Vanderbilt Journal of Transnational Law

Volume 33
Issue 1 *Issue 1 - January 2000*

Article 4

2000

Polish Communications Law: Telecommunications Takes Off in Transition Countries But at What Price Are They Becoming Wired?

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NOTES

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ABSTRACT

Internationally, the urge to expand and improve telecommunications services is spreading. Transition countries, attempting the leap from Third World status to becoming world leaders, have caught the fever and have attempted to reform their regulations governing telecommunications. In large part these laws have induced slow liberalization of the communications sector with an intrusive regulatory agency guarding every step taken towards privatization. The World Trade Organization's General Agreement on Trade in Services (GATS) encourages transition countries to use privatization as a way to increase funding for communications equipment. Many transition countries signed the GATS agreement in the hope of attracting international capital, while they slowly reform their domestic communications laws.

Poland, a signatory to the GATS agreement, is slowly refocusing its domestic communications law to allow some privatization. This Note examines the liberalization of the basic telecommunications sector in Poland and the role of GATS in this process. It includes a comparison of the legal reforms in Poland to those of other Eastern European countries. It also suggests ways in which transitional countries such as Poland can keep some domestic control over their telecommunications sectors, while continuing to comply with GATS objectives.

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I. INTRODUCTION

Spurred on by advances in telecommunications technology, the international arena has attempted to expand growth in communications. The need for an efficient, modern telecommunications sector is now regarded as crucial to economic development in transition countries.[1] The basic telecommunications industry[2] comprises a vast portion of the world's economy.[3] The development of new technologies has increased the need to communicate internationally, to spread new ideas and new technologies, and to stay competitive with the growth of new telecommunications technologies in domestic spheres. Government agencies, the institutions responsible for telecommunications regulation, and Transnational Corporations (TNCs), which have traditionally supplied most transitional countries with equipment and technology, have largely dealt with problems of technology transfer and local industrial development.[4] Recently, the World Trade Organization (WTO) has entered the equation with the General Agreement on Trade in Services (GATS)[5] specifications on international communications policy. These new regulations show an international commitment to privatization from those Member[6] countries participating in the negotiations. However, this commitment poses unique problems for transition countries.

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1. *See* Michael Hobday, TELECOMMUNICATIONS IN DEVELOPING COUNTRIES: THE CHALLENGE FROM BRAZIL 1 (1990); *see also* Jorn Kruse, *Institutional Options for Eastern European Telecommunications Policy, in* TELECOMMUNICATIONS TAKE-OFF IN TRANSITION COUNTRIES 7 (Karl-Ernst Schenk et al. eds., 1997) (defining "transition countries" as those countries that are in the latter stages of transition from a centrally-planned economic system to a market system).

2. *See* John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 875 n.3 (1997) (defining basic telecommunications services as "the unmodified transmission of voice or other basic data.") For example, phone service is a basic telecommunications service.

3. *See* Bjorn Wellenious, *Telecommunications in Developing Countries*, 21 FINANCE AND DEVELOPMENT 33 (Sept. 1984); *see also* BEN A. PETRAZZINI, THE POLITICAL ECONOMY OF TELECOMMUNICATIONS REFORM IN DEVELOPING COUNTRIES: PRIVATIZATION AND LIBERALIZATION IN COMPARATIVE PERSPECTIVE 2 (1995) (stating that the telecommunications industry had the second highest market value, after banking, in the world economy in 1993).

4. *See* HOBDAY, *supra* note 1, at 1.

5. I am referring not only to the GATS agreement itself but also to the Fourth Protocol to the General Agreement on Trade in Services and the Telecommunications Annex to the GATS agreement.

6. "Member" refers to a Member of the WTO.

Issues such as equity, public participation, economic and power distribution, welfare benefits, social accountability, and the protection of national, cultural, political, and personal sovereignty come into play when discussing the effects of increased access to public telecommunications. TNCs have become the major suppliers of increased telecommunications technology in developing countries; therefore, these companies seem to gain the most from the WTO's commitment to freer trade in the GATS agreement.[7] Developing countries such as Poland need to structure domestic telecommunications laws to take advantage of the Basic Telecommunications Act's ¶ 5(g) exception that a developing country may "place reasonable restrictions on access to and public use of public telecommunication transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services."[8]

This Note examines the liberalization of the basic telecommunications sector in Poland and the role of GATS in this process. Part II explains the provisions of GATS as they provide a mechanism for multilateral liberalization efforts. Part III presents a description of the reforms taking place in the Polish telecom regime and how these reforms fit in with Poland's obligation to comply with GATS objectives. Part IV compares the privatization of telecommunications in Poland with developments in other Eastern European countries, such as the Czech Republic, a country that has been slower to privatize its communications industries. A discussion of how Transnational Corporations have effected the move toward privatization follows in Part V. Part VI posits the ways in which transitional countries, such as Poland, can keep some domestic control over their telecommunications sectors, while continuing to comply with GATS objectives. One possible way to achieve privatization without loss of domestic control is through domestic infrastructure reforms. This gain in domestic control can be accomplished without subrogating the effort to achieve privatization or moving backward toward a government monopoly. Finally, Part VII concludes that a more

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7. *See, e.g.*, PETRAZZINI, *supra* note 3, at 4. For purposes of this Note, "developing countries" refers to "a country that is not as economically or politically advanced as the main industrial powers." BLACK'S LAW DICTIONARY 461 (7th ed. 1999).

8. General Agreement on Trade in Services, Apr. 15, 1994, Annex on Telecommunications, ¶ 5(g), 33 I.L.M. 1167, 1195 [hereinafter GATS]. The Annex on Telecommunications is also referred to as the "Basic Telecommunications Act." *See id.*

efficient telecommunications sector would better serve Polish interests, while continuing to comply with GATS.

II. GATS AS A MECHANISM FOR MULTILATERAL LIBERALIZATION EFFORTS

In February of 1997, sixty-nine governments formed a far-reaching agreement on a series of market-access commitments in the basic telecommunications sector within the framework of GATS.[9] The purpose of the GATS agreement is to "facilitate the increasing participation of developing countries in trade in services and . . . [to strengthen] their domestic services capacity and its efficiency and competitiveness."[10] The agreement takes a wide view of what constitutes trade and defines "trade in services" as the supply of a service through any of four modes.[11] Modes One and Three identify the telecommunications sector as a "trade in service."[12] Mode One deals with the cross-border supply of a service.[13] International phone calls fall into this category. Mode Three "entails the commercial presence of a supplier of one Member in the jurisdiction of another Member."[14] This includes foreign direct investment in telecommunications services.[15]

Once GATS defined telecommunications markets as "trade in services," the negotiating Members established basic commitments to one another, as well as terms and conditions of market access.[16] Three documents are crucial in interpreting the GATS objectives in relation to its bearing on the telecommunications sectors of Member countries: the Annex on Telecommunications, the Fourth Protocol on Basic Communications (Fourth Protocol), and the Reference Paper on Regulatory Principles (Reference Paper).

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9. *See* PATRICK LOW & AADITYA MATTOO, WORLD TRADE ORGANIZATION, REFORM IN BASIC TELECOMMUNICATIONS AND THE WTO NEGOTIATIONS: THE ASIAN EXPERIENCE 2 (World Trade Organization Staff Working Paper No. ERAD9801.WPF, Feb. 1998).

10. GATS, *supra* note 8, at 1168.

11. LOW & MATTOO, *supra* note 9, at 3.

12. Mode Two involves consumption abroad; some Members have included calling card services in Mode Two. *Id.* Mode Four covers "movement of natural persons from one jurisdiction to another." *Id.* Mode Four relates to the movement of telecommunications service suppliers and employees. *Id.*

13. *See id.*

14. *Id.*

15. *See id.*

16. *Id.*

A. *The Annex on Telecommunications*

The drafters of the GATS agreement included an Annex on telecommunications issues in order to make it clear that "[e]ach Member shall ensure that any service supplier of any other Member is accorded access to and use of telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions."[17] This obligation includes ensuring that a supplier is permitted to lease or purchase equipment, which interfaces with the Member's telecommunications network in order to provide the supplier's services,[18] to interconnect private leased or owned circuits with public telecommunications' transport networks,[19] and to use the supplier's own operating protocols.[20] These provisions illustrate the WTO's "freer access" policy favoring the opening of telecommunications services.

