

September 2002

The Telmex Saga Continues: Foreign Investors' Expectations and Realizations in the Struggle to Compete in the Mexican Telecommunications Market

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Marcus Eyth, *The Telmex Saga Continues: Foreign Investors' Expectations and Realizations in the Struggle to Compete in the Mexican Telecommunications Market*, 14 Pace Int'l L. Rev. 211 (2002)

DOI: <https://doi.org/10.58948/2331-3536.1196>

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PACE UNIVERSITY
SCHOOL OF LAW

INTERNATIONAL LAW REVIEW

Volume XIV, Number II

Fall 2002

ARTICLES

**THE TELMEX SAGA CONTINUES:
FOREIGN INVESTORS' EXPECTATIONS
AND REALIZATIONS IN THE STRUGGLE
TO COMPETE IN THE MEXICAN
TELECOMMUNICATIONS MARKET**

Marcus Eyth*

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I. INTRODUCTION

Mexico's attitude on foreign direct investment in telecommunications has only superficially restored investor confidence following the significant policy changes of the 1990s. By passing legislation to reduce investment barriers, a long era of internal economic disintegration came to an end, at least in theory. The message that the Mexican government sent to investors abroad is clear: Mexico is open for business. However, in order to persuade venture capitalists that investing in Mexico is safe and worthwhile, merely introducing a new legal framework may not be sufficient to consistently attract long-term investments into the multi-billion dollar industry in Mexico.

Following an initial surge of foreign direct investment into Mexico, particularly in the telecommunications market in the 1990s,¹ there has been a sense of uneasiness among investors who have begun to realize that a number of problems accompany Mexico's drastic foreign policy changes. The reduction of foreign investment barriers has undoubtedly provided some relief to eager investors, some of whom have finally been given the opportunity to compete in a highly lucrative market. However, it is naïve and unrealistic for such companies to expect that a country that had been dependent on nationalized industries for decades would adjust to a free market environment without difficulty. Introducing competition is a long-term process, which has been hindered in the Mexican telecommunications industry by Telmex, the now privatized market dominator. Through

¹ See Stephen I. Glover & JoEllen Lotvedt, *The Mexican Telecommunications Market: The Interplay of Internal Reform and NAFTA*, 3 NAFTA: L. & BUS. REV. AM. 23, 30 (1997).

Telmex's continued refusal to give up its monopoly, consumers and most alternative telecom providers are unable to reap the benefits of a truly competitive market in Mexico.

With a new wave of foreign telecommunication companies interested in entering the market, Telmex is experiencing continued pressure to face competition. The potential benefits to the Mexican public are vast in nature. However, with its paranoid and monopolistic attitude, Telmex refuses to budge on an extensive exclusivity deal it made with the government as part of the de-nationalization of the telecom industry, thereby severely limiting entrance and growth opportunities for other companies in Mexico. Although some may argue that Telmex's efforts to thwart the movement toward an open market is a natural reaction to the long-held nationalistic attitude within Mexico, the empirical data throughout Latin American countries suggests that inhibiting competition has resulted in slow growth, slow innovation, and high prices. Therefore, it is time for the Mexican administrative authorities and Telmex to cooperate in the effort to bring better telecommunication services and selection to frustrated Mexican citizens by fostering healthy competition.

The legal framework has been set forth by the necessary administrative authorities through Mexico's accession to international treaties, as well as changes in Mexico's domestic regulations. It is time for Telmex to follow the rules.

Part II of this comment addresses the milestone decision of the Mexican government to privatize Telmex upon realizing that de-nationalization was imperative for Mexico to improve its outdated telecom infrastructure and technology. Part III explores the political history of foreign direct investment in Mexico ranging from the open market policies of the early 20th century, through a gradual nationalistic development, and back to the open market tendencies at the end of the century. Part IV discusses administrative liberalization via the 1993 General Foreign Investment Law, as well as the 1995 Telecommunications Law through which the Mexican government attempted to officially give teeth to its new open-door investment policy. Part V discusses the significance of Mexico's accession to the World Trade Organization (WTO) and the obligations that follow from multilateral commitments in the investment industry over the

last thirteen years. Part VI reviews the five incremental steps the Mexican government has taken to liberalize the telecom investment industry. Part VII addresses investors' initial reactions to Mexico's new attitude on FDI in telecommunications, followed by a discussion of how the administration has failed to control Telmex. Furthermore, Part VII discusses the U.S. government's efforts to protect American telecom companies, which have invested enormous amounts of capital with the expectation that Mexico would enforce competition regulations. Part VIII concludes the comment.

II. PRIVATIZATION: A POTENTIAL VEHICLE TO IMPROVE TELECOM CONDITIONS IN MEXICO

While the Mexican government attempted to support its economy with nationalized industries for nearly half a century, Mexican citizens suffered the consequences, particularly in the telecommunications sector. Poor quality service or no service, outrageous prices, and outdated technology were common characteristics of the Mexican telecom industry prior to the 1990s. Just as other Latin American countries liberalized their telecom markets at this time (and experienced positive results including significant capital influx), the Mexican government realized that the solution to spark the stagnant economy generally, and the telecommunications sector specifically, might include privatizing Telmex, the sole underachieving telecom company serving — or failing to serve — the Mexican population and market. The sale of Telmex would be recorded as the largest privatization in Latin America.

A significant source of the force to privatize Telmex in 1989 stemmed from consumers at home and in professional settings who realized that the state-owned enterprise failed to address the needs of the public in either a prompt or efficient manner.² In a country with a population of approximately ninety million people, the underdevelopment in the industry resulted in astonishing statistics on telephone use. In urban settings, there existed an average of just nine phones per one hundred people (compared to fifty lines per one hundred people in the U.S.),

² See Brent Lee Vannoy, *Mexican Telecommunications: Privatization and NAFTA Open the Door For U.S. Expansion Into Mexican Markets*, 17 Hous. J. INT'L L. 309, 314-15 (1994).

whereas in rural settings, it was not uncommon for one phone to be shared by more than one thousand people.³ Furthermore, installation charges were nearly seven times greater than in the U.S., and waiting periods for new lines could last up to two years.⁴ Aside from the inconvenience of not being able to place personal calls, the amount of forgone business opportunities due to such abominable telecommunications conditions presumptively resulted in astronomical dollar figure losses.

With the exception of telephone workers and a small group of commentators who opposed privatization,⁵ public disapproval with newly elected President Salinas' privatization initiative was negligible. The nationalists who took some convincing included Telmex employees who felt betrayed and at risk of losing their jobs without the State acting as an industry security blanket. However, Mr. Salinas eased Telmex employees' concerns by making several promises when he personally announced the decision to sell the company. During a speech in front of disgruntled Telmex employees, Mr. Salinas promised: (1) that telephone workers' labor rights would be respected; (2) that all current employees would be able to keep their jobs; (3) that current employees would be awarded shares of the newly privatized company; (4) that the state would remain the 'rector' of telecommunications; and (5) that the new controller of Telmex would be a Mexican national.⁶ Consequently, Mr. Salinas convinced his listeners that these changes would not only dramatically improve telephone service, but would also strengthen scientific and technological research in the industry.⁷

By December of 1990, 55% of the majority voting rights in Telmex had been sold to a partnership for \$1.76 billion.⁸ However, the government retained 34% in limited voting rights, of

³ See Glover & Lotvedt, *supra* note 1, at 23.

⁴ See *id.* at 26.

⁵ Some anti-privatization arguments included: (1) the desire to retain profit potential of telecommunication (an argument that refuses to consider long-term benefits); (2) the yet to be concretely and credibly supported overbroad "essential to the public good" argument; and (3) national security concerns. See Vannoy, *supra* note 2, at 316-17.

⁶ See JUDITH CLIFTON, *THE POLITICS OF TELECOMMUNICATIONS IN MEXICO: PRIVATIZATION AND STATE-LABOUR RELATIONS, 1982-1995*, 150 (2000).

⁷ See *id.*

⁸ See William M. Berenson, *Developing the Regulatory Footprint for Newly Privatized Telecommunications Providers*, 38 FED. BAR NEWS & J. 400, 400 (1991).

which 4.4% was reserved for employees (Mr. Salinas made good on one of the promises addressed above). Telmex was completely privatized in 1994 when Grupo Carso (a Mexican manufacturing and mining entity), SBC (formerly Southwestern Bell) and France Telecom acquired the majority voting power of the Mexican telecommunications giant. Grupo acquired a 10% interest, while the latter two owners obtained a 5% interest each.⁹ The new consortium planned to spend a total of \$13 billion to make Telmex Latin America's top telecommunications provider.¹⁰

Despite Mexico's official open-door policy to foreign investment in telecommunications, Telmex refused to follow new telecom regulations, which were supposed to guarantee competitors an equal opportunity to enter the market. Part of the agreement to privatize Telmex included granting Telmex a monopoly on long-distance services until January 1, 1997, as well as on local service until 2026.¹¹

However, in exchange for granting Telmex a monopoly in long distance and basic services, the government required the company's new owners to launch "a massive revitalization program for the nation's telecommunications system."¹² Under this agenda, the new owners were required to: "(1) install 500,000 new lines each year; (2) install telephones in 10,000 towns with over 500 inhabitants; (3) quadruple the number of pay phones; and 4) digitize to provide fiber optic links to the larger cities."¹³ In essence, the agreement required the new Telmex owners to significantly upgrade consumer services and telecom infrastructure in exchange for receiving market advantages (i.e., via "concessions").

III. HISTORY OF MEXICAN POLICY ON FOREIGN DIRECT INVESTMENT (FDI)

Mexico has had a turbulent history with foreign direct investment policies, which arguably came full circle when the

⁹ See ARIZONA OFFICE OF TRADE, TOURISM AND INVESTMENT, *THE MEXICAN TELECOMMUNICATIONS MARKET* (2000), available at www.natlaw@natlaw.com [hereinafter ARIZONA OFFICE OF TRADE].

¹⁰ See Vannoy, *supra* note 2, at 317.

