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## Article

# The Evidence for Constitutionalization of the WTO: Revisiting the *Telmex Report*

Theodore Kill\*

### ABSTRACT

The discourse surrounding constitutionalization of the WTO remains divisive and contentious. Despite the fact that arguments for and against constitutionalization of the WTO derive much of their cogency from their potential to affect material outcomes within the multilateral trading system, the literature remains silent with regard to case studies of exactly how a particular constitutional conception has concretely impacted the WTO Dispute Settlement System. This article fills that gap by demonstrating how the concept of “rights-based constitutionalism” was central to the coherence of the Panel Report in Mexico—Measures Affecting Telecommunications Services. In its Report, the panel resolved several threshold issues of first impression regarding the concepts of interconnection, accounting rates and the mode of supply of basic telecommunications services. The panel’s treatment of these legal issues has been criticized by many commentators. With the benefit of the constitutional discourse that has blossomed in the years following the report, however, this article argues that the apparent inconsistencies within the

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\* Office of the Legal Adviser, U.S. Department of State. I am grateful for the comments of Robert Howse on a very early version of this article. I thank the participants of the 2009–10 SIAS Summer Institute on Comparative Federalism and Separation of Powers, and in particular Professors Daniel Halberstam and Christoph Möllers, for helping me to explore the issues of global constitutionalism underpinning this article. This article was drafted and completed before my employment with the U.S. Department of State. The views expressed herein are my own and do not necessarily reflect those of the U.S. Government or the Department of State.

Telmex Report can best be understood as the product of a particular vision of the WTO as a constitutional order established to safeguard the rights of individuals within the multilateral trading system.

## INTRODUCTION

The debate regarding constitutionalization of the World Trade Organization (“WTO”) can at times reach a fever pitch.<sup>1</sup> The battle lines are typically drawn at a high degree of abstraction centering around principles of constitutional justice or global subsidiarity.<sup>2</sup> Ideas such as these derive their cogency from their ability to affect material outcomes within the multilateral trading system, yet the literature remains silent with regard to case studies of exactly how a particular constitutional conception has concretely impacted the WTO Dispute Settlement System.<sup>3</sup> This article fills that gap by demonstrating how the concept of “rights-based constitutionalism”<sup>4</sup> was central to the coherence of the WTO Panel Report in *Mexico—Measures Affecting Telecommunications Services* (“*Telmex Report*”).<sup>5</sup>

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1. See, e.g., Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUROPEAN J. INT'L L. 945 (2008); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice: A Rejoinder*, 19 EUR. J. INT'L L. 955 (2008).

2. Petersmann, *supra* note 1, at 956.

3. The WTO Dispute Settlement System is a term used to encompass the complete range of dispute resolution mechanisms and institutions available to WTO Members within the WTO. The system “function[s] very much like a court of international trade: there is compulsory jurisdiction, disputes are settled largely by applying rules of law, decisions are binding on the parties and sanctions may be imposed if decisions are not observed.” MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 104 (2d ed. 2006).

4. See generally DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* 145 (2005). Howse and Nicolaïdis refer to this vein of constitutionalism as “libertarian.” Throughout this paper, however, I will use the term “rights-based constitutionalism.” Robert Howse and Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227, 236 (Roger B. Porter et al. eds., 2001).

5. Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004) [hereinafter *Telmex Report*].

The *Telmex Report* formed part of a long simmering trade dispute between the United States and Mexico regarding telecommunications traffic between the two countries. In bringing the dispute to the WTO, the United States alleged *inter alia* that Mexico had violated Article XVII of the General Agreement on Trade in Services (“GATS”);<sup>6</sup> Article 5.1 and 5.2 of the GATS Annex on Telecommunications;<sup>7</sup> and Sections 1.1 and 2.2 of the GATS Telecommunications Reference Paper (“Reference Paper”).<sup>8</sup> In the *Telmex Report* the panel (“*Telmex Panel*”) found that Mexico had indeed breached several of these commitments,<sup>9</sup> marking the first time that the WTO dispute resolution bodies were called upon to resolve a pure services dispute, the first dispute involving the Reference Paper, and the first dispute in which a panel applied WTO anti-competition rules.<sup>10</sup>

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6. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art. XVII, 1869 U.N.T.S. 183 (1994) [hereinafter GATS] (requiring Members to “accord to services and service suppliers of any other Member . . . treatment no less favourable than that it accords to its own like services and service suppliers,” which is typically referred to as a “national treatment” obligation).

7. *Id.* at Annex on Telecommunications Art. 5.1 (requiring Members to “ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions”). *Id.* at Annex on Telecommunications Art. 5.2 (requiring Members to “ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits”).

8. Section 1.1 of the Reference Paper states that “[a]ppropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.” Section 2.2 of the Reference Paper states that “[i]nterconnection with a major supplier will be ensured at any technically feasible point in the network.” Reference Paper, GATS Negotiating group on basic telecommunications para. 2.1 (Apr. 24 1996), available at [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm).

9. See *Telmex Report*, *supra* note 5, at para. 7.216 (finding that Mexico has failed to fulfill its commitment to providing interconnection at cost oriented rates under TRP §2.2); *id.* at para. 7.269 (finding that Mexico had failed to fulfill its commitment to prevent anti-competitive practices under TRP §1.1); *id.* at para. 7.335 (finding that Mexico had failed to fulfill its commitment to ensure that U.S. service suppliers were granted access to public telecommunications in Mexico on reasonable terms under GATT Telecommunications Annex 5(a)); *id.* at paras. 7.381, 7.385, 7.389 (finding that Mexico’s failure to grant access to private leased circuits and the Mexican telecommunications regulation regime were inconsistent with GATS Telecommunications Annex 5(b)).

10. See William J. Davey, *Specificities of WTO dispute settlement in services*

On a policy level, commentators have framed the *Telmex* Panel's approach as reflecting a choice between two conceptions of the nature of the rules embodied in the *WTO Telecoms Agreement*.<sup>11</sup> On one view, the disciplines in the *WTO Telecoms Agreement* created obligations only with regard to regulations actually promulgated by a government. On the competing view, the *WTO Telecoms Agreement* required WTO Members ("Members") to remedy the anticompetitive practices of private actors.<sup>12</sup> The *Telmex Report* resolved this debate in favor of the latter view. In the following analysis, however, this article highlights an antecedent legal determination. Namely, in order for the *Telmex* Panel to find itself in a position to make this critical policy choice, it first had to find that the dispute fell within the scope of the *WTO Telecoms Agreement*. This required the *Telmex* Panel to resolve threshold issues of first impression regarding the concepts of interconnection, accounting rates and the mode of supply of basic telecommunications services. The *Telmex* Panel's treatment of these legal issues has been criticized by many commentators, including the leading WTO treatise which has labeled the panel's conclusion with regard to mode of supply as "an untenable outcome."<sup>13</sup> With the benefit of the constitutional

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cases, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 276, 289 (Marion Panizzon, Nicole Pohl & Pierre Sauvé eds., 2008); Andrew W. Shoyer, *Lessons learned from litigating GATS disputes: Mexico—Telecoms*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 225, 226 (Marion Panizzon, Nicole Pohl & Pierre Sauvé eds., 2008); Shin-yi Peng, *Trade in Telecommunications Services: Doha and Beyond*, 41 J. WORLD TRADE 293, 313 (2007); Swiss Institute for International Economics and Applied Economic Research, *Mexico—Measures Affecting Telecommunications Services*, WTO NEWS 11 (July 2004), [http://www.unisg.ch/org/siaw/web.nsf/SysWebRessources/wtonews11etxt/\\$FILE/wtonews11e.txt](http://www.unisg.ch/org/siaw/web.nsf/SysWebRessources/wtonews11etxt/$FILE/wtonews11e.txt).

11. The *WTO Telecoms Agreement* is a term used to refer to the specialized regime which governs a WTO member's commitments in the telecommunications sector. MATSUSHITA ET AL., *supra* note 3 at 678. See *infra* note 71 and accompanying text.

12. See Eleanor M. Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271, 272–73 (2006).

13. See, e.g., MATSUSHITA ET AL., *supra* note 311, at 687; MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 394 (3d ed. 2005); Eric H. Leroux, *From Periodicals to Gambling: A review of systemic issues addressed by WTO adjudicatory bodies under the GATS*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 236, 257–58 (Marion Panizzon, Nicole Pohl & Pierre Sauvé eds., 2008); Chan-Mo Chung, *Interpretation of "Interconnection" by the WTO Mexico-Telecommunications Panel: A Critique*, 41 J. WORLD TRADE 783 (2007); Damien J. Neven & Petros C. Mavroidis, *Mexico—*

discourse that has blossomed in the years following the report, however, this article argues that the apparent inconsistencies within the *Telmex Report* can best be understood as the product of a particular vision of the WTO as a constitutional order established to safeguard the rights of individuals within the multilateral trading system. Viewed through the lens of this rights-based constitutional theory, the otherwise irreconcilable positions adopted by the *Telmex Report* become intelligible.<sup>14</sup>

This article assesses the extent to which an individual emanation of WTO jurisprudence could be said to reflect a certain constitutional vision of the WTO. Even with this caveat, however, it is undeniable that the discourse of constitutionalization can create a sort of feedback loop serving to further entrench the notion of the WTO as a constitutional organization.<sup>15</sup> Observations regarding a given institution's "constitution" are themselves internalized, whether contested or embraced, in subsequent constitutional discourse such that the simple act of framing a question in constitutional terms can serve to reify the object of study. The aim of this article is to inquire into the extent to which a particular type of constitutionalism has already begun to manifest itself within the GATS and what effects this may be expected to have. Part I introduces the concept of rights-based constitutionalism with a particular emphasis on its application to the world trading regime. Part II sets forth the facts and law at issue in the *Telmex Report*. This Part aims to show the state of play that existed in the international telecommunications field prior to the *Telmex Report*. Part III examines the outcome of the *Telmex Report* and demonstrates that at least part of its most

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*Measures Affecting Telecommunications Services (WT/DS204/R) A Comment on "El mess in TELMEX"*, in THE WTO CASE LAW OF 2003 188 (Henrik Horn & Petros C. Mavroidis eds., 2006); J. Gregory Sidak & Hal J. Singer, *Überregulation without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services*, 57 FED. COMM. L.J. 1 (2004); Philip Marsden, *WTO decides its first competition case, with disappointing results*, COMPETITION LAW INSIGHT, May 2004, at 3.

14. See Chios Carmody, *A Theory of WTO Law*, 11 J. INT'L ECON. L. 511, 556 (2008).

15. See Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31, 38-39 (Gráinne de Búrca & Joanne Scott eds., 2001); Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 668 (2006); Andrew Lang, Book Review, *Deborah Cass, The Constitutionalization of the WTO*, 17 EUR. J. INT'L L. 309 (2006).

controversial legal determinations are capable of comprehension as a product of rights-based constitutional theory. Part IV concludes by providing an assessment of the potential impact that *Telmex*-style constitutionalization could have on the WTO, both with regard to the jurisprudence of the WTO and its legitimacy.

## I. RIGHTS-BASED CONSTITUTIONALISM

The term “constitutional” has many different meanings.<sup>16</sup> For the rights-based constitutionalist, and hence for purposes of the analysis contained in this article, constitutionalism is considered to be an amalgam of liberal democratic principles, such as the rule of law and separation of powers, that have developed over centuries of experimentation so as to protect the rights of individual citizens.<sup>17</sup> These principles apply to

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16. See e.g., CASS, *supra* note 4; Richard Collins, *Constitutionalism as Liberal-Judicial Consciousness: Echoes from International Law's Past*, 22 LEIDEN J. INT'L L. 251, 253 (2009); Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5, 34 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579, 581 (2006); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006); Bardo Fassbender, *The Meaning of International Constitutional Law*, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 837, 839–40 (Ronald St. John Macdonald & Douglas M. Johnson eds., 2005); Pierre-Marie Dupuy, *L'unité de l'ordre juridique international*, 297 RECUEIL DES COURS 9, 227 (2002); Peter Holmes, *The WTO and the EU: Some Constitutional Comparisons*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 59, 60 (Gráinne de Búrca & Joanne Scott eds., 2001) (noting that economists “have a tradition of using the terms ‘constitution’ and ‘constitutionalisation’ to cover almost any arrangement that precommits economic policy to a fixed set of rules”); Howse and Nicolaidis, *supra* note 4, at 235–36; Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 216, 258–62 (1994).

17. See Ernst-Ulrich Petersmann, *European and International Constitutional Law: Time for Promoting “Cosmopolitan Democracy” in the WTO*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 81, 97 (Gráinne de Búrca & Joanne Scott eds., 2001) [hereinafter Petersmann, *European and International Constitutional Law*] (listing the “constitutional principles of freedom and non-discrimination”); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships*, 4 J. INT'L ECON. L. 3, 11–16 (2001) [hereinafter Petersmann, *Human Rights and International Economic Law*] (listing “cosmopolitan constitutional law”, “international constitutionalism”, and “national constitutionalism” among the eight core principles of constitutionalism which open the theory to a sort of endogeneity bias); Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic*

constitutionalized institutions of all varieties with different implications in each instance. Thus, the doctrine of separation of powers may be applied to a State or an international organization, perhaps with divergent institutional and policy prescriptions, although both the State and the international organization will be considered to have adopted constitutional systems to the extent that the principles are deployed to limit governmental powers so as to increase individual freedom.<sup>18</sup>

Within the world trading system, however, for the rights-based constitutionalist the relevant constitutional considerations are brought into sharper focus. Institutions within the world trading system have a definite role to play in providing the proper conditions within which market transactions can flourish.<sup>19</sup> In this context, the “basic objective” of constitutionalism is “constituting and limiting government

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*Law—Lessons for Strengthening International Dispute Settlement in Non-economic Areas*, 2 J. INT'L ECON. L. 189, 244 (1999) [hereinafter Petersmann, *Dispute Settlement*] (listing “freedom, non-discrimination, fair procedures and rule of law” as “constitutional guarantees”); Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An Introduction*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 3, 11–19 (Ernst-Ulrich Petersmann ed., 1997) [hereinafter Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System*] (listing the “constitutional values of freedom and non-discrimination”); Petersmann, *Constitutionalism and International Organizations*, 17 N.W. J. INT'L L & BUS. 398, 425–26 (1996–97) [hereinafter Petersmann, *Constitutionalism and International Organizations*] (listing “freedom, non-discrimination, rule of law, separation of powers and other fundamental rights”); Ernst-Ulrich Petersmann, *Limited Government and Unlimited Trade Policy Powers? Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 537, 538–40 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (listing the supremacy of individual rights over state power and the need to protect “equality before the law” as necessary premises to consider when discussing international economic law).

18. Ernst-Ulrich Petersmann, *Judging Judges: From ‘Principal-Agent Theory’ to ‘Constitutional Justice’ in Multilevel ‘Judicial Governance’ of Economic Cooperation Among Citizens*, 11 J. INT'L ECON. L. 827, 844 (2008) [hereinafter Petersmann, *Judging Judges*].

19. This idea is best expressed in the quote “in the absence of a world government, ‘public goods’ like non-discriminatory access to foreign markets and supplies, monetary stability and international legal certainty can be produced only through liberal international rules with ‘constitutional functions.’” ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW XL (1991) [hereinafter PETERSMANN, CONSTITUTIONAL FUNCTIONS]. See also Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 406 (listing “individual liberties and actionable property rights” as preconditions for the proper functioning of economic markets).

powers for the protection of equal rights of citizens by means of constitutional rules of a higher legal rank.”<sup>20</sup> Parsing of this basic objective reveals that the theory relies upon three premises whose full realization within the world trading system would require significant adaptation of the dominant legal and institutional conceptions of the WTO. First, the theory presupposes that individuals possess rights (“equal rights of citizens”) that are cognizable within the law of the WTO. Second, the theory posits the existence of broad “constitutional rules” that are of a “higher legal rank” than other non-constitutional rules within the world trading regime. Third, in order for these constitutional rules to serve their appointed function of protecting individual rights, rights-based constitutionalism envisages certain modalities by which the constitutional rules should be deployed by the judiciary so as to limit government’s ability (“limiting government powers”) to interfere with individual rights.

