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Telecommunications Under the NAFTA and Its Effect on Canada's Telecommunications Industry.

Geneva E. Stephens*

I. Introduction.

The current growth in telecommunications technology has brought the world into an era that some have likened to the industrial revolution.¹ This increasing technological development has made the telecommunications industry extremely important to a nation's economic productivity.² The United States, Canada, and Mexico realized its importance when they decided to give telecommunications specific attention in the North American Free Trade Agreement (NAFTA).³

At the International Telecommunications Convention, telecommunications was defined as "[a]ny transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wires, radio, optical or other electromagnetic systems."⁴ Under the NAFTA, telecommunications is defined as "the transmission and reception of signals by any electromagnetic means."⁵ The NAFTA definition is stated in more general terms and encompasses the definition of telecommunications given by the International Telecommunications Convention.⁶

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1. See Christopher J. Sozzi, *Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 435, 436 (1996); David Crane, *The New International Competitive Environment: A Canadian Perspective*, 21 CAN.-U.S. L.J. 15, 15 (1995); Laurence Huntley, *The Telecommunications Revolution: A Survivor's Guide*, Telephony, June 24, 1996, available in Westlaw, ALLNEWS, 1996 WL 8644720.
2. See Sozzi, *supra* note 1, at 436; Alexandra Field, *Current Developments in the FCC: Telecommunications and the NAFTA*, 25 LAW & POL'Y INT'L BUS. 1145, 1145 (1994).
3. Field, *supra* note 2. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 [hereinafter NAFTA].
4. See Sozzi, *supra* note 1, at 449 (quoting the International Telecommunication Convention, Malaga-Torremolinos, Oct. 25, 1973, 28 U.S.T. 2495, 2644.). See also, Robert W. Crandall & J. Gregory Sidak, *Competition and Regulatory Policies for Interactive Broadband Networks*, 68 S.CAL. L. REV. 1203, 1206 (1995)(for another definition of telecommunications).
5. NAFTA, ch. 13, art. 1310.
6. *Id.*

Three NAFTA chapters have significant impact on telecommunications deregulation: chapters 9, 12, and 13.⁷ Chapter 13 is principally concerned with the overall liberalization of telecommunications.⁸ One of the primary focuses of this chapter is to broaden access to public networks⁹ through the elimination of regulatory barriers, and creation of transparency¹⁰ in any regulations not eliminated by the NAFTA.¹¹ Chapter 12 focuses on non-discrimination among the member nations.¹² For instance, each member nation is required to grant most-favored nation status to the other member nations and to eliminate "prohibitive incorporation or licensing requirements".¹³ Chapter 9 ensures that the nations will cooperate in attempting to create uniform standards¹⁴ which will help to ensure compatibility between different products¹⁵.

The liberalization of telecommunications has had a significant impact on Canada and will continue to do so in the future.¹⁶ Canada's communications market has expanded greatly due to growing Canadian-based companies and foreign companies alike.¹⁷ In Mexico and the United States, Canadian companies have expanded in the area of high-technology communications.¹⁸

