supra note 10, at 11.

\textsuperscript{136} Sherman, supra note 100, at 82.

\textsuperscript{137} Reference Paper, supra note 107, at para. 2.5.

\textsuperscript{138} Id.

\textsuperscript{139} See Reference Paper, supra note 107, at para. 2.5(b). As with the term used in paragraph 2.2, there is no definition of a "reasonable" period of time. Some of the negotiators noted, however, that the four years needed to resolve an interconnection dispute between Telecom New Zealand and the new entrant, Clear, was not reasonable. Id.

\textsuperscript{140} Id. at para. 5. The paragraph addresses the potential for conflict of interest that arises when the body regulating the telecommunications industry is also the major telecommunications operator. The text achieves part of the U.S. goal for independence of the regulator. It requires that the regulator be separate from, and not accountable to, any operator. It does not require that the regulator be independent of any government ministry. In fact, paragraph 5 allows the government telecommunications ministry to be the regulator. Id.

\textsuperscript{141} See id. at para. 5.
States [would] request [WTO] consultations with Mexico regarding barriers to competition in Mexico's $12 billion telecommunications market. 142

Specifically, the United States sought resolution of three issues of concern regarding commitments Mexico undertook in the WTO under the Basic Telecommunications Agreement. 143 These issues were: (1) lack of effective disciplines over the former monopoly, Telmex, which uses its dominant market position to thwart competition; (2) failure to ensure timely, cost-oriented interconnection that would permit competing carriers to connect to Telmex customers for local, long-distance and international services; and (3) failure to permit alternatives to an outdated system of charging U.S. carriers above-cost rates for completing international calls into Mexico. 144

B. Section 1377 Comments

USTR first became concerned about the telecommunications regulatory environment in Mexico after conducting several annual reviews of foreign countries' compliance with telecommunications trade agreements under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988. 145 Section 1377 requires the USTR to review annually the operation and effectiveness of all United States trade agreements regarding telecommunications products and services. 146 The purpose of this review is to determine whether any act, policy or practice of a country that has entered into a telecommunications trade agreement with the United States: (1) is not in compliance with the terms of such an agreement or (2) otherwise denies (within the context of the terms of such agreement) mutually advantageous market opportunities to telecommunications products and services of U.S. firms in that foreign country. An affirmative determination under Section 1377 is considered a violation of a trade agreement under Section 304(a)(1)(A) of the Trade Act of 1974. 147

WorldCom, AT&T and the Competitive Telecommunications Association ("Comptel") filed comments as part of the Section 1377 annual review by USTR every year from 1998 until 2001 concerning Mexican compliance with telecommunications trade agreements. 148 All of the comments expressed concern about the inability of U.S. carriers to obtain reasonable termination charges for calls to Mexico and how this has caused significant harm to many U.S. consumers. 149

AT&T and WorldCom expressed their concerns about Mexico's failure to allow fully open markets, as required by its WTO commitments, in both international and domestic telecommunications services. 150 As a supplier of cross-border services to Mexico, these companies argued that they were entitled under the WTO Reference Paper to interconnect these services on non-discriminatory terms and at cost-oriented rates at any technically feasible point in Telmex's network. 151 Moreover,

---

143 Id.; see Basic Telecom Agreement, supra note 1.
144 July Press Release, supra note 142, at 1. United States Trade Representative Charlene Barshefsky said that "[t]he Mexican government had indicated its hopes to resolve many of the issues over the next few months." Id. at 1.
147 19 U.S.C. §304(a)(1)(A). Retaliation is mandatory and must be targeted at telecommunications products and services of the foreign country involved, unless actions against other economic sectors would be more effective in achieving compliance with the agreement. Id.
149 Id.; see also AT&T Letter, supra note 148, at 2.
150 WorldCom Letter, supra note 148, at 2; AT&T Letter, supra note 148, at 2. "Two years after the effective date of the WTO Agreement, Mexico has still failed to implement its WTO Commitments requiring the removal of market access barriers supporting the high settlement rates maintained by Telmex." In addition, "Mexico has failed to establish a level playing field required by its WTO Reference Paper commitments and therefore does not allow the new carriers in Mexico...to compete with Telmex on a fair and equal basis." AT&T Letter, supra note 148, at 5-6.
151 AT&T Letter, supra note 148, at 6. AT&T's affiliate, Alestra, is "unfairly disadvantaged by the longstanding failure of Cofetel, the Mexican regulator, to ensure that Telmex does not abuse its market power in its dealing with its com-
these two companies contended that Mexico's fulfillment of this obligation would substantially reduce the cost of U.S.—Mexico call termination.\(^{152}\)

