Bridging Open Markets in the "Big Bandwidth" Era: A Blueprint for Foreign Broadband Internet Deployment

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I. INTRODUCTION

Do you need a Federal Pizza Commission to control how to have a piping hot pizza delivered – in small, medium, or large size?[1] The former Chairman of the Federal Communications Commission (FCC), Reed Hundt, agrees with you: "No one thinks that pizzas are best delivered by a single monopoly."[2] Like pizza, "no one should think that personalized home or business bandwidth needs are best served by the old regime of regulated monopoly."[3] To deliver better pizza on the global information highway, on September 27, 2015, the U.S. Department of State unveiled a new initiative called "Global Connect" with the objective of bringing 1.5 billion people online by 2020.[4] Through this initiative, the U.S. government will work with other national governments, development agencies, nongovernmental organizations, and the private sector to acknowledge the economic importance of Internet access and integrate this goal into their countries' development strategies.[5] Under this initiative, people in developing countries will also be able to get anything they want on their "big bandwidth networks" —through voice, image, text, or data in any other combination.[6]

The announcement of the Global Connect broadband deployment initiative opens a discussion over the FCC's regulatory authority: while the FCC currently has presumptive regulatory authority over broadband deployment pursuant to Section 706 of the Telecommunications Act of 1996, this authority only covers broadband services in the United States, requiring the FCC to rely on other treaties, regulations, and rules to govern U.S. companies' entry into foreign markets.[7] Because of the involvement of foreign states' own regulatory interests, the Global Connect initiative and the anticipated direct investment projects will require the FCC to employ different rules and policies on U.S. basic telecommunications service providers and suppliers.[8]

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1. *See* Reed Hundt, Chairman, FCC, Remarks at Convergence or Collision: Telecommunications Regulation and the Internet (Mar. 7, 1997), https://transition.fcc.gov/Speeches/Hundt/spreh712.html [https://perma.cc/5AMB-EA27].
2. *Id.*
3. *Id.*
4. *See* Media Note, U.S. Dep't of State, U.S. State Department Launches Global Connect Initiatives at UNGA (Sept. 27, 2015), http://www.state.gov/r/pa/prs/ps/2015/09/247374.htm [https://perma.cc/8PYQ-UYFV].
5. *See* Catherine A. Novelli, Under Sec'y for Econ. Growth, Energy, & the Env't, U.S. Dep't of State, Remarks at the United Nations: Development in the Digital Age (Sept. 27, 2015), http://www.state.gov/e/rls/rmk/247375.htm [https://perma.cc/9YFM-8KSU].
6. Hundt, *supra* note 1.
7. *See* Telecommunications Act of 1996 § 706, 47 U.S.C. § 157 (2012). Such authority covers broadband services, "interstate communications, and international communications involving an [endpoint] in the United States." John P. Jenka, *Changing Federal Policies in Response to the Broadband Revolution*, N.J. LAW., Oct. 2012, at 21.
8. *See generally* Rachel Rosenthal, *United States v. Mexico: The First Telecommunications Challenge Confronting the World Trade Organization*, 10 COMMLAW CONSPECTUS 315, 334–35 (2002).

At the international level, the Basic Telecommunications Agreement (BTA),[9] entered into force in 1997, is the first concerted effort by sixty-nine members of the World Trade Organization (WTO), including the United States, to welcome foreign competition into some or all of their basic telecommunications service markets.[10] This agreement differed from earlier treaties[11] by providing sanctions to enforce compliance, mandating the development of operational services as well as breaking up legal monopolies on "infrastructure, standardized services, terminal equipment, and type approval" in each signatory's telecommunications market.[12] Two decades later, the United States has only experimented open telecommunications market in a four-year-long WTO dispute resolution in *United States v. Mexico*[13] and a FCC authorization of license application in *Telefonica Order and Authorization*.[14] As of today, the regulatory model set by the Telecommunications Act of 1996 has not been fully tested, even as U.S. Internet service providers,[15] one of the stakeholders under Global Connect, will soon advance into foreign markets to provide terminal equipment and operational services.[16]

This Note explores how the FCC should exercise its regulatory authority over U.S. companies' involvement in the provision of terminal equipment, operational services, and monetary assistance or capital contribution under a foreign host country's competition laws and policies. Section II of this Note describes the BTA commitments and other WTO obligations that the United States may utilize when negotiating with other WTO member states, as well as the regulatory impediments that U.S. company AT&T faced in providing long-distance calling services under Mexico's interconnection rate regulations. This Section examines the historical context of how the FCC's current regulations on foreign carriers' entry into U.S. telecommunications market may serve as a model to propose reciprocal treatment when negotiating investment agreements under the WTO framework. Section III discusses how the FCC – an expert agency well-positioned to regulate, implement, and remedy U.S. companies – is fulfilling the WTO commitments of the United States and how the post-BTA

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9. Fourth Protocol to the General Agreement on Trade in Services, Apr. 30, 1996, 36 I.L.M. 366, WTO Doc. S/L/20 [hereinafter Fourth Protocol].

10. Rosenthal, *supra* note 8, at 315.

11. Earlier treaties include the Treaty Establishing the European Economic Community, art. 85, Mar. 25, 1987, 298 U.N.T.S. 3, and the Constitution and Convention of the International Telecommunication Union, Oct. 2, 1947, 63 Stat. 1399, 30 U.N.T.S. 316.

12. For the history of earlier treaties, see Amy Lin, Comment, *Telecommunications Competition in the European Union after* France v. Commission – *The Terminal Equipment Case*, 9 CONN. J. INT'L L. 355, 356 (1994).

13. Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WTO Doc. WT/DS204/R (adopted Apr. 2, 2004) [hereinafter *United States v. Mexico Panel Report*].

14. Telefonica International Wholesale Services USA, Inc. (Lead Applicant) et al., *Order and Authorization*, 29 FCC Rcd 496, para. 1 (2014) [hereinafter Telefonica Order and Authorization].

15. Under U.S. domestic law, "Internet" refers to the "international computer network of both federal and nonfederal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1) (2012).

16. *See* Novelli, *supra* note 5.

telecommunications market pressures developing countries into offering reciprocal treatments. Finally, this Note concludes that in carrying out negotiations with developing countries under common WTO commitments, the FCC should form a coalition with newly industrialized countries when proposing reciprocal procompetitive regulations and establishing competition safeguards.

II. BACKGROUND

The Internet is an essential element of every country's infrastructure, but even today, open and secure Internet access remains a great challenge for nearly sixty percent of the world's population.[17] Article 19 of the Universal Declaration of Human Rights provides: "Everyone has the right to . . . seek, receive and impart information and ideas through any media and regardless of frontiers."[18] Statistics have shown a positive correlation between a country's gross domestic product and its Internet penetration.[19] Internet access is also a modern form of free speech.[20] With the Internet shortening the distance for all aspects of service provision, restrictions, and limitations on Internet interconnection,[21] a monopoly on Internet infrastructure is a nontariff barrier to economic growth in today's global market and defeats the Internet's purpose as an equal-access, nonexclusive platform for communication, collaboration, innovation, productivity, and improvement.[22] An ongoing clash with different countries' regulatory regimes and cross-border network providers' appeal to a laissez-faire global market, therefore, call for a procompetitive regulatory regime.

Over the last three decades, the United States has taken the lead on efforts to privatize telecommunications services.[23] With the passage of the

17. Lulu Chang, *On the Web Right Now? You're in the Minority - Most People Still Don't Have Internet*, DIGITAL TRENDS (Sept. 24, 2015, 2:02 PM), http://www.digitaltrends.com/web/4-billion-people-lack-internet-access/ [https://perma.cc/EDC8-4PA7].

18. G.A. Res. 217 (III) A, art. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

19. *See* Novelli, *supra* note 5 ("For every ten percent increase in a country's Internet penetration, its GDP expands by one to two percent.").

20. *See* Ivar A. Hartmann, *A Right to Free Internet? On Internet Access and Social Rights*, 13 J. HIGH TECH. L. 297, 302 (2013).