¹¹ See *id.* at 320.

¹² *Id.* at 321-22.

¹³ *Id.*

government privatized several industries including Telmex, and passed legislation which had the potential to significantly reduce investment barriers in the 1990s.¹⁴ This section addresses the history leading up to the government's decision to make fundamental changes in Mexican investment policies by reintroducing a more receptive attitude toward foreign direct investment.

Long before Mexico's most recent efforts to address the shortcomings that accompany an economy of nationalized industries, foreign investors were invited to freely enter the Mexican markets nearly one hundred years ago.¹⁵ The positive economic implications of an open market economy during the pre-1910 Mexican revolutionary period were impressive, whereby passive economic control at the administrative level resulted in significant economic growth.¹⁶ However, about twenty years of social and political instability followed as a consequence of a newly developed nationalistic attitude in Mexico, triggered by the introduction of the Mexican Constitution and the National Revolutionary Party into government.¹⁷ A combination of the Mexican revolution and the worldwide depression in the 1930s resulted in the abandonment of Mexico's liberal market model.¹⁸

In an effort to restructure the Mexican economy, the government focused almost exclusively on the internal promotion of domestic industries.¹⁹ Shortly before the Second World War, the government sent a milestone message to investors abroad by nationalizing Mexico's number one economic jewel: the petroleum industry. Additional measures to follow included implementing constitutional and general law limitations on foreign investment in mining, electric and nuclear power, bank-

¹⁴ See Foreign Investment Law (FIL), D.O., Dec. 27, 1993.

¹⁵ See Rafael X. Zahralddin, *Venture Capital Opportunities and Mexican Telecommunications After the passage of the NAFTA and the Ley De Inversion Extranjera*, 20 DEL. J. CORP. L. 899, 903 (1995).

¹⁶ See *id.* In 1897, Mexico was the recipient of 31.5 % of all U.S. foreign investment. See also VAN R. WHITING, JR., *THE POLITICAL ECONOMY OF FOREIGN INVESTMENT IN MEXICO* 59, 61-62 (1992).

¹⁷ See Zahralddin, *supra* note 15, at 904.

¹⁸ See *id.* See also WHITING, *supra* note 16, at 100.

¹⁹ See Fernando Sanchez Ugarte, *Mexico's New Foreign Investment Climate*, 12 HOUS. J. INT'L L. 243, 244 (1990).

ing, transportation, and communications.²⁰ As these government policies indicated a growing trend of hostility toward foreign investment, former heavily investing countries like the United States had no choice but to invest elsewhere.

Mexico's line of restrictions on foreign investment climaxed in 1973 shortly after the government seized control of the telephone industry²¹ with the passage of the Law to Promote Mexican Investment and to Regulate Foreign Investment (LPMI). At this time, scarcity of foreign investment, particularly from the U.S., was at its peak.²² Though, *arguendo*, the government may have had good intentions in passing the LPMI, the practical result was counterproductive to the development of the Mexican economy. In essence, the new rules promulgated foreign ownership restrictions in all industries. Furthermore, the government granted increased discretion and broad power to the LPMI ministry, which — not surprisingly — led to cases of corruption.²³ In sum, the practical implications of the law “clearly burdened new venture capital activities.”²⁴

The deterioration of Mexico's investment policies became more evident in the 1970s and 1980s, as indicated in the telecommunications industry. Extensive government regulation resulted in basic inefficiencies in this sector. For example, by keeping out foreign investors in Mexico, technology became stagnant; leaving the industry to manage outdated and cost inefficient systems without a realistic competitive future. Inept government management resulted in concrete, and for developed country standards, preposterous shortcomings: by 1989, fax machines were virtually non-existent, 20% of Mexico's phones were out of service at one time, and waiting periods for service could last longer than six months.²⁵ In sum, if Mexico wanted to develop into a modernized state in the world econ-

²⁰ These drastic nationalization measures were authorized under Article 27 of the new Mexican Constitution of 1917, which states in relevant part that “[t]he Nation shall have at all times the right to impose on private property such modalities as the public interest dictates, and the right to regulate the use and exploitation of all natural resources susceptible to appropriation, in order to preserve, and to effect equitable distribution of, the public wealth. . . .” See MEX. CONST. art. 27.

²¹ See Vannoy, *supra* note 2, at 312.

²² See Zahralddin, *supra* note 15, at 907.

²³ See *id.* See also WHITING, *supra* note 16, at 100.

²⁴ Zahralddin, *supra* note 15, at 907. See also WHITING, *supra* note 16, at 100.

²⁵ See Vannoy, *supra* note 2, at 312.

omy, its bungling government would need to embrace significant market-based reform.

Upon realization that its current policies lacked a globally competitive industrial future, the Mexican government took its first significant step toward improvement when President Salinas passed an amendment to the LPMI in 1989: the Regulations to the Law to Promote Mexican Investment and Regulate Foreign Investment (RLPMI). The new regulations marked a modest change in Mexico's policy to limit foreign investment in local industries.²⁶ Most importantly, the following new measures sparked new confidence in foreign investors by limiting the discretion of the foreign investment commission and setting forth a predictable and transparent legal framework, which imposed several basic conditions on capital investment from abroad. The new conditions required demonstrating *inter alia*: (1) a need to obtain capital investments financed from abroad; (2) the capacity to generate sufficient employment opportunities; and (3) the use of competitive technologies.²⁷

Aside from codifying these requisites, the RLPMI addressed one of the most significant considerations of foreign investors who decide on whether to invest in a specific foreign country: operational control of the enterprise.²⁸ Formerly, absent very rarely granted permission by the Foreign Investment Commission (FIC), the LPMI prohibited foreign investors from holding a majority interest in a Mexican company. In turn, foreign investors were denied practical control of the enterprise. Although the RLPMI improved these restrictions by allowing up to 49% foreign ownership in certain industries of the Mexican economy, the telecommunications sector was only moderately affected by these rules because investors remained subject to many LPMI restrictions. Consequently, in the telecommunications arena, the venture capital barriers remained.²⁹

²⁶ See Zahralddin, *supra* note 15, at 912.

²⁷ See *id.* at 910.

²⁸ See *id.* at 913.

²⁹ See *id.* at 915. See also Regulations to the Law to Promote Mexican Investment and Regulate Foreign Investment, art. 7 (1989) [hereinafter RLPMI].

IV. THE FOREIGN INVESTMENT LAW OF 1993 (FIL) AND THE
NEW TELECOMMUNICATIONS LAW OF 1995 (FTL): THE
INTRODUCTION OF A NEW LEGISLATIVE PROCESS FOR
PENETRATING FOREIGN INVESTMENT BARRIERS IN MEXICO

A. *The FIL: General FDI Liberalizing Legislation*

Following the dramatic changes in Mexican foreign investment policy (including the privatization of several vital industries), the government took additional steps to attract investment capital in 1993 by passing the Ley de Inversion Extranjera (Foreign Investment Law), which repealed the LPMI of 1973.³⁰ By passing the FIL, the government expected that a reduction in ownership percentage barriers, clearer guidelines on petitions and registration requirements for investments, and the existence of avenues to seek redress upon alleged violations of the FIL would trigger foreign investor confidence.³¹

The new law's objective was to provide an efficient set of regulations that would attract foreign investment into Mexico and ensure that such investments contribute to national development.³² The FIL mandates that for the first time, 100% direct foreign ownership is permitted in those industry sectors that are not specifically enumerated in the statute.³³ Unfortunately for foreign investors, the law sets specific percentage ceilings in some sectors, including the telecommunications industry in which foreign ownership is capped at 49%.³⁴ However, a significant exception to this rule provides for 100% direct foreign ownership in cellular telephone service, provided that the National Foreign Investment Commission (NFIC or Commission) grants approval of such an application.³⁵

1. *The Role of the NFIC*

Petitions for investment are considered by the NFIC, a finger of the Mexican Executive Branch of Government. The NFIC presents the first obstacle for investors to overcome in a foreign

³⁰ See FIL, D.O., Dec. 27, 1993.

³¹ See David J. Drez, *Direct Foreign Investment in Mexico's Telecommunications Market*, 3 NAFTA: L. & BUS. REV. AM. 112, 117 (1997).

³² See FIL, D.O., Dec. 27, 1993, art. 1.

³³ See Drez, *supra* note 31, at 118.

³⁴ See *id.*

³⁵ See *id.*

investment endeavor.³⁶ With the underlying objective of maximizing the benefits to Mexico, the Commission considers several principles in deciding whether to allow an investor to penetrate the market. The following criteria are considered in addition to already existing considerations set forth in the RLPMI.³⁷

First, the Commission determines what type of impact the investment will have on employment and training.³⁸ The Mexican government is concerned with creating new jobs for its citizens, as well as the need to monitor the quality of those jobs. For example, the Mexican government would prefer an investor who promises to treat Mexican employees fairly with respect to wages and working conditions.³⁹ Furthermore, this consideration supplements the RLPMI codification, which focuses on creating jobs that are permanent and promote worker training.⁴⁰

Second, an investor's promised introduction of technological advantages would be viewed favorably by the Commission and increase the investor's chance of entering the market.⁴¹ Particularly in the telecommunications industry, where outdated technology and resources are in desperate need of a surge (which in some cases even pose health risks to the public),⁴² the Commission views investors' newly developed information technology (IT) as a favorable element to accompany the investment.

Third, the NFIC closely examines the effects an investment might have on the environment.⁴³ For example, the Commission may be more reluctant to grant clearance to an energy plant project that does not pass the environmental standards of

³⁶ See *id.*

³⁷ RLPMI considerations include that: (1) the NFIC will not clear investments in fixed assets that exceed \$100 million; (2) it is required that foreign capital fund the investment; and (3) industrial projects are prohibited in the "Mexican Triangle" consisting of Monterey, Mexico City and Guadalajara.

³⁸ See Drez, *supra* note 31, at 119.

³⁹ See *id.*

⁴⁰ See Ramon H. Bravo, *Mexican Legal Framework Applicable to Operations Involving Financial Services*, 25 ST. MARY'S L.J. 1239, 1241 (1994).