The companies expressed great concern about the Mexican regulator, Cofetel's\(^{153}\) failure to ensure that Telmex's competitors may interconnect with Telmex's network at any technically feasible point under non-discriminatory terms\(^{154}\) and at cost-oriented rates.\(^{155}\)

The Section 1377 comments by AT&T and WorldCom also expressed the belief that Telmex's competitors are further disadvantaged by the above-cost domestic interconnection rates they must pay Telmex. Of particular concern were the "so-called 'off-net' interconnection charges that the competitive carriers pay to terminate their customers' calls in geographic areas not yet open to long-distance competition or otherwise

\(^{152}\) *Id.; WorldCom Letter, supra note 148, at 2.* The regulatory concern for call termination relies on two types of arguments. At one extreme, call termination is defined as a monopoly, therefore requiring regulation independently of market structure and competitive constraints. The second argument put forward is that regulation is necessary because negotiations to set reciprocal interconnection charges may be used as a vehicle for colluding in the retail market, via high interconnection charges. The consequence of adopting this approach is that network competition would not relieve regulators from directly setting terms and conditions for call termination. On the contrary, the emergence of network competition increases manifold the number of reciprocal interconnection relations telecommunications network operators have to negotiate among each other. The implications for regulation would be an increasing effort to monitor and potentially regulate call termination charges to an increasing number of networks. *Id.*


Mexico's Federal Telecommunications Law (FTL) required the creation of a telecommunications regulatory authority separate from the Secretariat of Communications and Transportation (SCT). On August 9, 1996, Cofetel was created by presidential decree. Similar to the United States Federal Communications Commission (FCC), Cofetel is charged with both implementing FTL and promulgating regulations based upon the FTL. Unlike the FCC, however, Cofetel is located wholly within the executive branch of the government, and must still work closely with SCT on competition policy and licensing matters.

\(^{154}\) Ramiro Tovar Landa, *Policy Reform in Networks Infrastructure: The Case of Mexico*, INSTITUTO TECNOLÓGICO

\(^{155}\) Id. As shown by a 1998 Ovum report, "Telmex does not offer a double transit termination charge service and new entrants are required to resell a long-distance service in order to provide national termination." AT&T T Letter, *supra note 148*, at 6. *See Solutions to Promote Competition and Develop the Telecommunications Sector in Mexico*, at http://www2.apii.or.kr/telwg/19tel/report/mexico.html#6.

\(^{156}\) AT&T Letter, *supra note 148*, at 6. Thus, competitive carriers in Mexico may terminate off-net long-distance calls only by resale of Telmex's long-distance services at retail rates of nearly 12 cents per minute plus an interconnection charge. This charge is more than three times higher than the nationwide rates available in most European countries and well over twice the level of the nationwide wholesale rates that are available in the U.S. market.

\(^{157}\) *Id.*

\(^{158}\) *Id.* The interconnection resolution issued by Cofetel on October 11, 2000, established that off net termination is interconnection and entailed the establishment of an off-net interconnection rate established by subtracting from the lowest Telmex retail price the cost of network elements not required by competitive carriers purchasing these services. *Id.*

\(^{159}\) *Id.; see Arturo Briceno, Fixed-Mobile Interconnection: The Case of Mexico, Strategic Policy Research, The Of-
can government’s telecommunication policies as they affect the resale of telecommunication services. First, Mexico reportedly does not permit licensed international private lines, a practice called international simple resale (“ISR”). CompTel argued that “[t]he provision of service on an ISR basis expands competitive entry opportunities for small U.S. carriers in foreign markets.”161 Secondly, CompTel alleged that Mexico continues to forbid carriers from engaging in so-called “pure” switched resale operations, which would allow carriers to provide service solely through the resale of services and facilities owned by other carriers.162 “As with ISR, pure switched resale expands the entry opportunities for small U.S. carriers in foreign markets, and Mexico’s refusal to license such opportunities constitutes a denial of market access, and an unreasonable restriction on the supply of a service. . .”163

C. Issues In The USTR Complaint

1. Lack of effective discipline over Telmex

The first issue raised by the U.S.’s complaint concerns the lack of effective government discipline over Telmex, the dominant Mexican telecommunications carrier. The U.S. charges that Mexico’s WTO obligations entail it to implement appropriate regulatory measures to thwart a major telecommunications supplier from engaging in anti-competitive practices.164 Despite Mexico’s telecommunications market being open to competition since 1996 and despite its WTO commitments, Telmex has actually expanded its market share of long-distance customers from 74 to 81 percent165 and has discouraged competitive carriers’ attempts to build out alternative local networks.166 The USTR also complained that the Mexican government has not yet initiated effective measures to prevent Telmex from engaging in anti-competitive practices ranging from denying competitors phone lines, pricing services at predatory rates, refusing interconnection and refusing to pay competitors fees it owes to them.167