The GATS Annex on Telecommunications also contains a list of limitations on the rights of suppliers to free access of Member States' telecommunications networks in GATS ¶ 5(d)-(g).[21] Section 5(g) specifically adds protection for developing countries, allowing a developing country to "place reasonable conditions[22] on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services."[23] These limitations do not frustrate the competitive nature of the Annex, due to their limited application. Thus, the Annex can be seen as a pro-competitive instrument within telecommunications regulation.[24]

B. *The GATS Fourth Protocol on Basic Communications*

In an effort to foster international telecommunications, the WTO negotiated the Fourth Protocol to GATS in 1996.[25]

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17. GATS, Annex on Telecommunications, *supra* note 8, ¶ 5(a), at 1194.
18. *See id.* ¶ 5(b)(i).
19. *See id.* ¶ 5(b)(ii).
20. *See id.* ¶ 5(b)(iii).
21 *See id.* ¶ 5(d)-(g), at 1194-95.
22. "Such conditions shall be specified in the Member's schedule." *Id.* ¶ 5(g), at 1195.
23. *Id.*
24. *See* LOW & MATTOO, *supra* note 9, at 7.
25. *See* Agreement on Telecommunications Services, Attachment of the Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 354, 373-74 (1997) [hereinafter Fourth Protocol].

Currently fifty-five governments, including many Eastern European countries, are signatories to the negotiation.[26] In order to participate in the Fourth Protocol, a WTO Member must adhere to the guidelines set forth in the agreement, which sometimes significantly alters the Member's existing approach to the delivery of basic telecommunications services.[27]

GATS requires each Member country to file an individual schedule[28] of commitments indicating the particular services it seeks to conform to the GATS guidelines.[29] The GATS general service principles require most-favored nation (MFN) treatment[30] of service suppliers from WTO Members, except where countries take specific exemptions in their schedules.[31] Key GATS participants were concerned that their markets would be harmed by the MFN status accorded to some foreign competitors who were WTO Members.[32] MFN treatment would require all WTO Members with open markets to grant all other WTO Members access to their markets on a non-discriminatory basis.[33] This would allow those WTO Members with closed markets[34] access to other Member's open markets without having to give up their closed systems. Likewise, a Member who commits to open its

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26. *See id.* The signatories to the Fourth Protocol are Antigua and Barbuda, Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Columbia, Cote d'Ivoire, the Czech Republic, Dominica, Dominican Republic, Ecuador, El Salvador, European Communities and their Member States, Ghana, Grenada, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Jamaica, Japan, Republic of Korea, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Senegal, Singapore, Slovak Republic, South Africa, Sri Lanka, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, the United States, and Venezuela. *See id.*

27. *See generally id.* at 373.

28. *See* Harwood, *supra* note 2, at 879. "Each country's schedule is annexed to the GATS and is incorporated into the agreement." *Id.*

29. *See id.*

30. "MFN treatment means regulatory treatment that is at least as favorable as that accorded to firms from any other foreign country." *Id.* at 877 n.12.

31. *See* GATS, *supra* note 8, Art. II, at 1169; *see also* Harwood, *supra* note 2, at 879; Stefan M. Meisner, Note, *Global Telecommunications Competition A Reality: United States Complies with WTO Pact*, 13 Am. U. Int'l L. Rev. 1345, 1351 (1998).

32. *See* Meisner, *supra* note 31, at 1351; *see also* Laura B. Sherman, *Introductory Note to the Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. 354, 355 (1997) (describing the free rider problem resulting from the grant of MFN treatment in the basic telecommunications sector without further agreement).

33. *See* Sherman, *supra* note 32, at 355.

34. A "closed market" refers to a market in which government-run or government-subsidized companies (or company) control the entire economic sector, without allowing international competitors entry into the market.

market cannot close its market on a selective basis to service suppliers from WTO Member countries.[35] This disparate result showed the need for market-opening policies to accompany the GATS agreement.

Recognizing this inequality, fifty-five countries under the auspices of the WTO negotiated the Fourth Protocol to GATS.[36] The Fourth Protocol contains many key provisions, including provisions concerning market access[37] and national treatment.[38] The GATS market access provision requires WTO Members to refrain from imposing certain types of quotas and other restrictions, or local incorporation requirements,[39] in service sectors that those members list in their GATS schedules.[40] Specifically, the market access provision prohibits six types of limitations: (a) limitations on the number of suppliers, (b) limitations on the total value of service transactions or assets, (c) limitations on the total number of service operations or on the total quantity of service output, (d) limitations on the total number of natural persons that may be employed, (e) measures which restrict or require specific types of legal entity or joint venture, and (f) limitations on the participation of foreign capital.[41]

GATS Article XVII sets forth the national treatment provision in a way that allows Members to specify limitations on national treatment in their schedules, rather than making these limitations an overarching principle of general application.[42] National treatment may be granted, denied, or qualified between Members according to specifications in their schedules.[43]

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35. *See* Sherman, *supra* note 32, at 355.

36. For the list of negotiating countries, *see* Fourth Protocol, *supra* note 25.

37. *See* GATS, *supra* note 8, art. XVI, at 1179.

38. *See* GATS, *supra* note 8, art. XVII, at 1180. The national treatment role requires WTO members to avoid treating foreign services suppliers differently from national or domestic service suppliers. *See* Sherman, *supra* note 32, at 355 n.8.

39. "Incorporation" refers to the way in which a telecommunications provider gains access to a countries' telecommunications network. For example, Poland's incorporation requirements mandate that a service provider procure a telecommunications license. *See* Polish Law on Telecommunications 1991, *translated and reprinted in* 11 CARDOZO ARTS & ENT. L.J. 585, 586 (1993).

40. *See* Sherman, *supra* note 32, at 355 n.7.

41. *See* GATS, *supra* note 8, art. XVI, at 1179.

42. This differs from the General Agreement on Tariffs and Trade (GATT), which makes national treatment a general, overarching principle. The countries negotiating the GATS agreement made national treatment subject to limitations in order to provide a more gradual and conditioned approach to opening telecommunications markets. *See* LOW & MATTOO, *supra* note 9, at 5.

43. *See id.*

C. *The Reference Paper*

In addition to providing market access commitments, the negotiating countries also decided on a set of pro-competitive regulatory principles contained in a Reference Paper.[44] The Reference Paper suggests the form of basic telecommunications regulation.[45] The Reference Paper supplies the necessary road map for WTO Member compliance with the Fourth Protocol.[46] Also, the Reference Paper defines the types of anti-competitive behavior that warrants regulation.[47] Further, the Reference Paper describes the types of regulations a WTO Member should adopt to quell such anti-competition.[48] The Reference Paper also sets forth the interconnection[49] obligations of Members, which

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44. The Reference Paper was never formally issued as a WTO document, even though fifty-seven countries adopted its principles in their entirety. *See* Reference Paper to the Fourth Protocol to the General Agreement on Trade in Services, Apr. 30, 1996, 36 I.L.M. 367 [hereinafter Reference Paper]. The countries that adopted the Reference Paper are Argentina, Australia, Belgium, Brunei, Bulgaria, Canada, Chile, Colombia, Cote d'Ivoire, the Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Finland, France, Ghana, Germany, Greece, Grenada, Guatemala, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Korea, Luxembourg, Malaysia, Mexico, the Netherlands, New Zealand, Norway, Papua New Guinea, Peru, Poland, Portugal, Romania, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, the United Kingdom, the United States, and Venezuela. *See* Sherman, *supra* note 32, at 357 n.23

45. *See* Reference Paper, *supra* note 44, at 367; *see also* Sherman, *supra* note 32, at 357; Meisner, *supra* note 31, at 1354; discussion *infra* Part II.C. (analyzing the Reference Paper).

46. *See generally* Reference Paper, *supra* note 44, at 367.

47. Examples of anti-competitive behavior include: exploiting the "essential facilities" of a "major supplier"; "engaging in anti-competitive cross subsidization; using information obtained from competitors with anti-competitive results; and not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services." Reference Paper, *supra* note 44, at 367. The Reference Paper further explains that the exploitation of an essential facility can occur when "a single entity or a group of entities supplies the essential facility and there is no economically-feasible substitute for the essential facility." Meisner, *supra* note 31, at 1354 n.43; *see also* Reference Paper, *supra* note 44, at 367 (defining "major supplier" as a "supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market").

48. *See* Reference Paper, *supra* note 44, at 367.

49. *See id.* (describing "interconnection" as the linking of suppliers providing telecommunications 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"); *see also* CHARLES H. KENNEDY & M. VERONICA PASTOR, AN INTRODUCTION TO INTERNATIONAL TELECOMMUNICATIONS LAW 26 (1996) (describing interconnection as the process by which a telecommunications provider attaches its equipment to an existing wireline network).

allow service suppliers to connect to a major supplier in order to increase competition.[50]

In addition to describing the type of regulation WTO countries should adopt, the Reference Paper suggests the creation of an independent regulatory agency in each Member country to ensure that these pro-competition objectives are followed.[51] With an impartial regulatory agency to deter anti-competitive behavior, the practical principles embodied in the Fourth Protocol can more fully come to fruition.[52]

III. DEVELOPMENT OF THE POLISH TELECOMMUNICATIONS SYSTEM

With the recent adoption of the GATS agreement in Poland, it is important to discuss the history of Polish telecommunications regulation in order to later analyze the increased benefits resulting from signing the GATS agreement. As a former communist country, Poland's telecommunications sector was extremely underdeveloped in the 1980s.[53] Polish lawmakers recognized the need to improve telecommunications infrastructure in order to increase competitiveness of Polish business in other economic sectors and to increase Poland's gross national product (GNP).[54] The improvements in telecommunications would enhance Poland's international standing, which is what the Polish government hoped to achieve by becoming a Member of the GATS agreement.[55]

The Polish public telecommunications system suffers from forty years of neglect after the devastation of World War II.[56] Post-war Polish governments did not find communications infrastructure a priority.[57] This neglect and the existing financial limitations left Poland with little choice but to undergo vast

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50. *See generally* Reference Paper, *supra* note 44, at 368.