Under a rights-based constitutional theory, the justification for this tripartite transformation of the world trading system is that the *WTO Agreement* was itself a

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20. Petersmann, *supra* note 16, at 6; *see also* Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 405, 445–46 (listing “dignity, liberty” and “legal equality” as basic rights); Ernst-Ulrich Petersmann, *Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS* 29, 39 (Frederick M. Abbott, Christine Breining-Kaufman & Thomas Cottier eds., 2006) [hereinafter Petersmann, *Human Rights, Markets and Economic Welfare*] (listing “freedom of choice, political competition and equal individual rights” as rights of citizens); Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, in *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* 3, 5 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) [hereinafter Petersmann, *National Constitutions*] (listing “equal treatment, equality, due process and fairness” as outcomes of these long-term considerations). This definition broadly coheres with the “core” of international constitutionalism identified by Klabbers, namely “placing limits on the activities of international organizations, subjecting those organizations to standards of proper behavior.” Jan Klabbers, *Constitutionalism Lite*, 1 *INT’L ORG. L. REV.* 31, 32 (2004). *See also* Bruno-Otto Bryde, *International Democratic Constitutionalism*, in *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* 103, 106 (Ronald St. John Macdonald & Douglas M. Johnson eds., 2005). The “proper behavior” in this case would be respect for the rules of a higher legal rank. Note that the government powers to be limited by constitutional rules include those exercised by international organizations. Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37 *J. WORLD TRADE* 241, 249 (2003) [hereinafter Petersmann, *Human Rights and the Law of the WTO*].

constitutional moment. By consenting to the *WTO Agreement* the WTO Members effectively “constitutionalize[d] the world trading system in response to the new challenges of the globalization of the world economy and of civil society.”<sup>21</sup> This can be problematic when attempting to apply rights-based theory to the reality of the modern trade law regime since the WTO and its Members do not view the institution through this constitutional lens.<sup>22</sup> As a result, much of the rights-based constitutionalist literature advocates for changes to bring the WTO into conformity with the three conditions listed above, which themselves are often presented as either self-evident or *faits accomplis*. The distinction between advocacy and identification, between prescription and depiction, which is customarily blurred in constitutional rhetoric,<sup>23</sup> is at times completely obscured in rights-based constitutional discourse regarding the WTO.<sup>24</sup> The following three sub-parts summarize the critically transformative trinity of concepts within rights-based constitutional theory as applied to the world trading regime, namely that individuals possess constitutional rights, that these rights consists of broad economic freedoms, and that judges have a special role to play in protecting individual economic rights.

#### A. INDIVIDUAL RIGHTS ON THE INTERNATIONAL PLANE

It is immediately apparent that if a legal system whose basic objective is to secure the “equal rights of citizens”<sup>25</sup> is to achieve its aim, then citizens or individuals under this regime must themselves possess rights. As a practical matter, if individuals did not possess rights, or if public authorities were

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21. See Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT’L L. 1, 19 (1998).

22. Carmody, *supra* note 14, at 539; Joel P. Trachtman and Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT’L L.J. 221, 229 (2003).

23. Collins, *supra* note 16, at 264.

24. See CASS, *supra* note 4, at 152–53. Cass presents the possibility that this ambiguity is consciously executed so as to expand the scope of debate relating to the WTO. *Id.* at 161–62. In this regard, rights-based constitutional theory follows in the tradition of what Koskenniemi has identified as “idealism” in international law. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 209–18 (2005).

25. See *supra* note 20 and accompanying text.

not vested with the power to vindicate those rights, the enterprise of securing individual rights through constitutionalization would be stillborn. Thus, the classic model of public international law where, absent express provisions to the contrary, only States possess the right to bring claims for violations of treaties on an international plane,<sup>26</sup> presents an inhospitable terrain for a theory of rights-based constitutionalization to take root. The WTO is in many ways innovative from the perspective of public international law,<sup>27</sup> but not as regards piercing the State veil and endowing citizens with rights. With the exception of intellectual property rights, the rights and obligations created and disputed within the WTO are those of States, not individual citizens.<sup>28</sup>

This state of affairs is sub-optimal for the rights-based constitutional theorist whose Kantian grounding places the interests and rights of individual citizens at the epicenter of the legal universe.<sup>29</sup> This human rights revolution in international law requires “a citizen-oriented national and international constitutional framework different from the power-oriented, state-centred conceptions of traditional international law.”<sup>30</sup> It is not surprising then that according to rights-based theory the substantive rights within the WTO have as “their ultimate

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26. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 197 (6th ed., 2008).

27. In particular the WTO's introduction of compulsory dispute resolution, adoption of decisions by negative consensus, and the idea that adjudicatory bodies may suggest methods of compliance to Members found to be in violation of their WTO commitments may all be considered innovative from the perspective of public international law.

28. See, e.g., Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, para. 7.72, WT/DS152/R (Dec. 22, 1999).

29. See Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 422–26; Petersmann, *Human Rights, Markets and Economic Welfare*, *supra* note 20, at 31; Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 EUR. J. INT'L L. 845, 850 (2002) [hereinafter Petersmann, *Rejoinder to Alston*]; Petersmann, *supra* note 21, at 7–11. On the nature of Petersmann's claim to grounding in Kantian thought see Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 837–41 (2002).

30. See Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 649 (2002); Peters, *supra* note 16, at 597 (stating that a classic theme of constitutionalism is seeking “to contain political power in order to safeguard the autonomy of the individual”); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 9, 161–62 (1999).

function to protect the rights of private citizens.”<sup>31</sup> This citizen-oriented purpose of the WTO’s rules, combined with the inherent nature of economic law as concerning individual action, militates in favor of a reallocation of procedural as well as substantive rights.<sup>32</sup> Because international economic law “is an instrument for empowering and protecting mutually beneficial cooperation among citizens across frontiers, judges should . . . recogniz[e] citizens as legal subjects.”<sup>33</sup> The argument proceeds from observation to advocacy; because individual citizens are the ultimate beneficiaries of WTO laws, individual citizens should be capable of vindicating their interest in these laws.

For the rights-based constitutionalist, the WTO’s ability to protect individuals is frustrated by producer-capture; the overriding emphasis on producer concerns at the WTO operates “to the detriment of the general citizen interest in maximizing consumer welfare through liberal trade.”<sup>34</sup> Bypassing the producer interests so as to address individual rights at the WTO level “serves broader constitutional functions for empowering individuals as legal subjects (‘market citizens’) rather than mere objects of integration, notably for protecting their personal self-development and equal basic rights against welfare-reducing government limitations.”<sup>35</sup> The emphasis on

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31. Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 453. *See also* Petersmann, *Dispute Settlement*, *supra* note 17, at 211.

32. Petersmann, *Dispute Settlement*, *supra* note 17, at 225.

33. Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, 19 EUR. J. INT’L L. 769, 773 (2008) [hereinafter Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*]. *See also* Ernst-Ulrich Petersmann, *Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy*, in EUROPEAN INTEGRATION AND INTERNATIONAL COORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN 383, 401–02 (Armin von Bogdandy, Petros C. Mavroidis & Yves Mèny eds., 2002) [hereinafter Petersmann, *Human Rights in European and Global Integration Law*].

34. Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT’L ECON. L. 19, 22 (2000) [hereinafter Petersmann, *The WTO Constitution*]. *See also* Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, *supra* note 33, at 797 (2008) (noting a “often one-sided focus” on governmental and producer interests); Petersmann, *Human Rights and International Economic Law*, *supra* note 17, at 27.

35. Ernst-Ulrich Petersmann, *The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?*, 7 J. INT’L ECON. L. 605, 621 (2004) [hereinafter Petersmann, *The ‘Human Rights Approach’*]. *See also*

increasing market freedoms has exposed advocates of rights-based constitutionalization to accusations of harboring a desire to Lochnerize WTO law.<sup>36</sup> The blindness of rights-based theories to the dangers of Lochner era jurisprudence is evidenced by a tendency within the theory not to question the potential adverse effects of universal robust privileging of individual economic freedoms.<sup>37</sup>

Rights-based constitutional theory complements principled arguments in favor of vesting WTO rights in individual citizens with consequentialist justifications rooted in the WTO's legitimacy and efficacy.<sup>38</sup> With regard to the former justification, the promotion of "citizen-oriented" economic freedoms is seen as increasing the legitimacy of international tribunals to engage in judicial review of State actions.<sup>39</sup> The argument with regard to efficacy works on at least two levels. At the horizontal level among States, it is argued that citizen enforcement of international law is a more effective means of ensuring peaceful resolution of international disputes.<sup>40</sup> At the vertical level, concerning the relations between a State and its own citizens, bestowing rights and the ability to enforce them upon citizens is seen as the most effective way of providing maximum freedom to all.<sup>41</sup> Accordingly, under the rights-based constitutional theory the structure of rights and obligations at the WTO should be rearranged. As a normative project "the citizens must become the main subjects and beneficiaries of

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Petersmann, *European and International Constitutional Law*, *supra* note 17, at 107.

36. Howse, *supra* note 1, at 946. In *Lochner v. New York*, the U.S. Supreme Court invalidated regulations regarding the maximum number of hours a baker could work based upon the idea that such regulations violated the bakers' freedom to contract. *Lochner v. New York*, 198 U.S. 45 (1905). According to one scholar, Lochner symbolizes "not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law." Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987).

37. Petersmann, *National Constitutions*, *supra* note 20, at 14.

38. See CASS, *supra* note 4, at 162–63.

39. See Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice'*, *supra* note 33, at 794.

40. See Petersmann, *supra* note 21, at 21; Petersmann, *Dispute Settlement*, *supra* note 17, at 238.

41. See Petersmann, *National Constitutions*, *supra* note 20, at 26; see also Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 424.

WTO rules.”<sup>42</sup> On this view the WTO is, or should become, “as much vertical as horizontal.”<sup>43</sup>

### 1. *Constitutional rules*

Having re-oriented the WTO bargain away from State and producer interests and vested citizens with the ability to invoke their individual economic rights within the multilateral trading system, the question for the rights-based constitutionalist then becomes one of identifying the constitutional rules that constrain the policy options available to governments so as to protect these individual rights. Rights-based constitutionalists maintain that there exists a WTO “constitution” that is superior to the Agreements listed in the Annexes to the *WTO Agreement* (“Annexes”) and various schedules of commitments.<sup>44</sup> It is not clear, however, of what exactly this “constitution” consists.<sup>45</sup> To the extent that the “constitution” consists solely of the *WTO Agreement* itself the proposition is non-controversial because Article XVI:3 states that the *WTO Agreement* will prevail over other documents in the event of a conflict. Nevertheless, the technical nature of the *WTO Agreement* does not lend itself to performing a constitutional function in the sense of protecting individual rights against government encroachment.<sup>46</sup> In addition, it is difficult if not impossible to identify rules in the *WTO Agreement* which would be of a higher legal rank in this sense vis-à-vis the Annexes. This is because the articles of the *WTO Agreement* address entirely unrelated matters, such as the administration and legal personality of the WTO itself. The preamble to the *WTO*

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42. Petersmann, *The WTO Constitution*, *supra* note 34, at 24. *See also* Petersmann, *Human Rights, Markets and Economic Welfare*, *supra* note 20, at 33.

43. Steve Charnovitz, *Comment*, in *EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 253, 253 (Roger B. Porter et al. eds., 2001).

44. *See, e.g.*, Petersmann, *Human Rights and International Economic Law*, *supra* note 17, at 24–25.

45. It is apparent, however, that the term constitution as used in this context is not to be equated with the normal sense in which the term is used in reference to international organizations to refer to “the legal framework within which an autonomous community of a functional (sectoral) nature realizes its respective functional goal . . . .” Erika de Wet, *The International Constitutional Order*, 55 *INT’L & COMP. L.Q.* 51, 53 (2006).

46. *See* JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 107 (2005).

*Agreement* refers to certain goals such as full employment, sustainable development and environmental protection, but to say that these represent rules with which the substantive obligations under WTO law must cohere strains the interpretive weight that can properly be assigned to the preamble.<sup>47</sup>

In fact, the constitutional rules advanced by rights-based theorists derive more from general principles than from any specific text to which the WTO members have agreed. Under a rights-based constitutional theory, the basic characteristic of a constitutional rule is that it is “universalisable.”<sup>48</sup> These universalizable rules are avowedly “general and abstract.”<sup>49</sup> In the case of the WTO, the universalizable rules to be fixed in the constitutional firmament are “worldwide guarantees of economic freedom”<sup>50</sup> with “maximum equal liberty as the ‘first principle of justice.’”<sup>51</sup> In this sense, economic freedoms such as those permitting cross-border trade in goods and services are recast as rules with “constitutional functions” because these rules constrain the ability of governments to act in certain ways inimical to individual rights.<sup>52</sup> Such rules derive their

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47. See Vienna Convention on the Law of Treaties art. 31(2), 1155 U.N.T.S. 331 (1969) [hereinafter VCLT]. The preamble to the VCLT itself affirms that disputes “should be settled . . . in conformity with the principles of justice and international law.” *Id.* at Pmbl. Petersmann has argued that this text “requires judges to review their traditionally state-centered conceptions of public international law, for example by judicial ‘balancing’ among competing principles, rights and other rules of law.” Petersmann, *Judging Judges*, *supra* note 18, at 838.

48. Petersmann, *Multilevel Trade Governance*, *supra* note 16, at 16.

49. *Id.* at 15.

50. Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System*, *supra* note 17, at 23. See also Petersmann, *Dispute Settlement*, *supra* note 17, at 211–12; Petersmann, *European and International Constitutional Law*, *supra* note 17, at 102. But see Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651 (2002) (critiquing the indeterminacy of these freedoms).

51. Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO*, 7 J. INT'L ECON. L. 585, 587 (2004).

52. See Petersmann, *National Constitutions*, *supra* note 20, at 47–48. See also Ernst-Ulrich Petersmann, *Addressing Institutional Challenges to the WTO in the New Millennium: A Longer-Term Perspective*, 8 J. INT'L ECON. L. 647, 663 (2005) [hereinafter Petersmann, *Addressing Institutional Challenges*]; Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 439; Petersmann, *The ‘Human Rights Approach’*, *supra* note 35, at 616; Petersmann, *Human Rights and International Economic Law*, *supra* note 17, at 14; Petersmann, *Judging Judges*, *supra* note 18, at 845; Petersmann, *supra* note 30, at 649. See

legitimacy in part from the “universally recognized insight that liberal trade and non-discriminatory competition tend to maximize consumer welfare.”<sup>53</sup> Note, however, that these rules can perform their constitutional functions only when construed as rights of citizens, not States.<sup>54</sup> Hence, according to the rights-based constitutional theory, the maximization of the liberty and economic freedom of the individual trader or consumer should become the universalizable constitutional rule animating the WTO.

## 2. *Protecting constitutional rights and the role of the judiciary*

The previous sub-parts examined two fundamental components of the rights-based constitutional conception of the WTO. First, in order to protect the equal rights of citizens in the world trading system, citizens must become direct subjects of these rights. Second, the constitutional rules that the WTO should apply to discipline States consist of broad economic freedoms vested in individual citizens. The final aspect of the rights-based constitutionalist theory is the institutional methodology by which the WTO should deploy these constitutional rules so as to restrict the ability of governments to interfere with individuals’ enjoyment of their rights. Consistent with the theory’s Kantian orientation, the methodology by which the constitutional freedoms are vindicated focuses on the role of judges.<sup>55</sup>

According to the rights-based constitutional theory, a strong judiciary is implied in any constitutional conception, since judges are presumed to be above politics and therefore capable of ensuring adherence to constitutional values.<sup>56</sup> Accordingly, domestic as well as international tribunals are exhorted to defend constitutional freedoms.<sup>57</sup> International

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generally Peters, *supra* note 16, at 585, 599.