In its complaint to the WTO, the United States asserted that Cofetel has thus far taken no action to enforce the dominant carrier regulations issued in October 2000.168 In addition, Cofetel has

---

161. July Press Release, supra note 142, at 2. In accordance with USTR’s view on Mexico concerning its willingness to open its market and subject Telmex to international competition, in January of 2000, the Federal Communications Commission ("FCC") took an unusual step of imposing an $100,000 fine on Telmex USA. Press Release, Enforcement Bureau, Federal Communications Commission, FCC’s Enforcement Bureau Proposes $100,000 Fine Against Telmex USA For Failure to Provide Lines and Circuits to Competitors, at http://www.fcc.gov/Bureaus/Enforcement/News_Releases/2000/nren0001.txt (Jan. 13, 2000). The FCC imposed the fine for Telmex’s failure to provide private circuits and lines to the U.S. subsidiaries in Mexico as it had been asked to do as a condition of its authorization to offer service in the United States. But, the Mexican Federal Telecommunications Commission, Cofetel, has argued that Telmex should fight the decision of the FCC. Regarding the fine, Telmex previously has argued that its decision to stop providing private circuits and lines to the U.S. subsidiaries in question was justified and reasonable because of the refusal of U.S. subsidiaries in Mexico to pay a debt of millions of dollars in interconnection fees. The FCC, however, rejected this argument in its explanation of its fine on Telmex USA for failure of its parent company Telmex to accept any private line or line orders from U.S. telecommunication companies’ Mexican subsidiaries. Id.

166. Telcos Setting the Ground for Increased Competition, Yahoo International Finance Center, at http://biz.yahoo.com/ifc/mx/news/11901-l.html (Jan. 1, 2001) [hereinafter Telcos]. Presently, interconnection fees are established by Cofetel and have been the subject of controversy and litigation. In October 2000, the interconnection fees Telmex charged competing long-distance carriers got reduced by Cofetel. Actions like this or the outcome of pending litigation could
taken little enforcement action in response to the numerous complaints filed since 1997 by competitive carriers concerning anti-competitive actions by Telmex. Among the key requirements of the dominant carrier rules that Cofetel has yet to enforce are: the authorization of Telmex’s tariffs; ensuring that Telmex does not engage in anti-competitive (below-cost) pricing; establishing cost-based rates for billing and collection, directory services, collect services, operator services and other services provided by Telmex to its competitors; Telmex’s adherence to quality and delivery time requirements for services provided to competitors; and Telmex’s compliance with accounting separation rules.

The government of Mexico and Telmex both reject U.S. claims concerning the failure of Cofetel to regulate the market and to implement regulations limiting Telmex’s monopoly powers. Telmex’s owner, Carlos Slim Helu, says the company “wants a strong, autonomous regulator” and he welcomes new regulations unless they unfairly tie Telmex’s hands or contradict Mexican laws. In addition, Telmex argues that it has stimulated line growth in Mexico and challenges the USTR’s allegation that Mexico has one of the lowest phone penetration rates in Latin America. Telmex argues that in the last nine years the number of fixed line telephones has grown from 6.4 million installed lines in 1990 to 10.8 million installed lines in the mid-1999.

have a material adverse impact on Telmex’s business, prospects, financial condition and results of operations. Id. 169 Mexico’s Cofetel to Step Up Regulation Of Telmex After Talks With Competition Fail, 17 INT’L TRADE REP. (BNA) 530 (Mar. 30, 2000). In 1998, Mexico’s Federal Competition Commission (CFC), the Commission Federal de Competencia, declared Telmex a dominant carrier in local telephony, domestic and international long distance and intercity connections. The CFC delegated to Cofetel the responsibility of applying measures to regulate the dominant carrier, yet their responsibility has failed to become recognized. Id. 170 AT&T Letter, supra note 148, at 4. 171 Kim Sunderland, U.S. Brings Telecom Dispute With Mexico to WTO, PHONE + INTERNATIONAL, 7 Sept. 9, 2000 at http://www.phoneplusinternational.com/articles.091rnewl.html [hereinafter Sunderland]. 172 Id.