⁴¹ See Drez, *supra* note 31, at 119.

⁴² Such risks may include rotted telephone poles or outdated and improperly maintained machinery. Sometimes the means to repair machinery may simply not be present in the country with respect to necessary parts or skills to maintain the equipment properly.

⁴³ See Drez, *supra* note 31, at 119.

the investor's country. A red flag is presumably raised when opportunistic investors attempt to introduce projects into a country and negative environmental implications are not considered to be severe enough to preclude the project from materializing. In most cases, investors will simply have to pass muster under the Mexican environmental standards.

Fourth, the FIL introduces a broad-spectrum requirement for the NFIC to take into consideration the general contribution of the investment to productivity in the country.⁴⁴ Essentially, the NFIC reviews and assesses what overall benefits accompany the investment with respect to Mexico's economy and the public. For example, an investment in the telecommunications sector that not only creates new quality jobs but also provides technological advances and attracts large amounts of capital into the country — most of which will stay within the borders through re-investing — is likely to qualify as an investment with sufficient positive effects in Mexico.

Finally, the FIL grants the Commission the discretion to impose conditions on the foreign investment, "to the extent that those conditions do not extort trade."⁴⁵ This criterion is a "catch-all" provision, which allows the Commission to balance the "Mexican benefits scale" if the benefit to the Mexican economy and consumers is limited under the proposed investor's agenda. For example, if the NFIC feels that the number of Mexican employees expected to work on a project is too few in number and that the petition does not provide for sufficient quality training of the employees, the Commission might set the following condition for approval: a requirement of an increased specified number of Mexican employees, who must go through an eight week training period at the investor's cost. Thus, the condition requires the investor to make an additional "valuable" contribution, in order to satisfy the Commission's expectations.

2. *New Transparency Under the FIL*

Aside from publicly submitting the above criteria taken into consideration by the NFIC, the new FIL places concrete limitations on the Commission, resulting in a benefit to investors who enjoy an increased sense of predictability upon their

⁴⁴ See *id.*

⁴⁵ FIL, D.O., Dec. 27, 1993, art. 29.

application to invest in Mexico.⁴⁶ For example, upon receiving a petition, the NFIC has a 45-day window to conclude that the foreign investor's application passes or fails the above set criteria.⁴⁷ If the Commission fails to render a decision within the time period, approval is automatic.⁴⁸ Consequently, such a provision guarantees administrative efficiency for investors who may be faced with time pressures, especially with respect to products in a volatile market. For example, if the process for receiving clearance for an investor in a new company lasted several years, the company may have already become insolvent by the time the NFIC approves the applicant. With this new time limitation, however, the investor receives prompt notification of whether to launch the project in Mexico or look elsewhere.

Additionally, a similar FIL time limitation is placed on the Ministry of Trade and Industrial Development with respect to decisions on whether to approve registration of a foreign company seeking operation in Mexico.⁴⁹ Under the new law, a foreign company, as well as all domestic companies with foreign investor constituents doing business in Mexico, must register with the National Registry of Foreign Investment and the Public Registry of Commerce within forty days of formation. Thereupon, the Ministry of Trade has fifteen days to grant the company's registration request. For reasons similar to those stated in the previous paragraph, the time limit placed on the Ministry is crucial to foreign investors who may be faced with having to promptly seek alternate means of investment if it is denied in Mexico at the incorporation stage.

Finally, the FIL provides for clear-cut recourse against foreign investors who fail to abide by the rules. For example, if investors act contrary to, or without necessary NFIC approval, the Ministry may impose sanctions against the foreign legal entity.⁵⁰ Rates of sanctions are set forth in the law, thereby providing foreign investors with constructive notice of potentially

⁴⁶ *See id.*

⁴⁷ *See id.* art. 28.

⁴⁸ *See id.*

⁴⁹ *See* FIL, D.O., Dec. 27, 1993, art. 32.

⁵⁰ *See id.* art. 38(I).

severe sanctions.⁵¹ Aside from providing investors with transparency in the sanction process, the FIL guarantees a degree of due process following an alleged violation.⁵² Before sanctions are imposed, investors are guaranteed a hearing during which they may comment on the following criteria taken into consideration by the Ministry: (1) nature of the violation; (2) seriousness of the action; (3) ability of the offender to pay; (4) time of non-compliance; and (5) total value of the transaction.⁵³

In sum, the FIL marks a significant departure from the previous Mexican government approach of complete control by removing "hosts of administrative and industrial restrictions on foreign investment,"⁵⁴ as well as some skepticism of foreign investors due to former unpredictability of the chance of approval. Though some limitations within the FIL continue to exist (i.e., some sectors which the industry exclusively reserves to the state, and foreign ownership percentage ceilings), the benefits accompanying the new regulations weigh far heavier, as the consequent influx in investment demonstrated.

By setting forth clear standards, considered by the NFIC, and placing limitations on the Commission's discretion (most importantly time limits), foreign investors became newly confident that Mexico provided a predictable, reliable and transparent investment process. Thus, the stage was set for continued growth of benefits within the foreign investment market. The FIL marked an important step in Mexico's overall reduction in investment barriers and acted as a precursor to the novel telecommunications law, which would be implemented two years later.

B. *The FTL: Liberalizing Telecom FDI Regulations*

By acceding to NAFTA in 1994, the Mexican government took another significant step to mandate transparency in the foreign investment administrative process and committed to open access of public telecommunication networks and services

⁵¹ In some instances, the question of whether to conform to or bend a rule might simply be a business question in considering the cost of abiding by the law compared to the risk of getting caught.

⁵² See FIL, D.O., Dec. 27, 1993, art. 38.

⁵³ See *id.*

⁵⁴ Zahraiddin, *supra* note 15, at 918-19.

on reasonable and non-discriminatory terms.⁵⁵ Moreover, the government sent a strong message to foreign investors regarding Mexico's commitment to attract capital in the global telecommunications sector when it passed the Federal Telecommunications Law on June 8, 1995 (FTL), which incorporated many of the regional trade agreement's principals into domestic law. The objectives of the FTL are set forth in Article 7:

[To] promote an efficient development of telecommunications; carry out the State control to this respect in order to guarantee the national sovereignty; promote *healthy competition* among the different renders of telecommunication services in order to promote better prices, diversity and quality of services in benefit of the users; and promote an adequate social coverage (*emphasis added*).

The most significant policy change compared to former legislation was the goal of introducing competition and rules for competition in both local and long distance services, as well as in radio and satellite communications.⁵⁶ To help to attract more investment, the FTL sets forth detailed ground rules for granting concessions to telecommunications companies interested in competing in the newly deregulated market.⁵⁷

1. *Establishing Agencies: The SCT and COFETE*

In an effort to implement the deregulation and pro-competition process as effectively and efficiently as possible, the government delegated authority to administrative bodies like the Ministry of Communications and Transportation (Secretaría de Comunicaciones y Transportes) (SCT or Ministry) to issue permits and licenses to companies interested in entering the market.⁵⁸ However, the government failed to provide guidelines to the SCT, thereby taking a significant risk in hopes that the agency would succeed even without a transition period into a competitive market from a system that had been dominated for

⁵⁵ See Vannoy, *supra* note 2, at 323-26. While there are significant implications of Mexico's accession to NAFTA, a discussion of the regional agreement is outside the scope of this comment. However, the basic principals of NAFTA are similar to those set forth in the WTO Agreement discussed below.

⁵⁶ See Drez, *supra* note 31, at 122.

⁵⁷ See Federal Telecommunications Law (FTL), D.O. June 7, 1995, Chap. III.

⁵⁸ See Drez, *supra* note 31, at 124.

decades by a nationalized monopoly service provider.⁵⁹ Not surprisingly, the newly created agency was overwhelmed with the expectation of introducing new telecommunications policy.⁶⁰

To address the SCT's shortcomings, the government created the Comision Federal De Telecomunicaciones (COFETE) in August of 1996 to assist the SCT in regulating the telecommunications market.⁶¹ COFETE was made up of a four-member panel headed by the former secretary of the SCT, Mr. Carlos Cassasus Lopez. COFETE, charged with overseeing the telephone, paging, cable TV, and wireless industries, operates as an autonomous sub-sector within the SCT and is analogous to the U.S. Federal Communications Commission.⁶²

The Ministry was faced with the challenge of taking the liberalized set of rules and implementing them in a structured, transparent manner that would make Mexico's newly opened market attractive to investors who were legitimately concerned about the long history of investment barriers. The key was to make the transition as smooth as possible and to ensure that true competition in the market would indeed result.⁶³ To achieve this challenging goal, the Ministry would need to be particularly cautious of the industry's giant, as Telmex would be inclined to inhibit fair competition by using its dominant position to discriminate against new entrants.⁶⁴ As one author pointed out in 1996, if the Ministry was successful in promulgating a smooth transition, a new competitive regime "[would offer] lower prices, higher service quality, broader consumer choice, more efficient industries, higher productivity, and a stimulus to economic growth, particularly in the information-intensive service industries."⁶⁵ In other words, absent variables

⁵⁹ See Adrienne Hanley, *Mexico's Commitment To Open Telecom Markets to Competition* 15-16 (1996), available at <http://www.natlaw.com/database>.

⁶⁰ See *id.* at 16.

⁶¹ See Glover & Lotvedt, *supra* note 1, at 27. See also *Communication: New Phone Commission Created*, 6 MEX. BUS. MONTHLY (Sept. 1, 1996).

⁶² See Glover & Lotvedt, *supra* note 1, at 27-28.

⁶³ See Hanley, *supra* note 59, at 34-35, for a review of how best to achieve this "smooth transition." Numerous suggestions have been made on how to implement the transition; however, the novelty of the situation makes it difficult to predict which method might be most effective in facilitating a market based on competitive principles. *Id.*

⁶⁴ See *id.* at 18-19.

⁶⁵ *Id.* at 20.

that impede free market access, the FTL sets the stage for healthy trade in the Mexican telecommunications market.