53. See Petersmann, *Dispute Settlement*, *supra* note 17, at 212.

54. Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System*, *supra* note 17, at 8.

55. See Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQ. L. 9, 31 (2007); Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, *supra* note 33, at 773–75. See also *supra* note 29 and accompanying text.

56. See Klabbers, *supra* note 20, at 33.

57. Petersmann has noted that judges in international tribunals must respect

tribunals are called to act as “independent guardians of respect for equal citizen rights by settling [international economic law] disputes in conformity with the human rights obligations of governments and the constitutional principles of citizen-driven self-governance.”<sup>58</sup> In somewhat more concrete terms, this mandate requires judges to interpret a State’s obligations “in conformity with their citizen-oriented treaty objectives (i.e., to promote mutually beneficial economic cooperation among citizens) . . . .”<sup>59</sup>

The role of the judge is seen as both necessary and justified. With regard to necessity, judges must assume the mantle of implementing constitutional rules because States cannot be relied upon to do so. The rights-based theory notes that freedom to trade at the intra-State level “has usually been achieved *not* by reliance on the benevolence of the rulers, but rather by the struggles of courageous citizens and judges defending individual freedom against discriminatory governmental and private restrictions of trade.”<sup>60</sup> Applying this insight to the world trade regime, “there is hardly any reason for judicial deference *vis-à-vis discriminatory* national restrictions in clear violation of the WTO guarantees of freedom and non-discrimination.”<sup>61</sup>

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the institutional limits of their mandate. Petersmann, *supra* note 16, at 39. Interestingly, in this same passage he offers the *Telmex Report* as an example of how WTO rules can directly impact the discretion of national legislatures even though, strictly speaking, WTO rules do not produce direct effect within a given national legal system.

58. Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, *supra* note 33, at 798. Note that, whereas typically norm entrepreneurs in the human rights area emerge from the coordinated civil societies of several countries, the right to trade advocacy proceeds from a multinational to a national stage. See generally Steve Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 111, 129–30 (Gráinne de Búrca & Joanne Scott eds., 2001).

59. Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and ‘Public Reason’ in Investor-State Arbitration*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 877, 890 (Christina Binder et al. eds., 2009).

60. Petersmann, *Human Rights and International Economic Law*, *supra* note 17, at 31; see also Petersmann, *Human Rights, Markets and Economic Welfare*, *supra* note 20, at 52; Petersmann, *Human Rights in European and Global Integration Law*, *supra* note 33, at 391; Petersmann, *supra* note 30, at 636; Petersmann, *European and International Constitutional Law*, *supra* note 17, at 105.

61. Petersmann, *Human Rights and International Economic Law*, *supra* note

The justification for positioning judges at the van of the rights-based revolution is set forth in legal as well as institutional terms. The fact that individuals increasingly bear rights under international law is cast as a factor militating in favor of a “reformative interpretation” of international economic law to protect individual rights where previously this was not the case.<sup>62</sup> At the institutional level, the argument proceeds from the assertion that all international regimes ultimately derive their legitimacy from their ability to protect basic human rights. Because economic freedoms perform “human rights functions,”<sup>63</sup> the interpretation of treaty obligations so as to expand economic freedoms increases respect for human rights and the legitimacy of the institution as well.<sup>64</sup>

To the extent that the role of States in this process of judicial constitutionalization is taken into account, their consent to constitutionalization is considered as implicitly given by the nature of their commitments at the WTO. A consequence of viewing the adoption of the *WTO Agreement* as a constitutional moment<sup>65</sup> is that “self-imposed liberal international economic obligations can . . . serve ‘constitutional functions’ for a more liberal interpretation, application and agreed extension to foreign trade of the corresponding constitutional principles of democratic societies such as . . . non-discriminatory market access . . . .”<sup>66</sup> Pursuant to their constitutional mission, judges may even be justified in discarding the principle of *pacta sunt servanda*,<sup>67</sup> at least where its application to substantive obligations fails to protect human

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17, at 32.

62. See Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, *supra* note 33, at 772–73; see also Tomuschat, *supra* note 30, at 161–62 (describing the general transition from a State-centered to an individual-centered system); *supra* note 26 and accompanying text.

63. See Petersmann, *Human Rights and the Law of the WTO*, *supra* note 20, at 268–69; see also John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedoms*, 48 CATH. U. L. REV. 1029, 1032–34 (1999); Petersmann, *supra* note 30, at 643–44; Petersmann, *European and International Constitutional Law*, *supra* note 17, at 92; Petersmann, *The ‘Human Rights Approach’*, *supra* note 35, at 616; Petersmann, *Rejoinder to Alston*, *supra* note 29, at 847.

64. See Petersmann, *Judging Judges*, *supra* note 18, 879–82.

65. See *supra* note 21 and accompanying text.

66. PETERSMANN, CONSTITUTIONAL FUNCTIONS, *supra* note 19, at XLI.

67. See generally VCLT, *supra* note 47, at art. 26 (defining *pacta sunt servanda* as “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”).

rights.<sup>68</sup> The overall effect of the rights-based constitutional theory is to provide judges with a platform for transforming the Dispute Settlement System into a sort of Trojan Horse of economic liberalization whereby judges use their constitutional authority to aggressively broaden Members' initial liberalization commitments through interpretation.<sup>69</sup>

## II. LAW AND FACTS IN THE *TELMEX REPORT*

The previous section summarized the principal tenets of rights-based constitutional theory as relates to the WTO. Before evaluating the *Telmex Report qua* rights-based constitutional document, however, it is necessary to understand the law and facts in play in that particular case. With regard to the law, in order to determine the commitments undertaken by a Member in the telecommunications sector a practitioner must look to the four components of the *WTO Telecoms Agreement*: the GATS itself, the *Annex* on Telecommunications, the Member's Reference Paper,<sup>70</sup> and the Member's schedule of specific commitments.<sup>71</sup> With the exception of the GATS, these documents concern themselves principally with technical and industry standards. Despite their relatively narrow focus, however, the meaning of key technical provisions of the *WTO Telecoms Agreement* remained contested even after the *Agreement* entered into force.<sup>72</sup> For purposes of this article, issues relating to the scope of the commitments that Members had made, as well as the terms "accounting rate" and "interconnection," will be of particular importance. In order to

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68. Petersmann, *Dispute Settlement*, *supra* note 17, at 244.

69. See Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 97–98 (2002); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 738–739 (1999).

70. See *supra* note 8.

71. See MATSUSHITA ET AL., *supra* note 3, at 678; David Luff, *Telecommunications and Audio-visual Services: Considerations for a Convergence Policy at the World Trade Organization Level*, 38 J. WORLD TRADE 1059, 1061 (2006); Jingxia Shi, *Telecommunications Services in China: Implications of WTO Membership*, 5 J. WORLD INVESTMENT & TRADE 579, 582 (2004); see also GATS art. XX; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting*, para. 160, WT/DS285/AB/R (April 7, 2005).

72. See Peter F. Cowhey, *Accounting Rates, Cross-Border Services and the Next WTO Round on Basic Telecommunications Services*, in *THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES* 51, 51 (Damien Geradin & David Luff eds., 2004).

understand the role of constitutional values in shaping the *Telmex* Panel's report it is necessary to understand the contemporaneous state of debate regarding the issues. The following sub-parts, therefore, present brief overviews of international trade law relating to accounting rates, interconnection, and modes of supply prior to the *Telmex Report*, as well as the underlying factual scenario of the dispute.

#### A. INTERCONNECTION AND MODES OF SUPPLY

Interconnection is one of the most important concepts within the Reference Paper,<sup>73</sup> if not within modern telecommunications policy generally.<sup>74</sup> The Reference Paper defines interconnection as "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."<sup>75</sup> The Reference Paper requires that interconnection be provided at "cost-oriented rates" and "under non-discriminatory terms," among other conditions.<sup>76</sup>

Prior to the *Telmex* Panel's finding that the term "interconnection" embraced international as well as domestic interconnection, evidence suggests that the term was primarily understood within the telecommunications industry to apply only to the domestic variant.<sup>77</sup> In other words, the Reference Paper's disciplines regarding interconnection applied to telecommunications suppliers of any nationality competing in the same domestic market, but Reference Paper imposed no obligations with regard to the terms of interconnection offered to

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73. Marco C.E.J. Bronckers & Pierre LaRouche, *Telecommunications Services and the World Trade Organization*, 31 J. WORLD TRADE, June 1997 at 5, 28; see also Shi, *supra* note 71, at 598; MARK NAFTEL & LAWRENCE J. SPIWAK, THE TELECOMS TRADE WAR: THE UNITED STATES, THE EUROPEAN UNION AND THE WORLD TRADE ORGANISATION 110 (2000); Chantal Blouin, *The WTO Agreement on Basic Telecommunications: A Reevaluation*, 24 TELECOMMUNICATIONS POLICY 135, 137 (2000).

74. See William H. Melody, *Interconnection: Cornerstone of Competition*, in TELECOM REFORM: PRINCIPLES POLICIES AND REGULATORY PRACTICES 53, 53 (William H. Melody ed., 1997).

75. Reference Paper, *supra* note 8, at para. 2.1.

76. *Id.* at para. 2.2(a).

77. Chung, *supra* note 13, at n.30.

incoming international signals.<sup>78</sup> The close resemblance between the definition of interconnection contained in the Reference Paper and the definition commonly used to refer to domestic interconnection in both the United States and the European Union supports this view.<sup>79</sup> This restrictive view of interconnection, moreover, is consistent with the pre-*Telmex Report* literature which indicated that the Reference Paper's disciplines regarding interconnection were designed to aid foreign entrants attempting to establish a physical presence in domestic telecommunications markets.<sup>80</sup> At least one country, however—Australia—took a broader view of the term, stating that points of interconnection for purposes of the Reference Paper could occur at “the international exchange, the trunk exchange, the local exchange, a radiocommunications base station, or any other point that may or may not be within national borders.”<sup>81</sup>

Assuming that the term interconnection is capable of embracing the domestic as well as international variants, the conditions of international connection would be subject to the Reference Paper disciplines only if the Member in question has made a commitment to apply the Reference Paper to telecommunications services being provided via a particular mode of supply. The GATS provides for four so called “modes of supply” which are typically referred to by number. Mode I supply encompasses “cross-border supply” of services where the service supplier and consumer remain in their respective distinct Member countries and the service crosses the border.<sup>82</sup>

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78. *Id.* at 789–90.

79. Bronckers & LaRouche, *supra* note 73, at 28; cf. Jeffrey H. Rohlfs & J. Gregory Sidak, *Exporting Telecommunications Regulation: The United States-Japan Negotiations on Interconnection Pricing*, 43 HARV. J. INT'L L. 317, 327–28 (2002) (noting the strong similarities between the Reference Paper and American regulatory policies embodied in the Telecommunications Act of 1996).

80. See, e.g., Blouin, *supra* note 73, at 137–38; Markus Fredebeul-Krein & Andreas Freytag, *The Case for a More Binding WTO Agreement on Regulatory Principles in Telecommunications Markets*, 23 TELECOMMUNICATIONS POLICY 625, 629 (1999).

81. Special Session of the Council for Trade in Services, *Communication from Australia: Interconnection*, para. 12, S/C/W/110/Add.9 (June 24, 1999). See generally *id.* at para. 13 (“A carrier which either owns or controls telecommunications facilities should be required to permit, on request, the interconnection of those facilities with an international carrier seeking access to those facilities, on the same terms as permitted to a national carrier.”).

82. GATS Art. 1.2(a).

Mode II supply encompasses “consumption abroad” where the service consumer travels to the country of the service supplier to obtain a service.<sup>83</sup> Mode III supply encompasses “commercial presence” where a service supplier from one Member country establishes a physical territorial presence in another Member in which the service consumer is located.<sup>84</sup> Mode IV supply encompasses “presence of natural persons” where the service supplier is a natural person who travels to the country in which the service consumer is located to provide a service.<sup>85</sup>

Members may commit to liberalization of service sectors with regard to specific modes of supply. For example, a Member could make a full commitment to the liberalization of gambling services under mode I, but make no commitment under mode III. This would have the effect of opening the Member’s market to gambling services providers located on the territory of other Members while preserving the discretion to prevent gambling services providers from other Members from establishing operations within its territory. Identification of which services are at issue and under which mode of supply the services are being provided will therefore be of critical importance in determining whether a particular measure falls within the scope of a Member’s WTO obligations in many GATS disputes.

International voice telephony services where the originating carrier does not have a physical presence in the country of termination qualify as cross-border or mode I supply. This is because the service, not the consumer or the service provider, crosses the border. Prior to the *Telmex Report*, it had been the long-established practice within the telecommunications industry and telecommunications trade law that the terminating carrier, that is the telecommunications provider in the country *into which* the call has been placed, was considered to have exported a service (the service of termination) that the originating carrier was considered to have imported into the country *from which* the call was placed. As some commentators have observed:

[A]n international call from the US to Mexico can be seen as the bundle of two strict complements, namely a routing from the US subscriber to the border and a termination within Mexico. The US

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83. GATS Art. 1.2(b).

84. GATS Art. 1.2(c).

85. GATS Art. 1.2(d).

operator is selling the bundle to a US subscriber and is purchasing one element of the bundle (one input) from a Mexican operator. From this perspective, Mexican operators are thus selling one service (termination) to a foreign firm. In other words, they are producing a service using domestic inputs and selling it to a foreign undertaking. This is literally a mode I type of supply but in this perspective the supplier is the Mexican operator which terminates the call . . .<sup>86</sup>

In 2000, Australia concurred with this view, stating that “the termination of a telephone call or similar service that originates in another Member is an exported service.”<sup>87</sup> Conversely, therefore, “it is the access to the network in a foreign country which is imported” into the State in which the call originates.<sup>88</sup> As will be explained below in Part IV, this traditional conception of international trade in telecommunication services conflicted with a rights-based, individual-focused conception of the WTO.

### 1. Accounting rates

The accounting rate system is a “century-old” method of allocating revenue between telecommunications companies engaged in the international trade of telecommunications services.<sup>89</sup> Traditionally, international telecommunications service was provided between two national monopoly telecoms

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86. Neven & Mavroidis, *supra* note 13, at 199–200; *see also* Shoyer, *supra* note 10, at 231; Bronckers & LaRouche, *supra* note 73, at 10.

87. Special Session of the Council for Trade in Services, *Communication from Australia: Negotiating Proposal for Telecommunication Services*, para. 8, S/CSS/W/17 (Dec. 5, 2000); *see also* Negotiating Group on Basic Telecommunications, *Communication from Australia: Response to Questionnaire on Basic Telecommunications*, pt. 2(A)(iii), S/NGBT/W/3/Add.14 (Oct. 21, 1994).

88. Anders Henten, *Trade in Telecom-Based Services*, in TELECOM REFORM: PRINCIPLES POLICIES AND REGULATORY PRACTICES 407, 412 (William H. Melody ed., 1997); *see also* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 128 n.32 (2002) (“[S]ince the sending carrier pays the receiving carrier, in trade terms, contrary to one’s instincts, the country or carrier terminating a call is functioning as an exporter of a service, and the country or carrier sending the call is functioning as an importer.”); Kenneth B. Stanley, *International Settlements in a Changing Global Telecom Market*, in TELECOM REFORM: PRINCIPLES POLICIES AND REGULATORY PRACTICES 371, 374 (William H. Melody ed., 1997); *but see* Boutheina Guermazi, *Reforming international accounting rates: a developing country perspective*, in THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES 83, 99 (Damien Geradin & David Luff eds., 2004) (“[U]nlike the traditional pattern of trade, the country which exports the call must pay the country that imports the call for its part in terminating the service.”).