2. Failure to ensure timely interconnection

The U.S. complaint also argues that Mexico’s WTO commitments require it to provide “timely, cost-oriented interconnection at any technically feasible point in the network.” This obligation requires competitors to access Telmex’s customers, which constitute 98% of the fixed-line subscribers. When USTR first publicized the U.S. complaint, Telmex charged an interconnection rate of approximately 4.6 cents per minute to connect long-distance carriers to Telmex customers, representing the single largest cost for any competitive long-distance carrier. This rate is drastically lower than rates of about half-a-cent in the U.S., Canada and Chile and rates of about one cent in Argentina and Peru. 173

3. Charging mechanisms for international calls

The United States complaint to the WTO also claims that Mexico’s commitments provide for a broad range of options for terminating international calls to Mexico. Unfortunately however, some of Mexico’s options maintain above-cost termination rates, thereby raising the rates that consumers pay for calls made between the United States and Mexico. For example, Mexico’s current rate of 19 cents per minute contrasts sharply with rates of roughly 6 cents per minute for calls made to the United Kingdom and Canada.


179 Michelle Gabrielle, Global Business: Taming a Bully U.S. Companies Tackle Mexican Telecommunications Market, eCOUNTRIES, available at http://www.ecountriescorporate.com/press/presscuttings/28_11_00.htm (Nov. 28, 2000). The 77 countries that have now made commitments comprise the world’s growing telecom service market, with 2000 revenues estimated to reach $900 billion. Id. 180 Sunderland, supra note 171, at 8. 181 Id. While a few countries maintain settlement rates of one dollar or more per minute, most have reduced significantly as a result of competitive pressures. Mexico’s rate of 19 cents per minute is equal to that of the Dominican Republic and compares favorably with Chile (27 cents), Costa Rica (36 cents), Ecuador (50 cents), and El Salvador (31 cents). But it is significantly higher than the lowest rates available for calls to more distant countries such as Brazil (15 cents), Israel (15 cents), Italy (12 cents), Lithuania (10 cents), or New Zealand (9 cents). And it is over three times the rate that applies to traffic across the northern U.S. border, which has a similar if
thermore, under Mexican rules, only the dominant carrier, which has incentive to keep the rate as high as possible, negotiates the international rate.\textsuperscript{182} The U.S. argues that real competition in the termination of international calls into Mexico would lead to dramatic reductions in the cost of U.S. to Mexico calls.\textsuperscript{183} Not surprising, Telmex has a different view. Concerning international settlement fees,\textsuperscript{184} which phone companies pay each other for long-distance calls across borders, Telmex argues it has decreased its 86 cents per minute fee of 10 years ago to 19 cents per minute.\textsuperscript{185} Telmex further argues that these fees are relatively typical between a wealthy nation and a developing nation.\textsuperscript{186} In addition, Telmex points out that the U.S. Federal Communications Commission ("FCC") applauded Telmex and AT&T for an agreement in early 2000 to reduce settlement rates ahead of schedule.\textsuperscript{187}

D. The Importance of Mexico

The issues raised in the U.S. complaint are not mere technical violations of WTO agreements. The U.S. has pursued the telecommunications case because Mexico is one the U.S.'s largest trading partners.\textsuperscript{188} The United States feels that failure to resolve the complaints puts the Mexican economy at an immense disadvantage with Mexico having fewer phone lines per capita — currently 11.2 lines per 100 people —\textsuperscript{189} than almost every major Latin American country.\textsuperscript{190} In addition, Mexico has accumulated fewer new lines in the past four years than that of Chile, Brazil, Guatemala and many other countries in Central and South America.\textsuperscript{191} The U.S. also believes that obstructions to competition could possibly undermine Mexico's ability to attract investment capital and develop electronic commerce and Internet services, all of which demand a competitive telecommunications marketplace.\textsuperscript{192} United States Trade Representative Charlene Barshefsky, stated that "for the sake of Mexico’s long-term economic growth, and the vibrant economic partnership we have...we urge Mexico to work...for a timely resolution of these vital issues."\textsuperscript{193}

E. Dispute Timeline

Although the WTO dispute settlement system is designed to work faster than the previous system under the GATT, these disputes often take between one and one and a half years to resolve.\textsuperscript{194} The U.S. formally requested consultations in the WTO over U.S. telecommunications firms' access to Mexico's market with a detailed list of complaints on August 17, 2000.\textsuperscript{195} The request alleged that since the creation of the GATS, Mexico had adopted regulatory measures that were anti-com-