51. *See id.* at 369 (requiring the proposed regulatory body to be "separate from, and not accountable to, any supplier of basic telecommunications services"). *See also* Harwood, *supra* note 2, at 884 (suggesting that this regulatory body should prevent anti-competitive behavior because such conduct would undermine the effects of the Fourth Protocol).

52. *See* Reference Paper, *supra* note 44, § 5, at 369; *see also* Sherman, *supra* note 32, at 357.

53. *See* Jerzy Kubasik, *Poland: Problems of Opening and Regulating the Public Network*, in TELECOMMUNICATIONS TAKE-OFF IN TRANSITION COUNTRIES, *supra* note 1, at 97-8.

54. For example, Polish widget producers cannot hope to compete on an international scale if the telecommunications system in Poland is so poor that they cannot communicate with their customers.

55. *See* Karl-Ernst Schenk, *Introduction* to TELECOMMUNICATIONS TAKE-OFF IN TRANSITION COUNTRIES, *supra* note 1, at 1.

56. *See* ELI NOAM, TELECOMMUNICATIONS IN EUROPE 277 (1992).

57. *See id.*

reforms in order to secure a place in today's world market.[58] Recently, Poland has demonopolized its telecommunications industry and allowed foreign suppliers to compete directly with domestic service suppliers.[59] The result has left Poland in a transition stage, unable to support telecommunications without substantial foreign investment and supplies and struggling to create a sphere in which its own domestic suppliers can compete.[60]

A. *Background on the Polish Telecommunications Sector*

Although Poland is one of the largest Eastern and Central European countries in terms of population and geography,[61] it has one of the lowest telecommunications penetration rates[62]—only thirteen telephone mainlines per 100 citizens—in the region.[63] The telephone subscriber waiting list remains at over two million, and the quality of service is low.[64] Poland's telephone services have been run, primarily, by Telekomunikacja Polska S.A. or Polish Telecommunications Joint Stock Company (TPSA), which has historically been a state-led monopoly.[65] Of TPSA's 72,000 employees, 18,000 are needed to operate the manual connections[66] commonly found in the countryside, making service both expensive and inefficient.[67] In the wake of these problems, Polish lawmakers have begun to privatize and liberalize its telecommunications sector.

The economic boom necessary to rebound Polish telecommunications after the COCOM embargo[68] requires that

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58. *See id.*

59. *See id.*

60. *See id. at* 277-78.

61. Only Russia and Ukraine are larger in terms of population and geography than Poland in Eastern and Central Europe. *See* Kubasik, *supra* note 53, at 97.

62. "Penetration rates" refers to the extent basic telecommunications services are available in different areas of a country. *See id.*

63. *See id.*

64. *See id.*

65. TPSA has historically been one of Poland's largest telecommunications suppliers. *See* Noam, *supra* note 56, at 277. Recently, however, initial stages of privatizing TPSA have begun. *See IPO of Polish Monopoly TPSA to Generate Some US $936 Million*, 8 E. Eur. Rep. (BNA) 738 (Nov. 1998) [hereinafter *IPO of Polish Monopoly*].

66. "Manual connections" refers to the telephone systems in which an operator must manually connect one customer's line to another customer's line to accomplish a connection. *See* THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 343 (2nd ed. 1998).

67. *See* Kubasik, *supra* note 53, at 97.

68. COCOM stands for Coordination Committee for Multilateral Export Controls. *See* TELECOMMUNICATION TAKE-OFF IN TRANSITION COUNTRIES, *supra* note 1,

the telecommunications infrastructure adapt to the current demands of the economy and to the potential of its development.[69] The Polish government has addressed this problem by attempting to attract foreign investment, stimulate technological innovation, and encourage local entrepreneurs.[70] In 1990, the Polish Economic Committee implemented a plan to restructure Polish telecommunications "from the top."[71] The first step in this plan was to establish a highly modern system of international and long distance connections.[72] These long distance connections bring quick and substantial profit, which can later be used to subsidize more rural areas.[73] In such rural areas many people have been waiting a dozen years or more for residential phone lines.[74]

The effect of this 1990 plan has been a period of slow improvement in Poland. In 1991, an international exchange of telecommunications equipment was inaugurated.[75] The exchange is supported by a digital radio link with the Satellite Telecommunication Center in Psary, which also contains digital equipment, dramatically increasing the output of the two Intelsat satellite stations.[76] Also in 1991, Polish and Danish companies launched the construction of a North-South fiber-optic trunk line, which runs from the island of Bornholm through Koszalin and Warsaw to the southern border of Poland.[77] This fiber-optic trunk line will provide long distance connections to these regions. The World Bank has also financed an East-West fiber-optic trunk line to connect Poland with the rest of Western Europe.[78] The most salient effect of these completed projects is that now some citizens of Poland can easily secure a connection to the telephone system in regions where this was formerly impossible.[79] Unfortunately, Warsaw, many other large cities, and rural areas

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at xiii. The COCOM embargo lasted from 1949-1994. *See generally* Trevor Hiestand, *Swords into Plowshares: Considerations for 21st Century Export Controls in the United States*, 9 EMORY INT'L L. REV. 679 (1995). East European countries traditionally supplied the Soviet Union with telecommunications equipment. The COCOM placed restrictions that kept modern technology from Eastern countries in order to limit supply to the Soviet Union. *See* Noam, *supra* note 56, at 275.

69. *See* Kubasik, *supra* note 53, at 97.
70. *See id.*
71. *Id.* at 98.
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.* at 99.

have not yet seen the full effects of these improvements; therefore, further reform is still necessary.[80]

B. *Poland's Telecommunications Administrative Regime*

Since 1987, telecommunications in Poland has been in a state of transition. Regulatory and administrative reform has taken the form of a slow process of unbundling the telecommunications sector.[81] Originally the Polish Post, Telegraph and Telephone (PPTT) was part of the Ministry of Post and Telecommunications (P&T).[82] The Ministry of P&T determines the general policy for the development of telecommunications in Poland and is responsible for the supervision and coordination of all domestic telecommunications activities.[83] The Ministry of P&T also represents the PPTT's interests abroad in the context of both bilateral and multilateral agreements with foreign telecommunications administrations.[84]

The legal basis for the activity of the Ministry of P&T comes from the Act of December 1, 1989 on the establishment of the Office of the Minister of P&T and the Act of November 23, 1990, on Posts and Telecommunications [the Communications Act], along with its modifications in 1991, 1992, and 1995.[85] These Acts brought an end to the state-run monopoly in the field of telecommunications.[86] The Communications Act, in compliance with GATS, sets out four levels of competitive activity in public telecommunications: (1) international telecommunications links and connections, (2) long distance telecommunications links and connections,[87] (3) sound and television broadcasting transmitting equipment,[88] and (4) local telecommunications.

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80. *See id.*

81. *See id.* at 121.

82. *See id.* Between 1987 and 1989, the Ministry of Transport, Maritime Economy and Communications managed telecommunications activities. *See id.* After the new government was elected in 1989, the Ministry of P&T was re-established and became the administrative and regulatory body responsible for supervising and coordinating PPTT's activities. *See id.*

83. *See id. But see Independent Regulatory Agency Envisioned Under New Draft Law*, 8 E. EUR. REP. (BNA) 366 (May 18, 1998) (predicting that the Ministry may give up supervisory control to a new independent regulatory agency in Poland's new draft of its telecommunications law).

84. *See generally* Polish Law on Telecommunications 1991, *supra* note 39, at 588-97.

85. *See* Kubasik, *supra* note 53, at 121.

86. *See id.* at 122.