2. *Scope of the FTL*

The FTL language is very broad, covering nearly every corner of the telecommunications industry.⁶⁶ Aside from issues raised by the inexperience of FTL implementers, the actual provisions of the FTL include both foreign investment attractors and deterrents. While theoretical shortcomings exist, the codifications and the law's policy of ensuring access to telecommunications networks set a promising foundation for foreign direct investment in Mexico.⁶⁷

a. Investment Deterrents: Lingering Limitations on FDI

On the one hand, possibly the least attractive criterion involves the limitation placed on foreign ownership of companies within Mexico. Placing a ceiling of 49% ownership in telecommunications, except for cellular telecommunications services where 100% ownership is permitted,⁶⁸ raises investor concerns about maintaining sufficient control over the company's day-to-day activities and general decision-making power. Furthermore, the law provides that public telegraph and radiotelegraph services are completely reserved to the state, and that investments in the radio spectrum are solely reserved to Mexican nationals.⁶⁹ Thus, both partial and complete limitations raise significant questions and impede investors' ambitions to engage the Mexican telecommunications market.

b. Investment Facilitators: A Transparent Process

On the other hand, the law sets forth a number of guidelines available to foreign investors, which, similarly to the FIL, lend transparency, predictability, and credibility to the investment process. For example, with respect to licenses, applications and permits, the FTL provides time limits before which permission to conduct business must be granted or denied. The SCT has 120 days to review a license application and ninety

⁶⁶ See Drez, *supra* note 31, at 122.

⁶⁷ See *id.* at 123.

⁶⁸ See *id.*

⁶⁹ See FTL, D.O., June 7, 1995, art. 9.

days to review a request for a permit.⁷⁰ Furthermore, the law provides that licenses are issued for a term of up to thirty years and may be renewed provided certain time limits are complied with under the renewal section.⁷¹ Thus, these guidelines limit the discretion of COFETE panel members and provide a sense of reliability to investors who may be under time pressure to decide whether to invest in the telecommunications market.

Furthermore, the FTL sets forth the specific obligations of licensees.⁷² The law mandates that under the separate satellite communications provision, all licensees must respect Intellectual Property Rights (IP).⁷³ The protection of IP is a serious concern, particularly for developed countries like the United States, which is host to a plethora of producers and creators of art and technology, the substance of which easily could be knocked-off in a less sophisticated market. Additionally, licensees are required to properly register with the SCT before conducting business, although they may freely establish rates.⁷⁴ Furthermore, not only may such rates not be applied discriminatorily but also existing telecommunications assets available to one licensee (i.e., transmissions towers and cables) must be made available on equal terms to other licensees.⁷⁵ Thus, at least in theory, foreign investors would feel confident to invest in a market where domestic entities will not be treated differently from foreign owned entities.

Additionally, the FTL provides for transparency in the administrative process by requiring that registration information remain public (as opposed to legally confidential).⁷⁶ This section complements the registration process set forth in the FIL, although the FTL does not set forth specific time restrictions on when companies must register.⁷⁷

Finally, the FTL provides guidelines to foreign investors with respect to compliance and sanctions. Companies are moni-

⁷⁰ See *id.* arts. 25 and 32 (respectively).

⁷¹ See *id.* art. 27.

⁷² See *generally id.* art. 44.

⁷³ See *id.*

⁷⁴ See FTL, D.O., June 7, 1995, art. 61.

⁷⁵ See *id.* art. 44(VI).

⁷⁶ See Drez, *supra* note 31, at 129.

⁷⁷ See FTL, D.O., June 7, 1995, arts. 64-65. See also Drez, *supra* note 31, at 129.

tored by and must cooperate with requests for compliance investigations by the SCT.⁷⁸ Investigations of license and permit holders for compliance with FTL provisions include on-site inspections of facilities and books. Accrued costs for such inspections are borne by the parties themselves.⁷⁹ Additionally, the law sets forth guidelines for sanctions and penalties if a company defies regulations.⁸⁰ Potential violations surface when companies conduct business without valid licenses or permits, fail to keep the proper books, or illegally intercept transmitted information via public networks. Penalties for these types of violations range from 2000 to 100,000 wages⁸¹ and are subject to doubling in repeat offender cases. In extreme violations, the SCT is granted the authority to seize property, facilities, and equipment used in violating the law.⁸²

V. MEXICO'S ACCESSION TO THE WTO: AN ADDITIONAL LAYER OF SECURITY FOR FOREIGN INVESTORS IN MEXICO

Aside from implementing new transparent procedural rules for foreign direct investors, which allowed investors to consider Mexico as a far more attractive candidate for investment in the telecommunications industry, Mexico's commitment to the WTO further encouraged foreign investors to allow more capital to flow into the Mexican market. Several key understandings under the WTO agreement (i.e., the Dispute Settlement Understanding (DSU)) provide additional security to foreign investors, particularly with respect to the remarkable increase in the trade of telecommunications equipment.

A. *The Trade Industry*

The U.S. export of telecommunications equipment to Mexico has grown exponentially since Mexico opened its markets. While equipment exports fluctuated in numbers between 1990 (\$563 million) and 1995 (\$733 million), the amount of U.S. dol-

⁷⁸ See FTL, D.O., June 7, 1995, art. 67.

⁷⁹ See *id.*

⁸⁰ See *id.* art. 71.

⁸¹ Under the FIL "Wages" are defined as the minimum daily wages in effect at the time of the violation. The minimum wage in Mexico following the implementation of the FTL was approximately U.S. \$12 per month, based on a six day, 48-hour work-week. See FIL D.O., Dec. 27, 1993, art. 38.

⁸² See FTL, D.O., June 7, 1995, art. 72. See also Drez, *supra* note 31, at 130.

lars invested into exports increased exponentially between 1996 (over \$1 billion) and 2000 (over \$2.5 billion).⁸³ Factors contributing to this dramatic growth in telecommunications trade with Mexico are manifold. Aside from the geographic advantage of sharing a two thousand mile border, a growing population closing in on one hundred million people, a GDP of \$581 billion, and the overhaul of the Mexican Telecommunications Administration served as a foundation to promote a thriving trade relationship.⁸⁴ In order to lend credibility to the new laws and policies, the WTO Agreement on Trade-Related Investment Measures, which relates only to goods, spells out that the administration is to consider foreign trade applications fairly and in a non-discriminatory fashion under the concept of "national treatment," provided for under Article III of the GATT. In relevant part, Article III.4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.⁸⁵

In light of the implications of Mexico's accession to the WTO (i.e., indicating that Mexico stands behind its liberalized policies), an optimistic U.S. Commercial Service in Mexico predicted that Mexico would become the number one trading partner of the U.S. by 2005.⁸⁶

B. *The Investment Industry*

By signing the WTO Agreement on Basic Telecommunications Services, Mexico "committed to market access and *national treatment* for all services (except satellite-based services) by January 1, 1998 . . . [and] adopted the Reference Paper to the Agreement, a consensus document based upon pro-competitive

⁸³ See Janette Stevens, *Telecommunications in Mexico*, EXPORT AMERICA, March 2001, at 23.

⁸⁴ See Stevens, *supra* note 83, at 23.

⁸⁵ General Agreement on Tariffs and Trade (GATT), *National Treatment on Internal Taxation and Regulation*, pt.2, at art. 3 § 4 (1947).

⁸⁶ See Stevens, *supra* note 83, at 23. Currently, the U.S.' premier trading partner is Canada, with Mexico and Japan close behind.

regulatory principles.”⁸⁷ In its application to the current situation in Mexico, the crucial concept of “national treatment” stands for Mexico’s commitment not to treat foreign investors any less favorably than its domestic counterparts in the competing companies’ industries.

In other words, Mexican officials are prohibited from granting a domestic corporation like Telmex an advantage, with respect to basic telecom services, over a foreign company like AT&T or GTE. Apart from committing to prevent anti-competitive practices within the industry, signatory countries like Mexico guarantee that “the regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of, and the procedures used by regulators, shall be impartial with respect to all market participants.”⁸⁸

Furthermore, the Agreement on Trade-Related Investment Measures (TRIMS) manifests additional assurance with respect to the signatory country’s commitment to the practice of non-discriminatory treatment of foreign investors.⁸⁹ The TRIMS objective is “to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners . . . while ensuring free competition.”⁹⁰ Not surprisingly, the unprecedented amount of capital introduced into the market resulted in an expected significant increase in the amount of trade in U.S. telecom equipment. Since unhindered competition is at the heart of this agreement’s agenda, and the WTO agreement provides no exception for Mexico, U.S. equipment shall be allowed to freely penetrate the Mexican equipment market without being subject to unfair advantages

⁸⁷ *Id.* at 24 (emphasis added). A group of over twenty-five countries made commitments to this Basic Telecommunications Agreement in 1998, including Mexico and the United States. See *The WTO Agreement: A Country-By-Country Guide to Commitments*, TELECOMM. REP. INT’L (Kelley, Drye & Warren L.L.P), Oct. 1998.

⁸⁸ U.S. Department of Commerce ITA Office of Telecommunications Technologies, *WTO Basic Telecommunications Services Agreement Reference Paper*, available at <http://www.telecom.ita.doc.gov/ot.home.nsf/504ea249c786e20f85256284006da7ab/362d52>.

⁸⁹ See *The Agreement on Trade-Related Investment Measures*, available at http://www.wto.org/English/docs_e/legal_e/18-trims_e.htm.

⁹⁰ *Id.* (emphasis added).

granted to domestic manufacturers. As a result of Mexico's new commitments, it was estimated that the practical implications of this newly liberalized scheme along with the favorable geographic situation would result in a combined telecommunications market for equipment and services in Mexico of over \$3.5 billion annually.⁹¹

VI. A REVIEW OF MEXICO'S FIVE INCREMENTAL STEPS TOWARD TELECOMMUNICATIONS INVESTMENT LIBERALIZATION

The Mexican government's incremental movement toward a free investment market (marked by (1) the privatization process, (2) the adoption of a newly deregulated administrative process, and (3) the accession to NAFTA and the WTO) sets the stage for an influx of foreign investment, particularly in the telecommunications market. This comment has addressed five significant steps taken by the Mexican government over the last thirteen years.