\begin{itemize}
\item \textsuperscript{182} Mexico’s Federal Law of Economic Competition, Dec. 24, 1992, Article 7. In order to fix maximum prices for products and services essential for the domestic economy or for mass consumption, the following shall apply:...II.- Without affecting the powers invested to other agencies, the Secretariat shall set, through founded and motivated intent of resolution, the maximum prices of goods and services determined by the preceding section, pursuant to criteria which shall seek to prevent shortages of supply. Without interpreting the following as a violation of this law, the Secretariat may concert or coordinate with producers or distributors necessary actions in this matter, to minimize the effects on competition and free market participation. Id.
\item \textsuperscript{183} See generally Peters, supra note 181.
\item \textsuperscript{184} See Brendan Case, U.S. Official Says Telmex Deal May Not Do Enough, THE DALLAS MORNING NEWS, Jan. 4, 2001, at 4D.
\item \textsuperscript{185} See Kenneth MacKay Special Envoy for the Americas to the U.S., Brazil Business Council Speech, at http://www.embaiixada-americana.org.br/macksp.htm (Sept. 19, 2000). We export more to Mexico than to Britain, France and Germany combined. Together, Canada and Mexico purchase more than 40% of all US exports. Id.
\item \textsuperscript{188} U.S. Taking Mexican Interconnection Concerns to WTO, COMM. DAILY, 1, July 31, 2000.
\item \textsuperscript{189} July Press Release, supra note 142, at 1.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Id.
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{195} WORLD TRADE ORGANIZATION, REQUEST FOR CONSULTATIONS, WT/DS204/1/S/L/88 (Aug. 29, 2000).
\end{itemize}
petitive and, in fact, tolerated privately established market access barriers. The letter cited specific examples of how Mexico had failed to live up to its commitments under Article XVI of the GATS. Overall, the United States considered the action and inaction by Mexico to be incompatible with its 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 sections 4 and 5.

On October 10, 2000, the United States and Mexico held WTO consultations in Guadalajara, Mexico that failed to resolve overall U.S. concerns. On October 20, the United States sent a letter to the Government of Mexico, acknowledging areas of progress and suggesting areas where immediate steps would be necessary to ensure Mexico’s compliance with its WTO obligations. The candid letter displayed a shift in tone from earlier signals that the U.S. might explore a variety of avenues for dispute settlement before resorting to a WTO panel. One of the key demands highlighted in the letter was the transformation of Mexico’s current rules on cross-border telecommunications traffic.

In response to the U.S. letter, Mexico issued rules to regulate the anti-competitive practices of Telmex and announced significant reductions in long-distance interconnection rates for 2001. Despite Mexico’s positive steps, on November 8, 2000, USTR announced that the United States would request the establishment of a WTO dispute settlement panel in order to consider U.S. claims that Mexico had failed to comply with its WTO commitments in the telecommunication services sector. The request filed by the U.S. at the meeting of the WTO Dispute Settlement Body was blocked by Mexico. The U.S. again requested a dispute settlement panel in January 2001 and a panel was created. USTR said the panel was necessary because Telmex had subsequently filed legal challenges against both measures undertaken by the Mexican government. In addition, the Government of Mexico appeared reluctant to enforce new rules against Telmex.

IV. ISSUES DECIDED

While the U.S. and Mexico were skirmishing about the creation of the WTO arbitration panel, a voluntary industry agreement was reached on December 29, 2000 between Telmex, Alestra and Avantel and then ratified by Mexico’s new Communications and Transportation Secretary Pedro Cerisola on January 2, 2001. The agreement resolves several controversies among the parties including the usage of certain assets, the settlement of outstanding debts and disagreements on interconnection rates, local interconnection, resale tariffs, quality standards and international traffic, among other subjects. The industry agreement, however, left some key aspects of the complaint unresolved, including Mexico’s failure to provide a system of competition for international calls and its failure to curb Telmex’s anti-competitive practices.

was filed in July 2000, Mexico’s telecom regulatory agency, Cofetel, published long-awaited regulations meant to curb Telmex’s monopolistic powers and to level the playing field for competitors. Cofetel has also published new, lower interconnection fees for long-distance competitors of Telmex. Telmex and Cofetel have been battling in the courts for three years over competition issues, and Cofetel’s new moves seem destined to ignite yet another round of legal battles.

197 Id.
198 Id. at 2; see also GATS Annex, supra note 38.
201 Id. in the letter, USTR Deputy Richard Fisher expresses the need for Mexico to understand that the issues raised are central to USTR’s decision regarding the need for arbitration by a WTO panel.
202 Id.

204 Press Release, United States Trade Representative, United States to Request WTO Panel on Mexico Telecommunications, at http://www.ustr.gov/releases/2000/11/00-78.html (Nov. 8, 2000)
205 Id.
206 Id.
The most significant aspect of the industry agreement was Telmex's decision to drop its challenge to a resolution by Cofetel to significantly reduce the fees Telmex charges competitors to complete calls from their customers via Telmex's networks, as well as its long-distance interconnection fees. During the year 2001, Telmex will abide by the 1.25 cent per minute interconnection fee set by Cofetel. In addition, Telmex agreed to reduce the amount it charges competitors for access to its networks in remote areas, known as "off-net" charges. Competitors will "now be charged 75 percent of the lowest retail rate Telmex offers to customers for access to those networks."