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7. Field, *supra* note 2. NAFTA ch. 9, ch. 12, ch. 13.
 8. See NAFTA, ch. 13.
 9. Public networks supply "the basic telecommunications such as local telephone calls." Field, *supra* note 2, at 1146.
 10. Transparency refers to regulatory provisions being made available to the public. NAFTA, Ch. 13, art. 1306.
 11. Field, *supra* note 2, at 1146. NAFTA, ch. 13, arts. 1302 & 1306.
 12. NAFTA, ch. 12 (Chapter 12 focuses on trade in all services industries, including telecommunications).
 13. NAFTA, ch. 12, arts. 1203 & 1210.
 14. Karen E. Lee, *Cooperative Standard-Setting: The Road to Compatibility or Deadlock? The NAFTA's Transformation of the Telecommunications Industry*, 48 FED. COMM. L.J. 487, 488 (1996) [hereinafter *Standard-Setting*].
 15. *Id.* at 489.
 16. See *Teleglobe Wins Right to Expand*, WLN 7308, 7-22-96; *Canada's Information Highway Speeds Along*, 72 J. Proprietary Rts. 35 (1995); *NAFTA Briefs: Mexico/Canada Trade Up 40%*, 50 MEX. TRADE & L. REP. 123 (1995) [hereinafter *NAFTA Briefs*]; *Communications a la NAFTA - Big Differences Between Canada and Mexico*, BUSINESS COMMUNICATIONS REVIEW, vol. 24, No. 2, p 30 (1994) [hereinafter *Communications a la NAFTA*]; *Call Centers: Global Connection for Companies and Their Customers*, Sales & Marketing Management, v148, n1, pT1 (1996)*Fact Sheets: Canada*, US Department of State Dispatch, vol. 6, No. 10, (1995), available in Westlaw, ALLNEWS, 1995 WL 8643489 [hereinafter *Fact Sheet*]. *Cybersurf Positions Its "Virtual T1" Technology for Global Expansion*, Canwire (1996) [hereinafter *Cybersurf Positions*]; *Northern Telecom to Supply Grupo Iusacell with Fixed Wireless Access Technology Through 3 Year US\$330 Million Agreement*, Canwire (1994) [hereinafter *Northern Telecom*]; Field, *supra* note 2, at 1149.
 17. *Id.*
 18. See Field, *supra* note 2, at 1149; *Northern Telecom to Supply Grupo Iusacell with Fixed Wireless Access Technology Through 3 Year US\$330 Million Agreement*, Canwire (1994); *Teleglobe Wins Right to Expand*, WLN 7308, 7-22-96; *Cybersurf Positions Its "Virtual T1" Technology for Global Expansion*, CANWIRE (1996).
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It is evident that Canada's economic growth in the telecommunications sector was aided by the NAFTA's elimination of tariff and non-tariff barriers (non-tariff barriers are restrictions other than duties).¹⁹ However, certain exceptions to the NAFTA have left in place some restrictions on telecommunications trade.²⁰ Exempted from the open trade provisions of the NAFTA is the operation of (but not access to) basic telecommunication services like voice and data transmission via telephone lines or mobile satellites.²¹ "[C]able or broadcast distribution of radio or television programming" is also excluded.²² Canada has also retained a general cultural exemption which allows it to regulate any industry that has an effect on Canadian culture.²³ Canada has interpreted this cultural exemption to include certain telecommunications sectors, including broadcasting.²⁴

These exceptions to the NAFTA's telecommunication deregulation have had either little effect or a negative effect on Canada.²⁵ In the cultural sector in particular, the cultural exemption has not posed a substantial barrier to entry of American culture into Canada²⁶ (which was Canada's motivation for insisting upon the exemption initially²⁷) and has caused an ongoing international dispute.²⁸

This comment will focus on the provisions of the NAFTA that deal with telecommunications, and their effect on Canada's economy. Part II details with specific areas of deregulation while Part III explains the corresponding effect on Canada's telecommunications industry. Next, Part IV defines and describes Canada's exceptions to the NAFTA's liberalization of telecommunications. Finally, Part V provides a detailed description of how these exceptions have affected Canada's telecommunications industry and how they will continue to do so in the future.

19. *Id.*

20. See NAFTA, ch. 13, arts. 1301-2 & 3; NAFTA, Annex 2106.

21. See NAFTA, ch. 13, Art. 1301-2 (which states that the operation of basic telecommunications networks is exempt); *NAFTA: Stairway to Heaven or Temple of Doom?*, SATELLITE COMMUNICATIONS, vol. 17, no. 10, p. 22, (1993) [hereinafter *NAFTA Stairway*] (states that the operation of satellite services is also exempt from the open trade provisions of Chapter 13).

22. NAFTA, arts. 1301-2.

23. NAFTA, Annex 2106.

24. See Donald S. MacDonald, *The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law*, 20 CAN.-U.S. L.J. 253, 254 (1994); See Mike Boone, *NCN: New Country Network: New Battle with U.S. Forming Over Broadcast Regulations: Country Network Dispute Has Set the Tone*, CALGARY HERALD, 1995; Ian Austen, *U.S. Broadcast Group Sings the Blues over Disconnected Cable*, Ottawa Citizen, A4, (1995); Peter Morton, *Canada-U.S. Near Satellite Deal*, Financial Post, (1996); Tim Baker & Tracey Wallace, *Member States Development Canada*, 1 NAFTA Rev. (Fall. 1995).