87. In long distance telecommunications, participation of foreign capital is limited to 49%. *See id.*

88. In sound and television broadcasting, the participation of foreign capital is limited to 33%. *See id.*

Local telecommunications services are by far the most competitive area. A license from the Ministry of P&T is the only eligibility requirement in order to provide telecommunications services at the national level.[89] Up to the end of 1997, the Ministry of P&T granted over 100 licenses, mostly to Telbank, Kolpak, Lublin-Telekom, and Polska Telefonia Komorkowa Sp. (Polish Cellular Telephony Ltd.-Central).[90]

However, much of the telecommunications infrastructure in Poland is still monopolistic[91] in the local telecommunications sector because TPSA still provides services to the public while playing a decisive part in the provision of almost all types of telecommunications services. Overseeing the activities of licensed networks is one of TPSA's responsibilities to the Ministry of P&T.[92] This dual role of the TPSA, as both a service provider and an overseeing agency for service providers, undermines the assertion that there is free competition in Polish telecommunications.[93]

In the field of international telecommunications links and connections, the Polish Ministry prohibits participation of foreign capital owners.[94] These services remain under a Polish monopoly that is run by the state.[95] Currently, only Polish domestic systems have undergone the initial stages of privatization.[96]

C. *Recent Developments*

Even with the important steps undertaken to improve this situation in the years 1989-1994, telecommunications in Poland is still far from satisfactory. In order to achieve its basic mission of providing all citizens of Poland with the ability to communicate with each other through improved telecommunications services, the Polish government is devising laws that will establish favorable conditions for accelerating the development of modern

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89. *See id.* Of course, there are strict requirements that must be met in order to secure a license.

90. *See id.* at 122-23.

91. "Monopolistic" in this sense refers to the "control or advantage obtained by one supplier over the commercial market within a given region." BLACK'S LAW DICTIONARY, *supra* note 7, at 1023. In Poland, TPSA has been given many controls over the telecommunications sector both regulatory control and control of market shares.

92. *See* Kubasik, *supra* note 53, at 123.

93. *See Privatization, Liberalization Of Markets Examined at ABA Meeting*, 8 E. EUR. REP. (BNA) 388, 389 (May 18, 1998) [hereinafter *ABA Meeting*].

94. *See id.* at 388.

95. *See* Kubasik, *supra* note 53, at 123.

96. *See ABA Meeting*, *supra* note 93, at 388.

telecommunications services.[97] According to the orders of the Ministry of P&T, all new telephone exchanges are to be based on digital technology.[98] Modernization and expansion of phone lines into unserviced areas will be an extremely costly endeavor. To finance these reforms, the Polish government envisions the following conditions before development: acquiring foreign credit, raising the Polish banks' standards of efficiency, offering tax discounts for operators, subsidizing installation of telephones in outlying rural villages, implementing telecommunications tariffs on the provision of services, and starting the process of gradual privatization of the national operator, TPSA.[99]

The last item on this list most concerns lawmakers familiar with drafting regulations for change in telecommunications infrastructure.[100] Transfer of telecommunications from public to private control involves sizable layoffs of personnel.[101] With 18,000 employees operating the manual exchanges in the countryside, a sizable amount of this workforce would become obsolete with the government's directive to privatize TPSA and establish a digital telecommunications network.[102]

The experiences of other transition countries provide examples of the effects of transferring from public to private control. The transfer of telecommunications to the private sector in Brazil improved the availability of capital for investments; moreover, rates for local users increased dramatically.[103] A similar situation may arise in Poland; rates may increase beyond the means of Poland's citizenry. With many Polish citizens unable to afford these services and possibly out of work as a result of privatization, the government's proposed reforms may be closer to utopian ideals than practical solutions to Poland's problems. Nevertheless, Polish lawmakers believe that by increasing Polish telecommunications technology today, later the possible increase in GNP created by economic competitiveness can subsidize provision of services to Polish citizens.[104]

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97. *See* Kubasik, *supra* note 53, at 99.

98. *See id.* (citing MINISTRY OF POST AND TELECOMMUNICATIONS, DEVELOPMENT PLANS FOR TELECOMMUNICATIONS AND POSTAL SERVICES, DOCUMENT FOR PARLIAMENT COMMISSION OF COMMERCE AND SERVICES (1992)).

99. *See* Kubasik, *supra* note 53, at 114-15.

100. *See* PETRAZZINI, *supra* note 3, at 165.

101. *See id.* at 170.

102. *See* Kubasik, *supra* note 53, at 97.

103. *See* PETRAZZINI, *supra* note 3, at 181.

104. *See* discussion *supra* Part III.

Polish officials expect to generate four billion U.S. dollars (PLN fifteen billion) in privatization revenues in 1999.[105] The government plans to reinvest most of the revenues in the telecommunications sector.[106] The revenues will be used to facilitate Poland's main goal of privatizing the domestic telecommunications market by 2003.[107] The Polish Cabinet approved its *Strategic Outline of Telecommunications Market Development, 1998-2001* in August of 1998.[108] The outline establishes that 1999 will be a year of increased privatization of domestic telecommunications firms and increased competition between service providers.[109] For example, in mid-October 1998, Poland's Treasury Ministry launched the initial public offering of TPSA on international stock exchanges.[110] By the end of 1999, it is estimated that TPSA will have a private operator competing against it in every region in Poland.[111] As new developments continue, TPSA may begin to lose its dominant position, as Poland's telecommunications market prepares to open up in order to meet GATS commitments by 2003.[112]

D. *Poland's Adherence to GATS Principles*

As a Member of the GATS agreement, Poland's telecommunications law attempts to follow the GATS' privatization objective. By becoming a signatory to the GATS policies covering telecommunications trade in services, Poland sends a message to industrialized nations that investment in Polish telecommunications will be fruitful. Poland's administrators believe that first attracting foreign investment and technology will achieve Poland's current mission of allowing its citizens and all bodies of administration to communicate with each other with required quality.[113] With this primary mission in mind, Poland became a Member to the GATS agreements.

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105. *See Government Expects PLN 15 Billion in Privatization Revenues Next Year*, 8 E. EUR. REP. (BNA) 616 (Sept. 1998) (citing a forecast made by Treasury Minister Emil Wasacz).

106. *See id.* at 617.

107. *See Cabinet Adopts 'Strategic Outline' As a Guide For Proposed Legislation*, 8 E. EUR. REP. (BNA) 617 (Sept. 1998) [hereinafter *Cabinet Adopts*].

108. *See id.*

109. *See id.*

110. *See IPO of Polish Monopoly, supra* note 65, at 738. The initial public offering included 15% of TPSA, 5% sold on the domestic market and 15% sold on international markets. *See id.* The Treasury set TPSA's initial share price at US$4.44 (PLN 15.20), valuing the company at US $936 million (PLN 3.2 billion). *See id.*

111. *See id.* at 739.

112. *See id.*

113. *See* Kubasik, *supra* note 53, at 99.

1. Poland's Participation

Poland is a signatory to the GATS agreement,[114] the Fourth Protocol,[115] and the Reference Paper.[116] In its schedule,[117] Poland committed to liberalize international public voice facilities and telegraph by 2003.[118] Long distance public voice services and facilities and cellular mobile telephone services will also be liberalized by 2003.[119] The domestic telecommunications market will be liberalized sooner, by 2000.[120]

Poland also placed some limitations on foreign investment in its schedule in order to provide for a more gradual adjustment to freer trade in services.[121] The schedule limits foreign equity in Polish telecommunications services to forty-nine percent for all international and domestic long distance services and public cellular services.[122] This limitation is consistent with the national treatment requirement in the Fourth Protocol, as a country's schedule of commitment can specify these restrictions.[123] Easing into free trade will also help Poland to cope with the problematic effects of privatization.[124]

2. Poland's Domestic Communications Law

Poland's objective to adhere to GATS principles shaped the formation of its communications laws. Poland's Communications Act specifies those entities entitled to provide telecommunications services as: (1) Poland's chief joint stock company TPSA, (2) "[o]rganizational units under the jurisdiction of the ministers of national defense and internal affairs," and (3) "[e]ntities which [have] received a telecommunications license."[125] The Communications Act sets up a licensing system whereby the Minister of Communications[126] grants a license[127] to providers[128]

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114. *See* GATS, *supra* note 8, at 1168.
115. *See* Fourth Protocol, *supra* note 25, at 374.
116. *See* Sherman, *supra* note 32, at 357 n.23.
117. *See supra* note 20 and accompanying text.
118. *See* World Trade Organization, *Highlights of Commitments and M.f.n. Exemptions Resulting from Negotiations*, <http://www.wto.org/wto/services/tel13.htm> (visited Sept. 19, 1998) [hereinafter *Highlights*] (webpage no longer available, on file with author).
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*
123. *See* LOW & MATTOO, *supra* note 9, at 5.
124. *See* discussion *supra* Part III.B.
125. *See* Polish Telecommunications Act, *supra* note 39, art 4 at 586.
126. *See id.* art. 17, at 589.
127. *See id.* (giving license specifications).

of telecommunications services. The Executive Order[129] on Telecommunications Equipment does not, however, require permits for the installation and operation of telecommunications networks that are not connected directly or indirectly to the public telecommunications network.[130] The Minister of Communications may not grant licenses for the provision of international public telecommunications services.[131]

Poland's licensing system is in compliance with the GATS obligations and the Reference Paper.[132] The Reference Paper further specifies that where a license is required, the period of time, licensing criteria, and terms and conditions of individual licenses should be made public on a non-discriminatory basis.[133] It also sets forth that the "reasons for denial of a license will be made known to the applicant upon request."[134] Entities granted a license pay annual fees for the operation of telecommunications lines, facilities, or networks.[135] As long as these fees are required on a non-discriminatory basis, Poland's licensing system is in conformance with GATS objectives as well as the Reference Paper.