Alestra and Avantel approved a compensation scheme to reimburse Telmex for money it had invested as special project fees to improve its networks to make interconnection feasible. This agreement includes a lump-sum fee by the two companies of about $140 million. But as much as 85 percent of the money to be paid to Telmex will be paid back through a five cent per minute long distance surcharge to be functional through 2004 or until the full amount is compensated.

The industry agreement includes a set of basic criteria for resolution of the issues surrounding international calls. These criteria could pave the way for an agreement, perhaps in separate negotiations between Telmex and U.S. carriers, on a new settlement rate. The existing 19-cent rate was negotiated only until the end of 2000.

The companies also reached agreement on a compensation scheme for local interconnection when Telmex completes local calls to competitors' customers or vice versa. This would work in keeping with a "bill-and-keep" system, where carriers will pocket fees collected from their own customers and anticipate that their competitors will do the same with fees owed to them, instead of shifting interconnection fees collected to the carrier that is owed the fee. Additionally, Telmex decided to appoint an independent auditor to guarantee the quality of service it provides to its competitors. It also arranged to provide private lines, which will also be observed by an independent auditor, for sale to competitors' customers.

Many industry insiders said that the willingness to negotiate on the part of Telmex was a result of a combination of political pressure from the U.S. through its WTO case and the new Mexican presidential administration of the reform-minded Vicente Fox. These factors will continue to affect the outstanding issues when the case is decided by the WTO.

V. REMAINING ISSUES TO BE DECIDED BY THE WTO, IF THE CASE MOVES FORWARD

Despite the industry agreement in January 2000, USTR has not amended its complaint against the government of Mexico. But in June

---

209 See id.
211 Id.
212 U.S. Serves Mexico With Demands, Deadline to Resolve Telecom Dispute, INSIDE US TRADE, 1, Oct. 27, 2000 [hereinafter Demands].
213 Pact, supra note 207, at 1.
214 Id.
215 Id.
216 Telcos, supra note 168, at 1. "Debt Settlement: Companies acknowledged their commitments to the "one-time investments" made by Telmex for interconnection services. A compensation system for settlement was established and became effective immediately, Telmex will receive $180 million from interconnection and special projects. One-hundred thirty seven million dollars will be transferred immediately ($70 million from Alestra and $67 million from Avantel) while the remaining $43 million will be paid over five years. Interconnection Rate: Parties accepted the fee for switched interconnection service set by Cofetel at $0.0125 per minute.

217 Telcos, supra note 168, at 3.
218 Pact, supra note 207, at 2.
220 Pact, supra note 207, at 2.
221 Id.
222 Id.
223 Id.
224 Case, supra note 184, at 1.
2001, the USTR backed away significantly from a threat to bring Mexico before a WTO dispute settlement panel.\textsuperscript{225} The U.S. had threatened to move to a panel in the absence of progress from Mexico by June 1, 2001, but WorldCom struck a deal with Telmex that was said to reduce a key rate charged for international calls.\textsuperscript{226} Despite the fact that USTR is not formally dropping its WTO complaint, USTR feels secure that WorldCom and Telmex "support regulatory reforms that would boost competition."\textsuperscript{227}

Under the deal, beginning January 1, 2001 the settlement rate was reduced from 19 cents per minute to 15.5 cents per minute.\textsuperscript{228} In addition, the rate would drop again beginning in 2002 to 13.5 cents per minute and to ten cents per minute in 2003.\textsuperscript{229} Starting in 2004, WorldCom would be able to negotiate the settlement rates on a competitive basis with Mexican providers, whereas under the current system, it may only negotiate one rate with Telmex that applies to all cross-border traffic.\textsuperscript{230} WorldCom and Telmex agreed to urge Mexico and the U.S. government to make necessary regulatory changes to allow increased competition by 2004.\textsuperscript{231}

AT&T is not in agreement with WorldCom on its deal with Telmex and will seek to have USTR push the dispute settlement process forward. AT&T maintains that the rates negotiated by WorldCom's deal are far too high to be consistent with Mexico's WTO commitments to charge for interconnection based on costs of providing the service.\textsuperscript{232}

While AT&T was not a party to the WorldCom/Telmex negotiations, under U.S. telecommunications law they are entitled to sign on under the same terms as WorldCom received. AT&T is still in separate, corresponding talks with Telmex on the issue. AT&T said it will oppose the approval of the WorldCom/Telmex deal by the FCC on the grounds that the rates negotiated by the companies are still not in the public's interest.\textsuperscript{233} AT&T asserts that the proposed rates are well above the four cent cost of providing the service and the settlement rates that prevail in competitive countries and do not conform with Mexico's prior WTO commitments.\textsuperscript{234} Critics of the agreement, however, argue that the pact does not represent a commitment from governments to make these changes and "charge that there is no guarantee that the Mexican government will allow those changes to take effect in 2004."\textsuperscript{235}