21. Interconnection refers to "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier." United States Schedule of Specific Commitments: Supplement 2, § 2.1, WTO Doc. GATS/SC/90/Suppl.2 (Apr. 11, 1997) [hereinafter U.S. Commitments Schedule].

22. *See* ORG. FOR ECON. CO-OPERATION & DEV., SHAPING POLICIES OF THE FUTURE OF THE INTERNET ECONOMY 4 (2008), http://www.oecd-ilibrary.org/docserver/download/230388107607.pdf [https://perma.cc/N67B-8A4B].

23. Janet Abbate, *Privatizing the Internet: Competing Visions and Chaotic Events, 1987-1995*, IEEE ANNALS HIST. COMPUTING, Jan.–Mar. 2010, at 10, 14–17 (discussing the U.S. National Science Foundation's role in initiating Internet privatization of the telecommunications industry under the Reagan administration); Sean P. Gorman & Edward J. Malecki, *The Networks of the Internet: An Analysis of Provider Network in the USA*, 24

BTA, the FCC concluded that its previous "effective competition opportunity" (ECO) test resulted in unnecessary time and regulatory burden for foreign carriers entering the U.S. market.[24] As a result, the FCC adopted an "open entry" standard.[25] The FCC's modification on market access policies, however, does not universally apply to all foreign countries; it is reserved for WTO members only.[26] Despite the FCC's liberalization efforts, U.S. companies, in contrast to their foreign counterparts, are not guaranteed nondiscriminatory treatment under different host countries' regulatory regimes.[27]

A. *The Basic Telecommunications Agreement Has Allowed the United States Access to Foreign Telecommunications Service Markets, But It Is Probable Most Developing Countries Will Not Agree to Incorporate Global Connect's Procompetitive Regulatory Principles by 2020.*

In response to numerous countries' appeals to open market access in basic telecommunications, the BTA was concluded in 1997 to implement procompetitive regulatory principles to promote competition, connectivity, universal service, transparent licensing practice, independence of the regulator, and efficiency in source allocation."[28] The BTA places emphasis on market access for delivery of telecommunications services in cross-border trade.[29] Under the BTA, "market access means more than just a removing of barriers," it means making the entrance of telecommunications services an enforceable right.[30] As a result, the BTA removed many obstacles in the market for cross-border services, including broadband Internet services, by entrusting domestic networks to foreign carriers and providing assurance against expropriation.[31]

The United States began its procompetitive regulatory experiments in the long-distance services market after the divestiture of AT&T in 1982, a

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TELECOMM. POL'Y 113, 115 (2000) (discussing the role of the U.S. while the world's telecommunication networks shifted into private control).

24. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, paras. 9, 35 (1997) [hereinafter *1997 Foreign Participation Order*].

25. *Id.*

26. "In addition to requiring that non-WTO markets satisfy the equivalency [analysis] . . . on the U.S.-non-WTO route, the [FCC] also required that non-WTO markets satisfy . . . [certain] settlement rates for at least fifty percent of the settled U.S.-billed traffic." Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Order on Reconsideration*, 15 FCC Rcd 18158, para. 7 (2000) [hereinafter *2000 Foreign Participation Order*]; *1997 Foreign Participation Order*, *supra* note 24, at paras. 15, 34, 36–40.

27. Peter Cowhey & Mikhail M. Klimenko, *Telecommunications Reform in Developing Countries After the WTO Agreement on Basic Telecommunications Services*, 12 J. INT'L DEV. 265, 268 (2000).

28. *Id.* at 356–57.

29. Cowhey & Klimenko, *supra* note 27, at 266.

30. *Id.* at 277.

31. *Id.* at 266; Alissi, *supra* note 38, at 490–91.

decade before the negotiation of the BTA.[32] After the BTA, the United States agreed to open its basic telecommunications service market to foreign suppliers to compete in "local, long distance[,] and international telecommunications services, provided either on a facilities-basis or through resale."[33] In return, the United States gained counterpart access to sixty-eight other members, including virtually all major U.S. international trading partners.[34] In addition to open access, the United States, along with sixty-four of these members, has attached the Reference Paper to the BTA "to enforce fair rules of competition for basic telecommunications services."[35] These Reference Papers put effective interconnection rules and the need to separate the regulator from the operator at their core.[36]

BTA negotiations are conducted within the GATS framework.[37] The BTA has a schedule of commitments from individual countries as an attempt to comply with the GATS principles, namely the requirement of national treatment and a number of market access provisions.[38] The GATS requires that WTO members provide "most-favored-nation" (MFN) treatment[39] to service providers from other WTO members.[40] The MFN principle, intended to prevent discrimination in trade and investment agreements, made many countries reluctant to open their market when they could not selectively close their market later to countries whose WTO commitments do not offer reciprocal treatment.[41] All member states are required to undertake the MFN obligation regardless of their individual level of participation in basic

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32. ROBERT W. CRANDALL, BROOKINGS INST., THE AT&T DIVESTITURE: WAS IT NECESSARY? WAS IT A SUCCESS? (2007), http://www.justice.gov/atr/att-divestiture-was-it-necessary-was-it-success [https://perma.cc/AP7P-Y2CG].

33. Fourth Protocol, *supra* note 9.

34. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 7847, para. 1 (1997) [hereinafter *1997 Proposed Foreign Participation Order*] (predating the *1997 Foreign Participation Order*).

35. *Id.* at para. 2; *see also* Stefan M. Meinsner. *Global Telecommunications Competition a Reality: United States Complies with WTO Pact*, 13 AM. U. INT'L L. REV. 1345, 1354–55 (1998) (explaining that the Reference Paper is a model instrument defining the form of basic telecommunications regulation, highlighting conducts that would warrant regulation, and outlining the types of anticompetitive behavior against which a WTO member must guard).

36. Cowhey & Klimenko, *supra* note 27, at 274.

37. *See* World Trade Organization, Ministerial Decisions of 15 December 1993, 33 I.L.M. 144 (1994) ("Negotiations shall [be] entered into . . . within the framework of the General Agreement on Trade in Services.").

38. John J. Alissi, Comment, *Revolutionizing the Telephone Industry: The World Trade Organization Agreement on Basic Telecommunications and the Federal Communications Commission Order*, 13 CONN. J. INT'L L. 485, 487–88, 490 (1999) (citing John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 883 (1997)).

39. General Agreement on Trade in Services art. II, para. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1B, 1869 U.N.T.S. 186 [hereinafter GATS] ("With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less [favorable] than that it accords to like services and service suppliers of any other country.").

40. Fourth Protocol, *supra* note 9.

41. *Id.*

telecommunications negotiations.[42] Although member states are permitted to give particular states less than MFN treatment, they are still obligated to "ratchet up" commitments under the MFN clause once they offer any other investor better treatment.[43] In order to comply with this obligation, members must publish "all international agreements that affect trade in services as well as 'all relevant [domestic] measures of general application, which pertains to or affect' the provision of services."[44] If utilized properly, free trade agreements (FTA) may be the ideal tool to come to terms with developing countries' reluctance to making BTA commitments.