Currently, the Minister of Communications requires licensed operators to interconnect to the existing Polish network system.[136] The Minister of Communications may further refine interconnection standards by issuing an executive order defining technical and operating requirements or requirements for the "coordinated operation of telecommunications facilities, lines and networks."[137]

The Minister of Communications supervises the State Telecommunications Inspectorate (PIT), which monitors telecommunications lines, networks, and facilities.[138] The

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128. Polish Telecommunications Act, Article 15 states, "Licenses may be granted to entities which, under separate regulations, are authorized to operate on the territory of the Republic of Poland." *Id.* art. 15.

129. Made pursuant to Article 13 of the Polish Telecommunications Act setting forth that "the minister of communications issues an executive order listing the telecommunications facilities, lines, and networks whose installation and operation do not require a license." *Id.* art. 13.

130. *See Polish Executive Order on Telecommunications Equipment*, Apr. 23, 1991, *available in* LEXIS, World Library, Central & Eastern European Legal Texts File.

131. *See* Polish Telecommunications Act, *supra* note 39, art. 16.

132. *See* Reference Paper, *supra* note 44, at 369.

133. *See id.* at 368-69.

134. *Id.* at 369.

135. *See* Polish Telecommunications Act, *supra* note 39, art. 20.1 at 590.

136. *See* Henrik Prößdorf, *Options and Reforms in a Political Economic Perspective*, *in* TELECOMMUNICATIONS TAKE-OFF IN TRANSITION COUNTRIES, *supra* note 1, at 225.

137. Polish Telecommunications Act, *supra* note 39, art. 9, at 588.

138. *See id.* art. 30.1-30.3, at 594.

Minister employs the PIT monitoring agency, an executive agency, to inspect all entities providing telecommunications services and to provide a report detailing compliance with Polish regulations and licensing requirements.[139] If these provisions are not met, the Minister may revoke the license pursuant to Article Nineteen of the Polish Law on Communications.[140]

3. Polish Government Program for Privatization of the Polish Economy

The plan to privatize the telecommunications industry is consistent with the Polish government's overall objective of privatization. The Polish government's plan operates under the premise that "privatization is a precondition for the development of an efficient market economy."[141] The Polish government has also said that commercialization[142] is the first step in the privatization process.[143] In the next stage, "[s]hares or participations may be made available to potential investors,[144] including individuals, groups of individuals, or domestic or foreign enterprises."[145] TNCs have a lot of capital and can outbid domestic corporations for these shares, creating a telecommunications sector largely run by outside interests. This leads to the possibility that the once monopoly-based Polish telecommunications sector may change hands to become a foreign-owned oligopoly, managed by mostly U.S.-based TNCs.

Eastern European authorities are acutely aware of the fear that competitors from more technically-advanced countries will overrun its private industries.[146] The authorities have heard these concerns from traditional government-granted monopoly firms wishing to keep TNCs out of the Polish telecommunications sector.[147] In recent years, however, Polish authorities have been more willing to enhance privatization of its telecommunications

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139. *See id.* art. 29.3-29.7, at 593.

140. *See id.* art. 19, at 590.

141. *Polish Government Program for Privatization of Polish Economy*, Dec. 1990, *available in* LEXIS, World Library, Central & Eastern European Legal Texts File.

142. Commercialization is the transformation of a state enterprise into a joint stock company with the Treasury as the only shareholder. *See id.*

143. *See id.*

144. This is usually done in the form of initial public offerings or IPOs. The most recent example is the IPO of TPSA. *See IPO of Polish Monopoly, supra* note 65, at 738.

145. *Polish Government Program for Privatization of Polish Economy, supra* note 142.

146. *See* Kruse, *supra* note 1, at 8.

147. *See id.* at 7.

sector[148] in order to increase its know-how in communications and information technologies and to improve its penetration rates.[149]

In order to achieve privatization, Poland needs Western technologies and large investments. To obtain these, Poland has to provide business opportunities to attract private firms.[150] If Poland were to move too far in the direction of liberalizing its markets, however, the fears of foreign ownership of telecommunications could become realities.

IV. COMPARISON OF POLAND'S COMMUNICATIONS LAW TO OTHER TELECOMMUNICATIONS REGIMES

The telecommunications sectors in other Central and Eastern European countries have some common traits with Poland,[151] and their reforms in communications laws have taken similar routes.[152] However, there are differences in regulatory arrangements between these countries.[153] Poland, Hungary, and the Czech Republic all vest regulatory authority in a minister, who then directs other regulation authorities[154] that are responsible for the more technical management tasks.[155]

Liberalization has proceeded along each country's individual schedule annexed to the Fourth Protocol.[156] Poland and Hungary now allow private operators in local and regional networks; however, privatization has moved more slowly in the Czech Republic.[157] One striking example of the differences between the Eastern European countries' regulations concerns the

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148. For example, the Polish government has agreed to designate the city of Krakow as a free economic zone in order to increase foreign investment to the area. *See Motorola To Invest Up To $108 Million In Facilities At Krakow High-Tech Park*, 8 E. EUR. REP. (BNA) 298 (Apr. 20, 1998). The U.S.-based Motorola Company has taken advantage of the free economic zone and recently agreed to invest up to $108 million in Krakow to build a new software center. *See id.; see also Links to Poland's High-Tech Sector*, 8 E. EUR. REP. (BNA) 298 (Apr. 20, 1998).

149. *See* Kruse, *supra* note 1, at 7.

150. *See id.* at 7-8.

151. *See* Prößdorf, *supra* note 136, at 223.

152. For a comparison of developing privatization in Brazil, see generally Hobday, *supra* note 1, at 88-202.

153. *See* Prößdorf, *supra* note 136, at 223.

154. *See id.* (stating that differences between these authorities are more on the level of organization structure).

155. *See id.*; *see also* Czechoslovakia Law on Administrative Jurisdiction, Sept. 19, 1990, § 2, *available in* LEXIS, World Library, Central & Eastern European Legal Texts.

156. *See* Fourth Protocol, *supra* note 25, at 373.

157. *See* Prößdorf, *supra* note 136, at 224-25.

privatization of long distance telephone networks. While Poland allows competition, restricting only foreign ownership to forty-nine percent,[158] Hungary and the Czech Republic still permit monopolies on long-distance service.[159]

Poland, Hungary,[160] and the Czech Republic have all implemented licensing systems.[161] Further, all three impose obligations on licensed operators in order to maintain some control of foreign operations in their respective countries while complying with the GATS non-discrimination policy.[162] Poland requires licensed operators to interconnect to its network and provide an individual development timetable for each operator.[163] Similarly, the Czech Republic requires each licensed operator to submit a development plan[164] in order to foster development of domestic telephone networks.[165] Hungary requires licensed operators to meet certain growth requirements.[166] By providing licensing systems, Eastern European countries liberalize private networks and comply with GATS market access provisions. However, the licensing agreements enable the domestic telecommunications administrators to retain some control of foreign participation.

The Central Eastern European countries have implemented these various telecommunications sector reforms,[167] moving toward more competition and less government control.[168] The pressure to implement even more reforms is more intense than in Western countries with existing adequate technologies.[169] Starting from a position of inadequate infrastructure after the

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158. *See id.* at 225 tbl. 9.2.

159. *See id.*

160. *See* Hungarian Law on Telecommunications (Act LXXII), Sept. 1, 1993, §19, *available in* LEXIS, World Library, Central & Eastern Europe Legal Texts.

161. *See* Prößdorf, *supra* note 136, at 224-25 tbls. 9.1, 9.2.

162. *See id.* at 225 tbl. 9.2.

163. *See id.*

164. There are two republic-level operators in the Czech Republic that make up the Czech Telcom companies: SPT Praha and SPT Bratislava. *See* Noam, *supra* note 56, at 279.

165. *See* Prößdorf, *supra* note 136, at 225 tbl. 9.2.