25. See MacDonald, *supra* note 24, at 254; Robin Van Harpen, *Mamas, Don't Let Your Babies Grow Up to be Cowboys: Reconciling Trade and Cultural Independence*, 4 MINN. J. GLOBAL TRADE 165, 181, 184 & 186 (1995); *Exemption Under Canada-U.S. Trade Law*, 20 CAN.-U.S. L.J. 253, 253 (1994).

26. *Id.*

27. See Michael Braun & Leigh Parker, *Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?*, 22 DENV. J. INT'L L. & POL'Y 155, 160 (1993).

28. *Supra* note 24.

II. Telecommunications deregulation under the NAFTA.

The chapters of the NAFTA that deal with telecommunications focus primarily on equipment, private networks, and enhanced services²⁹ (items such as voice mail, 800 numbers, call forwarding and call waiting³⁰). These chapters set out underlying policy objectives for governments to implement, and specify restrictions on governmental regulation.³¹ "Together, these provisions comprise a potentially powerful tool in liberalizing and strengthening the North American telecommunications industries..." for both the providers and the users.³²

A. OPEN TRADE PROVISIONS UNDER CHAPTER 13, TELECOMMUNICATIONS.

The general scope of telecommunications under the NAFTA is covered in Chapter 13.³³ This chapter defines three basic policies that governments must seek in achieving liberalization, including: non-discrimination against other member nations, open access to and use of public networks, and encouragement of the free flow of information.³⁴

The policy of encouraging free flow of information is stated in Article 1302-4 which "requires the parties to guarantee freedom of movement of information to persons of the other NAFTA nations. This freedom includes movement of information in networks that are run solely within a corporation as well as access to information that can be read into and stored in machines."³⁵

The second major theme in chapter thirteen deals with non-discrimination among member nations.³⁶ Article 1302-8 states that each nation must treat persons of other member nations "on terms and conditions no less favorable than those accorded to any other customer or user of like public telecommunications transport networks or services in like circumstances."³⁷ In other words, a member nation must do two things.³⁸ Taking Canada as an example, first, Canada must treat United States or Mexican individuals on equal terms as persons from Canada.³⁹ Second, Canada must treat United States

29. Field, *supra* note 2, at 1146.

30. See *Getting Through to Latin America: What to Expect in the Telecommunications Sector*, LATINFINANCE (1995), available in, Westlaw, ALLNEWS [hereinafter *Getting Through*]; ABC Net: *Value-added Services*, (visited Dec. 17, 1996) <<http://www.hkabc.net/english/services/valserv.html>> (enhanced or value-added services includes on-line services like internet services or e-mail).

31. Field, *supra* note 2.

32. *Id.*

33. NAFTA, ch.13, Telecommunications.

34. Field, *supra* note 29.

35. *Id.*

36. *Id.*

37. NAFTA, art. 1302-8.

38. *Id.*

39. *Id.*

or Mexican individuals no differently than any other country outside of the NAFTA that has been accorded most-favored nation status.⁴⁰

The final theme incorporated into Chapter 13, access to and use of public networks, is a critical part of the NAFTA.⁴¹ Public networks supply "basic telecommunications such as local telephone calls."⁴² "[L]imiting such access is one of the primary ways that governments have engaged in discriminatory restrictions."⁴³ "The time and resources required can be prohibitively high if foreign companies have to relocate their services into a country or obtain additional licenses in order to gain access to the public network."⁴⁴

Access and use is discussed in detail in Articles 1301 and 1302.⁴⁵ Article 1302-1 states that each nation must ensure that persons of another nation have access to and use of any public telecommunications transport network or service.⁴⁶ Article 1301-2 guarantees access and use of the public network specifically to broadcasters and cable system operators (existing limits with regards to distribution of radio or television programming will be discussed later).⁴⁷ According to Article 1302-2, a nation must ensure access and use by permitting persons to: 1) purchase or lease equipment that interfaces with the public network, 2) attach equipment to the public network, 3) interconnect private networks to the public network, and 4) perform operating functions that enable connection to and use of the public network.⁴⁸ The only conditions a government may impose on access and use are stated in Article 1302-6.⁴⁹ Only safeguards necessary to ensure the public service responsibilities of common carrier services or to protect the technical integrity of the networks may be implemented.⁵⁰