At the negotiation table, developed countries often prioritize investments in advanced networking when negotiating for cross-border infrastructure development because foreign suppliers offer lower cost, higher efficiency, and more flexible telecommunications services as compared to their traditional state-owned monopoly counterparts.[45] Increased volumes and global mobility in the trade of goods and services has made it possible to demand for "even more sophisticated services at lower price" at regional level.[46] In contrast, developing countries fear the potential financial fallout during the adjustment period because "incumbent . . . companies were very significant features in their national stock markets."[47] Due to this ambivalence, developing countries were more reluctant to join the competition reform.[48] In addition, because of "a combination of inexperience, rapidly changing global conditions, and the difficulties of forging a political consensus on optimal policies" to transition to a competitive marketplace, countries have been tempted to prolong monopoly when privatizing the telecommunications market.[49] Despite these tensions, the newly industrialized countries' participation in the BTA negotiation strongly pushed forward the liberalization of telecommunications markets.[50]

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42. Rosenthal, *supra* note 8, at 318.
43. *Id.* at 318; Cowhey & Klimenko, *supra* note 27, at 268.
44. Rosenthal, *supra* note 8, at 319 (citing GATS, *supra* note 39, at art. III, para. 1).
45. Cowhey & Klimenko, *supra* note 27, at 267.
46. *Id.*
47. *Id.*
48. During the Uruguay Round negotiations in 1994, "the industrial countries feared a two-tier market would emerge – general competition in industrial countries and a blend of privatization and very limited competition in developing countries." *Id.*
49. *Id.* at 278.
50. *Id.*

B. *World Trade Organization Members Who Have Not Yet Committed to the Basic Telecommunications Agreement Are Free to Liberalize Their Markets on a Sector-by-Sector, Mode-by-Mode Basis Under the General Agreement on Trade in Services.*

All WTO members are, at a minimum, bound by a certain level of obligations upon their accession to the WTO.[51] WTO member states who have not yet committed to the BTA bear the obligations to publicize their regulatory process, to refrain from discriminating between domestic and foreign suppliers, and to be legally bound by market access commitments.[52] Signatories of the BTA bear more obligations, but are not required to open their telecommunication transport networks or services fully to other members.[53]

The GATS constitutes an integral part of the WTO framework that is essential to ensure the opening of global markets.[54] As such, both the main body and the Annex of the GATS are applicable to every WTO member.[55] The GATS, like other WTO frameworks, "operates on three levels: the main text containing general principles and obligations; annexes dealing with rules for specific sectors; and individual countries' specific commitments to provide access to their markets."[56] The 1993 Annex on Telecommunications, however, contained no general commitments or principles with regard to the degree of liberalization of each member state's telecommunications markets.[57] Instead, under the 1993 Annex, member states are empowered to set individual standards, licensing requirements, and other qualification matters.[58] The current standard of liberalization of telecommunications is then established through approximately 100 schedules of commitments filed in the past two decades, including individual specific commitments under Articles XVI (Market Access), XVII (National Treatment), and XVIII (Additional Commitments).[59] The United States, like many WTO members, also made additional commitments in a "Reference Paper" that lays out "a set of procompetitive regulatory principles applicable to the telecommunications sector."[60] These specific commitments are grouped by service sector and by

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51. *Handbook on Accession to the WTO: Introduction and Summary*, WTO, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm [https://perma.cc/QU9H-M5GY] (last visited Nov. 14, 2016).

52. *See* Cowhey & Klimenko, *supra* note 27, at 280.

53. *See* Keven C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 124 (2003).

54. *United States v. Mexico Panel Report*, *supra* note 13, at 141; Alissi, *supra* note 38, at 489.

55 . *United States v. Mexico Panel Report*, *supra* note 13, at 139.

56. Alissi, *supra* note 38, at 488.

57. *Id.*

58. *Id.*

59. *United States v. Mexico Panel Report*, *supra* note 13, at 139; Alissi, *supra* note 38, at 489.

60. *United States v. Mexico Panel Report*, *supra* note 13, at 139.

mode of supply of the service.[61] In this way, in the telecommunications sector, the member states utilized the third level of the WTO framework, the member's specific commitments, to complement what was left blank in the second level.

Nondiscriminatory obligations, such as the MFN, are subject to negotiation on a sector-by-sector basis.[62] States are free to open access for telecommunication transport networks or services to another member state by undertaking sector-specific commitments on market access or national treatment.[63] Such commitments, once made, "cannot be withdrawn unless the commitment . . . did not benefit any other member or the withdrawing member gives a compensatory adjustment."[64] Because of this estoppel rule, sector-by-sector commitments provide common and effective safeguards for foreign investors' interest.[65]

WTO members also enjoy the freedom to choose their means of delivery on a mode-by-mode basis when entering into agreements for services. The GATS categorizes how international trade in services is supplied and consumed into four modes of delivery: (1) cross border supply, where nonresident service suppliers supply services across the border into another member's territory; (2) consumption abroad, where resident service suppliers supply services within their territory to a nonresident; (3) foreign commercial presence, where nonresident service providers establish companies or commercial presence in another member's territory; and (4) movement of natural persons, where a nonresident moves to another territory for the purpose of providing services.[66] In telecommunication services, modes 1 and 3 described above cover both the provision of telecommunication services that cross the border and foreign investment in independent telecom network infrastructures in another country.[67]

The basic telecommunications service sector has a dual function within the framework of the GATS because it is both "a means of economic activity and [a] means of delivery for other economic activit[ies]."[68] Without undertaking telecommunications market access commitments, member states are still required to refrain from imposing quotas or quantitative restrictions that are overly restrictive for new foreign service suppliers' entry into their domestic service markets.[69] In compliance with its MFN obligation, a member state should also give foreign basic telecommunications service suppliers the same opportunity as a national provider to access the public networks, to offer value-added services, to purchase or lease equipment, and

61. *Id.*; *see also* U.S. Commitments Schedule, *supra* note 21, at 2–3.
62. Fourth Protocol, *supra* note 9.
63. *Cf.* Rosenthal, *supra* note 8, at 322.
64. *Id.*
65. Alissi, *supra* note 38, at 490.
66. GATS, *supra* note 39, at art. I(2); *Glossary Term: Modes of Delivery*, WTO, https://www.wto.org/english/thewto_e/glossary_e/modes_of_delivery_e.htm [https://perma.cc/7EUP-B596] (last visited Nov. 14, 2016).
67. *See* Alissi, *supra* note 38, at 491.
68. Rosenthal, *supra* note 8, at 321.
69. *Id.* at 320.

to choose operating protocols.[70] These obligations cover the three means of private investment discussed in this Note.

Following the BTA, joint ventures, mergers and company takeovers will form partnerships that offer global access, defending against inflated charges with diversified options.[71] This discussion is of particular importance for agreements on broadband Internet services because the Internet has made distance less of a service barrier, has potential to benefit underserved citizenries and can dramatically improve developing countries' access to telecommunications and information systems.[72]

C. United States v. Mexico *Likely Will Serve as a Precedent for the Global Connect Initiative When Investing in Other Basic Telecommunications Agreement Members; Its Application, However, Has Limitations.*

The WTO's Dispute Settlement Body (DSB) issued a panel report on April 2, 2004, resolving a dispute where the United States raised a complaint against Mexico's domestic regulations on its international calls carriers.[73] This is the first WTO panel proceeding to deal with telecommunications services and the first to deal solely with trade in services under the GATS.[74] The issues raised by the United States reflected a strategic action, because Mexico, as one of the largest trading partners of the United States, suffered a disadvantage as its phone lines per capita were fewer than almost every other major Latin American country.[75] As a result of its anticompetitive policies, Mexico's "ability to attract investment capital [as well as to] develop electronic commerce and Internet services" was hindered.[76]

From 1997 to 2002, under Mexico's International Long Distance Rules (*Reglas del Servicio de Larga Distancia*),[77] eleven out of twenty-seven carriers were authorized to operate international gateways for incoming and outgoing international calls in accordance with the terms and conditions set by Telmex, the largest supplier of basic telecommunications services in Mexico.[78] In its complaint, the United States first claimed that Mexico had failed to set "cost-oriented, reasonable rates, terms[,] and conditions" for

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70. *Id.* at 320–22.

71. Alissi, *supra* note 38, at 510–11.

72. *See, e.g.*, H.R. DOC. NO. 109-118, at 297 (2006) (presidential statement regarding the United States–Oman Free Trade Agreement).

73. *See generally United States v. Mexico Panel Report*, *supra* note 13.

74. *Id.* at 138.

75. Rosenthal, *supra* note 8, at 330.

76. *Id.*

77. Reglas para prestar el Servicio de Larga Distancia Internacional que deberán aplicar los Concesionarios de Redes Públicas de Telecomunicaciones autorizados para prestar este Servicio, Diario Oficial de la Federación [DOF] 11-12-1996 (Mex.), formato HTML, http://dof.gob.mx/nota_detalle.php?codigo=4906583&fecha=11/12/1996 [https://perma.cc/33NE-U4J6] (consultada el 26 de enero de 2017) (Mex.); *see also United States v. Mexico Panel Report*, *supra* note 13, at 4.

78. *United States v. Mexico Panel Report*, *supra* note 13, at 2.