166. *See id.*

167. For a comparison with telecommunications reforms in Sub-Saharan Africa, see generally S. T. Kwame Boafo, *Communication Technology and Dependent Development in Sub-Saharan Africa, in* TRANSNATIONAL COMMUNICATIONS: WIRING THE THIRD WORLD 103, 103-24 (Gerald Sussman & John A. Lent eds., 1991). For a comparison with Latin American reforms, see generally WALTER T. MOLANO, THE LOGIC OF PRIVATIZATION: THE CASE OF TELECOMMUNICATIONS IN THE SOUTHERN CONE OF LATIN AMERICA (1997). For a comparison with communications in India, see generally STEPHEN D. MCDOWELL, GLOBALIZATION, LIBERALIZATION AND POLICY CHANGE: A POLITICAL ECONOMY OF INDIA'S COMMUNICATIONS SECTOR (1997).

168. *See* Prößdorf, *supra* note 136, at 195.

169. *See id.*

communist era, Eastern European countries are trying to move toward international competitiveness as quickly as possible. To compound matters, nearly every sector of these countries' economies is currently undergoing privatization efforts, making state budgets tight.[170] This common situation leaves the Eastern European countries relying on foreign financing in the form of TNC investment and supply of services.[171]

V. THE ROLE OF TRANSNATIONAL CORPORATIONS IN THE PRIVATIZATION PROCESS

The WTO specified in the GATS agreement that "[m]embers shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector."[172] In most countries, however, this information is in the hands of private telecommunications companies. Making such information available to other countries' developing telecommunications sectors usually comes with the price of increased control of the provision of such services to that country.[173]

U.S. TNCs are among the world's heaviest consumers of international telecommunications services, and U.S.-based companies are highly competitive relative to their international rivals.[174] Due to its competitive position, the United States has long sought to promote increased competition among international telecommunications providers.[175] The U.S. government, encouraged by the lobbying efforts of multinational telecommunications companies, employs an international

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170. *See id.*

171. These Eastern European countries have relied on foreign investment more recently. For example, the Ericsson company signed a large contract to provide Poland, Serbia, and the Ukraine with equipment worth more than $100 million. *See Ericsson Wins Big Orders in Ukraine, Poland, Serbia*, 8 E. EUR. REP. (BNA) 297 (Apr. 20, 1998). The Czech Republic's two rival telecommunications companies have realized the need for foreign investment and have listed their stock on the London Stock Exchange in an effort to secure expansion capital. *See Competing Czech Companies List GDRs on London Exchange*, 8 E. EUR. REP. (BNA) 461 (BNA) (June 15, 1998).

172. GATS, *supra* note 8, ¶ 6(c), at 1195.

173. *See* MOLANO, *supra* note 167, at 123. (stating that investors are offering to provide new technology to developing countries in return for "buying up" state-run services).

174. *See* Harwood, *supra* note 2, at 874.

175. *See id.*

strategy to induce other countries to open their telecommunications markets.[176]

The first branch of this strategy is for the United States to participate in multilateral market access agreements, including the WTO's GATS agreement, Telecommunications Annex, and the Reference Paper.[177] The Telecommunications Annex to GATS "guarantees that providers of any service for which a country has made a market access commitment under the GATS will have access to that country's public telecommunications networks and services on a reasonable and nondiscriminatory basis."[178] This policy decreases some of the barriers to entry that have stymied TNC access to foreign telecommunications sectors in the past.[179]

The second branch of this strategy is to use the power of the Federal Communications Commission (FCC) over licensing and ownership regulations of U.S.-based telecommunications companies as leverage to prompt individual countries to open up their foreign markets to these companies.[180] These competitive safeguards enacted by the FCC were implemented in order to stimulate lower prices and more responsive services.[181] However, until recently many countries prohibited or restricted U.S.-based TNCs' provision of basic telecommunications services as an encroachment on their national operators' monopolies.[182]

Transition countries, such as those in Eastern Europe, have come to realize that they need Western technologies and investments in order to expand and improve their telecommunications sectors.[183] In order to attract TNCs to their domestic spheres, these countries have to provide business opportunities for private firms.[184] This calls for liberalization of their basic telecommunication markets.[185] Transition countries also must maintain competitive structures, such as an accessible licensing system, and keep entry barriers low in order to prevent market dominance.[186]

This liberalization process, however, may be accompanied by certain pitfalls. Many Eastern European governments have maintained strict certification procedures in order to keep control of basic telecommunications provision in the hands of domestic

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176. *See id.* at 875-76.
177. *See id.* at 877, 879-80.
178. *See id.* at 880.
179. *See id.* at 876.
180. *See id.*
181. *See id.* at 875-76.
182. *See id.* at 876.
183. *See* Kruse, *supra* note 1, at 8.
184. *See id.*
185. *See id.*
186. *See id.*

firms.[187] Unfortunately, this has the effect of maintaining the controlling domestic suppliers' monopolies.[188] Thus, small-scale domestic service providers cannot exist on their own in these Eastern European countries without some foreign backing. Foreign TNCs, therefore, must have a certain share of the economy in order to create the competition necessary for privatization.

VI. RECOMMENDATIONS FOR THE DEVELOPMENT OF MORE EFFICIENT TELECOMMUNICATIONS REGIMES IN TRANSITION COUNTRIES

Participation in worldwide, pro-competitive agreements delivers the possibility of increased access to telecommunications services in transition countries. Some externalities accompany increased access, and analysis of policy decisions should take these externalities into account. The extent to which the GATS objectives increase competition is also the subject of debate. It is not likely that a global telecommunications sector will emerge from present levels of competition and cross-border trade, but the possibility still concerns international lawmakers. This section analyzes domestic control of telecommunications and offers recommendations to transition countries for the development of laws that will provide a more efficient use and provision of telecommunications services.

A. *Externalities Associated with Telecommunications Reform*

Transition countries' approaches to telecommunications reform differ regionally based on certain "network externality variables."[189] Issues such as equity, public participation, economic and power distribution, welfare benefits, social accountability, and the protection of national, cultural, political, and personal sovereignty come into play when discussing the effects of increased access to public telecommunications.[190] The GATS negotiations placed considerable emphasis on the role of foreign investment.[191] The internal reaction to direct foreign

187. *See* Prößdorf, *supra* note 136, at 225 tbl. 9.2.
188. *See id.*
189. *See* R. Capello & P. Nijkamp, *Access to Telecommunication Networks: Regional Variations in Consumption Network Externalities, in* OVERCOMING ISOLATION 129, 143 (Henry Coccossis & Peter Nijkamp, eds., 1995).
190. *See* LOW & MATTOO, *supra* note 9, at 1
191. *See id.* at 15.

investment and the provision of foreign technology has a striking effect on network externality variables.[192]

The type of development taking place in transition countries, at least at first, leads to some of these externalities, including inequity, misallocation of resources, and increasing polarization of wealth and poverty.[193] Exacerbating this decrease in social welfare is the problem that most of those who work to build the physical configurations needed for telecommunications networks to grow usually are the last to receive access to the system.[194] Politicians and state agents often dismiss these equity problems by stating that the "comparative advantage"[195] of increased access to telecommunications justifies the initial stages of distorted development.[196] Many lawmakers believe that improving the telecommunications infrastructure will generally benefit Poland, as increasing the ability of Polish businesses to communicate with more customers increases GNP.[197] However, if social inequities are not alleviated—as part of a national agenda to increase equality of provision as well as quality of provision—the social welfare of national citizens will remain a problem.

Also, increased provision of advanced technology (such as e-mail and internet service provided through phone lines) increases communication and the spread of ideas between transition countries and capitalist First World cultures.[198] Some international policy analysts have argued that the influx of foreign culture available through telecommunications has decreased the homogeneity of domestic culture.[199] International organizations[200] have used telecommunications media to spread progressive information resources and have attempted to enfranchise groups

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192. *See id.* at 15-16.

193. *See* Gerald Sussman & John A. Lent, *Introduction: Critical Perspectives on Communication and Third World Development, in* TRANSNATIONAL COMMUNICATIONS, *supra* note 167, at 19.

194. *See id.*

195. *See* GRAHAM BANNOCK ET AL., THE PENGUIN DICTIONARY OF ECONOMICS 79 (5th ed. 1992) (defining "comparative advantage" as the idea that agents are most efficiently employed in activities they perform relatively better than others. In international trade it is suggested that countries specialize in areas in which they have a comparative advantage.).

196. *See* Sussman & Lent, *supra* note 193, at 19-20.

197. *See supra* text accompanying notes 57 and 105.

198. *See* Sussman & Lent, *supra* note 193, at 20.

199. *See id.* (arguing that exposure to foreign culture has increased "personal independence-oriented, society-focused, and nationally conscious norms" which overcome the semifeudal values which may remain in former-Communist countries).