In the agreement, one important change from the U.S. standpoint includes Mexico putting an end to a requirement that only the carrier with the greatest market share (Telmex) be allowed to negotiate settlement rates.\textsuperscript{236} This means that U.S. companies have the option of negotiating more favorable rates with Telmex's competitors and Telmex's affiliates.\textsuperscript{237} In addition, the pact entails removing U.S. and Mexican regulations that enforce a "proportionate return" requirement, an arrangement under which companies service incoming international calls in proportion to the outgoing calls that originate with them.\textsuperscript{238} On the U.S. side, the FCC has to certify that competition conditions existed in Mexico such that its international settlement policy, including the proportionate return requirement, need no longer apply.\textsuperscript{239}

One vital difference in the WorldCom deal and the U.S. original demands is that the U.S. has pressed Mexico for open competition in international calls beginning in 2003, while the WorldCom deal would hold off until 2004.\textsuperscript{240} While the agreement would progressively reduce the settlement rate companies on either side of the border charge each other to complete, there are still issues between the United States and Mexico that are not resolved. These issues include

\begin{itemize}
  \item \textsuperscript{225} USTR Postpones WTO Action On Mexican Telecom Regulation, \textit{Corporate Mexico: Reforma (Mexico)}, available at 2001 WL3332555, (June 4, 2001).
  \item \textsuperscript{226} USTR Backs Off Mexico WTO Threat In Wake Of Telecom Company Deal, \textit{Inside U.S. Trade}, (June 1, 2001) at http://www.insidetrade.com/sec-cgi/as_web.exe?SEC_current+B¶rade01226 [hereinafter USTR Backs Off].
  \item \textsuperscript{227} Id.
  \item \textsuperscript{229} Id.
  \item \textsuperscript{230} Id.
  \item \textsuperscript{231} \textit{AT&T Balks At WorldCom-Telmex Settlement Rates Pact}, 21 \textit{Comm. Daily}, 1, June 1, 2001 [hereinafter \textit{AT&T Balks}].
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} WorldCom filed the deal with the FCC on May 30, 2001. Interested parties had twenty-one days in which to comment. Id.
  \item \textsuperscript{234} \textit{AT&T Balks, supra} note 231, at 2.
  \item \textsuperscript{235} \textit{USTR Backs Off, supra} note 226, at 1.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} \textit{AT&T Balks, supra} note 231, at 2.
  \item \textsuperscript{240} \textit{USTR Backs Off, supra} note 226, at 2.
\end{itemize}
Mexico's failure to provide a system of competition for international calls and its failure to "curb Telmex's anti-competitive practices in the market."  

With the additional agreement between Telmex and WorldCom much of what was originally part of USTR's complaint has been resolved.  

As a result, the U.S. government may be reluctant for the World Trade Organization Dispute Panel to decide the remaining issues because they are narrower and the Basic Telecom Agreement is not explicit with regard to these issues. Nevertheless, the United States should proceed with the remaining issues even if the Dispute Settlement Body persists in resolving in the United State's favor. A rule could provide helpful guidelines to all countries and their telecommunications industries.  

If the WTO Dispute Settlement Body does have the opportunity to decide these issues, it should require the Government of Mexico to live up to its old commitments under the Basic Telecom Agreement along with Telmex's new commitments under the WorldCom agreement. This case, if ever presented, includes issues of commercial and legal significance for the future of the telecommunications industry. The Dispute Settlement Body can clear up the ambiguities in the Agreement, thereby setting a precedent for future cases.  

Real competition in the termination of international calls into Mexico would lead to dramatic reductions in the cost of U.S.-Mexico calls, greatly enhancing the ability of the 20 million Mexicans and Mexican-Americans living in the United States to stay in touch with families and friends in Mexico. The current system denies the majority of Mexican and U.S. consumers the benefits of better services and lower prices. The Dispute Settlement Body should bear in mind that the main objectives of the Basic Telecom Agreement were to increase coverage of telecommunications services and to make sure that the entire population received more and better services. The liberalization and competition policies within the Agreement are only means to achieve such goals. A consumer-driven environment where consumers have real choice requires a wide range of suppliers of telecommunications services. This is why fostering competition is so important. The WTO should find that the Government of Mexico has violated the Basic Telecom Agreement and should require Mexico to remedy its violations.  