Telmex's provision of interconnection.[79] As a result, U.S. basic telecom suppliers suffered economic loss when Mexico allowed Telmex to charge an interconnection rate that substantially exceeded cost in order to restrict the supply of scheduled basic telecommunications services and to monopolize the negotiation of interconnection rates with foreign countries.[80] Second, according to the United States, Mexico failed to effectively regulate Telmex's anticompetitive practice when the International Long Distance Rules allowed Telmex to fix rates for international interconnection.[81] As a result, U.S. basic telecom suppliers were unable to access Mexico's public telecom networks or lease private operation facilities on the same terms and rate as Mexican providers.[82] The United States requested the panel sanction Mexico for its failure to comply with its specific commitments undertaken in its GATS Schedule.[83] Mexico, in its defense, argued that its GATS obligations do not apply to the accounting rates at issue, which were set by bilateral agreements between the United States and Mexico, and therefore, it argued, the United States could not succeed in its claims.[84]

While the case was pending before the DSB, a voluntary industry agreement between Telmex and two U.S. companies, Alestra, and Avantel, was reached at the end of 2000 to reduce long-distance interconnection fees, market access charges, as well as resale tariffs.[85] However, the industry agreement did not provide a solution to Mexico's failure to revise the anticompetitive regulation in question that substantively harmed the U.S.carriers and failure to provide a competitive system in the international long-distance calling market.[86] The DSB panel eventually concluded that Mexico violated its GATS commitments when: (1) Mexico failed to maintain appropriate measures preventing Telmex's anticompetitive practices; and (2) Mexico failed to implement regulations ensuring reasonable, nondiscriminatory access to and use of telecommunication networks.[87] On June 1, 2004, Mexico and the United States reached an agreement on Mexico's implementation of the DSB panel report's recommendations and rulings.[88] By August 12, 2005, Mexico published its new resale regulations allowing for the commercial resale of access to long distance and international long distance services, fully complying with the DSB's recommendations.[89]

79. *Id.* at 6.

80. *Id.*

81. *Id.* at 6.

82. *Id.* at 7. "Facilities-based" services are services provided by supplier over its own facilities. "Non-facilities-based" services are telecommunications services supplied through facilities leased from other operators. *Id.* at 144.

83. *Id.* at 7.

84. *Id.* at 7–8.

85. *Rosenthal*, *supra* note 8, at 331–32.

86. *Id.* at 331.

87. *See generally United States v. Mexico Panel Report*, *supra* note 13, at 224–25.

88. Status Report by Mexico, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/9/Add.8 (Aug. 19, 2005), http://trade.ec.europa.eu/doclib/docs/2005/november/tradoc_125847.pdf [https://perma.cc/F5KJ-MWAM].

89. *United States v. Mexico Panel Report*, *supra* note 13, at 1–2.

The telecommunications regime after the BTA suggests several important limitations of the existing WTO framework, which refused to "set common regulatory principles" for fear of infringing on national sovereignty.[90] First, services cannot have tariffs set upon them.[91] As Peter Cowhey, the former chief of the FCC's International Bureau, commented: "Liberalizing the rules of foreign investment in Mexico (to allow a foreign investor to own the majority equity of a phone company) has no convenient offset—Mexico would have to reduce its market access commitments on some other segment of the telecommunications services market."[92] Second, the regulators' constant shifts in market rules create continual grounds for unilateral national adjustments of market access commitments and have trade effects that cannot be easily determined.[93] Third, the nullification approach to dispute resolution under the Marrakesh Agreement would lead to uncertainty as to whether obligations would exist and survive in times of national turmoil.[94]

III. THE FCC'S REGULATIONS ON FOREIGN CARRIERS' ENTRY INTO THE U.S. TELECOMMUNICATIONS MARKET MAY SERVE AS A MODEL TO PROPOSE RECIPROCAL TREATMENT WHEN NEGOTIATING INVESTMENT AGREEMENTS UNDER GLOBAL CONNECT.

A. *The FCC Is the Expert Agency on Issues Relating to Broadband Internet Access Service.*

An independent agency unaffiliated with government ministries is the key to prevent inconsistency between initial policy goals and later enforcement.[95] In the United States, that independent agency whose purview is communications-related issues is the FCC.[96]

1. The FCC is an Expert Agency in Making Policy and Business Judgment to Leverage Foreign Markets' Restrictions in Future Trade Negotiations.

In response to the international telecommunications service market, the FCC has been making proactive efforts under the congressional mandate to "promote and protect competition . . . , encourage liberalization . . . , prevent [anticompetitive] conduct in the provision of international services or

90. Cowhey & Klimenko, *supra* note 27, at 276.
91. *Id.*
92. *Id.* at 276–77.
93. *Id.* at 277.
94. *Id.*
95. *Id.* at 278.
96. *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/2PNH-6Z96] (last visited Nov. 16, 2016).

facilities, and take into account important interests related to . . . foreign policy and trade policy."[97] As the lead regulator on broadband Internet access matters, the FCC "is charged with regulating commercial use of the radiofrequency spectrum (such as that used for wireless broadband service), interstate communications, and international communications involving an endpoint in the United States."[98] The FCC asserts exclusive jurisdiction over most matters involving broadband Internet access services, especially those with international nature.[99]

When it comes to foreign carriers' entry into the U.S. telecommunications market, the FCC is equipped with the expertise to create a blueprint to assure easy entry while stimulating innovation. In designing a regulatory regime fulfilling the United States' BTA commitment to "provide[] for market access and national treatment for all telephone services . . . through any means of network technology,"[100] the FCC took its first step in August 1997, when it issued an Order requiring U.S. companies to agree with foreign companies on benchmark settlement rates.[101] Because AT&T and other U.S. carriers had to pay more than half of its long-distance-calling revenue in exchange of foreign carrier's interconnection services, the existing settlement system originally resulted in a net outflow of $5.4 billion each year.[102] The *1997 Benchmarks Order* trimmed the outflow to less than $2 billion and helped the customers save an average of sixty-eight cents on an oversea call.[103] The FCC's *1997 Benchmarks Order* was "specifically implemented to prepare the U.S. market for . . . when the [BTA] takes effect, by lowering settlement rates to a cost basis."[104] To provide an easy transition to the benchmark settlement rates, the FCC designed a five-step transition to accommodate foreign countries' different income level and monitored carriers' prices to ensure that the savings were passed on to U.S. consumers.[105]

At the time, international settlement rates were not an issue covered by either the Telecommunications Act of 1996 or the Marrakesh Agreement.[106] Because of the lack of legal support, the FCC's unilateral move drew harsh criticism from communications practitioners, who predicted that foreign

97. Reform of Rules and Policies on Foreign Carrier Entry into the U.S. Telecommunications Market, *Report and Order*, 29 FCC Rcd 4256, para. 1 (2014) [hereinafter *2014 Foreign Participation Order*].

98. Jenka, *supra* note 7, at 21.

99. *Id.* at 22.

100. Alissi, *supra* note 38, at 491–92.

101. International Settlement Rates, *Report and Order*, 12 FCC Rcd 19806, paras. 1–2 (1997) [hereinafter *1997 Benchmarks Order*]. U.S. carriers negotiate with foreign carriers to determine an "accounting rate," which is the price for one minute of international phone service. *Id.* at 495–96. The settlement rate is the portion that each carrier receives out of this accounting rate. *Id.* at 496.

102. Mark Landler, *Under FCC Rules, Cost of Overseas Could Drop*, LAS VEGAS SUN (Aug. 8, 1997, 9:21 AM), http://lasvegassun.com/news/1997/aug/08/under-fcc-rules-cost-of-overseas-calls-could-drop/ [https://perma.cc/Q6NG-BKJL].

103. *Id.*

104. Alissi, *supra* note 38, at 500.

105. *Id.* at 501.