89. Guermazi, *supra* note 88, at 83; *see also* Stanley, *supra* note 88, at 372.

carriers. The carrier in the country in which the call originated would transmit the call over its facilities to the carrier in the country where the call was to be terminated. The originating carrier would then bill the customer who had placed the call and pay the foreign carrier that had terminated the call for its services. The rate at which the foreign or terminating carrier was compensated was, and is, known as an accounting rate. Accounting rates were not necessarily set according to market forces, but rather were the product of opaque bilateral negotiations between national monopolies.<sup>90</sup>

Frustrated by the inability to push through reforms of the accounting rate system within the International Telecommunications Union, the United States led the charge to place reform of the accounting rate system on the agenda during negotiations of the *WTO Telecoms Agreement*.<sup>91</sup> An analysis of the negotiating history, however, reveals the limitations on the intended scope of the nascent WTO telecommunications regulatory regime with regard to accounting rates. A February 1997 *Report of the Group on Basic Telecommunications* announced an Understanding that the application of accounting rates “would not give rise to action by Members under dispute settlement under the WTO.”<sup>92</sup> At the time, this Understanding was interpreted by some as an agreement to withhold all disputes regarding accounting rates.<sup>93</sup> The Understanding and the advent of the *WTO Telecoms Agreement*, however, provided as much support to those who saw in the *WTO Telecoms Agreement* the end of the accounting rate system<sup>94</sup> as to those

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90. Stanley, *supra* note 88, at 375.

91. See Bronckers & LaRouche, *supra* note 73, at 6–7; Richard Joseph & Peter Drahos, *Contested Arenas in International Telecommunications: Towards an Integrated Political Perspective*, in TELECOMMUNICATIONS AND SOCIO-ECONOMIC DEVELOPMENT 99, 112–13 (Stuart MacDonald & Gary Madden eds., 1998).

92. Negotiating Group on Basic Telecommunications, *Report of the Group on Basic Telecommunications*, para. VII S/GBT/4 (Feb. 15, 1997); see generally Special Session of the Council for Trade in Services, *Communication from Mexico: Telecommunication Services*, para. 8(ii), S/CSS/W/101, (July 10, 2001) (“Mexico considers the ‘Understanding on Accounting Rates’ to be in force . . .”).

93. Guermazi, *supra* note 88, at 85; see also Daniel Roseman, *Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects Under the GATS*, in DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION 83, 104 n.8 (Aaditya Mattoo & Pierre Sauvé eds., 2003).

94. See, e.g., NAFTEL & SPIWAK, *supra* note 73, at 114–15 (arguing that, among other things, one of the general policy objectives of the WTO was to end the international settlement-of-accounts regime); Henten, *supra* note 88, at 418–19

who thought the accounting rate regime would be virtually unaffected.<sup>95</sup> The Understanding could be interpreted as applying only to the most-favoured nation (“MFN”) requirement of the GATS such that the Understanding would preclude claims based upon accounting rate inconsistency with the MFN discipline, but permit claims based upon accounting rate inconsistency with any other applicable disciplines. On this view, the Understanding reflected the fact that the accounting rates system under the International Telecommunications Regulations typically resulted in different Members being charged different rates, which is to say that the accounting rates system in the vast majority of cases constituted an *ipso facto* violation of MFN. The Understanding could thus be read as a simple clarification, in light of the fact that the normal application of these regulations would give rise to a claim for MFN violation,<sup>96</sup> that Members were not to submit disputes regarding accounting rates *qua* MFN violation to dispute settlement. The WTO Secretariat, however, appeared to tip the scales in favour of an interpretation precluding any adjudication of disputes over accounting rates when it observed without further qualification that “[a]n Understanding between Members exists that no dispute on accounting rates should be taken to the Dispute Settlement Body.”<sup>97</sup> To the extent that this view represented a common intention of the parties to leave accounting rates unaffected by scheduling telecommunications this approach should have received deference in the treaty interpretation process.<sup>98</sup> Nevertheless, prior to the *Telmex Report* the issue remained an open question.

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(arguing that a trade regime in the telecom services area will bring down the international accounting rate system).

95. See Chung, *supra* note 13, at 785 (discussing the differences in reaction to the WTO telecommunications agreements).

96. See Guermazi, *supra* note 88, at 100 (discussing how the international accounting rate regime, as operating today, is in conflict with the MFN principle under the GATS).

97. Special Session of the Council on the Negotiations, WTO (Dec. 5–6, 2000), [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_wk\\_novdec2000\\_e.htm#negotiations](http://www.wto.org/english/tratop_e/serv_e/serv_wk_novdec2000_e.htm#negotiations).

98. Appellate Body Report, *supra* note 70, at paras. 159–60; see also, Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, para. 109, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998) (noting that each schedule represents the tariff commitments made as part of a common agreement among *all* members); Isabelle Van Damme, *The Interpretation of Schedules of Commitments*, 41 J. WORLD TRADE 21 (2007)

## 2. *The facts: Mexican telecommunications regulations and WTO commitments*

With the concepts of accounting rates and the relation between interconnection and modes of supply in mind, this section examines the particular facts and law at issue in the *Telmex Report*. The corporation at the heart of the eponymous report, Telefonos de México (Telmex), is a major global player in telecommunications. With the financial backing of the likes of France Telecom and Southwestern Bell Corporation, in the year preceding the *Telmex Report* Telmex ranked 21st in total revenue out of all OECD service providers with 10.829 million USD.<sup>99</sup> Although monopolistic practices are forbidden under the Mexican Constitution,<sup>100</sup> prior to the adoption of the *Telmex Report*, Telmex had a storied history of appropriating rents as evidenced by findings that Telmex's distortionary power in the Mexican market had led to sub-standard service and a price structure which reduced affordability for the average Mexican.<sup>101</sup> Nevertheless, Telmex continuously opposed

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(discussing the Appellate Body's use of common intention in interpreting member's schedules).

99. Organization for Economic Co-operation and Development, *OECD Communications Outlook 2005*, 26 tbl.1.1, [http://www.thepublicvoice.org/events/tunis05/oecd\\_outlook.pdf#search=%22OECD%20Communications%20Outlook%22](http://www.thepublicvoice.org/events/tunis05/oecd_outlook.pdf#search=%22OECD%20Communications%20Outlook%22). Telmex is the centerpiece of billionaire Carlos Slim Helú's empire. See Marc Lacey, *Carlos Slim Helú: The Reticent Media Baron*, N.Y. TIMES, Feb. 15, 2009, at B1 (New York Edition). Mexico received the second largest amount of foreign direct investment among developing countries from 1990 to 2002 thanks largely to Telmex. Kálmán Kalotay, *The Rise of Foreign Direct Investment in the Telecommunications Services of Developing Countries*, 5 J. WORLD INVESTMENT & TRADE 811, 815 tbl.3 (2004).

100. Constitución Política de los Estados Unidos Mexicanos art. 28 [C.P.], as amended, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.). For a review of Mexican telecommunications law see Luz Estella Ortiz Nagle, *Antitrust in the International Telecommunications Sector: The United States Challenges Mexico's TELMEX Monopoly*, 33 U. MIAMI INTER-AM. L. REV. 183, 193-213 (2002).

101. Traci Carl, *Callers, U.S. Phone Carriers in Common Cause Against High Mexican Rates*, ASS'D PRESS, Aug. 18, 2000, available at LEXIS, News File. According to one study, in 2002 the monthly cost of a telephone subscription in Mexico was .34% of per capita GDP, placing Mexico 51st out of 102 markets surveyed. See also Kalotay, *supra* note 98, at 825 tbl.6 (citing THE GLOBAL INFORMATION TECHNOLOGY REPORT 2003-2004: TOWARDS AN EQUITABLE INFORMATION SOCIETY 263 (Soumitra Dutta et. al. eds., 2004)). Despite the high cost of its services, Telmex continues to generate a large volume of consumer complaints. According to the latest statistics available from the Mexican consumer protection agency, the Procuraduría Federal del Consumidor, Telmex ranked first in the number of consumer complaints registered in 2006 and 2007, but ranked

government efforts to increase competition in the Mexican telecommunications market.<sup>102</sup> Telmex's fight to maintain its market power continued even in the wake of the findings against Mexico in the *Telmex Report*.<sup>103</sup> As a result, the Mexican telecommunications regulations continued to be among the most prohibitive with regard to foreign direct investment among OECD countries following the *Telmex Report*.<sup>104</sup>

At the time of the United States' request for a panel, Telmex's monopoly power was already under attack both domestically and internationally.<sup>105</sup> In the 1990s the Mexican Government established the Comisión Federal de Competencia (CFC) and the Comisión Federal de Telecomunicaciones (Cofetel) with mandates to promote competition.<sup>106</sup> Increased international and domestic regulation, however, threatened but did not fundamentally undermine Telmex's market power.<sup>107</sup>

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only third in this category in 2008. Procuraduría Federal del Consumidor 2006, at 15, [http://www.profeco.gob.mx/n\\_institucion/inf\\_des/inf\\_anual06.pdf](http://www.profeco.gob.mx/n_institucion/inf_des/inf_anual06.pdf); Procuraduría Federal del Consumidor 2007, at para. 5.1, [http://www.profeco.gob.mx/n\\_institucion/inf\\_des/inf\\_anual07.pdf](http://www.profeco.gob.mx/n_institucion/inf_des/inf_anual07.pdf); Procuraduría Federal del Consumidor 2008, at 15, [http://www.profeco.gob.mx/n\\_institucion/inf\\_des/inf\\_anual08.pdf](http://www.profeco.gob.mx/n_institucion/inf_des/inf_anual08.pdf).

102. See Teléfonos de México S.A. de C.V. Boletín Informativo (2006), [http://www.telmex.com/mx/corporativo/salaPrensa\\_ComPrensa2006\\_060403ev.html](http://www.telmex.com/mx/corporativo/salaPrensa_ComPrensa2006_060403ev.html) (discussing a joint venture between Telmex and Verizon).

103. See, e.g., ESTUDIO COMPARATIVO INTERNACIONAL DE TELEFONÍA FIJA UTILIZANDO LA METODOLOGÍA DE CANASTAS 5 (2006), [http://www.telmex.com/mx/corporativo/pdf/estudio\\_nera\\_tarifas.pdf](http://www.telmex.com/mx/corporativo/pdf/estudio_nera_tarifas.pdf).

104. David Haugh, Roselyne Jamin & Bruno Rocha, *Maximising Mexico's Gains From Integration in the World Economy*, 31 *tbl.4* (OECD Econ. Dep't Working Paper No. 657, Doc. No. ECO/WKP(2008)65, 2008).

105. See, e.g., *Telmex Still Unable to Agree With Competitors on Interconnection Fees for Long-Distance Services*, SOURCEMEX, Nov. 11, 1998, <http://www.thefreelibrary.com/TELMEX+STILL+UNABLE+TO+AGREE+WITH+COMPETITORS+ON+INTERCONNECTION+FEES...-a053211223> (describing Telmex's struggles in making agreements with other major telecommunications companies, as well as domestic pressure from alliance groups).

106. Decreto por el que se crea la Comisión Federal de Telecomunicaciones [Decree creating the Federal Telecommunications Commission], *Díario Oficial de la Federación* [DO], 9 de agosto de 1996 (Mex.); see also Shanker A. Singham, *Market Access and Market Contestability: Is the Difference Purely Semantics? A Business Perspective*, 25 *BROOK. J. INT'L L.* 337, 359–61 (1999) (discussing the inaction of the CFC in the face of its own and OECD findings of anti-competitive behavior on the part of Telmex).

107. This scope of this article is limited to the impact of WTO law. For a discussion of the effects of NAFTA on Mexican telecommunications see Sergio E. Aleman, *NAFTA and its Impact on the Privatization of Mexico's Telecommunications Industry*, 7 *L. & BUS. REV. AM.* 5 (2001). For a discussion of domestic efforts to curb Telmex's market power see Oliver Solano, Rafael del Villar

Although Telmex did not lack domestic critics, Telmex's accounting rate regime was not the subject of reform talks. This is because, like most other emerging economies, Mexico was and continues to be a net revenue recipient under the accounting rate system.<sup>108</sup> As such, abandonment of the accounting rate regime would result in decreased revenues coming into Mexico.

The Federal Telecommunications Law (FTL), which governed the routing of all incoming international telecommunications traffic in Mexico, formed the cornerstone of the regulatory regime challenged by the United States in the *Telmex Report*.<sup>109</sup> The FTL required each operator of a public telecommunications network to possess a concession from the Mexican Secretariat of Communications and Transportation.<sup>110</sup> The FTL further stipulated that such concessions would be issued only to legal or physical persons of Mexican nationality.<sup>111</sup> In 1996, the FTL was complemented by the promulgation of the International Long Distance Rules (ILD).<sup>112</sup> The ILD established an accounting rate regime whereby the concessionaire with the largest percentage of the long distance business with a given country was entitled to negotiate the termination fee that would be charged for all calls originating

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& Rodrigo Garcia-Verdu, *Challenges to the Effective Implementation of Competition Policy in Regulated Sectors: The Case of Telecommunications in Mexico*, 26 N.W. J. INT'L L. & BUS. 527 (2006).

108. See International Telecommunication Union, *Direction of Traffic: Trading Telecom Minutes Executive Summary* (1999), [http://www.itu.int/ITU-D/ict/publications/dot/1999/page11\\_dot.html](http://www.itu.int/ITU-D/ict/publications/dot/1999/page11_dot.html) (discussing how the accounting rate system was favorable to developing countries). Calls originating in the United States accounted for nearly two thirds of all U.S.—Mexico telephone traffic. Elliot Blair Smith, *Mexican Phone Company Sets Sights on 'Telepirates'*, USA TODAY, June 19, 2001, at 6B. See also Guermazi, *supra* note 88, at 96 (noting that developing countries receive large amounts of payments each year); Joseph & Drahos, *supra* note 91, at 110–11 (discussing how the accounting rate system was favorable to developing countries); Stanley, *supra* note 88, at 385 tbl.3 (showing that Mexico received the largest amount of net settlement payments from the United States in 1994).

109. Ley Federal de Telecomunicaciones [L.F.T] [Federal Telecommunications Law], *Diario Oficial de la Federación* [DO], 7 de junio de 1995 (Mex.).

110. *Id.* at art. 11.

111. *Id.* at art. 12.

112. Reglas para prestar el servicio de larga Distancia Internacional que deberán aplicar los concesionarios de redes públicas de telecomunicaciones autorizados para prestar este servicio [International Long Distance Rules], *Diario Oficial de la Federación* [DO], 11 de diciembre de 1996 (Mex.).

in that country regardless of which Mexican carrier actually terminated the call.<sup>113</sup> Thus, under the ILD if it were the case that Telmex terminated 51% of phone calls originating in Spain, for example, then Telmex would negotiate the fee charged by all other telecommunications operators for terminating the remaining 49% of the call volume from Spain. At the time of the United States' request for a panel, Telmex's predominant market share granted it the power to negotiate the accounting rate charged on all calls originating from all foreign countries.<sup>114</sup>

During the course of negotiations at the WTO, Mexico apparently attempted to harmonize its then extant domestic regulations with its liberalization commitments under the *WTO Telecoms Agreement* by placing the appropriate restrictions in its *Schedule of Specific Commitments*.<sup>115</sup> Section 2 of the Reference Paper contains the Mexican commitments to provide interconnection within Mexico to international service providers.<sup>116</sup> The scope of the Mexican commitments under Section 2 is delimited by language in Section 2.1 which states that Section 2 commitments apply "on the basis of the specific commitments undertaken" in Mexico's *Schedule of Specific Commitments*.<sup>117</sup> Therefore, the obligations established in Section 2 are binding on Mexico only to the extent to which market access has been granted under Mexico's *Schedule of Specific Commitments*.<sup>118</sup> Mexico's *Schedule of Specific Commitments* for telecommunications services, in turn, faithfully reflects the FTL's requirement that all mode I supply

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113. *Id.* at regs. 2:XII, 13.

114. *See Telmex Report, supra* note 5, at para. 2.2.

115. Special Session of the Council for Trade in Services, *Mexico—Schedule of Specific Commitments*, GATS/SC/56/Suppl.2, 11 April 1997 [hereinafter *Schedule of Specific Commitments*].