VI. CONCLUSION  

The U.S.-Mexico case is likely to be a prototype for future telecommunication disputes before the WTO, if USTR decides to push forward with the case in the future. First, the same telecommunication issues that are involved in this case will likely arise with other countries. Even though telecommunications issues and facts tend to be very specific, the issues of interconnection fees, the determination of fair costs between domestic and international providers and the willingness of the domestic regulator to actually regulate the national monopoly are just a few of the issues that are common to many markets. Second, while it is true that the U.S. was motivated to challenge Mexico's policies because Mexico is one of the U.S.'s largest trading partners, there are many other markets around the world that possess potential for U.S. companies. Moreover, other countries with well-developed telecom industries may perceive the U.S. challenge as a template for their own challenges. The U.S. shares a border with Mexico, and considering the cross border interactions and the numerous phone calls between the two countries, the Mexican telecommunications industry is not well developed. The same could be said for Western Europe and the emerging telecom markets in Eastern Europe. Even if the U.S.-Mexico dispute sets no precedent, the importance of the Mexican market has been enough to convince the USTR as

---

241 Id.  
242 Id.  
243 Press Release, United States Trade Representative, Year 2000 Foreign Trade Barriers Report (March 31, 2000). Mexico has exceeded Japan to become the United States' second largest single country trading partner and has the fastest growing major U.S. export market over the last six years. Since the NAFTA was enacted on January 1, 1994, U.S. exports to Mexico have increased by 109 percent, larger growth than to any other major single-country market. Id.  
244 July Press Release, supra note 142 at 30.  
245 See Case, supra note 184, at 2.  
247 Barshefsky Statement, supra note 246, at 1.  
well as WorldCom and AT&T to dedicate a significant amount of resources to fighting this case.

Any dispute that is brought to the WTO has a political element. To be sure, the U.S. needed not just a good case on the merits of the Basic Telecom Agreement, but the political determination to bring an ally and trading partner before the WTO. Not surprisingly, that political will is supplemented by the economic interests of the U.S. companies involved in the dispute. Conversely, Mexico has its own political and economic interests to address as well.

The elections in both the U.S. and Mexico in the past year have changed the political environment. Neither the Bush Administration in the U.S. nor the Fox Administration in Mexico was responsible for the dispute being brought to the WTO. It is possible that they will attempt once again to settle the case. Having said that, it is difficult to predict the impact that the presidential administration of Vicente Fox may have on the Mexican telecommunications regulatory environment. The Fox administration has announced its intention to stimulate investment in the telecommunications sector with reforms to the federal communications law, including plans to provide universal telephone service by doubling the current number of phone lines in five years. One cannot predict whether or when such new plans may be implemented and their effects on U.S. business.

Similarly, it is difficult to predict the impact that the Bush administration will have on the pending case. While the Clinton administration put a lot of time and resources into the case, it remains to be seen if the Bush administration will do the same even after the WorldCom pact. Presumably, the same political and economic calculations that caused the Clinton Administration to bring the case still prevail, but given the multitude of trade issues between the United States and Mexico, there is no certainty that the telecom case will retain the same priority.

One of the lessons of the U.S.-Mexico case so far is that the Basic Telecom Agreement is written broadly, yet the problems in the telecommunications industry are specific and that the WTO is a dull instrument at best. Likewise, the Agreement is not self-executing. What matters in the long run is how countries choose to implement the text. If countries are faithful to the text and purpose of the Basic Telecom Agreement there will be few disputes.

Of course, even if national governments attempt to faithfully implement the Telecom Agreement, there can be complications arising from the local judicial and regulatory systems. In Mexico, for example, Cofetel is not the ultimate authority on Telmex since any of the regulator’s decisions can be overturned by Mexican courts. And, at this point, it appears that Telmex has no intention of dropping its legal actions against Cofetel.

Without a WTO ruling, the rights of future U.S. carriers in the Mexican market will remain unprotected. Avantel and Alestra might have benefited from an agreement with Telmex, but there are no guarantees that the incumbent’s generosity will extend to future entrants or that Telmex will not change its mind.

There is no doubt that much attention will be directed at the WTO Dispute Settlement Body if it decides its first telecommunications case. While the effects of non-compliance concerning the Basic Telecom Act have been unclear, the WTO has a chance to clarify its position on these issues. First, the WTO should find that there is not a system of competition for international calls that actually exists in Mexico. Second, the WTO should make it clear it will not tolerate Telmex’s anti-competitive practices under the Basic Telecom Agreement. The WTO should direct Mexico to remedy these problems and come into compliance with its obligations under the Basic Telecom Agreement. Such actions by the WTO will help to ensure the effectiveness of the Agreement and provide an incentive for other countries to adhere to their obligations.