First, through the initial liberalization vehicle of the 1989 RLMPI, the Mexican administration started to raise international investor interest, especially by: (1) limiting the discretion of the foreign investment administration; (2) formulating a tangible framework for foreign investors; and (3) opening the door to foreign control in Mexican markets.

Second, foreign investors became increasingly interested in Mexican FDI development when Mexico took its next step toward liberalization via the privatization process. Foreign investors were encouraged by the Mexican government's decision to take the drastic step of de-nationalizing major industries. A particularly strong message was sent to telecommunications entrepreneurs when Telmex, the backbone of Mexico's telecommunications industry, was privatized in 1990.

Third, the administration's next step to attract foreign investment included providing a legislative foundation to complement its new policies by implementing the FIL in 1993. Through the new law, the administration provided clearer guidelines for petitioners in several areas, including administrative considerations on allowing investment, placing time limits on bureaucratic activities, and providing for avenues of

⁹¹ See Stevens, *supra* note 83, at 23.

redress (i.e., due process) for investors who felt that they were treated inappropriately in the process.

Fourth, a healthy step toward liberalizing the telecommunications market was marked by the implementation of the FTL in 1995. Through this new law, which closely paralleled the objectives of the FIL on an industry specific level, the concept of competition was finally introduced into a market that had been dominated by the Telmex monopoly for nearly half a century. However, despite promising legislative changes, the issue remained of how effectively the new legislative bodies (i.e., COFETE) would be able to reintroduce the free market concept, if at all.

Finally, by becoming a signatory to the largest multilateral agreement, the Mexican government inherently promised fair play within the telecom trade and investment industry, which foreign investors viewed as further assurance that foreign capital was safe within Mexican borders. Since the DSU provides an effective forum for the settlement of disputes, foreign investors felt confident that "Big Brother" in Geneva would be watching and willing to intervene if Mexican officials discriminated against foreign companies. Since foreign direct investors, arguably, had recourse in domestic and international fora, it seemed even more reasonable to invest in Mexico.

VII. MEXICO IS OPEN FOR BUSINESS . . . OR IS IT?

A. *Early Reaction to Mexico's New Telecommunications Liberalization*

The reaction of U.S. foreign investors to Mexico's progressive changes in telecommunications legislation and new international commitments was daring. The Mexican developments had set the stage for a predictable, transparent, and reliable foreign investment-friendly arena. Consequently, shortly before the market was officially liberalized in the basic communications industry (i.e., up to 49% foreign ownership), several of the major U.S. telecommunications companies conducted extensive negotiations and entered into partnerships with Mexican affiliates.

1. *The New U.S. Constituent Market Entrants*

The major companies in the telecom market included: (1) Telmex/SBC International/France Telecom; (2) Telmex/Sprint, Avantel, S.A.; (3) Alestra-Unicom; (4) Iusatel; (5) Marcatel, S.A.; and (6) Investcom, S.A., all of which received licenses to compete around the time that the FTL was passed in 1995.⁹²

The privatization of Telmex in 1990, by which SBC International and France Telecom purchased 10% and 5% respectively,⁹³ resulted in some progress in the telecom infrastructure. Improvements included connecting fifty four of Mexico's largest cities by laying nearly 15,000 kilometers of fiber optic cable and adding nearly 3.3 million new phone lines, as well as installing over 120,000 new public phones.⁹⁴ The two foreign constituents invested over \$10 billion as part of the agreement.⁹⁵

The Telmex/Sprint alliance was established in 1995 and focused on cross-border services with corporate, consumer, and carrier markets, mainly to the U.S. and Canada.⁹⁶ This joint venture addressed cross border marketing ambitions, joint technology transfer, and IP licensing. A significant consumer target of the venture was to offer telecommunications services to Hispanics in the U.S.⁹⁷ Ironically,⁹⁸ part of the agreement required that Sprint would not enter as a competitor in the long distance market.⁹⁹ However, the Telmex/Sprint joint venture only lasted until May of 1999, when Telmex bought Sprint's shares in the company. The companies' impasse resulted from conflicting goals because Telmex wanted to expand the venture's scope into

⁹² See Glover & Lotvedt, *supra* note 1, at 30.

⁹³ See ARIZONA OFFICE OF TRADE, *supra* note 9, at 7. The Telmex-Sprint Consortium began providing basic telephone services to consumers in Mexico and the U.S. in 1996. *Id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See Hanley, *supra* note 59, at 42.

⁹⁷ See *Telmex, Sprint Joint Venture Falls Apart* (May 5, 1999), at http://www.idg.net/ec?external=1&content_source_id=200remote_addr=&doc_id=73637.

⁹⁸ "Ironic" because Telmex was indirectly inhibiting competition by including this "anti-competition clause" in its agreement with its partner.

⁹⁹ See *Telmex, Sprint Venture Falls Apart*, *supra* note 97.

areas such as money orders, an ambition Sprint was not willing to pursue.¹⁰⁰

Avantel, S.A. is a joint venture made up of MCI Communications Corporation and Banacci (Grupo Financiero Banamex-Accival), which began providing services in 1996,¹⁰¹ as one of the earliest companies to compete with Telmex. Avantel's underlying goal was to construct a sophisticated fiber optic cable network to connect Mexico's "Triangle" cities (Mexico City, Guadalajara and Monterey), and to specifically address business and government consumer needs of long-distance services.¹⁰² Aside from being an early entrant into the market, this venture held an advantage over other competitors because Banamex already held Mexico's largest private telephone network in 1995, which it leased to public and private firms in Mexico.¹⁰³ In September of 1995, Avantel proposed an investment of \$1.8 billion.¹⁰⁴

The next largest U.S. constituent joint venture, named Alestra, was made up of AT&T and Alfa Telecom (a Mexican consortium of industrial companies), which later merged with Unicom (made up of a joint venture including U.S. constituent GTE). Rather than focusing on a particular telecom specialty, this new venture provided a wide range of communications services in Mexico. The double U.S. constituent make-up of the company set the stage for increased competitive strengths to counter Telmex. Alestra's joint venture investment proposal totaled over \$1 billion.¹⁰⁵

The third largest joint venture entered into between U.S. and Mexican company constituents was called Iusatel. This alliance consisted of a 42% stake held by Bell Atlantic and a Chilean long-distance carrier controlled by Grupo Iusacell, S.A. (one of Mexico's largest telecommunications operators).¹⁰⁶ Though

¹⁰⁰ See *id.* (According to Sprint executives reporting to the Wall Street Journal.)

¹⁰¹ Avantel's license was granted on September 15, 1995. See Bjorn Wellenius & Gregory Staple, *Beyond Privatization: The Second Wave of Telecommunications Reforms in Mexico*, The World Bank Discussion Papers # 341, 17 (Nov. 1996), available at <http://www.worldbank.org>.

¹⁰² See ARIZONA OFFICE OF TRADE, *supra* note 9, at 8.

¹⁰³ See *id.*

¹⁰⁴ See Wellenius and Staple, *supra* note 101, at 17.

¹⁰⁵ See *id.*

¹⁰⁶ See Glover & Lotvedt, *supra* note 1, at 33.

this partnership initially entered the market to provide local and long-distance services, Bell Atlantic desired to gain a foothold in the Mexican wireless services market as well. Following an initial block of the idea by Mexican officials (resulting in foreign concerns about how “open” the Mexican telecommunications market really was), the government agreed in 1996 to let Iusatel engage the wireless market in less populated areas as part of a five year plan to extend services to Mexico’s rural areas. This partnership’s proposed investment was \$808.7 million.¹⁰⁷

Though there were some non-U.S. constituent companies, which took advantage of the opportunity to enter the new Mexican telecommunications market, their proposed investments were relatively minor compared to those partnerships with U.S. constituents. Such companies included Marcatel S.A. (\$485 million investment), Investcom S.A. (\$433.6 million investment), Unicom Telecomunicaciones S. de R.L. (\$340.2 million investment), and Cableados y Sistemas S.A. (\$155.6 million investment).¹⁰⁸ Nevertheless, these joint ventures — particularly in the aggregate — provided the industry with additional doses of competition, regardless of their relatively minor individual substantive impact on the market.¹⁰⁹ Thus, the fact that astronomical amounts of money flowed into Mexico provided additional evidence that the government had been successful in its goal of attracting foreign capital into Mexico.

The six new partnerships’ ambitious investment decisions represented the overall attitude of foreign investors who saw Mexico’s significantly deregulated administrative reforms as an invitation to compete in a healthy industrial market. This surge in joint ventures made quid pro quo business sense by presenting a mutually beneficial opportunity to U.S. constituents despite the minority limitation on foreign ownership. While Mexican companies could make use of extensive capital and newer technological standards, U.S. investors gained valuable insight into the local telecommunications industry and “[devel-

¹⁰⁷ See Wellenius and Staple, *supra* note 101, at 17.

¹⁰⁸ See *id.*

¹⁰⁹ Although multi-million dollar investments are ordinarily not considered minor, when comparing the capital numbers to some of the U.S. company numbers, there is a significant difference.

oped] a relationship with local suppliers [without] running afoul of the investment restrictions that still exist for foreign investors in Mexico.”¹¹⁰ Furthermore, with Mexico’s liberalized policies now in place, the boards of directors of U.S. constituent companies were confident that the risks of floating significant amounts of company capital were outweighed by the potential return in this very green, yet promising market.¹¹¹

Great potential returns were expected in the telecommunications market, since the need for foreign investment in this Mexican industry ran the gamut from desperately needed basic introduction of telecommunications in most areas to the need for significant technology upgrade in those industrial areas where phone lines already existed, but business opportunities were stymied due to outdated equipment and a lack of efficient services. Thus, billions of dollars of foreign capital flowed into the Mexican telecommunications industry following the implementation of the FTL and Mexico’s accession to the WTO.