106. *Id.* at 495.

carriers would refuse to accept the FCC's rates and question the FCC's action as an encroachment of the WTO's authority under the BTA.[107] The FCC's action also triggered strong disappointment from other WTO member states who saw the Order as placing overly restrictive conditions on foreign carriers and placing countries into different categories.[108]

In response to the criticism and the direct challenge to its jurisdiction, the FCC claimed that it had the legal authority under the Communications Act of 1934 "to declare rates and practices to be unjust and unreasonable and to . . . [place] a limit on the amount that U.S. carriers can pay" foreign companies to complete international calls.[109] Where the FCC lacks jurisdiction over foreign companies, the FCC can compel assistance from foreign government authorities when U.S. companies encounter resistance from foreign carriers.[110] For example, in 1996, when faced with the refusal from the dominant Argentine carrier, Telintar, to accede to AT&T's proposed rates on international calls, the FCC's order that other U.S. carriers withhold settlement payments to Telintar successfully forced Telintar to restore AT&T's service.[111] Even if a country were to cut off its circuits to the United States altogether, U.S. carriers would be able to route calls through a third country, allowing "that country's carrier [to] pass them on to the hostile country."[112] The FCC argued that its benchmark settlement rates would stimulate traffic flow, thus increasing foreign carriers' overall profits, and lead to higher quality service, lower costs, and more options for consumers.[113] The utilization of tactics such as the aforementioned go-between carrier would, according to the FCC, incentivize countries to come to an agreement on rates.[114]

The growth of the Internet led the FCC to decide that it should fix the access charge system by reducing terminating charges and originating charges.[115] The FCC would then "tilt that [] charge toward the business lines and away from residential, and increase flat rate charges" on multiple-line end users.[116] The FCC intends to guarantee price discounts for long distance services offered to low-volume users.[117]

The FCC and the WTO framework work together to reduce tariffs in telecommunications and to encourage international competition, further enabling the Internet's profound impact on technological advancements.[118] In

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107. Landler, *supra* note 102 (quoting Albert Halprin, a former FCC official who commented on the Order's impact on New Zealand's national carrier: "This is going to antagonize foreign carriers . . . . Instead of trying to lead a global effort to reform the system, the FCC has chosen to make itself the champion for U.S. carriers.").

108. Alissi, *supra* note 38, at 503–04.

109. *1997 Benchmarks Order*, *supra* note 99, para. 24.

110. Alissi, *supra* note 38, at 501, 505.

111. *Id.* at 505–06.

112. Landler, *supra* note 102.

113. Alissi, *supra* note 38, at 502–03.

114. Landler, *supra* note 102.

115. *Id.*

116. *Id.*

117. *Id.*

118. Alissi, *supra* note 38, at 511.

the years leading up to Big Bandwidth era, the FCC repeatedly addressed the need to include Internet into its foreign participation packet. As former Chairman Hundt commented at roughly the same time of BTA's conclusion:

> In my term the Internet has exploded into consciousness; the hardware and software business in the [United States] has more or less tripled in market cap; . . . and the entire world has agreed in the World Trade Organization to reject the old way of monopoly in the communications sector and adopt the American paradigm of competition to build the global information highway.[119]

2. The FCC is Also an Expert Agency in Settling Investor-State Disputes and Enforcing Procompetitive Regulations.

Dispute settlement and rule enforcement are essential to the stability of a rule-based system.[120] Claims arising under the GATS, its Annexes, and schedules of specific commitments are subject to the Dispute Settlement Understanding.[121] Under the Dispute Settlement Understanding, WTO member states acknowledge WTO's binding authority and agree to its jurisdiction for disputes arising out of their schedule of commitments.[122] However, the FCC maintains it has the authority to address anticompetitive behavior and "is not limited to relying on WTO dispute resolution procedures."[123] In comparing dispute settling powers from different agencies, it is important to see if national practices appear to be significantly inconsistent with international "best practices" because appealing to different authorities may result in conflicting answers and raise conflict of laws concerns.[124]

The WTO's dispute resolution process focuses on efficiency and aims at prompt settlement.[125] Member states have changed the dispute resolution process to take more of a legal, rather than diplomatic, approach, including the right of recourse to the DSB, preventing one party from blocking panel formation, repealing the pre-1994 consensus requirement, allowing the possibility of a cross-retaliation remedy, and providing the option of arbitration on retaliation.[126] The WTO obligates governments to compensate entities that suffer losses when they violate their commitment schedules, which "increases the credibility of the government's intent to liberalize."[127]

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119. Hundt, *supra* note 1.
120. Alissi, *supra* note 38, at 490.
121. *United States v. Mexico Panel Report*, *supra* note 13, at 141.
122. Alissi, *supra* note 38, at 494.
123. International Settlements Policy Reform, *Report and Order*, 27 FCC Rcd 15521, para. 69 (2012) [hereinafter *2012 Benchmarks Order*].
124. Cowhey & Klimenko, *supra* note 27, at 275.
125. Alissi, *supra* note 38, at 490.
126. Rosenthal, *supra* note 8, at 321.
127. Cowhey & Klimenko, *supra* note 27, at 279.

Member states often agree on setting up a recommended domestic enforcement mechanism and a time frame after a panel report is issued with regard to interconnection settlements.[128] Member states often also agree on setting up an "independent domestic body" to resolve disputes regarding conditions, rates, and terms.[129] The BTA even requires the host countries to provide new marketplace entrants access to an independent regulator once interconnection disputes arise.[130]

The WTO dispute settlement proceedings function to interpret obligations not clearly defined by any of the agreements.[131] This is because states sometimes resort to "constructive ambiguity" to enable consensus on WTO rules.[132] For example, the BTA obligated states to ensure "timely" access with "transparent and reasonable" terms and to apply "cost-oriented" rates.[133] Member states may negotiate on removing nontariff barriers, such as criteria for licensing and anticompetitive business practices through any generally applicable trade measures "administered in a reasonable, objective, and impartial manner."[134] Although the signatories to the GATS retain some discretion over their national objectives and domestic anticompetition policies, at a minimum, they have committed "not to let monopoly suppliers become additional barriers" to basic telecommunications services.[135] The DSB, in *United States v. Mexico*, noted that "different approaches used by governments in the drafting of their respective GATS schedules may give rise to divergent understandings and expectations."[136] As a result, the DSB, when resolving disputes, will often allow expansive views in the interpretation and clarification of GATS provisions offered by adversary states.[137] The DSB considers whether rulings provided for in those agreements are in conformity with "customary rules of interpretation of public international law," are "to preserve the rights and obligations of members under the covered agreements," and are "to provide security and predictability to the multilateral trading system."[138]

The FCC is also a competent jurisdiction to regulate anticompetitive practices. The FCC established, in its recent *2012 Benchmarks Order*, a series of indicia demonstrating anticompetitive behavior: "(1) increasing settlement rates above benchmarks[;] (2) establishing rate floors . . . that are above previously negotiated rates[;] or (3) threatening or carrying out circuit disruptions to achieve rate increases or changes to the terms and conditions

128. Rosenthal, *supra* note 8, at 325.

129. *Id.*

130. Alissi, *supra* note 38, at 494. An "independent regulator" is one that is not "involved with any supplier of basic telecommunications services." *Id.*

131. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 410 [hereinafter *Dispute Settlement Understanding*].

132. *See United States v. Mexico Panel Report*, *supra* note 13, at 139.

133. Rosenthal, *supra* note 8, at 325.

134. *Id.* at 319.

135. *Id.*

136. *United States v. Mexico Panel Report*, *supra* note 13, at 138.