200. For example, Peacenet and other humanist, social groups use telecommunications to spread their messages to those in transition countries. *See id.* at 22.

across national boundaries.[201] Ambitious for increased foreign capital to spend on development, state authorities have paid less attention to the possibility of waning cultural identity.[202] However, as TNCs begin to supply services, national telecommunications providers may become less well known domestically. Riddled with foreign propaganda and commercials, the telecommunications sector in transition countries may lose its "national" appeal.[203]

Although liberalization and privatization of telecommunications sectors are touted as beneficial to transition countries, many world lawmakers, including the WTO, do not factor these externalities into the analysis. When a transition country drafts its telecommunications laws, it should address such externalities. Ultimately, the costs and benefits of certain provisions may be valued differently after weighing externalities into the analysis.[204]

B. *Global Competition—The Universal Market?*

International legal scholars have contemplated the possibility of a universal, telecommunications market.[205] Some scholars urge developing countries to draft domestic laws in order to achieve this result.[206] A WTO agreement on easier and non-discriminatory market access is only one step towards the creation of a globally competitive telecommunications regime, however.[207] Issues such as international competition, pricing policy, and barriers to trade must be addressed before global competition will loom on the horizon. Although the WTO stresses the importance of global cooperation in bringing about a universal market, such a universal system, if it is developed at all, probably will not originate for some time. Therefore, even though the possibility of a global market excites international policy makers, in reality countries like Poland do not, and should not, stress a universal market as a goal in drafting their current telecommunications laws. Some issues relevant to privatization, however, may reflect the legal and policy decisions needed to increase market universality.

International competition policy is now overwhelmingly concerned with stripping away the access barriers created by the

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201. *See id.*
202. *See id.* at 21.
203. *See id.* at 37.
204. *See* Capello & Nijkamp, *supra* note 189, at 143.
205. *See* VINCENT CABLE & CATHERINE DISTLER, GLOBAL SUPERHIGHWAYS: THE FUTURE OF INTERNATIONAL TELECOMMUNICATIONS POLICY 33 (1995).
206. *See id.* at 37.
207. *See id.* at 33.

nationalized telecommunications monopolies: the move toward privatization.[208] As soon as these countries achieve the sought-after privatization, national regulators will have to provide regulation of "unfair" competitive trade practices or monopolistic behavior.[209] It may be that upon liberalization of the telecommunications sector of Poland, Polish regulators may be unprepared to pass new anti-trust regulations, similar to those in the United States.[210] The Polish infrastructure is also ill-equipped to monitor or police TNC suppliers and their subsidiaries for monopolistic behavior.[211]

Another complicated element of establishing cross-border competition in the provision of telecommunications services is price control.[212] In many countries, cross-border pricing and revenue sharing are based on an artificial and negotiated "settlement price."[213] This price bears little relation to the actual costs of provision or the price charged to consumers.[214] Although the GATS agreement admonishes price discrimination, countries with newly demonopolized telecommunications markets may have difficulty adjusting prices away from settlement prices and towards a "fair pricing" policy.[215]

In practice, subtle use of barriers to trade can deny market access to other countries, even in theoretically open systems.[216] Anti-competitive policies, price discrimination, or strict licensing standards may inhibit free trade even in Member countries complying with the GATS agreement. Although these practices prevent total global free trade in telecommunications services, they may provide for more domestic control, at least for the present.[217]

Full global competition may be further away than some telecommunications analysts currently perceive due to false indicators of liberalization. In many transition countries, the withdrawal, at least partially, of direct government participation in telecommunications has accompanied liberalization.[218] The decrease of state ownership of telecommunications markets is not necessarily a reliable indicator of the degree of privatization that

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208. *Id.*
209. *See id.* at 36.
210. The United States has set up anti-trust regulations in the Sherman Act. 15 U.S.C.S. § 1 (Law. Co-op. 1998).
211. *See* CABLE & DISTLER, *supra* note 205, at 36.
212. *See id.* at 33.
213. *See id.*
214. *See id.*
215. *See id.*
216. *See id.* at 35.
217. *See id.*
218. *See* LOW & MATTOO, *supra* note 9, at 27.

has occurred, however.[219] Also, foreign direct investment does not necessarily correspond with the degree of market openness.[220] In part, the absence of a correlation results because domestically-owned firms can offer competition for the established incumbents and because foreign firms try to gain a monopolistic position similar to that of a state-run market.[221] Thus, the result is that the degree of foreign market penetration that has occurred is not always an adequate indicator of the degree of competition in a telecommunications sector.

Global competition currently does not loom on the horizon. Transition countries first need to overcome price controls, barriers to entry, and false indicators of market openness. Although WTO negotiations try to stress the utopia of global competition, the GATS agreements on telecommunications are only the commencement of global telecommunications competition.

C. *Analysis of Domestic Control*

Domestic governments in transition countries, such as Poland, comply with the GATS agreement in order to encourage TNCs from industrial countries to invest in Polish telecommunications systems. Poland's regulators also strive to check foreign ownership and control to prevent a TNC-dominated domestic telecommunications sector, however. These checks are largely in the form of licensing systems and limits on investment, and they result in curbing the ideal of "free trade." The GATS agreement allows such checks, assuming the Member follows the basic goals of GATS in the Basic Telecommunications Act's ¶ 5(g) exception.[222] This section allows a Member country to place restrictions on free trade in telecommunications services for the purpose of strengthening its domestic infrastructure and services.[223]

In the haste to comply with the GATS agreement and to compete internationally in telecommunications, however, transition countries often neglect the development of adequate infrastructure. Transition countries must establish a framework for internal regulation and control before attempting to expand their connections beyond the boundaries capable of their

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219. *See id.*

220. *See id.* (analyzing the relationship between foreign direct investment and the degree of openness of telecommunications markets in the Asian transition countries).

221. *See id.*

222. *See* discussion *infra* Part I.

223. *See* GATS, *supra* note 8, at 1195.

administrative control. The rush to "get wired" should not be at the expense of failing to train individuals capable of maintaining the administrative system.[224]

International trade in telecommunications and information services can be divided into three overlapping categories: provision of equipment, services, and direct investment.[225] Although governments in transition countries seek to encourage provision of equipment and direct foreign investment, it is difficult to believe TNCs will provide these services without also attempting to control provision of services. Transition countries need to accept that all three sections of the market are bound together and that it is very difficult to separate the three. Therefore, telecommunications lawmakers need to weigh the benefits of increased provision of services with the costs of decreased domestic control and provide telecommunications laws that adequately reflect the outcomes of decreasing domestic provider protections. Strict licensing requirements and foreign investment inducements will counteract each other if lawmakers do not decide which policy to support.

D. *Recommendations*

Overcoming these constraints on the development of telecommunications is perhaps the most daunting challenge transition countries face today. The economic, financial, institutional, and technical issues that must be addressed in order to effectively provide telecommunications services are critical. To be effective, telecommunications laws first must alleviate immediate problems while also preparing for long-term institutional and policy decisions. International telecommunications commitments should not be considered passing fancy, subject to later retraction. Such domestic regulations and commitments of world efforts to control telecommunications must last long enough to ensure material improvements, including an orderly flow of resources into and out of the transition country.[226]

Poland and other transition countries made a good start by joining the GATS Annex on Telecommunications, the Fourth Protocol, and the Reference Paper. Committing to the WTO's pro-competition regulations portrays to international financing agencies and other sources of external financing the high priority

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224. *See* LOW & MATTOO, *supra* note 9, at 1.

225. *See* JANE H. YUROW, ISSUES IN INTERNATIONAL TELECOMMUNICATIONS POLICY 180-81 (1983).

226. *See* Wellenius, *supra* note 3, at 35.

given to telecommunications.[227] National financing and planning authorities also need to continue to consider the telecommunications sector as a high priority industry and explicitly consider telecommunications investment as they do other spending on infrastructure for different economic sectors.[228]

However, given the scarcity of investment resources, efficient use of such investment should become the main focus of administrators in transition countries. Selective introduction of new services, encouraging liberalization among trade partners, decreasing protection of incumbent providers, and training regulators will help increase efficiency in provision of telecommunications services.

1. Provision of New Services

Transition countries must first alleviate inequities by providing and improving telephone services, which will constitute the core of telecommunications investment.[229] As this infrastructure is built up, new specialized communications services, otherwise unaffordable, can be provided at low marginal cost.[230] Because transition countries are largely building their telecommunications networks from the ground in many areas of the country, they can skip the initial steps in telecommunications evolution and start with more advanced services. For example, Polish lawmakers have codified this policy by making a law providing that all new telephone exchanges will be based on digital technology.[231] This will save money in the long run, while allowing such countries to offer businesses better technology. Additional new services can later be added at marginal cost, once a second stage of investment becomes available. Providing laws requiring a core set of advanced services is a more cost-effective solution for a country's overall communications regime than supplying each component separately, as investment allows. Also, provision of new services signals to foreign investment sources that telecommunications development is a priority in that country. Finally, these laws would allow greater flexibility to

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227. Commitments to provide market access and national treatment at a future date are binding under WTO law. *See* LOW & MATTOO, *supra* note 9, at 23. Failure to honor these commitments would create an obligation to pay damages to those who are deprived of benefits. *See id.* This need to compensate under WTO agreements makes the commitment to liberalize more credible. *See id.*

228. *See* Wellenius, *supra* note 3, at 35.