B. *Practical Realizations*

1. *Thwarted Investor Expectations*

Although the Mexican administration laid a promising foundation with respect to liberalizing its telecommunications market, foreign investors have not been able to “come to Mexico simply to sip on [m]argaritas along the Pacific coastline,”¹¹² without serious concern about the kind of treatment new market entrants actually receive.¹¹³ It is one thing to set a transparent domestic and international legal framework for foreign investors, effectively implementing it is another. After the initial reaction of unprecedented influx of foreign capital into Mexico, concerns quickly surfaced with respect to how open the Mexican market actually was to companies that were looking for a fair opportunity to compete in the market.

¹¹⁰ Glover & Lotvedt, *supra* note 1, at 31.

¹¹¹ *See id.*

¹¹² Camila Castellanos, *Foreign Interest: Mexico has Become a Major Player in the International Business Community*, Mexico Connect, available at http://www.mexicoconnect.com/mex/_travel/bzm/bzmtop50-99.html.

¹¹³ *See id.* (Telmex continues to act like a protectionist; U.S. companies are being treated unfairly; and COFETE is not changing the regulations fast enough to open the sector to fair trade.)

Investor concerns focused on Telmex, the now privatized Mexican telecommunications giant. According to the government's new regulatory changes, Telmex would have to sacrifice its monopoly when the markets were opened. However, given the kind and extent of concessions granted to Telmex by the Mexican administration to facilitate the transition into an open market (i.e., exclusivity rights guarantees), competition is still hindered in the Mexican telecommunications industry today. COFETE has simply been unable to administer the newly implemented FTL in a pro-competitive manner, thus leaving international competitors at a disadvantage. Consequently, it is argued that Mexican authorities still need to make significant changes to its administrative process, particularly with respect to its treatment of Telmex, in order to realize benefits to consumers that true competition introduces to a market.

2. *COFETE's Failure to Enforce Regulations in Accordance with the FTL and WTO*

Hopes of foreign competitors ran high following Mexico's promised opening of the telecommunications market. With the new COFETE assigned to regulate the industry under the supervision of the SCT, expectations soared along with the capital flow into Mexico. However, the newly displayed confidence was premature, as it quickly became obvious that COFETE would be unable to control Telmex.

a. *Interconnection Rates*

U.S. constituent companies and U.S. consumers became skeptical of the Mexican so-called competitive environment when companies' rights to enter the market on a fair playing field were undermined by unreasonable concessions COFETE enforced on behalf of Telmex.¹¹⁴ As a part of the new FTL, the government granted Telmex the right to retain full control over the complete telecommunications network through 1996.¹¹⁵ As the sole licensed supplier of full services, the owner of the public exchanges and the nationwide network of local telephone lines (including long distance transmission facilities), Telmex held

¹¹⁴ See generally Glover & Lotvedt, *supra* note 1.

¹¹⁵ See *id.* at 28.

the unchallenged status of telecommunications king.¹¹⁶ However, the provisions of the new Act required Telmex to realize competition on January 1, 1997, by granting interconnection access to sidelined companies.¹¹⁷ Interconnection provides alternate carriers in the market an opportunity to enter the telecommunications infrastructure by allowing multiple carriers' networks to interface.¹¹⁸ The law, specifically, provides that upon request of a new concession holder, a public telecommunications network (i.e., Telmex) must provide interconnection within sixty days of the request.¹¹⁹ If carriers are unable to come to an interconnection agreement, the SCT, which must approve all agreements, is required to set the terms and conditions of interconnection rates.¹²⁰

Unfortunately, after the January 1, 1997, deadline passed, COFETE failed to enforce the rules obligating Telmex to remove the barriers to competition. For example, although Telmex was supposed to allow competitors to hook into the central switching network and basic infrastructure through use of existing lines (as opposed to forcing competitors to construct new lines), the terms of interconnection agreements were unduly influenced by Telmex in such a way that they practically block competitors' reasonable entrances into the market.¹²¹ Since the rates charged for interconnection service directly affect the cost of providing service (and consequently affect the amount end-users will need to be charged for entrants to survive in the market), unreasonably high interconnection fees kept new companies out of the market.¹²² In some cases, Telmex even went as far as to completely refuse to lease private line space to competitors, leaving disappointed U.S. companies no choice but to seek recourse in domestic and international legal fora in light of Telmex's blatant defiance of the rule.¹²³

¹¹⁶ See Hanley, *supra* note 59, at 49.

¹¹⁷ See *id.* at 48.

¹¹⁸ See *id.*

¹¹⁹ See FTL, D.O., June 7, 1995, art. 42.

¹²⁰ See *id.* art. 43.

¹²¹ See generally Letter from Michael G. Oxley, Congressman, Fourth Ohio District, to Ambassador Charlene Barchefsky, United States Trade Representative (Mar. 10, 2000), available at www.house.gov/oxley/s0003c.htm.

¹²² See *id.*

¹²³ See, e.g., U.S. Department of State International Information Programs, *Text: U.S. to Request WTO Consultations with Mexico on Telecommunications*

Although one might argue that COFETE and the SCT were in place to ensure that such behavior (i.e., contracting on an uneven playing field) would be contravened, the reality remains that Telmex exercises its influence over COFETE to achieve favorable decisions. Not only has Telmex been wreaking havoc in Mexican courts since its privatization in 1990 by protesting the new FTL rules COFETE is supposedly enforcing against it, but a senior writer for *eCountries.com* for Latin American countries points out that "if Telmex is not happy, . . . the [Mexican] Supreme Court can override any decision made by COFETE."¹²⁴ In other words, if Telmex feels unfavorably treated by a COFETE decision, Telmex can "use its resources" to meet its goals in a superior forum, regardless of the kind of anti-competitive practical result such actions may have on the market.

The negative implications of Telmex's continued monopolistic behavior regarding the high interconnection fee issue affects not only investor decisions but also consumers as well, particularly in the U.S. Mexican-American community of over twenty million people, which found itself paying more to place a call to Mexico than to most places in Brazil.¹²⁵ While Mexican consumers pay nearly four times as much as U.S. consumers for telecommunications services,¹²⁶ U.S. consumers were feeling the effects at home too. At \$.046 per minute, Telmex's interconnection rate for connecting long distance carriers to Telmex customers is by far the highest cost for competitive long distance carriers compared to rates for calls to farther away countries.¹²⁷ Although \$.046 per minute may not appear like a particularly significant amount, when taking into consideration the aggregate of three billion minutes of calls from the U.S. to Mexico per year,¹²⁸ these statistics result in an egregiously deep reach into

(July 28, 2000), available at <http://www.usinfo.state.gov/regional/ar/trade/wto2htm>.

¹²⁴ Michelle Gabrielle, *Taming a Bully: U.S. Companies Tackle Mexican Telecommunications Market*, CFO (Nov. 28, 2000), available at <http://www.cfo.com/printarticle/1,4580,0/83/AD/1240,00.html>.

¹²⁵ See Letter from Michael G. Oxley, *supra* note 121.

¹²⁶ See Trade Officials, *Telmex Cutting U.S. Competition*, 2 (July 30, 2000), at http://www.adti.net.html_files/thirdparty/sundaycapital_tradeofficials073000.html.

¹²⁷ Rates in the United States, Canada and Chile are about \$.005 per minute. See U.S. Department of State International Information Programs, *supra* note 123.

¹²⁸ See Trade Officials, *supra* note 126, at 1.

U.S. consumer pockets. Furthermore, U.S. carriers continue to face competition-diminishing rates for the transport of calls to Mexican regions where they have not yet established their own networks.¹²⁹

b. Termination Rates

Aside from charging interconnection fees, which allow U.S. carriers access to Telmex's customer pool,¹³⁰ Telmex and several other Mexican companies collect a "termination rate" each time U.S. callers complete phone calls to Mexico. Due to Mexico's outmoded system, this additional cost burdens competitors and consumers alike because they are forced to pay higher prices for access and service. The rate that was negotiated between government officials in 1999 for calls from the U.S. to Mexico included a \$.19 above-cost termination rate.¹³¹ Compared to the \$.06 rate for calls to Canada and the United Kingdom, this gross disparity leaves consumers in the U.S. suffering significant monetary consequences. Due to Telmex's continued monopolistic behavior regarding the termination rate, U.S. carriers are having a difficult time entering the market on a level playing field, thereby finding their chances of prospering or even surviving in the market significantly undermined.

3. Seeking Recourse in the WTO

COFETE's failure to contain Telmex climaxed on November 8, 2000, when U.S. Trade Representative (USTR) Charlene Barshefsky requested a panel at the WTO to address U.S. concerns about Mexico's failure to comply with WTO telecommunications obligations.¹³² In particular, the complaint alleged that Mexico had failed to ensure "timely, non-discriminatory interconnection for local competitors, cost-oriented interconnection calls into and within Mexico, including calls to remote regions where competitive suppliers lack facilities, and competitive al-

¹²⁹ See U.S. Department of State International Information Programs, *supra* note 123, at 3.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

ternatives for terminating international calls into Mexico, currently set [disproportionate rates].”¹³³

The WTO Dispute Settlement Understanding offers the U.S. an effective forum to address these concerns, as significant trade sanctions may be imposed if Mexico is found to be in violation of its commitments.¹³⁴ Despite repeated promises by the Mexican government to address its competition barriers,¹³⁵ Ms. Barshefsky’s continued attempts to settle the matter during consultations with then President Zedillo failed. Consequently, the U.S. sought WTO recourse.