116. Reference Paper, *supra* note 8.

117. *Schedule of Specific Commitments, supra* note 114, at § 2.1.

118. *Telmex Report, supra* note 5, at para. 7.93–95; *see also* David Luff, *Current international trade rules relevant to telecommunications services*, in *THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES* 34, 39 (Damien Geradin & David Luff eds., 2004) (noting that limitations to the obligations made by the WTO members are possible to the extent to which they are described in the Schedule); Piet Eeckhout, *Constitutional Concepts for Free Trade in Services*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 211, 218 (Gráinne de Búrca & Joanne Scott eds., 2001) (noting that the specific commitments of market access apply only to the extent that a member has agreed to a service schedule); BRONCKERS & LAROCHE, *supra* note 73, at 19.

of telecommunications services, that is in cases where only the services cross the border, must be routed through a company in possession of a concession granted by the Mexican Secretariat.<sup>119</sup> Under mode III, the mode of supply requiring commercial presence by the supplier in both the exporting and importing Member countries, Mexico's schedule inscribes the FTL's requirement that a concession from the Mexican Secretariat be obtained in order to establish commercial presence in Mexico.<sup>120</sup> Because only Mexican corporations could possess concessions from the Mexican Secretariat, the effect of Mexico's scheduled limitations on mode I and mode III supply of telecommunications services was to require all foreign telecommunications companies to use the services of a Mexican telecommunications operator for the termination of calls within Mexico.<sup>121</sup> This, at least, is the apparent reading intended by Mexico.

### III. RIGHTS-BASED CONSTITUTIONALISM IN THE *TELMEX REPORT*

Such was the state of play facing the *Telmex* Panel. Questions lingered regarding the extent to which the *WTO Telecoms Agreement* disciplined accounting rates and whether the Reference Paper's requirements relating to "interconnection" applied when the hand-off occurred at a border. Moreover, given the fact that the services seemed to be supplied on a mode I basis from Mexico into the United States,

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119. *Schedule of Specific Commitments*, supra note 114. The authentic Spanish text reads "el tráfico internacional debe ser enrutado a través de las instalaciones de una empresa con una concesión otorgada por la Secretaría de Comunicaciones y Transportes (SCT)." GATS art. I:2 specifies that under mode I, services are supplied "from the territory of one Member into the territory of any other Member."

120. *Schedule of Specific Commitments*, supra note 114. GATS art. I:2 specifies that under *Mode 3* services are supplied "by a service supplier of one Member, through commercial presence in the territory of any other Member."

121. Although Mexico's intent was to preclude market access by foreign owned firms, Mexico's schedule is best interpreted as a pre-commitment that signaled to other Members the intention to reform the terms of market access at a point in the future. See generally Rudolf Adlung, *Public Services and the GATS*, 9 J. INT'L ECON. L. 455, 474 (2006) (noting that the opening of monopolies over time was a key factor in the extended negotiations over telecommunications); see also Leroux, supra note 13, at 258; Donald H. Regan, *A Gambling Paradox: Why an Origin-Neutral "Zero-Quota" is Not a Quota Under GATS Article XVI*, 41 J. WORLD TRADE 1297, 1314 (2007).

Mexico had seemingly shielded its domestic market from any competition by limiting its market access commitments to reflect the fact that its domestic regulatory regime did not allow for foreign ownership of telecommunications companies. Notwithstanding Mexico's scheduled limitations, the *Telmex* Panel found that the Reference Paper's disciplines applied to the facts of the dispute and held Mexico to be in violation of four separate commitments under the *WTO Telecoms Agreement*.<sup>122</sup> This section analyzes the *Telmex* Panel's approach, paying particular attention to the pivotal role of the individual consumer in the *Telmex Report's* treatment of modes of supply. Based upon this factor, as well as the panel's judicial methodology, Part III concludes that the *Telmex Report* is best understood as an instantiation of rights-based constitutionalism.

#### A. MODES OF SUPPLY FROM THE PERSPECTIVE OF THE CUSTOMER

The *Telmex Report's* rights-based orientation is manifest in the primacy assigned to the perspective of the individual consumer when determining the scope of Mexico's commitments under the *WTO Telecoms Agreement*. As discussed above, one of the central goals of the rights-based constitutional project within the world trade regime is to transform citizens from passive bystanders to active subjects and bearers of rights under international trade law.<sup>123</sup> The *Telmex Report* achieves this aim, in function if not in form, by shifting the lens of analysis for determining the scope of WTO disciplines from the telecommunications companies and States that have negotiated the terms of trade in international telecommunications to the individual customer. Although the *WTO Telecoms Agreement* was drafted to address the specific concerns and needs of monopolistic national telecommunications carriers, the *Telmex Report* reimagines the terms on which the concessions were granted based on the assumed understanding of the individual consumer.

The critical passage in this regard comes in paragraphs 7.29 to 7.45 of the *Telmex Report*.<sup>124</sup> In this section, the *Telmex*

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122. See *Telmex Report*, *supra* note 5, at para. 7.216.

123. See *supra* notes 28–43, and accompanying text.

124. *Telmex Report*, *supra* note 5.

Panel holds that the services at issue are being provided on a mode I basis from the United States into Mexico, meaning that the service is being exported from the United States and into Mexico. Recall with regard to mode I supply Mexico had specifically stated that all services must be routed through a company holding a concession from the Mexican Secretariat.<sup>125</sup> Also recall that with regard to mode III supply, Mexico had not committed to opening its telecommunications markets to foreign operators with a physical presence in Mexico.<sup>126</sup> Faced with these two reservations, the only way that the *Telmex* Panel could reach the merits of the dispute was to determine that the services were being provided on a mode I basis from the United States into Mexico, thereby reversing the standard characterization of international telecommunications traffic.<sup>127</sup>

In reaching its determination that the services are being supplied on a mode I basis from the United States into Mexico the *Telmex* panel relies upon the decisive influence of the individual consumer's perspective. The apotheosis of the individual occurs at paragraph 7.42 when the panel states that "[w]hat counts is the service that the supplier offers and has agreed to supply to a customer."<sup>128</sup> Among a range of competing factors, the dispositive consideration appears to be the customer's conception of the service at issue. The arrangements between the international telecommunications operators which had dominated the treatment and classification of international telecommunications service are subservient to the arrangements between the domestic provider and domestic consumer of these services. In the words of the panel,

[I]n the case of a basic telecommunication service, whether domestic or international, or supplied cross-border or through commercial presence, the supplier offers its customer the service of completing the customer's communications. Having done so, the supplier is responsible for making any necessary subsidiary arrangements to ensure that the communications are in fact completed.<sup>129</sup>

Taken at its face value, the panel's consumer-based reorientation of the economic transactions in question is as

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125. See *Schedule of Special Commitments*, *supra* note 119.

126. See *supra* notes 115–121 and accompanying text.

127. See *supra* notes 86–88 and accompanying text.

128. *Telmex Report*, *supra* note 5, at para. 7.42.

129. *Id.* at para. 7.42.

distortionary as it is decisive; if the consumer believes that she is buying an international service, then WTO law should construe a given set of transactions as constituting an international service to the consumer. Accordingly, the *Telmex* Panel interpreted a set of transactions that had traditionally been considered as constituting an export from Mexico into the United States as an export from the United States into Mexico.<sup>130</sup> The traditional legal characterization of the telecommunications traffic between the United States and Mexico, however, would have effectively precluded the panel from reaching the merits of the U.S. complaint and left the individual consumer without legal recourse.<sup>131</sup> This is because the *WTO Telecoms Agreement* does not discipline regulations relating to the terms under which services are exported from a WTO Member.<sup>132</sup> Therefore, if the interests of the individual consumer were to be protected, the services at issue had to be characterized as imports into, not exports from, Mexico.

While the centrality of the consumer's role in the *Telmex Report* marked a new development for GATS jurisprudence, this was not the first time that the role of the consumer had been recognized in WTO panel reports. In *US—Sections 301—310 of the Trade Act of 1974* a panel noted that “it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix.”<sup>133</sup> The panel in that case noted that “one of the primary objects of the GATT/WTO . . . is to produce certain market conditions which would allow . . . individual activity to flourish.”<sup>134</sup> These statements acknowledge the fact that, individuals, legal or real, are the “real part[ies] in interest” in almost any imaginable trade dispute.<sup>135</sup> The scope of the individual's role, however, has remained sharply delimited. The Appellate Body, for example, has clarified that the expectations of private rights holders need not necessarily always be taken into account when

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130. See *supra* notes 86–88 and accompanying text.

131. See *supra* notes 125–126 and accompanying text.

132. See Neven & Mavroidis, *supra* note 13, at 208.

133. Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, para. 7.73, WT/DS152/R (Dec. 22, 1999).

134. *Id.* at para. 7.73.

135. ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 113 (2006).

interpreting the Agreement on Trade-Related Intellectual Property Rights (“TRIPs”).<sup>136</sup>

The role of consumers is also well established with respect to considerations of “likeness” for purposes of determining whether there has been discrimination against a particular product under WTO law.<sup>137</sup> In this context, however, the perspective of the consumer is but a component of the broader inquiry to determine the competitive relationship between two products.<sup>138</sup> It is the establishment of this competitive relationship, considering the evidence as a whole, that determines whether or not WTO non-discrimination disciplines will apply to particular goods.<sup>139</sup> In the *Telmex Report*, the consideration of the individual’s perspective is contained in its discussion of the context within which mode I supply should be determined within the framework of Article 31 of the Vienna Convention on the Law of Treaties (VCLT).<sup>140</sup> In this regard, the dicta could be considered to be consistent with other WTO jurisprudence concerning the role of the individual. Nevertheless, the *Telmex* Panel’s categorical pronouncement, that “[w]hat counts is the service that the supplier offers and has agreed to supply to a customer”<sup>141</sup> marks a departure from the language used in other panel and Appellate Body reports. The *Telmex* Panel’s formulation seems to focus on the consumer’s perspective to the exclusion of other evidence rather than contextualize the consumer’s perspective as one piece of evidence among many.

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136. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 48, WT/DS50/AB/R (Dec. 19, 1997).

137. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, para. 92, WT/DS135/AB/R (March 12, 2001) (noting that the consumer will have a different view of “likeness” than producers); Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, para. 114, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999) (noting that determining whether a competitive relationship exists between products is not exclusively determined by consumer preference); Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, 21, WT/DS31/R (June 30, 1997) (noting that likeness must be determined on a case-by-case basis); Appellate Body Report, *Japan—Alcoholic Beverages II*, 20, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Nov. 1, 1996) (discussing the discretionary nature of making a “likeness” decision).

138. Appellate Body Report, *European Communities supra* note 135, at para. 117, WT/DS135/AB/R (Mar. 12, 2001).

139. *Id.* at para.103.

140. *VCLT, supra* note 47.

141. *Telmex Report, supra* note 5, at para. 7.42

Ultimately, the *Telmex* Panel's parsing and legal characterization of the set of transactions that constitutes an international telephone call confirm the primacy of the individual consumer in establishing the outcome. Unless one is willing to accept that the individual consumer's perspective has a transformative effect on the interpretation and application of WTO law, how can it be the case that a transaction between a U.S. consumer and a U.S. corporation constitutes mode I supply "from the territory of one Member into the territory of [another] Member"?<sup>142</sup> Unless the perspective of the individual is privileged, the *Telmex* Panel's conclusions seem contradictory or "untenable."<sup>143</sup> The implications of the transformation wrought by the *Telmex* Panel's focus on the consumer's perspective are explored in Part IV below.

#### B. APPLYING THE REFERENCE PAPER—VINDICATING CONSTITUTIONAL RULES

The shift of emphasis from the perspective of the telecommunications carrier to the consumer and the consequential determination that the services at issue were being supplied on a mode I basis into Mexico, however, did not *ipso facto* require the *Telmex* Panel to apply the disciplines of the Reference Paper to the facts of the *Telmex Report*. The interpretation of the scope of the Reference Paper disciplines relating to interconnection and accounting rates remained an open question even after establishing that the services at issue were being provided on a mode I basis from the U.S. into Mexico. While less controversial than the panel's individual focused reorientation of the legal conception of the mode of supply services at issue, the panel approached these open questions in a form consonant with the underlying constitutional rule that lies at the heart of the rights-based constitutionalist theory requiring maximum trade liberalization as judged from the perspective of the individual.<sup>144</sup>

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142. GATS, *supra* note 6, at art. 1(2)(a).

143. MATSUSHITA ET AL., *supra* note 3, at 687.

144. See *supra* notes 44–54 and accompanying text.

With regard to interconnection, the dominant view prior to the *Telmex Report* was that the term did not encompass the hand-off of telecommunications signals at an international border.<sup>145</sup> Thus, even following the *Telmex* Panel's finding that the services at issue were being supplied on a mode I basis from the United States into Mexico, the panel could still have held that the Reference Paper's disciplines relating to interconnection did not apply. The panel, however, focused on the broad meaning of the term "linking" as used in the Reference Paper's definition of interconnection in holding that Mexico's interconnection commitments did apply to the services at issue in the *Telmex Report*.<sup>146</sup>

The *Telmex* Panel also had little trouble dismissing Mexico's objections that even if the Reference Paper's disciplines regarding interconnection applied to the hand-off of telecommunications signals at an international border, the specific discipline requiring interconnection fees to be "cost-oriented" could not apply. Mexico had argued that this was the case because these fees were in fact "accounting rates" and therefore could not be the subject of dispute settlement proceedings as per the Understanding contained in the February 1997 *Report of the Group on Basic Telecommunications*.<sup>147</sup> The *Telmex* Panel's legal reasoning in this regard is sound. The panel states the fact that the Understanding cannot directly alter the scope of Mexico's commitments under WTO law.<sup>148</sup> Instead, the Understanding can only offer guidance to the interpretation of Mexico's commitments under Section 2 of the Reference Paper.<sup>149</sup>

Notwithstanding these facts, it has been argued that the *Telmex* Panel's conclusions with regard to the Reference Paper's requirement to provide interconnection at cost-oriented rates are correct only if "§ 2.2(b) of the [Reference Paper] is interpreted outside its context," in the sense of VCLT Article 31.<sup>150</sup> However, while it may be correct to assail the panel's interpretation of the *WTO Telecoms Agreement* as overly

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145. See *supra* notes 77–80 and accompanying text.

146. *Telmex Report*, *supra* note 5, at paras. 7.102–06, 7.143.

147. See *supra* notes 92–98 and accompanying text.

148. *Telmex Report*, *supra* note 5, at para. 7.126.

149. *Id.* at para. 7.126.

150. Neven & Mavroidis, *supra* note 13, at 208.

literalist,<sup>151</sup> the panel's stance may also be understood as implicitly constitutionalist. It may even be the case that on a rights-based constitutional view the panel's approach is in fact consistent with the VCLT. For example, VCLT Article 31 states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>152</sup> Recall that for the rights-based constitutionalist the purpose of the WTO is the defense of the constitutional guarantee of free trade.<sup>153</sup> Therefore, from a rights-based constitutional perspective, the *Telmex* Panel's interpretation of the Reference Paper is not so much inconsistent with the context of the Reference Paper as it is consistent with the overriding purpose of the Reference Paper and the WTO itself.<sup>154</sup>

### C. THE ROLE OF JUDGES

The *Telmex Report* marked a radical departure from the conventional legal characterization of international telecommunications services within the industry and WTO communities. By privileging the perspective of the consumer, the panel paved the way for an expansive application of the Reference Paper's disciplines regarding interconnection. The aggressive approach of the panel, particularly with regard to establishing mode I supply between suppliers and consumers located in the territory of a single WTO Member, is consistent with the role envisaged for judges under a rights-based constitutional theory.

The importance of the *Telmex* Panel's broad assumption of judicial prerogative is most evident when compared with the

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151. Chung, *supra* note 13, at 790. Chung also points out that strict reliance on the literal meaning of words "can be a useful tool to extend the scope of WTO competence." *Id.* at 788. It has also been argued that excessive literalism risks results that contradict those intended by the negotiators. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 261 (2004).