229. *See* discussion *infra* Part III.A.

230. *See* Wellenius, *supra* note 3, at 35.

231. *See* Kubasik, *supra* note 53, at 99.

respond to changing needs and would "facilitate subsequent development of new services."[232]

2. Encouraging Liberalization Among Trading Partners

Countries would benefit if their trading partners were also to liberalize their communications industry. For example, many countries took advantage of the liberalizing momentum created in the GATS negotiations because this made it easier to undertake market-opening obligations in the absence of *quid pro quo* terms specific to each country.[233] Therefore, Poland should encourage smaller Eastern European countries to liberalize their telecommunications regimes and to become signatories to the GATS agreements.[234] Governments can create greater domestic support for liberalization, through building cross-sectoral coalitions, if other governments are moving in the same direction at the same time.[235]

3. Decrease Protection of Domestic Incumbent Suppliers

One of the reasons governments in transition countries are unwilling to liberalize their telecommunications sector immediately is a variant of the traditional "infant industry" argument.[236] National firms often prefer to operate as high cost-poor quality producers in a protected market, rather than as low cost-high quality producers facing international competition.[237] Although Poland signed the GATS agreement that obligated it to decrease some protection of domestic suppliers, the extent that Poland will decrease protection is not apparent.

Protection of domestic firms is socially costly, as it requires government agencies to provide research and development for a market unwilling to expand or improve quality of services.[238] By cutting back on domestic firm protection, foreign investors may provide transition countries with the positive effects of additional

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232. Wellenius, *supra* note 3, at 36.

233. *See* LOW & MATTOO, *supra* note 9, at 26.

234. For example, Belarus, Lithuania, and Ukraine are Poland's neighboring countries that are not signatories to the Fourth Protocol. *See* Fourth Protocol, *supra* note 25, at 373.

235. *See* LOW & MATTOO, *supra* note 9, at 19.

236. *See id.* at 22.

237. This is due to the fear that international competitors will drive prices down so low that domestic providers will not be able to continue to supply services profitably. *See id.* at 22 n. 15.

238. Even though these domestic firms charge higher rates for service, expansion into rural areas is not economically rational given the high cost of equipment needed to extend service. *See id.*

capital: the transfer of technology and know-how. This decrease of protection would improve Poland's telecommunications sector as a whole.

4. Establishing an Independent Regulatory Agency

A new telecommunications law, being drafted by the Polish Telecommunications Ministry,[239] proposes establishing an independent regulatory body to take on several key regulatory functions currently performed by the Ministry.[240] This legislation concurs with GATS policy, as the Reference Paper suggested establishing an independent regulatory agency.[241] The new regulatory agency would issue licenses, negotiate interconnection fees, and regulate telecommunications tariffs.[242] Critics of the agency are concerned that, if established, it will become "yet another bureaucracy."[243] The Ministry supports the agency's creation, however, stating that the agency will be given a "sufficient amount of power to regulate and supervise the market."[244]

With an emphasis on supervision instead of control, the Polish administration hopes that an independent regulator will foster free-market ideals and attract more foreign investment, thereby increasing competition. New legislation would render the PIT, which supervised compliance with Polish telecommunications laws under the control of the Ministry of P&T, obsolete. Perhaps this would free government funds to provide for a Polish telecommunications research and development subsidy or to subsidize provision of telecommunications services in rural areas.[245] An independent regulatory agency enables governments to concentrate on efficient provision of services, while giving foreign service providers further incentive to invest in Polish telecommunications.[246]

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239. This new law is still in the process of being drafted as of publication of this Note.

240. *See Independent Regulatory Agency Envisioned Under New Draft Law*, 8 E. EUR. REP. (BNA) 366 (May 18, 1998) [hereinafter *New Draft Law*].

241. *See* Reference Paper, *supra* note 44, at § 5, 369 (requiring the proposed regulatory body to be "separate from, and not accountable to, any supplier of basic telecommunications services"); *see also* Harwood, *supra* note 2, at 884 (suggesting that this regulatory body should prevent anti-competitive behavior because such conduct would undermine the effects of the Fourth Protocol).

242. *See New Draft Law*, *supra* note 240, at 366.

243. *Id.*

244. *Id.* (quoting Ministry spokesman Miroslaw Luniewski).

245. *See* CABLE & DISTLER, *supra* note 205, at 36.

246. This incentive stems from an alleviated concern that the government acts in the interests of its domestic firms and tends to protect those firms at the expense of TNCs. *See New Draft Law*, *supra* note 240, at 366.

5. Administrative Support

Few transitional governments or regulatory agencies have any experience or institutional context for the types of regulatory activities that accompany liberalization.[247] Some telecommunications policy analysts believe that transition governments will have to contend with significant "teething problems" as they attempt to put their regulatory machinery in place.[248] Such difficulties may spill over into WTO dispute resolution fora.[249]

Independence of administrators can partly solve administrative inexperience.[250] If government officials do not have to spend time training and overseeing activities in the industry, they can provide innovative regulations to facilitate privatization in compliance with the GATS agreements. Experts in the industry can direct the new independent agency, providing skill and training to those less familiar with new technologies. The WTO should include an administrative telecommunications training policy in its next international agreement. With the vast influx of information flowing into privatizing transition countries, administrators need to be familiar with current trends in the industry to create laws to control the system and run it effectively.[251] Without efficiency, many service providers will not invest. On the other hand, in a loose system with little control of licensing for example, domestic firms will lose too much business to TNCs, thereby decreasing the number of domestic service providers and creating new foreign oligopolies of service providers.[252] Transition countries' telecommunications laws should strive to achieve a middle ground.

6. Public Subsidies for Research and Development

Plans to privatize in transition countries include putting domestic companies on the stock market to increase capital.[253] The government may use the increase in capital to train incumbent suppliers to use and provide new technologies and to

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247. *See* LOW & MATTOO, *supra* note 9, at 25. Those who have accumulated regulatory experience have taken a number of years to acquire it, and there are many disputes as to the best approach. *See id.*

248. *See id.* (mentioning the problems associated with the "teething" process).

249. *See* LOW & MATTOO, *supra* note 9, at 25; *see also* GATS, *supra* note 8, art. XXIII (regarding dispute resolution).

250. *See* discussion *infra* Part VI.D.4.

251. *See* Sussman & Lent, *supra* note 193, at 28-30.

252. *See id.*

253. *See ABA Meeting, supra* note 93, at 387; *IPO of Polish Monopoly, supra* note 65, at 738.

begin government-subsidized research and development programs.[254] National research and development programs decrease reliance on TNC information and technology and will improve a transition country's international standing as a telecommunications service provider.

VII. CONCLUSION

Privatization of telecommunications sectors in Eastern European countries can be seen as an immediate and direct way of generating a large infusion of foreign currency into the national economy.[255] Telecommunications improvements act as a catalyst to other sectors of the economy, improving Poland's overall international competitiveness. The telecommunications provisions of the GATS agreement provide a certain degree of uniformity to telecommunications regulations, while offering governments of transition countries a way to commit to liberalization. This commitment increases foreign capital inflows, as the risk of investing in the infrastructures of transition countries decreases by a country's promise to privatize in compliance with GATS.[256]

Polish lawmakers are currently working on a new Polish telecommunications law, scheduled to take effect in January 2001.[257] These reforms will increase Polish uniformity with international telecommunications laws. Poland also plans to eventually become a part of the European Union,[258] further binding Poland to private, capitalist regimes.[259] Although these commitments symbolize Polish interest in decreasing control over telecommunications providers, domestic telecommunications laws may need to be more narrowly tailored in order to establish freer market access. Polish telecom firms need foreign investment and technology to learn to compete on an international level. Improving Polish infrastructure and privatizing the telecommunications sector will eventually decrease Polish dependence on TNCs, as Polish firms establish themselves as technologically-advanced providers. Then Poland will be able

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254. *See* CABLE & DISTLER, *supra* note 205, at 36.

255. *See ABA Meeting*, *supra* note 93, at 387.

256. *See* LOW & MATTOO, *supra* note 9, at 28.

257. *See Cabinet Adopts*, *supra* note 107, at 617.

258. For discussion of specific European Union policies on telecommunications, see generally OLIVER STEHMANN, NETWORK COMPETITION FOR EUROPEAN TELECOMMUNICATIONS 257-310 (1995) and Stephanie L. Harkness, Note, *International Partnerships in the European Union Telephone Service Market: Towards a New Monopoly?*, 19 B.C. INT'L & COMP. L. REV. 187 (Winter 1996).

259. Poland plans to enter the European Union by 2008. *See Cabinet Adopts*, *supra* note 107, at 617.

to join the group of elite provider countries that control international telecommunications laws and policy.

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