Chapter 13 sets limitations on governments to underscore these liberalizing policy objectives.⁵¹ Both article 1303 restricts regulation of providers of enhanced services.⁵² Articles 1303-1 and 1303-2 state that governments may not use regulations that unreasonably prolong the "application process, discriminate, impose common carrier requirements, or in other ways hamper the entrance or existence in the market of enhanced services providers."⁵³ In addition, "while Chapter 13 allows the parties to determine which

40. *Id.*

41. Field, *supra* note 29.

42. *Id.*, at 1146.

43. *Id.*, at 1147.

44. *Id.*

45. NAFTA, art. 1302.

46. NAFTA, art. 1302-1.

47. NAFTA, art. 1301-2.

48. NAFTA, art. 1302-2.

49. NAFTA, Art. 1302-6.

50. *Id.*

51. NAFTA, art. 1303-1, 2. See Field, *supra* note 2, at 1147.

52. Field, *supra* note 2, at 1147.

53. *Id.*

entities may operate as common carriers and to maintain or designate monopoly providers for basic services, it also sets limits by requiring each party to adopt competitive safeguards that limit the ability of entities to engage in anti-competitive behavior.”⁵⁴

B. THE NAFTA CHAPTER 9, STANDARDS-RELATED MEASURES.

The next major section of the NAFTA that deals with telecommunications is chapter 9 which details guidelines and restrictions on industry standards.⁵⁵ “The use of different product standards is one of the most significant types of non-tariff barriers addressed by the NAFTA.”⁵⁶ A standard is a “set of technical specifications adhered to by a producer, either tacitly or as a result of a formal agreement.”⁵⁷ Different product standards create incompatibility, which discourages users from purchasing a foreign manufacturer’s product.⁵⁸ The NAFTA directs each nation “to utilize the product standards set by international standard-setting organizations as a basis for all their standards.”⁵⁹ Reliance on these organizations is aimed at creation of global standards, elimination of incompatibility, and establishment of open trade markets.⁶⁰

The benefits of standardization include: decreased costs, reduced need for translators (translators are tools that create compatibility between different products), and increased consumer welfare.⁶¹ A consumer gains greater utility from the consumption of a particular good when all other persons consume a good compatible with the user’s product.⁶²

The benefits of standardization also extend to manufacturers.⁶³ Compatibility standards establish a larger, more competitive market.⁶⁴ They also “promote price competition among manufacturers.”⁶⁵ In addition, they may “prevent manufacturers from wasting resources by producing duplicative equipment.”⁶⁶

“Service providers, such as telephone and data network providers, profit as well.”⁶⁷ Providers are very reluctant to invest significant financial resources in hardware

54. *Id.*

55. *NAFTA, ch. 9.*

56. Karen E. Lee, *Supra* 14, at 487.

57. *Id.* at 488.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 489.

62. *Id.*

63. *Id.* at 490.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

equipment and technology.⁶⁸ This is especially true when service providers do not have a guaranteed user market.⁶⁹ Compatibility creates a needed user market by making all products usable to a larger number of consumers.⁷⁰

However, there are some drawbacks to standard-setting.⁷¹ They include a loss of technology with unique characteristics and a reduction in the variety of available goods.⁷² As a result, consumers have a smaller variety of products from which to choose.⁷³ This loss partially affects consumers who have unique or unusual technical needs.⁷⁴ In addition, once a standard is adopted it is difficult to change.⁷⁵ "Manufacturers whose technology is not adopted as the standard are forced to discard their product."⁷⁶

The driving force behind the standard-setting section of the NAFTA was the "desire to eliminate the use of standard-related measures of telecommunications products and other products as non-tariff barriers to trade"⁷⁷ (a non-tariff barrier includes all regulations of trade other than duties⁷⁸). A nation imposes a non-tariff barrier to protect its domestic industries.⁷⁹ Differing standards serve as non-tariff barriers because "[t]he incompatibility between the two products prevents market penetrations by the country seeking entry into a particular market."⁸⁰