152. VCLT, *supra* note 47, at art. 31.1.

153. See *supra* notes 26–69 and accompanying text.

154. The panel itself stops short of explicit endorsement of a constitutional justification, although it does state that a broad interpretation of the term "interconnection" is consonant with the object and purpose of the GATS. *Telmex Report*, *supra* note 5, at para. 7.121.

result that would obtain under the accepted practice within telecommunications law as agreed by States and telecommunications carriers, or on a strict application of the WTO scheduling guidelines as set forth by the GATT Secretariat. Prior to the *Telmex Report*, international telecommunications law and the telecommunications industry had consistently treated termination of international phone calls as a service exported from the terminating country and imported into the originating country.<sup>155</sup> Applying this logic to the services at issue in the *Telmex Report*, there would concededly be mode I supply, but in the reverse direction.<sup>156</sup> Instead of finding, as the *Telmex* Panel did, that there was mode I supply of a service from the United States to Mexico, there would be mode I supply of a service from Mexico to the United States.<sup>157</sup> In crafting a result that diverged from the previously accepted practice of States and telecommunications carriers on the one hand and the guidelines of the GATT Secretariat on the other, the *Telmex* Panel fulfilled the rights-based constitutional conception of a strong judiciary that acts to protect individual interests by constraining governmental powers.<sup>158</sup>

With regard to WTO scheduling guidelines, although the panel accorded “substantial interpretative weight” to an *Explanatory Note* issued by the GATT Secretariat,<sup>159</sup> this Note,<sup>160</sup> upon closer analysis points towards a different conclusion than that adopted by the panel.<sup>161</sup> The *Explanatory Note* states that “the supply of a service through telecommunications or mail . . . are all examples of cross-border [mode I] supply, since the service supplier is not present within the territory of the member where the service is delivered.”<sup>162</sup>

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155. See *supra* notes 86–88 and accompanying text.

156. See *supra* note 86 and accompanying text.

157. See *supra* note 86 and accompanying text.

158. See *supra* Part I(c).

159. *Telmex Report*, *supra* note 5, at para. 7.43.

160. GATT Secretariat, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, para. 19(a), MTN.GNS/W/164 (Sept. 3, 1993) [hereinafter *Explanatory Note*].

161. *Telmex Report*, *supra* note 5, at para. 7.43.

162. *Explanatory Note*, *supra* note 160, at para. 19(a). This text was repeated at paragraph 28 of *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, WTO Doc. S/L/92 (Mar. 28, 2001).

The *Explanatory Note*, however, does not support a finding that the telecommunications services at issue in the *Telmex Report* were being provided on a mode I basis into Mexico as the *Telmex Panel* states.<sup>163</sup>

In the first place, it should be clear that the reference to “the supply of a service through telecommunications” in the *Explanatory Note*<sup>164</sup> cannot be understood as a reference to the “public telecommunications transport services” at issue in the *Telmex Report*.<sup>165</sup> As the *Telmex Panel* correctly observed,<sup>166</sup> the GATS Annex on Telecommunications defines “public telecommunications transport service” as “any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally [such as] telegraph, telephone, telex, and data transmission typically involving the 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.”<sup>167</sup> Thus, for purposes of the *Telmex Report* there is no doubt that the services at issue are the public voice telephony, circuit-switched data transmission and facsimile services themselves.<sup>168</sup> The ordinary meaning of the *Explanatory Note*, in referring to “the supply of a service through telecommunications,” establishes a distinction between the telecommunications service itself and the distinct service that is supplied *via* telecommunications.<sup>169</sup> The *Explanatory Note* says only that the latter is an example of cross-border supply.<sup>170</sup> On a proper reading the passage of the *Explanatory Note* to which the *Telmex Panel* cites says nothing about the

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163. *Telmex Report*, *supra* note 5, at para. 7.43.

164. *Explanatory Note*, *supra* note 160 at para. 19(a).

165. *Telmex Report*, *supra* note 5, at para. 7.22

166. *Id.* at para. 7.22

167. GATS, *supra* note 6, at Annex on Telecommunications art. 3(b). The final gerundial phrase here cannot be construed according to the canon of *reddendo singula singulis*. To read the text thusly would result in an interpretation whereby only data transmission services would occur without changes in form or content of customer information. It cannot have been the drafters’ intent to indicate that this qualifier applied only to data transmission services, whereas information provided via telegraph, telephone and telex services underwent changes in form and content during transmission.

168. *Telmex Report*, *supra* note 5, at para. 7.23

169. *Explanatory Note*, *supra* note 160 at para. 19(a).

170. *Id.*

cross-border supply of “telecommunications services” in their own right, but rather only addresses services that use telecommunications as a delivery platform.

Positive and negative contextual comparison confirms that the *Explanatory Note* does not address the question of telecommunications services as such. The full text of paragraph 19 (a) reads: “International transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (e.g. a computer diskette, or drawings) are all examples of cross-border supply, since the service supplier is not present within the territory of the Member where the service is delivered.”<sup>171</sup> The negative comparison is made with the first category of cross-border supply identified by the *Explanatory Note*, “international transport.”<sup>172</sup> Whereas the other two categories of supply include the word “service”, international transport does not. This implies that international transport is, of itself, a service, whereas the other two categories enumerated concern only services that cross borders either “through telecommunications or mail” or “in exported goods.” This comparison establishes that the *Explanatory Note’s* reference to “the supply of a service through telecommunications” refers to telecommunications not as a service in itself, but rather as a modality through which a given service moves across a border.

The positive comparison to be made here is between two prepositional phrases “through telecommunications” and “in exported goods.” As stated above, both phrases describe a modality through which a given service moves across a border. The text supports the conclusion that the *Explanatory Note* identifies “telecommunications” as an example of mode I supply only if the service itself and the modality through which the service moves across the border are read as constituting a single service. Yet if this approach is applied to “services embodied in exported goods,” this would result in a finding that the “exported goods” are a service that is provided on a cross-border basis. Obviously this cannot be the proper reading

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171. *Id.*

172. *Id.*

because “exported goods” are self-evidently not a “service” falling under the disciplines of the GATS.

In light of the fact that the plain meaning and contextual analysis of the *Explanatory Note* establish that the *Explanatory Note* does not speak to whether or not telecommunications services are an illustrative example of the types of services that are provided on a mode I basis, the *Explanatory Note*'s reasoning takes on a heightened importance. The *Explanatory Note* states that the examples contained therein constitute mode I supply “since the service supplier *is not present within the territory* of the Member where the service is delivered.”<sup>173</sup> Transposing this text into the customer-centric parlance of the *Telmex Panel*,<sup>174</sup> the *Explanatory Note*'s meaning is that mode I supply occurs where the supplier is not present in the territory of the Member in which the customer is present.

Although the *Telmex Panel* emphasizes the same words in the above-quoted text, the panel's legal conclusion does not cohere with notions of delivery and supply as articulated in the *Explanatory Note*, or indeed by the *Telmex Panel* itself. The *Telmex Panel* states that the critical factor in determining the mode of supply is the service that the supplier “has agreed to supply to the customer” and that the “supplier offers its customer the service of completing the customer's communications.”<sup>175</sup> The various inputs that the supplier must secure in order to provide the service are considered “subsidiary arrangements” which do not displace the primacy of the agreement between the supplier and the customer.<sup>176</sup> Therefore, if one were to search for the locus “where the service is delivered,”<sup>177</sup> to use the terms of the *Explanatory Note*, this can only be the place where the customer is found in the United States. To state otherwise would be nonsensical on the panel's own logic which acknowledges that the services in question are being supplied “to the customer” and not to the terminus point in Mexico.<sup>178</sup> Thus, the service is being delivered, or supplied, to the customer wherever it is that the customer is to be found.

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173. *Id.* (emphasis added).

174. *See supra* notes 128–129 and accompanying text.

175. *Telmex Report*, *supra* note 5, at para. 7.42.

176. *Id.*

177. *Explanatory Note*, *supra* note 160, at para. 19(a).

178. *Telmex Report*, *supra* note 5, at para. 7.42.

On the facts of the *Telmex Report*, both the service supplier and the customer are found in the territory of a single WTO Member, viz. the United States. Therefore, it is patently not the case that “the service supplier is not present within the territory of the Member where the service is delivered.”<sup>179</sup> Accordingly, if the consumer’s perspective is truly the relevant level of analysis, a strict application of the *Explanatory Note* to the facts of the *Telmex Report* would require a finding that there was no mode I supply because the service supplier is present in the territory of the Member where the service is delivered.

The text of the *Telmex Report* indicates that the *Telmex* Panel was aware that the identification of mode I cross-border supply of a service in a situation where both consumer and supplier are found on the territory of a single WTO Member was at least questionable. For example, the *Telmex* Panel stated that the “silence of subparagraph (a) [of Article I:2 GATS] with respect to the supplier suggests that the place where the supplier itself operates, or is present, is not directly relevant to the definition of cross-border supply.”<sup>180</sup> Notwithstanding this assertion, the conception of mode I supply put forth in the *Telmex Report* has been undercut by subsequent jurisprudence that conforms to the proper reading of the *Explanatory Note* set forth above. In distinguishing between “remote supply” of a service and “cross-border supply” the panel in *US-Gambling* made clear that cross-border supply occurs “only when the service supplier and the consumer are located in territories of different Members.”<sup>181</sup> This is strong evidence that the panel in *Telmex* was indeed overreaching in this regard.

The *Telmex* Panel’s bold posture is best viewed as a manifestation of the privileged position reserved for judges within rights-based constitutional theory. In the course of

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179. *Explanatory Note*, *supra* note 160, at para. 19 (a), *supra* note 162 (emphasis added). Of course, the Mexican service suppliers are not present in the territory of the Member where the service is delivered, but as we have already seen a finding that the services at issue are being exported from Mexico to the USA on a mode I basis would have no utility in vindicating consumer interests. *See* note 155 and following text. *See supra* note 155 and accompanying text.

180. *Telmex Report*, *supra* note 5, at para. 7.30.

181. Panel Report, *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 6.32, WT/DS285/R, (10 November 2004).

interpreting a document, the Reference Paper, that “makes eminent sense [as] an obligation to impose minimum competition-law requirements to incumbents, in full respect of the territoriality principle conferring jurisdiction,” the panel staked out a new course.<sup>182</sup> That new course placed the individual at the center of the determinative analysis with regard to the scope of rights under WTO law and effectively expanded the liberalization commitments beyond what had been envisaged by the negotiators.

Further, the panel’s embrace of a heightened role for judges in increasing liberalization is confirmed by the fact that the panel’s pronouncements on the centrality of the individual consumer in establishing under which mode of supply a particular service falls do not appear to be in the nature of a direct response to the arguments of either party. The United States had contended that the services in question were being provided on a mode I basis on the grounds that the traffic or transmissions themselves were a service and these transmissions were patently crossing the border.<sup>183</sup> On the other side, Mexico’s submissions focused on distinguishing between the concept of a telephone call and the act of transmitting customer provided data by a supplier.<sup>184</sup> The panel apparently took the initiative by itself to carve out a role for the individual in the international trade law relating to telecommunications.

#### IV. LESSONS FROM TELMEX

Although some express bewilderment at the seemingly innocuous introduction of constitutionalism at the international level,<sup>185</sup> the stakes are undoubtedly high. Part III demonstrated how a rights-based constitutionalist approach can alter the outcome in a given trade dispute. Part IV considers the broader implications of the rights-based approach of the *Telmex Report* for the WTO both in terms of its jurisprudence and as an institution.

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182. Neven & Mavroidis, *supra* note 13, at 208.

183. *Telmex Report*, *supra* note 5, at paras. 7.25–26.

184. *Id.* at paras. 7.27–28

185. Fassbender, *supra* note 16, at 839.

A. COUNTERINTUITIVE CONSEQUENCES OF THE *TELMEX* APPROACH

If one applies the *Telmex* Panel's customer oriented approach to certain services, the legal characterization of cross border transactions becomes the inverse of that which the negotiating parties would consider them to be. For example, imagine that the *Telmex* Panel's dictum that "[w]hat counts is the service that the supplier offers and has agreed to supply to a customer"<sup>186</sup> were to be applied to legal characterization of the transactions involved in the cross-border provision of customer service via telecommunications.<sup>187</sup> Often, if not predominantly, in situations of cross-border customer service provision a customer places a domestic telephone call which is then routed across an international border by the service supplier. The customer's call is then answered in the territory of another WTO Member from which the service, be it software support, financial advice, travel booking, etc., is provided.

On a view which does not privilege the perspective of the consumer, cross-border provision of customer service via telecommunications constitutes a paradigmatic case of mode I supply: customer service is being exported from the Member into which the call has been placed and imported into the territory of the Member where the consumer who placed the call is located.<sup>188</sup> If, however, the individual's perspective forms the dominant prism of analysis, then the transaction becomes purely domestic because the consumer has placed a domestic call and has, we may assume for purposes of this discussion, contracted domestically for the provision of a service. The subcontracts and telecommunications routing that the primary supplier has concluded with the foreign service providers are recast as "subsidiary arrangements to ensure that the communications are in fact completed."<sup>189</sup> In the *Telmex Report*

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186. *Telmex Report*, *supra* note 5, at para. 7.42.

187. Under the *Services Sectoral Classification List* the cross-border provision of customer service via telecommunications is capable of including services catalogued under Professional Services; Computer and Related Services; Other Business Services; and Recreational, Cultural and Sporting Services. *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991).

188. See *Explanatory Note*, *supra* note 160, at para. 19(a); Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, para. 28, S/L/92 (Mar. 28, 2001).

189. *Telmex Report*, *supra* note 5, at para. 7.42.

the panel's focus on the individual consumer converted what was traditionally seen as an export from Mexico into an export from the United States. In the case of remote provision of customer service, however, the same approach would convert what was traditionally seen as an export from the Member to which the phone call had been routed into a purely domestic transaction, notwithstanding the clear cross-border aspects. This finding would preclude the application of any WTO disciplines and leave the Member in which the individual consumer was located free to place restrictions on the remote provision of customer service from other Members, even if the Member enacting the restrictions had made commitments in the relevant sectors.

Although this recasting of international trade in the remote provision of customer service is a logical consequence of the panel's focus on the role of the individual, it is equally as inconsistent with the goals of the rights-based constitutional project as it is with WTO law.<sup>190</sup> Nevertheless, it serves as useful illustration of the fact that increased recognition of the rights of individuals within the world trading system need not, and indeed likely will not, ultimately lead to increased liberalization. Recalibrating the legal instruments of the WTO based on the rights and perspectives of individuals will lead to both trade promoting and trade restricting outcomes. Only by assuming that all affected parties will immediately see the wisdom of increased liberalization can blanket recognition of individual rights at the WTO function as a plausible path to increased liberalization. There are good reasons to doubt the validity of such an assumption. In fact, to the limited extent that WTO law has recognized individual rights to date the effect has been to empower individuals to *inhibit* trade, rather than to force further liberalization.<sup>191</sup>

#### B. IMPACT ON NEGOTIATIONS

In the context of the WTO it is clear that the outcomes of certain disputes have an increasing impact on ongoing

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190. See *supra* note 20 and accompanying text.