137. *See id.*

138. *Id.* at 138–39.

of termination agreements."[139] Although adopted as a case-specific approach, the FCC clarified a possible ambiguity in its rules that even "partial blockages . . . are unlikely ever to be appropriate or justified in the public interest and do not benefit the provision of international services to consumers in the United States or abroad."[140] The FCC also laid out evidentiary and intent requirements in adjudicating anticompetitive conduct claims.[141]

In comparison to WTO's DSB, the FCC's alternative dispute arrangement is better suited for policy enforcement because it gives the complainants a greater level of certainty while not sacrificing impartiality.[142] After the DSB resolves a particular dispute through a nonbinding action, member states may change regulatory policies to defeat the DSB's purpose of seeking "security and predictability."[143] The FCC, by contrast, was entrusted by Section 303(r) of the Communications Act to implement treaties and adopt further regulations to implement the United States' commitments.[144] Despite a lack of jurisdiction over pure foreign carriers, the FCC nonetheless possesses tools to enforce its policies when U.S. carriers petition to resolve matters that could not be agreed on over an extended period of time.[145] For example, the FCC may impose obligations under its regulatory mandates on U.S. international facilities-based carriers to indirectly pressure foreign carriers with termination of U.S. traffic or through collective negotiation power.[146] In the AT&T-Fiji dispute in 2014, the FCC directed all U.S.-based carriers to conduct settlements with Fiji International Telecommunications Limited (Fintel), the incumbent international carrier in Fiji, at a rate that does not exceed the FCC's benchmark rate and to notify the FCC should a benchmark-compliant rate be negotiated.[147]

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139. *2012 Benchmarks Order*, *supra* note 123, para. 31.

140. *Id.* at para. 35.

141. *Id.*

142. *Dispute Settlement Understanding*, *supra* note 131, at art. 27(2) (establishing impartiality of DSB). As an independent federal agency, FCC's impartiality is rooted in the Due Process Clause in the Fifth Amendment to the Constitution for the United States and the Administrative Procedure Act, 5 U.S.C. §§ 551–584 (2012). *See* William A. Wines & Mark E. Linebaugh, *Current Issues in Public Policy: An Analysis of the FCC's Ruling on Fleeting Profanies and Observations on the Road Ahead for the High Court*, 8 RUTGERS J.L. & PUB. POL'Y 73, 107–08 (2010).

143. Cowhey & Klimenko, *supra* note 27, at 277.

144. Jennifer A. Manner et al., *An Overlooked Basis of Jurisdiction for Net Neutrality: The World Trade Organization Agreement on Basic Telecommunications Services*, 22 COMMLAW CONSPECTUS 57, 72–73 (2014).

145. *See, e.g.*, Chip Yorkgitis, *FCC to Enforce Benchmark Rate on U.S. to Fiji Route*, COMMLAW MONITOR (Mar. 12, 2014), http://www.commlawmonitor.com/2014/03/articles/federal-state-regulatory/fcc-to-enforce-benchmark-rate-on-u-s-to-fiji-route/ [https://perma.cc/4ESE-EDMH].

146. *See id.*

147. Petition for Enforcement of International Settlements Benchmark Rates on the U.S.-Fiji Route, *Memorandum Opinion and Order*, 29 FCC Rcd 2210, paras. 2, 9, 13 (2014) [hereinafter *2014 U.S.-Fiji Benchmark Rate Order*].

B. The Open Entry Standard, Along with Other Measures that the FCC Has Taken, Offers a Three-Step Model for Other Countries to Fulfill Their World Trade Organization Commitments Through Broadening the Scope of Foreign Entry and Lifting Burdensome Application Requirements.

In light of the American commitments under the BTA to open markets, the FCC adopted the Open Entry Standard to further open the U.S. market to competition from foreign companies in its 1997 Foreign Participation Order.[148] The 1997 Foreign Participation Order modified the FCC's previous rules and policies applying the ECO test to WTO Members as a condition for foreign carrier to enter into the U.S. market.[149] Under the ECO test, foreign carriers were required to obtain: "(1) section 214 authorizations to provide facilities-based, switched resale, and resold non-interconnected private line service; (2) authorizations to exceed the [twenty-five percent] foreign ownership benchmark; and (3) cable landing licenses."[150] Under the Open Entry Standard, the United States granted WTO member applicants a presumption that their entry into the U.S. market was in the public interest because they were already subject to the same anticompetitive regime as U.S. carriers and thus, were not required to demonstrate that they meet the ECO test.[151] For issues related to market competition, such presumption may be overcome by a showing that the FCC's safeguards and potential conditions attached to grants of authority are not sufficient to offset the competitive concerns that may arise when a foreign carrier obtains dominant market power in the U.S. market.[152]

Two years after the adoption of the Open Entry Standard, upon reconsideration of the 1997 Foreign Participation Order, the FCC concluded that the Open Entry Standard would produce "significant consumer benefits through lower prices for existing services and greater service innovation, as well as one-stop shopping resulting from newly-found efficiencies."[153] The Open Entry Standard achieves the same goals as under the 1995 Foreign Carrier Entry Order: "(1) to promote effective competition in the U.S.

148. *1997 Foreign Participation Order*, *supra* note 24, at para. 48.

149. *2000 Foreign Participation Order*, *supra* note 26, at para. 2 (discussing Market Entry and Regulation of Foreign Affiliated Entities, *Report and Order*, 11 FCC Rcd 3873 (1995) [hereinafter *1995 Foreign Carrier Entry Order*]).

150. *Id.* (citations omitted).

151. The "anticompetitive regime" refers to the countries' enhanced commitments made under the BTA, the FCC's regulatory safeguards, and antitrust laws addressing competitive concerns resulting from foreign participation in the U.S. telecommunications market. *Id.* at paras. 2–3.

152. *2012 Benchmarks Order*, *supra* note 123, at para. 4 ("[This] presumption, however, is limited to competition issues."); *id.* at paras. 11–12, 16–17 (rejecting the petition that the same entry standard as WTO members' participation in the U.S. telecommunications market should apply to Bell Operating Companies' (BOC) entry into in-region interLATA markets because the BOCs would be significant market participants posing a greater risk of competitive harm to the U.S. international services market when possessing unique capabilities and incentives).

153. *2000 Foreign Participation Order*, *supra* note 26, at para. 4.

telecommunications services market; (2) to prevent [anticompetitive] conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their telecommunications markets."[154]

1. Under the United States' Basic Telecommunications Agreement Commitments, the FCC Has Adopted the Open Entry Standard to Replace Its Effective Competitive Opportunities Test Licensing Requirements.

Under the GATS, the United States committed to market access and national treatment for most services in the telecommunications sector with a limit of twenty percent direct foreign investment in mobile services, cellular services, and personal communications services.[155] In addition, under the BTA, the United States agreed to allow service suppliers recourse to a regulator independent from basic telecommunication suppliers to resolve interconnection disputes.[156] Furthermore, the scope of the United States' commitment to BTA is reflected in both the United States' submission to the Group on Basic Telecommunication and 47 U.S.C. § 310, the latter being amended by the Telecommunications Act of 1996 concurrently with the conclusion of the BTA.[157]

By enforcing the 1997 Foreign Participation Order, the FCC first "eliminat[ed] the application of the ECO test to flexible settlement arrangements that deviate from the international settlements policy, narrow[ed] the 'No Special Concessions Rule,'[158] revis[ed the FCC's] dominant carrier safeguards . . . , and streamlin[ed] the section 214 application process" under the Telecommunications Act of 1996.[159] Since the FCC issued the 1997 Foreign Participation Order, the FCC has further refined its procompetitive policies related to the International Settlement Policy (ISP) and its filing requirements.[160] The ISP Reform Order loosened the

154. *2000 Foreign Participation Order*, *supra* note 26, at para. 4.

155. U.S. Commitments Schedule, *supra* note 21, at 2.

156. *Id.* at 2.5, 5.

157. Communication from the United States, *Conditional Offer – Revision*, S/GBT/W/1/Add.2/Rev.1 (Feb. 12, 1997), http://www.ntia.doc.gov/legacy/oiahome/gbtfiles/USOFFER.htm [https://perma.cc/R4LD-9W6J]; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 403, 110 Stat. 56, 131 (1996) (codified as amended in scattered sections of 47 U.S.C.).

158. The "No Special Concessions" rule prohibits a U.S. international carrier from agreeing to accept special concessions with respect to traffic or revenue that flows directly or indirectly from any foreign carrier that possesses market power in the foreign market. *See* 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, *Report and Order and Order on Reconsideration*, 14 FCC Rcd 7963, 7974 (1998) [hereinafter *ISP Reform Order*].

159. 47 U.S.C. § 214 (1994) (detailing the public interest analysis); *2000 Foreign Participation Order*, *supra* note 26, at para. 6.