Chapter 9 of the NAFTA is the primary chapter dealing with compatibility standards.⁸¹ Article 904-4 states the general prohibition against using standard-related measures as non-tariff barriers to trade.⁸² Article 904-4 states that "no party may prepare, adopt, maintain or apply any standards-related measures with a view to or with the effect of creating an unnecessary obstacle to trade between the parties."⁸³ Chapter 9 also states that the "parties shall to the greatest extent practicable make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the parties."⁸⁴ Next, Chapter 9 mandates that "each party shall use, as a basis for its standards-related measures, relevant international standards or international standards whose completion is imminent..."⁸⁵

68. *Id.*

69. *Id.* at 491.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 494.

78. *Id.*

79. *Id.*

80. *Id.*

81. *NAFTA, ch. 9.*

82. *NAFTA, ch. 9, art. 904-4.*

83. *Id.*

84. *NAFTA, ch. 9, art. 906-2.*

85. *NAFTA, ch. 9, art. 905-1.*

Articles 904, 905 and 906 make mandatory the standards promulgated by international standard-setting organizations.⁸⁶ They also compel the telecommunications industry to adopt cooperative standard-setting as the sole method used to achieve standardization.⁸⁷

“Cooperative standard-setting occurs when market participants voluntarily delegate compatibility decision-making authority to standardization organizations.”⁸⁸ These organizations cooperate to arrive at a consensus among the participants; they exist at industry-wide, national, and international levels.⁸⁹ Cooperative standard-setting is the primary source of standardization created by the NAFTA.⁹⁰

The International Telecommunications Union (ITU) and the International Organization for Standardization (IOS) are two such organizations that work hand-in-hand.⁹¹ However, the ITU deals exclusively with telecommunications standards.⁹² The Telecommunications Standards Advisory Council of Canada (TSACC) is the standard-setting organization for Canada and this organization works with the ITU.⁹³ These organizations work to ensure that the free-trade goals of the NAFTA are achieved through unified standard-setting measures.⁹⁴

C. TELECOMMUNICATIONS SERVICES UNDER CHAPTER 12.

“Advances in technology are creating new services and making many types of existing services increasingly tradeable across national boundaries.”⁹⁵ Thus, it was neces-

86. NAFTA, Ch. 9, art. 904, 905, & 906.

87. *Id.*

88. Lee, *supra* note 14, at 494.

89. *Id.* See TELECOMMUNICATIONS STANDARDS ADVISORY COUNCIL OF CANADA, DRAFT SUMMARY RECORD OF THE FOURTEENTH MEETING, (1996), (visited Dec. 17, 1996) <<http://www.tsacc.ic.gc.ca/TSAC/>>. [hereinafter TSACC Report].

90. NAFTA, ch. 9.

91. Lee, *supra* note 14, at 494.

92. *Id.*

93. *Id.*

94. TELECOMMUNICATIONS STANDARDS ADVISORY COUNCIL OF CANADA (TSACC). The TSACC national initiatives “are complemented by active participation internationally in the Global Standards Collaboration meetings, and through involvement...in numerous regional ...and industry forums...” The TSACC’s mandate states that the TSACC is to “recommend strategies for domestic and international...standards development...” The TSACC is also mandated to implement and promote standards in the existing infrastructure “to meet the needs of Canadian users, industry, and government.” <http://www.tsacc.ic.gc.ca/TSACC/index.html#1> Mandate. Canada also has the Consultative Committee Telecommunications (CCT) which is a “trilateral industry trade association project to stimulate trade expansion and the evolution of telecom equipment and services...” This organization “serves as industry advisor the NAFTA Telecommunications Standards Subcommittee...” *Id.*

95. Lee, *supra* note 14, at 494.

sary to ensure that trade in cross-border services, including telecommunications, was deregulated in the NAFTA.⁹⁶ Chapter 12 is the primary section of the NAFTA that deals with services, and it establishes basic principles that apply to telecommunications.⁹⁷ The main goals of this chapter are assuring that service providers of each country are accorded nondiscriminatory treatment, are not required to have a commercial presence as a condition for providing service, and are given access to all professional licensing and certification procedures.⁹⁸