The decision to bring a claim against Mexico resulted not only from pressures of U.S. potential competitors who continued to be sidelined due to anti-competitive entrance conditions but also from existing competitors as well. For example, AT&T’s (Alestra’s) general counsel pointed out that since Mexico continues “to impede low-cost cross border traffic, lacks cost-based rates for interconnection to Telmex’s network, and has not implemented an effective pro-competitive regulatory regime,”¹³⁶ Mexico will lack the means to realize the IT revolution. According to another AT&T spokesperson, the current circumstances “[make] it almost economically impossible, for new companies especially, to get in and compete in the [Mexican] telecom market.”¹³⁷ MCI Worldcom (Avantel), the other major non-Mexican constituent company, further supported USTR action¹³⁸ and warned that continued failure to implement competition would result in thwarting the growth of the internet and digital revolution in Mexico.¹³⁹ According to the president of Worldcom Ventures and Alliances, the company is “hopeful that this [WTO] action will lead to a predictable and equitable competitive playing field, delivering the full benefits of competition to Mexican consumers and businesses.”¹⁴⁰

¹³³ Gabrielle, *supra* note 124, at 1.

¹³⁴ See generally GATT, arts. XXII & XXIII.

¹³⁵ See U.S. Department of State International Information Programs, *supra* note 123, at 1-2.

¹³⁶ See Trade Officials, *supra* note 126, at 2.

¹³⁷ Gabrielle, *supra* note 124, at 3.

¹³⁸ See *id.* at 2.

¹³⁹ See *id.*

¹⁴⁰ *Id.*

At the top of a list of concerns forwarded to the WTO, the USTR emphasized COFETE's failure to discipline the dominant carrier.¹⁴¹ While WTO obligations require Mexico to prevent a major supplier from engaging in anti-competitive practices, no effective measures have been implemented to stop Telmex from inhibiting U.S. competitors' attempts to enter the market, who have proposed to offer services via interconnection or by building alternate local networks.¹⁴² According to the USTR, "to date, the Mexican government has not introduced effective measures to prevent Telmex from denying competitors phone lines, pricing services at predatory rates, refusing to interconnect, and refusing to pay competitors fees it owes them."¹⁴³ Aside from Mexico's failure to reign in the insolent Telmex, the U.S. complaint addressed the issues of outrageously high interconnection and termination rates, which were significantly disproportionate to comparable rates charged for calls to other Latin American countries.¹⁴⁴

a. Mexico's Reaction to U.S. Allegations

While complaints about Telmex's anti-competitive behavior in the Mexican Telecommunications industry increased, the creativity of Jorge Nicolin (President of COFETE) and Carlos Slim (Chairman of Telmex) also increased in defending the allegations. According to Nicolin, Mexico was fulfilling all of its commitments under the WTO as it was preparing to implement new regulations that would supposedly reduce Telmex's dominance.¹⁴⁵ However, the U.S. remained skeptical and continued to move forward with the WTO complaint, as international investors were experiencing first hand that rules do not carry weight if they are not effectively enforced.

Telmex set forth an array of arguments to counter allegations that it was unfairly treating competitors in the market and keeping potential competitors out. Astoundingly, Telmex representatives claimed that it was their company that was un-

¹⁴¹ See, e.g., U.S. Department of State International Information Programs, *supra* note 123.

¹⁴² See *id.*

¹⁴³ *Id.*

¹⁴⁴ See *id.*

¹⁴⁵ See Trade Officials, *supra* note 126, at 1.

fairly discriminated against under the newly implemented FTL. First, Telmex argued that the new rules required the company to implement a price floor, thereby limiting its ability to pass along savings to consumers.¹⁴⁶ Second, Telmex claimed that the regulations, which require Telmex to be responsible to other license holders for tariffs associated with billing and collection, as well as emergency and operator calls, would result in an unfair advantage to competitors because Telmex would have to provide services to them below cost.¹⁴⁷ Third, Telmex argued that its ability to grow globally was severely hindered by the new rules.¹⁴⁸ Consequently, the company argued that the new measures subjected Telmex to the risk of suffering significant monetary losses.¹⁴⁹ In an interview in June of 2000, Mr. Slim attacked U.S. long-distance competitors for supporting USTR action: "Instead of going to the market, they go to the government. I think they have more lawyers than engineers. We worry about the quality of our service, our infrastructure and our market position."¹⁵⁰

The reality, however, is quite to the contrary. First, though it is understandable that Telmex would oppose the new rules, and — specifically — the implementation of a price floor, the company incorrectly concluded that consumers would suffer an increase in prices. This short-term closed-minded view ridicules the underlying theory behind competition, which through an increase in competitors and subsequent efforts to entice consumers to change carriers, actually lowers prices. Telmex's claim that it will have to raise its price is unfounded because if Telmex did so in a truly free market, customers with an actual choice would choose a competitor offering a lower price. Hence, by providing the price floor, the Ministry was acting in the consumers' best interests.

Second, Telmex's argument that the rules requiring the company to provide certain tariffs to other license holders favor new entrants and force the company to provide services to competitors below its costs also lacks substance in light of the Min-

¹⁴⁶ See Gabrielle, *supra* note 124, at 2.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ Trade Officials, *supra* note 126, at 2.

istry's need to bring Mexico into compliance with WTO regulations. While it is true that there is a likelihood that Telmex may lose some customers, market share, and profitability, the "affirmative action" type mechanism introduced as a measure to breakup the monopoly necessarily requires a reduction in power and control enjoyed by the monopolist. Thus, in order to directly address the source of the problem, Telmex must realize and be willing to accept competitors' increases in customers, market share and profitability. Furthermore, the company's argument is largely unsubstantiated in light of the fact that Telmex's total revenues reached \$2.8 billion in just the first quarter of 2000, an increase of 23.7% compared to the same period in 1999.¹⁵¹ In light of the empirical data, it is clear that COFETE has either failed to enforce the rules that shift a part of the market's benefits to competitors, or its efforts have simply not resulted in the expected effect to de-throne Telmex.

Third, the argument regarding Telmex's alleged inability to grow globally also lacks merit. Since the introduction of the new rules, Telmex has moved in the exact opposite direction by expanding its operations three-fold: domestically, north and south of the border. Domestically, Telmex continues to expand not only with its basic telecommunications network but also its cellular subsidiary (Telcel) as well. According to Telmex CFO Adolfo Cerezo, new cellular customers are being added daily with a customer base near 6.5 million.¹⁵² Additionally, Telmex successfully penetrated the southern market. For example, Telmex has been rapidly expanding and modernizing the telecommunications infrastructure in Guatemala.¹⁵³ Finally, Telmex has enjoyed success in the U.S. via the company's recent admittance as a publicly traded company on the NYSE. Telmex's expansion into the U.S. is particularly controversial for U.S. competitors because the FCC treats Telmex equally to other competitors in the U.S. (i.e., Telmex enjoys national treatment within the U.S. as provided for under the WTO), while COFETE continues to grant American telecommunications companies less favorable treatment than it provides its home

¹⁵¹ See Gabrielle, *supra* note 124, at 2.

¹⁵² See *id.*

¹⁵³ See *id.*

telecommunications giant.¹⁵⁴ In sum, Telmex is expanding its operations in all directions.¹⁵⁵

Despite Telmex's protectionist arguments both in courts and in the press, the fact remains that the company continues to impose its big stick policy on competitors and COFETE, and will continue to do so until meaningful measures are introduced to check the monopoly. While COFETE claims that Mexico's telecom market is open for business, the Ministry continues to afford Telmex advantages over competitors by failing to implement a pro-competitive regulatory structure. Consequently, existing "competitors" are left without the opportunity to fairly participate in the market, and consumers continue to pay egregious fees for telephone services and equipment.

C. *The Statistics: Negative Implications of the Telmex Monopoly on Consumers Compared to Telecom Systems in Other American Countries*

Mexico is one of several countries in Central and South America that experienced drastic changes during the last decade of the 20th century with respect to liberalizing the telecommunications markets. By comparing the results of Mexico's supposed "opening" of the market in 1997 to the results of other Latin American countries with truly opened markets, it becomes clear that Mexican businesses and consumers could be enjoying greater benefits today. However, as Mexico has enjoyed mere quasi-liberalization, the resulting benefits have been half-baked at best.

First, it is argued that competitive markets grow faster than markets stymied by monopolies. Mexico enjoyed a 4% increase (from 7-11%) in the number of main telephone lines following the privatization of Telmex in 1990 and the opening of the market in 1997. However, due to concessions granted to Telmex, particularly with respect to the basic telecommunications sector upon privatization (i.e., exclusivity rights), such figures are bare compared to countries in which no exclusivity rights were granted. For example, upon privatization, growth in Chile accelerated to 21% per year, largely due to the fact that

¹⁵⁴ See Letter from Michael G. Oxley, *supra* note 121, at 1-2.

¹⁵⁵ See *id.*

competitors were free to enter the market faced with far fewer practical restrictions than in Mexico.¹⁵⁶ Thus, had COFETE successfully tamed Telmex after opening the market, competition today would be at an advanced stage resulting in greater access to telephone lines than consumers in Mexico currently enjoy. At 11%, Mexico has one of the lowest fixed lines percentages in the Americas compared to Uruguay at 28% and the U.S. and Canada at 66% and 64%, respectively.¹⁵⁷

Next, it is argued that competition results in faster alignment of prices with cost. Chili's long distance rates were comparable to those of competitive markets in the developed world almost immediately upon opening the market. However, in Mexico, where Telmex continues to reign even after privatization, the cost of calling the United States is approximately three times higher than for Americans calling into Mexico.¹⁵⁸ Thus, through Telmex's continued refusal to open the market, U.S. consumers calling Mexico continue to pay egregiously high prices while consumers within Mexico pay super-egregiously high prices compared to average rates charged in competitive markets.

Third, it is argued that competition enhances opportunities for providing better quality and inexpensive services with respect to innovative and enhanced uses of telecommunications. Aside from the introduction of the internet into Latin America in the mid 1990s, the introduction of satellite systems, as well as cellular phone services and equipment are examples of newly explored telecommunications areas. The statistics with respect to internet users in Mexico are deplorable: while Chili already enjoyed statistics of approximately 20 internet users per 100 PCs in 1996, Mexico and other countries, slower to realize the benefits of privatization and true open markets, were struggling to attain 10 users per 100 PCs.¹⁵⁹ The saga on internet opportunities in Mexico continues even today because of Telmex's refusal to follow domestic and international anti-competition laws.