160. *2000 Foreign Participation Order*, *supra* note 26, at para. 8 (discussing 1998 Biennial Regulatory Review Reform of the International Settlements Policy and the *ISP Reform Order*).

requirements on settlement arrangements for foreign carriers that lack market power in the United States, as well as on "routes where U.S. carriers are able to terminate at least fifty percent of their U.S. billed traffic at rates that are at least twenty-five percent below the applicable benchmark rate."[161]

As part of the post-BTA competitive carrier safeguards, the FCC modified foreign entry licensing requirements through the 1999 Benchmarks Reconsideration Order.[162] In doing so, the FCC narrowed the condition set in the 1997 Benchmarks Order that "the provision of facilities-based switched or private line service to foreign markets will only be authorized if the foreign carrier on the route offers a settlement rate that is at or below the relevant benchmark" to only apply "where the foreign carrier possesses market power in the foreign destination market."[163] This fulfills the United States' BTA commitments by subjecting foreign carriers to the same public interest standard of entry favoring neither foreign nor domestic applicants.[164]

The BTA also enables the FCC to adopt a deregulatory approach that would "allow [the FCC] to promote and protect competition in the international telecommunications service market."[165] The FCC eliminated the ECO test for "international section 214 applications and cable landing license applications filed by foreign carriers or their affiliates that have market power in countries that are not members of the [WTO]."[166] Monopolies were historically popular in phone services because they "assured jobs, prevented foreign companies from taking away potential revenue, and allowed the countries to resist foreigners' attempts to negotiate lower settlement rates."[167] Recent studies, however, show that monopolies lack motivation to adopt new technologies and result in a lower rate of return from existing public resources.[168] Under the old system, because monopolies in different countries controlled the domestic communications system and had the responsibility for handling international communications, monopolies forced the market into "accepting artificially inflated international settlement rates."[169] Today, liberalization of telecommunications markets in all countries would stimulate innovation, lower communications cost, and boost information sharing in the global marketplace.[170] Therefore, liberalization is the most sustainable solution to the risk that foreign market power may be used in an anticompetitive way to the detriment of U.S. consumers.[171]

The application of the ECO test to countries that are not members of the WTO is so limited that it is impractical. The FCC found that non-WTO

161. *Id.*

162. International Settlement Rates, *Report and Order on Reconsideration and Order Lifting Stay*, 14 FCC Rcd 9256, para. 8 (1999) [hereinafter *1999 Benchmarks Reconsideration Order*].

163. *2000 Foreign Participation Order*, *supra* note 26, at para. 9.

164. *Id.* at paras. 6, 11.

165. *2014 Foreign Participation Order*, *supra* note 97, at paras. 1, 4.

166. *Id.* at para. 1.

167. Alissi, *supra* note 38, at 497.

168. *Id.*

169. *Id.* at 497–98.

170. *2014 Foreign Participation Order*, *supra* note 97, at para. 16.

171. *Id.*

Member states "collectively represent only about one percent of the world's gross domestic product" and are also "smaller countries [that] may be without resources to support a regulatory framework that meets all of the detailed ECO Test requirements."[172] Even then, these countries may still have a "relatively open market" despite not fully satisfying the ECO Test.[173] The FCC therefore concluded that the 1997 Foreign Participation Order's intent to use the ECO test to incentivize non-WTO member states to open their markets to competition and join the WTO may no longer be the best approach to doing so.[174] The FCC redefined its public interest analysis of applications to review "whether U.S. carriers have the legal ability to offer international facilities-based services in the destination country, to obtain a controlling interest in a facilities-based carrier in that country to originate and terminate international traffic . . . in that market, or to own or lease submarine cable capacity in that market."[175] In doing so, the FCC attempted to review whether the U.S. carriers are able "to compete effectively in the market of an applicant from a non-WTO [m]ember country seeking authorization to provide international services in the United States."[176]

2. The FCC Can Analyze a Host Country's Procompetitive Obligations by Examining Its World Trade Organization Commitments, Existing Regulation for the Service or Facility, and Existing Licensing Requirements for Foreign Entrants.

The FCC should adopt the method of interpretation from DSB when examining a host country's policies on services covered by its GATS commitments. The first step is to determine whether a service and a mode of supply is covered by a WTO Member State's reference paper annexed to GATS.[177] Then the FCC should interpret the scope of this country's commitments with regard to that industry, in domestic and international context, respectively.[178] In *United States v. Mexico*, for example, broadband Internet infrastructure and service provisions are covered by the "interconnection" commitment in the BTA, because both the BTA and the FCC's rules have adopted a definition of "telecommunications," to include any "real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information."[179] Finally, the FCC should examine whether the

172. *Id.* at paras. 10, 17.
173. *Id.* at para. 10.
174. *Id.* at paras. 16–17.
175. *Id.* at para. 18.
176. *Id.*
177. *Cf. United States v. Mexico Panel Report*, *supra* note 13, at 143 (DSB's method of interpretation).
178. *Cf. id.*
179. 47 U.S.C. § 153(43) (1994) (current version at 47 U.S.C. § 153(50) (2012)); GATS, *supra* note 39, at Annex on Telecommunications § 3(b).

host country intends to implement the laws and policies on that industry in a way that fulfills any of its commitments.[180]

U.S. companies, when seeking the FCC's approval of foreign ownership as common carrier, are also subject to a series of inquiries as required by the FCC's existing policies.[181] Currently, an FCC approval for licensing requires the FCC to: (1) ascertain the applicants' "percentages of foreign ownership, whether existing or planned," regardless of the foreign country's WTO membership, to determine whether the foreign investment may pose a risk of harm to important national policies; (2) compile "detailed information as to the citizenship and principal places of business of the [applicants'] investors," except for those holding "foreign equity and/or voting interests of five percent or less"; and (3) loosen filing requirements for petitions for declaratory ruling or modification on existing foreign ownership rulings.[182] Such licensing requirements require licensees to request and receive FCC approval before foreign ownership exceeds 20 percent in the licensee and "before direct or indirect foreign ownership of their U.S. parent companies exceed 25 percent."[183]

After the sunset of the ECO test, when U.S.-licensed companies enter into non-WTO countries, the FCC analyzes whether the host country has provided effective competitive opportunities for U.S.-licensed companies to own and operate relevant facilities under the 2012 Foreign Participation Order standard.[184] In the *Telefonica Order and Authorization*, the FCC examined a petition by a group of applicants to apply for a license in Aruba to "construct, land, and operate a noncommon carrier fiber-optic submarine cable system" under the Cable Landing License Act and Section 1.767 of the FCC's rules.[185] The applicants sought a determination as to whether Aruba, a WTO nonmember, provided "effective competitive opportunities for U.S. carriers to own and operate submarine cable facilities in Aruba."[186]

In making such determination, the FCC first examined whether there were impediments in the host country to the U.S. carriers' legal, or de jure, ability to hold ownership interests in target services or infrastructure.[187] The FCC may consider whether there are statutory limits on the number of licenses that may be issued, whether the licenses are issued to entities owned by foreign investors, and whether the process of obtaining approvals from

180. *See United States v. Mexico Panel Report*, *supra* note 13, at 143.

181. *See generally* Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, As Amended, *Second Report and Order*, 28 FCC Rcd 5741, para. 3 (2013) [hereinafter *2013 Foreign Ownership Second Report and Order*].

182. *Id.* at paras. 3–5 (adopting the Open Entry Standard in the assessment of all foreign investment; revising and simplifying previous regulatory framework requiring licensee to return to the FCC repeatedly when, for example, creating a new subsidiary even if it has already received a foreign ownership ruling).

183. *Id.* at paras. 10–11.

184. *See* Telefonica Order and Authorization, *supra* note 14, at para. 13.

185. *Id.* at para. 1 (citing 47 C.F.R. § 1.767).

186. *Id.* at para. 7.