Article 1202 requires that each country treat services providers of other NAFTA countries no less favorably than it treats its own services providers in like circumstances.⁹⁹ In addition, “[w]ithin a NAFTA country, a state or province must provide service suppliers from other NAFTA countries treatment no less favorable than the most favorable treatment that the state or province accords to the services suppliers of the country of which the state or province forms a part.”¹⁰⁰

Article 1202 also obligates the NAFTA countries to extend Most Favored Nation treatment to other NAFTA service providers.¹⁰¹ “[E]ach NAFTA country must accord services suppliers of either of the other two countries treatment no less favorable than it accords, in like circumstances, to services providers of any country.”¹⁰² NAFTA countries must also accord the better of Most Favored Nation treatment to the other NAFTA countries.¹⁰³ This rule guarantees that NAFTA services suppliers “will obtain the maximum liberalization of trade and investment in services offered by any of the NAFTA countries.”¹⁰⁴

Chapter 12 also contains provisions for the modes of supplying services.¹⁰⁵ Article 1205 ensures that service providers cannot be compelled to establish any kind of local presence, including establishment of a local office, or residency in a NAFTA country, as a condition for selling services in the local market.¹⁰⁶ The result is that cross-border trade in service is liberalized under the NAFTA.¹⁰⁷ This provision includes cross-border trade in the production, distribution, marketing, sale, and delivery of a service.¹⁰⁸

Although Chapter 12 does not eliminate all regulations in the services area, it does provide for transparency in existing regulations.¹⁰⁹ Article 1207 states that each

96. Harry G. Broadman, *International Trade and Investment in Services: A comparative Analysis of the NAFTA*, 27 INT'L LAW. 623, 624 (1993).

97. NAFTA, ch. 12.

98. *Id.*; See Field, *supra* note 2, at 1146.

99. Broadman, *supra* note 96, at 637.

100. NAFTA, ch. 12, art. 1202.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. See NAFTA, ch. 12, art. 1205.

107. NAFTA, ch. 12, art. 1205.

108. See Broadman, *supra* note 96, at 638.

109. *Id.*

NAFTA country must publish any existing and prospective nondiscriminatory measures at the federal, state, or provincial levels that limit the number of services providers or the operations of services providers in a particular sector.¹¹⁰ Other NAFTA countries can request consultations in order to negotiate liberalization of the restrictions.¹¹¹

Chapter 12 also ensures that all professional licensing and certification requirements and procedures are transparent.¹¹² Article 1210 requires that each country ensure that any such requirements and procedures are based on objective criteria that is accessible to persons from other member nations.¹¹³ All requirements must also be "no more burdensome than is necessary to ensure the quality of the services rendered, and are not disguised restrictions..."¹¹⁴

Chapter 12 does not require automatic recognition by one country of the credentials of services providers of another NAFTA country.¹¹⁵ But Article 1210 does require the NAFTA country to afford the other countries the opportunity to demonstrate that their licenses and certifications should be recognized.¹¹⁶

III. Telecommunications Liberalization: Effect on Canada's Telecommunications Industry.

All three member countries have felt the impact of the NAFTA on their telecommunications industries.¹¹⁷ For Canada in particular, the most significant effects have been felt in a growing telecommunications industry at home and in trade with other member countries.¹¹⁸ In Canada, growth in the telecommunications industry has been initiated and supported by Canadian based companies and American companies alike.¹¹⁹ The benefits of this expansion have been felt by Canadian telecommunications providers as well as consumers.¹²⁰ In Mexico and the United States, Canadian trade in telecommunications has also experienced a boost.¹²¹ In Mexico, this is evidenced most clearly in trade statistics which show that overall Canada-Mexico trade increased by 40% in the year following the NAFTA's implementation.¹²² This growth in trade has been spurred in part by Canada's development of telecommunications equipment and services and their

110. See NAFTA, ch. 12, art. 1207.

111. *Id.*

112. *Id.*

113. See NAFTA, ch. 12, art. 1210.

114. NAFTA, ch. 12, art. 1210.

115. *Id.*

116. *Id.*

117. *Id.*

118. See Field, *supra* note 2, at 1149.

119. *Id.*; Northern Telecom, *supra* note 16; Teleglobe Wins Right to Expand, *supra* note 16; Cybersurf Positions, *supra* note 16.