191. See Steve Charnovitz, *The WTO and the Rights of the Individual*, 36 INTERECONOMICS 98, 108 (2001).

negotiations.<sup>192</sup> As established above, the *Telmex Report* employed a rights-based constitutionalist approach to the application of the *WTO Telecoms Agreement* so as to arrive at conclusions that seem contradictory, for example the finding that a transaction between a U.S. supplier and a U.S. consumer constitutes cross-border supply of a service. Despite these observations, the panel's approach in the *Telmex Report* has elicited almost no overt adverse reaction with regard to negotiations in the intervening years; ongoing negotiations do not show signs of revisiting the panel's conclusions.<sup>193</sup> Indeed, even in the immediate aftermath of the *Telmex Report* the WTO Secretariat noted that Members were "remarkably uniform in calling for further improvements in market access and national treatment, the undertaking of commitments by Members that have not yet done so, and more widespread adoption of Reference Paper commitments."<sup>194</sup> The Chairman of the Council for Trade in Services did identify "scheduling- and classification-related concerns" in the area of telecommunications, but these are vague and of minor importance when compared with the scheduling issues to be addressed under other sectoral classifications.<sup>195</sup> Overall, telecommunications liberalization continues to enjoy broad support among WTO Members.<sup>196</sup>

The general lack of outcry among Members in response to the *Telmex Report* is likely attributable to the fact that the field of telecommunications law is in some ways uniquely well suited as a test case for building acceptance of judicial liberalization under a rights-based constitutional theory. Liberalization in telecommunications services carries an expectation of increased

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192. See Petersmann, *Addressing Institutional Challenges*, *supra* note 52, at 650.

193. See Peng, *supra* note 10, at 305–06.

194. Special Session of the Council for Trade in Services, *Information Note by the Secretariat: Telecommunications Services*, para. 2, JOB(05)/208 (Sept. 26, 2005).

195. Special Session of the Council for Trade in Services, *Report by the Chairman to the Trade Negotiations Committee*, at 14, TN/S/23 (Nov. 28, 2005). Also, the Chairman's summary of the scheduling issues to be addressed under modes I and III make no mention of the complications arising from the *Telmex Report*. *Id.* at 21–22.

196. See Chairman of the Trade Negotiations Committee, *Rep. by the Chairman of the TNC: Services Signalling Conference*, paras. 11–12, JOB(08)/93 (July 30, 2008).

efficiency, technology and public welfare gains.<sup>197</sup> As a result, telecommunications negotiations at the WTO have benefitted from the broad consensus among Members that a more efficient and technologically advanced telecommunications sector creates increased opportunities across other business sectors.<sup>198</sup> Indeed, much of the liberalization achieved in telecommunications during the Uruguay Round was attributable to the efforts of the financial services lobby and the telecommunications sector's own technology driven liberalization.<sup>199</sup> In addition, the fact that Egypt and Honduras have unilaterally inscribed schedules liberalizing their respective telecommunications sectors without receiving corresponding concessions from other Members demonstrates that the consensus recognizing the benefits to be gained from telecommunications liberalization has spread to developing countries as well.<sup>200</sup> Mexico's failure to appeal the panel's report

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197. See Chung, *supra* note 13, at 793–94; Massimo Geloso Grosso, *Liberalising Infrastructure Network Services and the GATS 35* (Organisation for Economic Co-operation and Development, Trade Policy Working Paper Series, Paper No. 34, Doc. No., 2006); Bernard Hoekman, *Liberalizing Trade in Services: A Survey* (World Bank, Policy Research Working Paper Series, Paper No. WPS 4030, 2006); Daniel Roseman, *Economic Impact of Trade and Investment Liberalization in the Telecommunications Sector*, 3 J. WORLD INVESTMENT & TRADE 943, 943–44 (2002).

198. See Special Session of the Council for Trade in Services, *Communication from Australia, Canada, the European Communities, Japan, Hong Kong China, Korea, Norway, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States*, TN/S/W/50, (July 1, 2005); Special Session of the Council for Trade in Services, *Communication from Cuba*, TN/S/W/2, (May 30, 2002); Special Session of the Council for Trade in Services, *Communication from Colombia*, S/CSS/W/119, (Nov. 27, 2001); Special Session of the Council for Trade in Services, *Communication from Chile*, para. 29, S/CSS/W/88, (May 14, 2001); Special Session of the Council for Trade in Services, *Communication from Switzerland*, para. 1, S/CSS/W/72, (May 4, 2001); see also Kalotay, *supra* note 99, at 822–23.

199. See Pierre Sauvé, *Been there, not yet done that: Lessons and challenges in services trade*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 599, 607–08 (Marion Panizzon, Nicole Pohl & Pierre Sauvé eds., 2008); Adlung, *supra* note 121, at 470–71; Cowhey, *supra* note 72, at 53–54; Roseman, *supra* note 93, at 84.

200. See Rudolf Adlung, *Trade liberalization under the GATS: An Odyssey?*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 209, 214 (Marion Panizzon, Nicole Pohl & Pierre Sauvé eds., 2008). The schedules are available at GATS/SC/30/Suppl.3, 5 June 2002 (Egypt), and GATS/SC/38/Suppl.2, 16 September 2005 (Honduras). Pascal Lamy highlighted Egypt's experience as a success story in a symposium held on the 10th anniversary of the WTO Telecoms Agreement. Press Release, World Trade Organization, WTO DG Lamy celebrates benefits of opening trade in telecoms (Feb. 20, 2008), available at [http://www.wto.org/english/news\\_e/pres08\\_e/pr517\\_e.htm](http://www.wto.org/english/news_e/pres08_e/pr517_e.htm).

has been cited as an indication that perhaps the Mexican government welcomed the opportunity to further its deregulation of telecommunications without the hefty political cost at home.<sup>201</sup>

Members' interest in overcoming intransigent domestic regulatory hurdles to liberalization could also account for the general acquiescence in the *Telmex* Panel's reorientation of the legal characterization of the services involved which brought the hand-off of international telecommunications traffic within the discipline of the Reference Paper. As is the case for any service, the web of internal regulations involving any number of domestic government agencies can complicate and frustrate attempts at liberalization.<sup>202</sup> Even a grant of full market access can be rendered meaningless by an uncomplimentary regulatory regime.<sup>203</sup> Moreover, the disparate domestic regulatory approaches to "interconnection" that had been adopted after entry into force of the *WTO Telecoms Agreement* placed the credibility of the WTO at risk.<sup>204</sup> Therefore, given the broad consensus in favor of telecommunications liberalization,

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201. See MATSUSHITA ET AL., *supra* note 3, at 684 n.231 (contending that no appeal was made in order to shift the blame for the political fallout); *but see* Heinz Hauser, *Mexico—Measures Affecting Telecommunications Services* WTO NEWS (Univ. of St. Gallen/Swiss Inst. For Int'l Econ. & Applied Econ. Research, St. Gallen, Switz.), Nov. 2004, at 3, [http://www.siaaw.unisg.ch/org/siaaw/web.nsf/SysWebRessources/wtonews11epdf/\\$FILE/wtonews11e.pdf](http://www.siaaw.unisg.ch/org/siaaw/web.nsf/SysWebRessources/wtonews11epdf/$FILE/wtonews11e.pdf) (arguing that the fact that there was no appeal "can be viewed as an indicator of the high quality of the legal reasoning."). Given the analysis in this article, the explanation provided by Matsushita et al. is more convincing and, moreover, coheres with the idea that the WTO is useful as a safety valve for depoliticizing certain issues. See Damian Chalmers, *Administrative Globalisation and Curbing the Excesses of the State*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 351, 365 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006); Petersmann, *Dispute Settlement*, *supra* note 17, at 230; Petersmann, *Constitutionalism and International Organizations*, *supra* note 17, at 436–37. It is also likely that industrial consumers of telecommunications would have been in favor of the *Telmex Report* and therefore may have lobbied against appeal. See Adlung, *supra* note 200, at 213. Although, *Telmex* no doubt is a powerful lobby within the Mexican government, domestic trade authorities must balance the concerns of other lobbies impacted by WTO disputes among other factors in determining whether or not to pursue a given course of litigation. See GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 60–64 (2003).

202. See Anupam Chander, *Trade 2.0*, 34 YALE J. INT'L L. 281, 299 (2009).

203. See Special Session of the Council for Trade in Services, *GATS 2000: Telecommunications*, para. 11, S/CSS/W/35 (Dec. 22, 2000); Peng, *supra* note 10, at 305–06.

204. See Roseman, *supra* note 93, at 98.

the outcome legitimacy of the *Telmex Report* likely accounts for the muted impact of the more radical implications of rights-based constitutionalism contained therein.

To the extent that the success of telecommunications negotiations is attributable to the factors discussed above, this does not preclude the possibility that the deleterious effects of the *Telmex Report's* approach to judicial constitutionalization could manifest elsewhere. It could be the case that the institutional deficiencies exposed by the *Telmex Report* in the form of a perceived widening of the liberalization commitments beyond the original intentions of Members is preventing breakthroughs in sectors that do not share the endogenous drive for liberalization that characterizes telecommunications. If States perceive that their basic bargains are recalibrated to take into account customer or consumer interests they may reduce their appetite not only for future concessions, but also for delegation of power to the adjudicatory organs.<sup>205</sup> It has been observed that an “approach of resolving uncertainty against the regulator” can lead to lessened future liberalization.<sup>206</sup> Thus, the failure to make progress in the education, health care, postal-courier sectors, etc. could reflect Members’ uncertainty about the ability to predict the scope of their commitments.<sup>207</sup> In this regard, the *Telmex Report's* blurring of the lines with regard to modes of supply seems germane to the current stalemate. Observers do not predict a breakthrough with regard to competition policy and regulation.<sup>208</sup> At least one reason is the perceived lack of clarity provided by the GATS.<sup>209</sup> Members’ reticence regarding uncertainty of commitments, combined with the tendency for GATS disciplines to strike deep into the heart of the regulatory state, is reflected in the

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205. See Trachtman & Moremen, *supra* note 22, at 225–26.

206. See Regan, *supra* note 121, at 1315–16. The Appellate Body has stated implicitly that employment of a bias in favor of increased liberalization is inappropriate as a method of interpreting the covered agreements. See Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, paras. 241–43, WT/DS269/AB/R, (Sept. 12, 2005).

207. See *Services: Negotiations—State of Play*, WTO.ORG, [http://www.wto.org/english/tratop\\_e/serv\\_e/state\\_of\\_play\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/state_of_play_e.htm); see also Aaditya Mattoo, *Services in a Development Round: Three Goals and Three Proposals*, 39 J. WORLD TRADE 1223, 1231 (2005); Marsden, *supra* note 13, at 9.

208. See Peng, *supra* note 10, at 316–17.

209. See Alejandro Jara & M. del Carmen Domínguez, *Liberalization of Trade in Services and Trade Negotiations*, 40 J. WORLD TRADE 113, 117 (2006).

proposal that future negotiations be predicated upon an understanding that services negotiations focus on non-discrimination to the exclusion of other obligations.<sup>210</sup> This approach presumes that a narrow focus on non-discrimination would elicit greater liberalization commitments.<sup>211</sup> The evidence from the *Telmex Report*, however, demonstrates that if the rights-based constitutionalist approach were to gain currency among the WTO adjudicatory organs, then perhaps even narrowly designed commitments based only on non-discrimination would be susceptible to expansive interpretation consistent with constitutional guarantees of economic freedom.

### C. ASSESSING RIGHTS-BASED CONSTITUTIONALISM AND WTO LEGITIMACY

Because constitutionalization is “instrumental to the achievement of other values,”<sup>212</sup> it is appropriate for the adjudicatory organs to adopt constitutional strategies that contribute to the achievement of the values for which the WTO was avowedly established. These include raising income levels, increasing employment and respecting sustainable development goals.<sup>213</sup> The WTO, however, can only achieve these goals in the long-term if it enjoys institutional legitimacy and the support of its constituents. While the result in the *Telmex Report* undoubtedly contributes to increased liberalization, the consequences of the rights-based constitutionalist policy preferences and methodology evidenced in the *Telmex Report* could ultimately weaken the institutional legitimacy of the WTO.

The *Telmex Report*, at first glance appears to have been a robust success in economic terms. With regard to outcome legitimacy, or the perceived ameliorative effect of an institutional action, the *Telmex Report* has had a salutary impact on the state of telecommunications commerce between the United States and Mexico. The *Telmex Report* dealt a blow to an entrenched monopoly that repeatedly demonstrated its

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210. See Mattoo, *supra* note 207, at 1224.

211. *Id.* at 1224.

212. Trachtman, *supra* note 16, at 630.

213. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 154.

willingness to seek higher rents at the expense of its customers.<sup>214</sup> As has been seen from Telmex's decades long success in maintaining its domestic market power, the intransigence of WTO Members in negotiating a transition to market-based accounting rates was in large part a product of the huge rents which the regulatory regime provided to incumbent suppliers.<sup>215</sup> The pre-*Telmex Report* status quo, however, was wildly inefficient.<sup>216</sup> The *Telmex Report* alleviated some of the inefficiency of this old system, a fact which is not denied even by critics of the panel's reasoning.<sup>217</sup> Data for the year following the *Telmex Report* shows that traffic originating in the United States and terminating in Mexico rose by over 95%.<sup>218</sup> Moreover, the opaque nature of accounting rates rendered any civil-society lead reform in this area unlikely.<sup>219</sup> The effect of the *Telmex Report* could therefore be seen as

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214. See *supra* notes 100–105 and accompanying text.

215. See Cowhey, *supra* note 72, at 52–56 (discussing the problems associated with accounting rate negotiations from a political economy perspective).

216. In 1996 the U.S. Federal Communications Commission estimated that economic rents accounted for 80% of international telecommunications revenue. See *id.* at 58.

217. See Neven & Mavroidis, *supra* note 13, at 217.

218. See 2004 FCC INT'L TELECOMMUNICATIONS DATA 1, 39–44 tbl.A1 (2006), available at <http://www.fcc.gov/ib/sand/mniab/traffic/files/CREPOR04.pdf>; 2003 FCC INT'L TELECOMMUNICATIONS DATA 1, 38–43 tbl.A1 (2005), available at <http://www.fcc.gov/ib/sand/mniab/traffic/files/CREPOR03.pdf>. Note, however, that the impact of the *Telmex Report* should not be overstated as trade related telecommunications issues continued to arise between Mexico and the United States following the *Telmex Report*. See generally 2008 USTR SEC. 1377 REV. 1, 8 (2008) available at <http://www.ustr.gov/sites/default/files/Results%20of%20the%202008%201377%20Review.pdf> (dispute involving mobile termination rates pending COFETEL resolution); 2007 USTR SEC. 1377 REV. 1, 4 (2007) available at <http://www.ustr.gov/sites/default/files/Results%20of%20the%202007%201377%20Review.pdf> (dispute involving Mexico's failure to implement COFETEL's recommended interconnection rates); 2006 USTR SEC. 1377 REV. 1, 3 (2006) available at [http://ustraderep.gov/assets/Trade\\_Sectors/Telecom-E-commerce/Section\\_1377/asset\\_upload\\_file43\\_9276.pdf](http://ustraderep.gov/assets/Trade_Sectors/Telecom-E-commerce/Section_1377/asset_upload_file43_9276.pdf) (contention involving COFETEL's failure to release interconnection rate model to resolve dispute between Mexican cellular and fixed-line companies).

219. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 27–28 (1982). The *Telmex Report* could even be described as democracy-reinforcing to the extent that it increased the transparency of accounting rates *qua* trade restriction. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 546–48 (2001).

positive when assessed by the criterion of the immediate perceived overall economic benefits.<sup>220</sup>

Nevertheless, despite the consensus appraisal of the *Telmex Report* outcome, the economic impact of the *Telmex Report* is not unambiguously positive for all stakeholders. The *Telmex Report* can be seen as offering evidence in support of those who see rights-based constitutionalism within the WTO as a threat to a State's ability to define and pursue its own development program. For years, developed countries such as the United States implemented a policy of cross-subsidization to support efforts to achieve universal service.<sup>221</sup> This policy allowed telecommunications providers to expand into markets that otherwise would have lacked service.<sup>222</sup> Today, developing countries employ accounting rates, notwithstanding their trade distortionary effects, as an important tool in efforts to expand their own networks.<sup>223</sup> The principle benefit of this strategy is that it allows telecommunications providers to fund an increase in the reach of the telecommunications networks until a hypothetical point in the future when the system is eventually liberalized. On an uncharitable view, the *Telmex Report* short-circuited the network development and liberalization process in Mexico by instituting a modern U.S. style industrial policy rooted in corporate autonomy.<sup>224</sup> The reverse of the increased

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220. See Gary N. Horlick, *Comment*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 259, 259 (Roger B. Porter et al. eds., 2001).