187. *See id.* at paras. 14–17.

host country agencies is the same regardless of the applicant's nationality.[188] If no impediments are found, the FCC then moves on to consider "whether other factors give U.S. carriers the practical or de facto ability to hold ownership interests in cable facilities in the destination market" followed by whether the U.S. carriers "have the right to collocate facilities, provide or obtain backhaul capacity, access technical network information, and interconnect to the public switched network."[189] The FCC's considerations include whether facilities owners "have agreed to provide access and collocation" to foreign applicants, whether U.S. companies have a right to use any capacity they own to provide service in the host country, and whether "there existed reasonable and nondiscriminatory charges, terms, and conditions for interconnection to a foreign carrier's domestic facilities."[190]

During negotiations, partner countries contemplated under Global Connect who are also WTO members should be invited to model their processes after the FCC's abovementioned measures. In return, the FCC should utilize a transition plan that exceeded the United States' BTA commitments, largely dispelling nonmember states' reluctance to commit to Global Connect without economic and political stability.

3. In Turn, Host Countries, As Partners Contemplated Under Global Connect, Will Be Pressured into Agreeing on Competitive Safeguards by Their Most Favored Nation Obligations and the Global Market.

Another incentive for all developing countries to adopt competitive safeguards is the increasingly widespread procompetitive practices in the global market. Competitive safeguards are one of the most essential elements in the BTA reference papers.[191] Because of these safeguards, the Reference Papers ensure fair and nondiscriminatory treatment of new entrants in host countries and prevent monopolists from abusing their market power.[192] They are more than just a gesture to welcome foreign investments, but rather, they enhance credibility with investors in the telecommunications sector who highly value stable policy environment in their risk analysis as to whether to enter into a given market.[193]

188. *See id.* at para. 15.

189. *Id.* at paras. 12–13.

190. *See id.* at paras. 20–21 (determining that the Aruba Interconnection Decree did not render access or collocation impermissible when all involved station owners agreed to allow U.S. companies to own and use cable landing capacity, interconnection, collocation and backhaul facilities under the same terms as other Aruban companies).

191. *See* Alissi, *supra* note 38, at 493.

192. *See id.* at 493–94 (quoting *The WTO Telecom Agreement: Results and Next Steps: Hearing Before the Subcomm. on Telecomm., Trade, & Consumer Prot. of the H. Comm. on Commerce*, 105th Cong. 54 (1997) (statement of Dr. Kenneth W. Leeson, Chairman, Committee on International Telecommunications Policy; U.S. Council for International Business)).

193. Cowhey & Klimenko, *supra* note 27, at 277.

Countries with poor institutional endowments can improve the credibility of their regulatory agencies by importing policies from overseas.[194] For example, China made strong commitments on telecom concessions modeled after existing member states' commitment schedules as part of its terms of accession to the WTO.[195] Meanwhile, central and eastern European regulators who prepared early by incorporating existing member states' "best practices" into their domestic policies at the time of their accessions to the WTO gained credibility with European Union governments.[196] Regulators in developing countries have also benefited from an increase in credibility due to financial aid from international organizations like the International Monetary Fund and the World Bank conditional on adherence to their regulatory regimes.[197]

Existing FTAs have presented a few approaches to prevent major suppliers in its territory from engaging in or continuing anticompetitive practices. In addition to the MFN treatment required by the GATS, other FTAs have also offered national treatment to each other as a general obligation upon its major suppliers of public telecommunications services.[198] In comparison to MFN's purpose to ensure nondiscriminatory treatment between foreign service providers, national treatment intends to ensure nondiscriminatory treatment between "like" services from imported and domestic suppliers and providers once the foreign services have entered the market.[199] Some FTAs provide for additional obligations. In the United States-Chile FTA, for example, the parties agreed on making available "access to network elements on an unbundled basis."[200] While subject to the higher authority of national law and regulations, this FTA gives the parties more freedom to reach a tailored agreement to better address the needs of their bilateral investment relationship.[201] In the United States-Singapore FTA, additional provisions discharging foreign suppliers of the physical presence requirement where it is not practical by allowing for virtual collocation are adopted to transform the mobility of telecommunication services into competitive advantage.[202]

Opponents of this change argued that the private sector would hesitate to take the risks in developing countries that are more politically unstable and

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194. *Id.* at 278.

195. *Id.* at 268.

196. *Id.* at 278.

197. *Id.*

198. *See, e.g.*, Trade Promotion Agreement, Peru-U.S., art. 14.4, Apr. 12, 2006, LEXIS 134 ("Each Party shall ensure that major suppliers in its territory accord suppliers of public telecommunications services of another Party treatment no less favorable than such major suppliers accord to their subsidiaries, their affiliates, or non-affiliated service suppliers regarding: (a) the availability, provisioning, rates, or quality of like public telecommunications services; and (b) the availability of technical interfaces necessary for interconnection.").

199. *Principles of the Trading System*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [https://perma.cc/WQ7V-2SWP] (last visited Oct. 18, 2016).

200. Free Trade Agreement, Chile-U.S., art. 13.4(3)(a), Jan. 1, 2004, LEXIS 242.

201. *Id.* at art. 13.4(3)(c).

202. Free Trade Agreement, U.S.-Sing., art. 9.4(4)(b), May 6, 2003, LEXIS 254.

unstructured.[203] They argued that "the ability to combine outdated [infrastructure] with state-of-the-art systems may prove to be too difficult."[204] Some were also concerned about the possible effect on employment rate and, by corollary, the economy in developing countries where monopoly carriers had employed around five million people.[205]

These concerns, can best be addressed by newly industrialized countries introducing BTA-level competition to reshape developing countries' commitments in all aspects. The U.S. government has calculated that at least eighty-five percent of the world market measured by revenue, is covered by strong market access commitments.[206] Because the BTA led to a revolutionary new way of doing business in the following decade, eighty percent of the world market could by no means refrain from spilling over to the rest of the global market.[207] The newly industrialized countries, through making binding commitments under BTA, are rerouting the lucrative international traffic into less competitive markets to induce more profits.[208] They also form interest coalitions to strengthen their own cross-border information services in riskier countries with less regulatory transparency and little competition.[209] Former monopolists who contributed heavily to these countries' recent industrialization, furthermore, became highly innovative and actively expanded into neighboring countries.[210] In doing so, they transformed into countries with a progressive political force conceiving and promoting new ways of providing services in developing countries who have yet to commit to cater to the needs of innovative business models and new technological approaches such as fiber-optic networks and worldwide undersea cable systems.[211]

As a general matter, with the market incentives channeled by newly industrialized countries, developing countries are also inclined to adopt competitive measures because they will eventually benefit from new technologies, tools, and innovative services made available by the diffusion of broadband and foreign investment on other Internet infrastructure.[212] For example, by increasing access to broadband, the Internet has created opportunities to gain broader access to information, to reallocate resources, and to create innovative and more user-driven business models.[213] With the help of independent regulators like the FCC and the WTO to minimize investors' risks and maximize the Internet's economic value, the telecommunications market could expect the global network soon reach its full potential.

203. Alissi, *supra* note 38, at 508.
204. *Id.* at 508–09.
205. *Id.* at 509.
206. Cowhey & Klimenko, *supra* note 27, at 268.
207. *Id.*
208. *Id.*
209. *Id.* at 268–69.
210. *Id.* at 269.
211. *Id.*
212. *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 22, at 4.
213. *Id.*

IV. CONCLUSION

By forming a coalition with newly industrializing countries, who are the major players under the BTA regime, the United States can take advantage in trade negotiations, transnational political lobbying, and market activities to gradually sweep away the developing countries' reluctance to make stronger commitments. In addition to political and economic techniques regularly employed by the FCC, the United States, by exporting transparent processes, subject to host countries' legal review, offsetting concessions for the loss of monopoly suppliers, and incentivizing all stakeholders by offering reciprocal treatment, can successfully implement procompetitive regulatory policies over developing countries' underdeveloped telecommunications services.

In the end, new opportunities for U.S. companies to march into regions where Internet service has been controlled by monopolies should cut costs for broadband Internet services worldwide. Developing countries will enjoy significant changes when competition brings advanced technologies that industrialized countries have enjoyed for many decades. Under the Global Connect initiative, there will be more joint ventures, mergers, and company takeovers in the private sector, leading to new entities that will serve consumers in the global market. By eliminating nontariff barriers, these partnerships will help prevent inflated charges and facilitate local economic growth, which in turn will generate more revenue for technology advancement.