120. Cybersurf Positions, *supra* note 16

121. Field, *supra* note 2, at 1149.

122. See *supra* note 16.

ensuing introduction into Mexico.¹²³ In America, Canadian telecommunications companies who have developed advanced technology have benefited from consumer desire for new and technologically improved products.¹²⁴

A. EXPANSION OF CANADA'S TELECOMMUNICATIONS INDUSTRY AT HOME.

Canadian and American companies have both benefited in Canada due to deregulation and standardization in Canada's telecommunications industry.¹²⁵ American companies have created a number of different telecommunications markets in Canada,¹²⁶ and Canadian companies have also developed numerous existing markets.¹²⁷

One of the largest growing sectors for American companies is in call centers.¹²⁸ A call center is a telemarketing business or the customer service division of an existing corporation.¹²⁹ "As business becomes more global in scope the services provided by international call centers become essential."¹³⁰ Canada is perceived as a desirable location for such call centers because the telecommunications infrastructure is very similar to that of the United States and the NAFTA has made that infrastructure much more accessible to American companies.¹³¹ The NAFTA's standardization provision has also made Canada a likely place for call centers by making American equipment more comparable with existing Canadian networks.¹³²

Canadian companies are also expanding as a result of liberalization under the NAFTA.¹³³ Bell Canada, in response to foreign competition, has expanded its products and services in the area of long distance telephony.¹³⁴ Local competition in long distance service was sustained in the NAFTA provisions of chapter 13.¹³⁵ This chapter, which provides for access to and use of a member country's telecommunications infrastructure,

123. *Id.*

124. *Id.* See *Nortel Builds First Unregulated Telephone Network in Mexico*, Nortel New Releases, (Sept. 10, 1996) <http://www.nortel.com/home/press/1996c/9_10_/9625_Avantel.html>

125. See, *Cybersurf Positions*, *supra* note 16; *Cybersurf Enters Into Joint Venture*, available on the internet, Keyword: Cybersurf [hereinafter *Cybersurf Enters*].

126. *Cybersurf Positions*, *supra* note 16; *Bell Canada: Cisco Routers Ensure "Telco-Like" Network Reliability*, (visited Dec. 17, 1996) <<http://www.kalpana.com/warp/public/536/7.html>>. [hereinafter *Bell Canada*]; *Call Centers*, *supra* note 16.

127. See *Call Centers*, *supra* note 16; *Communications a la NAFTA*, *supra* note 16.

128. See *Bell Canada*, *supra* note 126.

129. *Call Centers*, *supra* note 116.

130. *Id.*

131. *Communications a la NAFTA*, *supra* note 16.

132. *Call Centers*, *supra* note 16.

133. *Id.*

134. See *Bell Canada*, *supra* note 126.

135. *Id.*

allows foreign long distance services to come into Canada.¹³⁶ Bell Canada, which previously enjoyed a monopoly position, responded with better service and equipment, and greater efficiency in production.¹³⁷ Bell Canada has succeeded in being a competitive long distance carrier, and its restructuring has helped to give consumers better services at lower prices.¹³⁸

Overall, it is readily apparent that deregulation under the NAFTA has greatly benefited Canada's telecommunications industry. It has introduced local competition in Canada, and it has opened up the Canadian market to foreign telecommunications companies.

B. EXPANSION OF CANADA'S TELECOMMUNICATIONS INDUSTRY INTO MEXICO AND THE UNITED STATES.

Telecommunications deregulation under the NAFTA has also opened up the Mexican and United States markets, an opportunity of which Canada was quick to take advantage.¹³⁹ Canada has expanded its telecommunications industry into Mexico, primarily by seeking joint venture partnerships or distributors.¹⁴⁰ Mexico has been attractive to Canadian businesses who seek Mexican partners with technical ability and experience in the region.¹⁴¹

One of the most significant reason for Canadian expansion into Mexico is Mexico's underdeveloped telecommunications infrastructure.¹⁴² Canadian companies have supplied communications products to Mexican companies who have used them to develop the infrastructure for nationwide basic telephony.¹⁴³ Northern Telecom in particular, has a 3 year supply deal with a Mexican corporation that is worth 330 million dollars.¹⁴⁴ This agreement is the largest ever for Northern Telecom in the area of wireless services.¹⁴⁵

Canadian telecommunications companies are also expanding into the U.S. as a result of the NAFTA.¹⁴⁶ Canada is one of the global leaders in telecommunications technology.¹⁴⁷ Companies like the Canadian based Cybersurf have created innovative prod-

136. See NAFTA, *supra* note 8.

137. *Bell Canada*, *supra* note 126.