221. See Sidak & Singer, *supra* note 13, at 20; Rohlfs & Sidak, *supra* note 79, at 333.

222. See Sidak & Singer, *supra* note 13, at 20; Rohlfs & Sidak, *supra* note 79, at 327.

223. See Guermazi, *supra* note 88, at 105.

224. See Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship*, 15 *EUR. J. INT'L L.* 651, 657–58 (2004). Recent interventions in the financial and automotive industries place the consistency of the U.S. ideological outlook in doubt. Certainly one cannot imagine the United States saying now, as it did in 2003 with respect to the negotiation of subsidies disciplines, that the “fundamental issue is: should governments be investing in private sector companies and if so, under what circumstances? While it could be argued that the nature of capital markets in certain lesser developed countries may lead to government investment in the private sector, what is the justification in countries with well-developed capital markets? . . . If the equity markets determine that a company will not generate a market return, the actions of any government which determines otherwise should be subject to strengthened disciplines.” Negotiating Group on Rules, *Subsidies Disciplines Requiring Clarification and Improvement: Communication from the*

economic efficiency coin is that, in the wake of the *Telmex Report*, Telmex will have a decreased capacity to expand its network towards the goal of universal service, a right explicitly recognized in the Reference Paper.<sup>225</sup>

Critics of rights-based constitutionalism warn against precisely these sorts of outcomes.<sup>226</sup> By privileging economic freedoms, rights-based constitutionalism obscures competing concerns and drastically restricts the policy options available to meet other development or social goals. Moreover, by purporting to remove certain “constitutionalized” principles from the realm of negotiations or politics, rights-based constitutionalization can reduce the scope for democratic decisions at the national level.<sup>227</sup> This can increase the WTO’s democratic deficit by shielding Members from accepting full responsibility for WTO norms.<sup>228</sup> Most criticism in this vein focuses on rights-based constitutionalism’s distortionary impact on human rights.<sup>229</sup> Nevertheless, the *Telmex Report* shows that a rights-based constitutional approach to trade can affect other policy choices, in this case, the progression towards universal telecommunications service.

Even assuming that resolving disputes according to rights-based constitutional theory would increase overall welfare, the constitutionalist claim that the economic gains from trade resulting from an aggressive judicial posture can endow the WTO with the legitimacy necessary to perpetuate its institutional mission has certain flaws.<sup>230</sup> On a rights-based constitutionalist theory, the gains from trade described above are seen as providing a “utilitarian justification” for the

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*United States*, 4, TN/RL/W/78 (Mar. 19, 2003).

225. Reference Paper, *supra* note 8, para. 3 (“Any member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.”).

226. See generally Howse & Nicolaidis, *supra* note 4; Sarooshi, *supra* note 224, at 658–60; Howse, *supra* note 69, at 95.

227. See Howse & Nicolaidis, *supra* note 4, at 228; cf. Klabbers, *supra* note 20, at 47, 50–51.

228. See TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 34 (2004).

229. See generally Howse, *supra* note 1; Alston, *supra* note 29, at 824.

230. See *supra* notes 38–40 and accompanying text.

liberalization of the international trading system.<sup>231</sup> Welfare promotion *qua* institutional goal is a “constitutional insight” that increases the trading system’s legitimacy.<sup>232</sup> Therefore, the increased efficiency and net welfare gain of the *Telmex Report* directly supports the legitimacy of the WTO. This theory of legitimacy, however, overlooks the fact that while the WTO is ostensibly an agreement about non-discrimination and economic freedom, it does not solely memorialize these principles. The years of careful negotiations that culminated not only in the GATS, but also in the TRIPs, Technical Barriers to Trade, and Sanitary and Phytosanitary agreements can neither be reduced to nor legitimately placed in the service of a simple mantra of liberalization.<sup>233</sup> The WTO cannot rely solely upon an exogenous ideology to perpetuate its legitimacy, but rather must evolve for the benefit of its constituents.<sup>234</sup> The question remains as to who its constituents are. Despite calls for opening the Dispute Settlement System to private litigants,<sup>235</sup> States, or in WTO parlance, Members, remain the WTO’s constituents.<sup>236</sup> Thus, while it may be proper in some circumstances for the WTO to consider the impact of its actions on citizens independent of their governments,<sup>237</sup> it is another

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231. See Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, *supra* note 33, at 796. *But see* Econ. & Soc. Council, Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination & Protection of Minorities, *The Realization of Economic, Social, and Cultural Rights: Human rights as the primary objective of international trade, investment and finance policy and practice*, ¶ 3, U.N. Doc. E/CN.4/Sub.2/1999/11 (June 17, 1999) (by J. Oloko-Onyango & Deepika Udgama) (stating that “liberalization in the global regimes of trade, investment and finance does not, *ipso facto*, lead to more positive impacts on the well-being of humankind in general or to the enhancement of economic development in particular.”).

232. See Petersmann, *Addressing Institutional Challenges*, *supra* note 52, at 663.

233. See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 404–06 (2000).

234. Trachtman, *supra* note 16, at 626.

235. See Georgios I. Zekos, *The Case for Giving Private Parties Access to the WTO Dispute Settlement System*, 8 J. WORLD INVESTMENT & TRADE 441, 449 (2007).

236. Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 EJIL 969, 974 (2007); Klabbbers, *supra* note 20, at 43; Alston, *supra* note 29, at 834. States themselves prefer to view the WTO from a contractual as opposed to constitutional perspective. See Carmody, *supra* note 9, at 539; Trachtman and Moremen, *supra* note 22, at 229.

237. See Econ. & Soc. Council, Comm’n on Human Rights, Sub-Comm’n on the Promotion & Protection of Human Rights, *Economic, Social, and Cultural Rights: Mainstreaming the right to development into international trade law and policy at*

thing to depart from the bargains that the governments have struck.

Without fetishizing certain conceptions of sovereignty or the WTO as a “member-driven institution”<sup>238</sup> it is entirely appropriate to consider States’ view of the system when assessing the best way to move forward. In a domestic setting where judgments are typically backed by the Weberian monopoly on the legitimate use of force, lack of this subjective legitimacy is unlikely to result in non-compliance. In the international setting, however, the paucity of coercive means for ensuring compliance coupled with, or even arising out of, the sovereign equality of the parties to a given dispute places a premium on the ability of a judicial institution to cohere with the expectations of the States that have vested the institution with its power. This setting places into high relief the words of U.S. Supreme Court Justice Felix Frankfurter that a “[c]ourt’s authority . . . ultimately rests on sustained public confidence in its moral sanction.”<sup>239</sup> International organizations remain acutely reliant upon State consent to substantiate their legitimacy.<sup>240</sup> States comply with decisions emanating from the Dispute Settlement System because it is conducive to the achievement of their overall aims.<sup>241</sup> Although most States include compliance with their international legal obligations among these aims, if a given institution or its judgments are no longer viewed as legitimate, the institution will decline and its judgments will not be obeyed.<sup>242</sup>

Given the central role of expectations in legitimating the WTO, dispute outcomes that fail to cohere with these expectations pose a risk to the stability and growth of the

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*the World Trade Organization, transmitted by Note by the Secretariat*, para. 16, U.N. Doc. No. E/CN.4/Sub.2/2004/17 (June 9, 2004).

238. See John H. Jackson, *The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited*, 4 J. INT’L ECON. L. 67, 72 (2001).

239. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J. dissenting).

240. See Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, in *THE DIVIDED WEST* 115, 141 (Ciaran Cronin ed. trans., 2008).

241. Cf. Jeffrey L. Dunoff, *Does the United States Support International Tribunals? The Case of the Multilateral Trade System*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 322, 353 (Cesare P. R. Romano ed., 2009).

242. See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907, 908 (2004).

system. If the effects of institutional practice in creating expectations which in turn form the basis for governmental decision are significant,<sup>243</sup> then the downstream impacts of judicial constitutionalization may be deleterious. The impact of the adjudicatory organs on WTO legitimacy at the Member level can be measured with reference to the extent to which their reports accord with Member expectations. Generalizing the rights-based constitutional approach of the *Telmex Report* so as to consistently resolve disputes in favor of less regulation is one way to increase certainty regarding the *ex ante* expected interpretations of the Reference Paper.<sup>244</sup> It is not clear, however, that such a bias was intended by the negotiators.<sup>245</sup> As such, a consistent rights-based jurisprudence could erode Members' tolerance for delegation of power to the adjudicatory organs.<sup>246</sup> Rulings by the adjudicatory bodies that appear to go beyond the terms of the current negotiated concessions have a particularly delegitimizing effect at the WTO because these outstanding issues are precisely the province of the inter-Member political decision making process.<sup>247</sup> As has been observed, "legitimacy is reduced when policy areas that were previously the object of authentic and effective political choices . . . are pre-empted . . . by coming under the control of politically non-accountable authorities."<sup>248</sup>

Nevertheless, the tendency to advance liberalization through the adjudicatory bodies is not solely a product of rights-based constitutional theory, but rather also an institutional feature of the WTO. As an institutional phenomenon, the pressure to liberalize through dispute resolution is a result of the peculiar asymmetry within the WTO between the efficiency of the dispute settlement system and the at times intractable nature of the formal rule-making procedures. This asymmetry creates pressure on the

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243. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 19 (1969). On the centrality of expectations within WTO law see Carmody, *supra* note 14, at 542; see also Chios Carmody, *WTO Obligations as Collective*, 17 *EUR. J. INT'L L.* 419, 422–31 (2007).

244. *But see* Carmody, *supra* note 14, at 541.

245. See Peng, *supra* note 10, at 300–01.

246. Cf. Trachtman & Moremen, *supra* note 22, at 232–35; Regan, *supra* note 121, at 1315–16.

247. Kumm, *supra* note 242, at 927; Howse & Nicolaidis, *supra* note 4, at 241.

248. FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 26 (1999).

adjudicatory bodies to bypass the negotiating table and create new rules in the course of adjudication.<sup>249</sup> The ongoing standstill of negotiations only serves to heighten the role of dispute resolution in interpreting the agreements.<sup>250</sup> Although this view has been advanced as a harsh critique of the WTO, the institutional incentive for rulemaking by the adjudicatory bodies need not be understood solely as a negative consequence of the WTO's structure. As long as panels and the Appellate Body act within the bounds of the agreed texts, the ability to create rules through adjudication allows for the possibility of efficient clarification of otherwise unclear agreements between Members. As the panel itself noted, the treaties' "constructive ambiguity" contributes to reaching a consensus during negotiations, but leaves treaties open to divergent interpretations in the event of a dispute.<sup>251</sup> Judicial rulemaking also avoids the political asymmetries and resulting inefficiencies inherent to the "power-based bargaining" process which occurs at trade rounds and within the WTO's formal policy development channels.<sup>252</sup>

Within this nuanced view of judicial rulemaking, a critique of rights-based constitutionalist interpretation is not to be equated with a charge of inherent systemic judicial activism within the WTO's dispute resolution system.<sup>253</sup> Rather, what is

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249. See Holmes, *supra* note 16, at 75; CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 38 (2001); John H. Jackson, *International Economic Law in Times that are Interesting*, 3 J. INT'L ECON. L. 3, 8 (2000).

250. See Peng, *supra* note 10, at 310–11.

251. *Telmex Report*, *supra* note 5, at para. 7.3; see also MIKE MOORE, A WORLD WITHOUT WALLS—FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE 111 (2003); Holmes, *supra* note 16, at 65; Steinberg, *supra* note 151, at 259. The vagueness of the Reference Paper does, however, increase uncertainty about the outcome of disputes. Cf. Damien Geradin & Michel Kerf, *Levelling the playing field: Is the WTO adequately equipped to prevent anti-competitive practices in telecommunications*, in THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES 130, 151–53 (Damien Geradin & David Luff eds., 2004). Note that this deliberate ambiguity is to be distinguished from the conceptually "open texture" of all rules of law. See H. L. A. HART, THE CONCEPT OF LAW 127–28 (2d. ed. 1994).

252. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L. ORG. 339, 341 (2002).

253. See e.g., Roger P. Alford, *Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196, 196 (2006–07); John Ragosta, Navin Joneja & Mikhail Zeldovich, *WTO Dispute Settlement: The System is Flawed and Must Be Fixed*, 37 INT'L LAW. 697, 698

interesting is that the issue of constitutionalization, by its very nature, lies at the intersection of law and politics.<sup>254</sup> By agreeing to compulsory dispute settlement WTO Members have implicitly consented to a degree of judicial discretion through the Dispute Settlement System. This makes it inevitable that a panel's views on a matter may come to affect the outcome of a given case.<sup>255</sup> It is only on a naïve view that treaties create a single immutable legal relationship that is preserved for all time.<sup>256</sup> Therefore, while the rights-based constitutionalism in the *Telmex Report* may tell us quite a bit about the theory's impact in a given case, the *Telmex Report's* impact must be contextualized to take account of the fact that it represents but a single sample. Although the *Telmex Report* demonstrates that a general conversion to rights-based constitutionalism by the adjudicatory organs would likely undermine the legitimacy of the WTO, the response of the Members and the adjudicatory organs manifests the resiliency of the system. With regard to the response of the Members, in this case they seemed willing to accept increased liberalization in the area of telecommunications perhaps for institutional and sectoral reasons.<sup>257</sup> Meanwhile, the adjudicatory organs have not embraced the bold view of the judiciary advocated in rights-based constitutionalism. To the contrary, the subsequent WTO jurisprudence has assuaged Members' potential fears of judicial overreaching by correcting the most controversial products of the *Telmex Report's* rights-based constitutionalism.<sup>258</sup> Thus,

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(2003); cf. Steinberg, *supra* note 151, at 269–70; Susan Esserman & Robert Howse, *The WTO on Trial*, 82 FOREIGN AFF. 130, 133–35 (2003).

254. See Jan Klabbers, *Straddling Law and Politics: Judicial Review in International Law*, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 809, 834 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

255. See Trachtman, *supra* note 16, at 640.

256. See John Merrills, *The Mutability of Treaty Obligations*, in INTERROGATING THE TREATY 89, 89 (M. Craven & M. Fitzmaurice eds., 2005). The rise of treaty-bodies and international tribunals *qua* treaty interpreters has no doubt contributed to the innately plastic nature of treaty obligations. See Kumm, *supra* note 242, at 914.

257. See *supra* notes 194–201, 249–252 and accompanying text.

258. See *supra* note 181 and accompanying text discussing the panel report in *U.S.—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. This panel also implicitly rejected the *Telmex Report* view of GATS Article XVI. See Leroux, *supra* note 13, at 257–58 (noting that the *Telmex Report* panel's understanding of Article XVI “has the effect of turning Article XVI on its

while the rights-based constitutional approach of the *Telmex Report* may have increased the uncertainty regarding WTO liberalization commitments, this isolated case does not appear to be a threat to the legitimacy of the WTO.

#### V. CONCLUSION

This article has argued that the *Telmex Report* vindicates a rights-based constitutional theory of the WTO. The contention that the *Telmex Report* marks a step-towards rights-based constitutionalization of the GATS, however, is by no means a prediction of future constitutionalization. Indeed, even in the most “constitutionalized” of legal-political regimes, the actual constitutional structures and rules are in a near constant state of flux.<sup>259</sup> With that said, this article’s analysis shows that rights-based constitutionalism is not mere “purposeful scratching of a mainstream itch,” as has been said of other forms of international constitutionalism.<sup>260</sup> Rather, the *Telmex Report* shows the potential power of rights-based constitutionalism as a theory that comes complete not only with an ideology, but with a specific model of a judiciary as accomplice in achieving its ideological goals.

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head, as a market access restriction that does not fall within the scope of Article XVI:2 is permitted, as correctly decided by the Panel in *US—Gambling.*); Regan, *supra* note 121, at 1307.

259. See Daniel K. Tarullo, Book Review, 5 J. INT'L ECON. L. 941, 942 (2002).

260. Collins, *supra* note 16, at 285.