¹⁵⁶ See LUIGI MANZETTI, REGULATORY POLICY IN LATIN AMERICA: POST PRIVATIZATION REALITIES, CHAPTER 8, REGULATING THE TELECOMMUNICATIONS SECTOR: THE EXPERIENCE OF LATIN AMERICA, 203 (2000).

¹⁵⁷ See Stevens, *supra* note 83, at 24.

¹⁵⁸ See MANZETTI, *supra* note 156, at 203.

¹⁵⁹ See *id.* at 204.

It appears that Telmex has made a commitment to conquer any international internet service provider (ISP) that poses a threat to Carlos Slim's latest acquired ISP jewel, Prodigy. In order to keep Prodigy literally next to none, Telmex continues to refuse providing lines to competitive ISPs, thus leaving competitors and entrants into this astronomically growing field without viable opportunities to expand or create customer bases.¹⁶⁰ Consequently, while Prodigy enjoys increased expansion in the market manifested by an additional 30,000 customers per month,¹⁶¹ competing ISPs can do little but stand by as consumers are forced to reach deeper into their pockets for internet service. Were Mexican consumers granted the opportunity to choose among a selection of ISPs, the cost of access would be lower, which in turn would open the door to an increased amount of internet users within Mexico. Given the vast realm of benefits enjoyed by internet users, particularly in business and educational fields, the detrimental effects to Mexican consumers without internet access are far greater than simply monetary costs.¹⁶²

D. *Recent Developments in the Struggle to Introduce Competition into the Mexican Telecommunications Industry*

1. *Telmex Applies a 'Band-Aid' Approach to Temporarily Calm the Storm*

After USTR Barshefsky strongly advocated disgruntled U.S. companies' positions at the WTO for most of the year 2000 in an effort to prod Mexico to remove barriers to competition in the \$12 billion telecommunications industry, the U.S. adopted a less aggressive approach following Telmex's "unofficial" recognition of its anti-competitive behavior. The WTO case was set to go to arbitration to determine whether the Mexican government had made sufficient, if any, effective changes in enforcing the FTL. However, the U.S. eased the pressure in January of 2001

¹⁶⁰ See Gabrielle, *supra* note 124, at 2.

¹⁶¹ See *id.*

¹⁶² Aside from business losses, a lack of being "on line" results in lower computer proficiency and literacy statistics and a general lagging behind these times of globalization.

after Telmex signed several agreements with long-distance rivals to settle legal clashes over interconnection rates.¹⁶³

In a supposed second effort to open the Mexican market (after the debacle in 1997), the two major U.S. constituent companies in Mexico, Avantel and Alestra (i.e., Worldcom and AT&T), agreed to pay Telmex \$137 million in unpaid fees while Telmex, Avantel and Alestra agreed to drop lingering lawsuits, which had maimed the industry since 1997.¹⁶⁴ Additionally, Telmex agreed not to challenge an FTL mandate to cut interconnection fees and allow Avantel and Alestra access to connections and digital trunking, which U.S. constituent companies had been denied in the past.¹⁶⁵ Telmex followed through with its band-aid approach by entering into additional bi-lateral agreements on the same prevailing interconnection and access issues with smaller competitors.¹⁶⁶ Although the Mexican Telecommunications Minister, Pedro Cerisola, denied that Telmex's "cooperation" in reaching these agreements was an effort to discourage U.S. pursuit of the WTO arbitration decision, Telmex officials stated that "the accord is likely to resolve most U.S. concerns."¹⁶⁷

2. *The Ultimate Victims Remain Consumers and Less Influential Companies*

Despite Telmex's scanty attempts to temporarily circumvent its obligations under the new FTL and the WTO, Telmex continues to monopolize the Mexican telecommunications market. Thus, investors and — consequently — consumers continue to be unable to reap the benefits that accompany a truly competitive market. Since the continued reign of Telmex makes it impossible for investors to enter the market on a level playing

¹⁶³ See Mobile News, *Telmex and Rivals Sign Pact to Open Mexico's \$12 billion Market* (Jan. 4, 2001), at http://uk.gsmbox.com/news/mobile_news/all/25937.gsmbox.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See Fiona Ortiz, *Telefonos De Mexico S A: Reform Seen Only Hope For Mexico Telecoms Competition*, BUS. WK. (Nov. 16, 2001), available at http://research.businessweek.com/reuters_news_full_story.asp?id=N26184460&symbol=.

¹⁶⁷ *Id.*

field, consumers are left with few options, high prices, and poor quality of telecommunications services.¹⁶⁸

The statistics still speak for Telmex's continued anti-competitive behavior: Telmex dominates 58% of the market for international calls originating in Mexico; 68% of the domestic long-distance market; 97% of the local market;¹⁶⁹ and is the largest internet provider.¹⁷⁰ Consequently, one analyst for Merrill Lynch & Co., points out that "[a]nyone who wants to do business in the telecom industry in Mexico has to do business with Telmex."¹⁷¹

Although the agreements Telmex reached with the larger competitors in the industry temporarily silenced Alestra's and Worldcom's cries for fair play, such agreements failed to address virtually any of the smaller companies' practical needs. According to a spokesperson of the smaller long-distance company Marcatel, "we were 100 meters under the water, now we are 10 meters under. We are still drowning, but not at the same depth."¹⁷² It is unfortunate for the smaller companies that Alestra and Worldcom, the two most influential companies, have been placated by their agreements with Telmex. Since less influential companies are less likely to successfully lobby the USTR to continue applying pressure on Mexico, the door to fair and effective entrance into the market for smaller companies remains closed.

3. *The Bottom Line: Mexican Exercise of Fictitious Competition Continues*

Despite recent attempts to curb Telmex's dominance, the agreements reached among a small percentage of the companies in the market effectively circumvented the underlying issues at the heart of the anti-competition problem in the Mexican tele-

¹⁶⁸ Mexicans are still very unsatisfied with "the phone company." Although the telecom infrastructure has improved, consumers continue to "fume over mystery charges and insistent dinnertime calls urging them to return to Telmex long-distance service." See Elizabeth Malkin, *Telmex: Mexico's 800-Pound Gorilla: Its Quasi-monopoly is a Safe Haven for Investors*, BUS. WK. ONLINE (June 18, 2001), at http://www.businessweek.com/magazine/content/01_25/b3737725.htm/.

¹⁶⁹ See *id.*

¹⁷⁰ See Ortiz, *supra* note 166, at 1.

¹⁷¹ Malkin, *supra* note 168, at 1.

¹⁷² Ortiz, *supra* note 166, at 2.

communications industry. Introducing a "cease fire" between Telmex and its two rivals failed to result in true opportunity for new companies to enter the market. Even though such agreements may result in some individual benefits to the involved companies, "they are not changes that give security and inspiration to investors."¹⁷³ Another indication of how these agreements failed to attract investment into Mexico is the fact that President Fox's campaign promises of a continued flow of investment capital into the Mexican telecom industry fell far short of his expectations.

Additionally, COFETE remains a toothless agency, leaving potential market entrants with little choice but to hope that the new round of laws currently being drafted by the Communications Ministry and Congress will provide for a true competitive environment in Mexico. These new regulations will supposedly give COFETE the power to acknowledge Telmex's monopoly officially and actually sanction Telmex by assigning the company handicaps until a level playing field is provided for in the market.¹⁷⁴ Whether such rules will enjoy greater success than the former "new rules" remains to be seen. Without question, Telmex's simple disablement of the original rules provides neither confidence to foreign investors nor incentive for Telmex to change its attitude toward competitors.¹⁷⁵

In sum, the Mexican telecommunications market is still not attractive to foreign investors seeking an open market, a fair playing field, and healthy competition. Despite allegedly successful recent direct attempts to reach agreements with Telmex, and the indirect pressures exerted on the Mexican government via diplomatic channels and the WTO, the competitive environment that Telmex and COFETE argue to be fostering is a practical fiction. The effects remain two-fold: Telecom investors are discouraged from investing in Mexico and consumers continue to suffer the negative implications of the lingering Telmex monopoly.

¹⁷³ *Id.* at 2.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 3.

VIII. CONCLUSION

The Mexican government deserves some recognition for addressing an issue that has plagued the Mexican telecommunications industry for more than half a century, namely the Telmex telecom monopoly. Following years of procurement of protectionist attitudes toward FDI, Mexico went through a number of administrative changes in an effort to liberalize foreign investment generally, resulting in the enactment of the FIL in 1993. Additionally, the Mexican government opened the doors to foreign investment in the telecommunications sector by privatizing Telmex and by subsequently passing the FTL in 1995. To foreign investors, these new laws suggested that Mexico had finally adopted a predictable, transparent, and reliable system, which set the stage for healthy competition in Mexico's telecommunications market. With Mexico's accession to the WTO and its vicarious commitment to the DSU, foreign investors in telecommunications were further assured that capital could safely flow into Mexico. Consequently, astronomical amounts of U.S. capital entered the Mexican telecom industry.

Despite Mexico's significant administrative changes, the Mexican government has been unable to tame the telecommunications giant to date because Telmex continues to enjoy significant liberties in a manner that effectively contravenes the anticipated free market concept of competition. Consequently, the market enjoys slower growth than in comparable countries, the quality of telecom services is poor, and costs remain high. Additionally, lofty interconnection and termination rates continue to plague consumers.

Unless the U.S. goes forward with WTO proceedings in order to remedy the continued lack of competitive conditions in the telecommunications market, Mexico's failure to enforce anti-competition rules (the FTL and WTO obligations) will continue. Consequently, foreign investors who have entered, or would like to enter the Mexican market are competitively disadvantaged while Telmex continues to dictate its unofficial monopoly. Until Telmex is disarmed and forced to play by the rules, the Mexican legislative changes merely present a façade, as opposed to an effective regulating tool. While it is pertinent to note that investors continue to lose business opportunities in

Mexico, the ultimate losers remain the consumers who, without choices, end up paying higher prices and receive lower quality service from Telmex.