138. *Id.*

139. *Id.*

140. See NAFTA Briefs, *supra* note 16. *Cybersurf Positions*, *supra* note 16.

141. See NAFTA Briefs, *supra* note 16.

142. *Id.*

143. See *Getting Through*, *supra* note 30. Mexico lags behind the rest of the world in telecommunications services like value-added services. *Id.* This lack of services "has created some unique opportunities in the market." *Id.* "[D]emand is being fueled by business consumers" who desire these new services. *Id.* The cellular industry, of which Canada's Northern Telecom is a big part, also provides extra services that the standard telecommunications infrastructure cannot provide...." *Id.* See *Northern Telecom*, *supra* note 16.

144. See NAFTA Briefs, *supra* note 16; *Northern Telecom*, *supra* note 16.

145. See *Northern Telecom*, *supra*, note 16.

146. *Id.*

147. See *Cybersurf Positions*, *supra* note 16; *Cybersurf Enters*, *supra* note 125.

ucts and services that sell well in the American market.¹⁴⁸ Cybersurf has recently created a unique information access system similar to the existing internet system, but which allows users to dial into very powerful central servers and access information from databases not available anywhere else on the internet.¹⁴⁹ Cybersurf is bringing Windows databases which users can access from a computer as simple as a 286.¹⁵⁰ Cybersurf is the only internet access company in all of North America which can make Windows databases available to its dial up customers.¹⁵¹

IV. Exclusions to Telecommunications Deregulation Under the NAFTA.

Although the NAFTA covers a broad range of important telecommunications areas, some restrictions on telecommunications have been left in place.¹⁵² The NAFTA does not include the operation of basic telecommunication services (like telephone lines¹⁵³).¹⁵⁴ The NAFTA also excludes broadcast and cable distribution of radio or television programming via land based networks or mobile satellites.¹⁵⁵ The most significant exclusion does not deal with telecommunications directly. Canada took a general culture exemption which states that Canada may regulate any industry that has an impact on Canadian culture.¹⁵⁶ Recently, Canada has interpreted this exemption to include broadcasting.¹⁵⁷

A. EXCEPTIONS UNDER CHAPTER 13: THE OPERATION OF BASIC TELECOMMUNICATION SERVICES AND THE BROADCAST AND CABLE DISTRIBUTION OF RADIO AND TELEVISION.

Chapter 13, which covers the overall deregulation of telecommunications, states two important exclusions.¹⁵⁸ Article 1301 states that, other than provisions for access and use of public networks, Chapter 13 "does not apply to any measure adopted or maintained by a Party relating to cable or broadcast distributions of radio or television programming."¹⁵⁹ Article 1301 also states: "[N]othing in this Chapter shall be construed to

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. See NAFTA, ch. 13, art. 1301-2 & 3; NAFTA, Annex 2106.

154. See Field, *supra* note 2, at 1148.

155. NAFTA, Ch. 13, *supra* note 8.

156. *Id.*

157. NAFTA, Annex 2106.

158. See MacDonald, *supra* note 24. See Boone, *supra* note 24. Austen, *supra* note 24. Morton, *supra* note 24. Baker & Wallace, *supra* note 24.

159. NAFTA, ch. 13, art. 1301(2).

require a Party” to authorize the operation of telecommunication networks or services.¹⁶⁰

The exclusion for the operation of public networks refers to the operation of basic voice and data communications transported by land based networks or by mobile satellite.¹⁶¹ The practical effect of this exclusion allows each country to maintain or designate a monopoly provider of telecommunications services.¹⁶² However, this exclusion does not refer to use and access issues.¹⁶³

As stated in Section II, Chapter 13 specifically calls for the open access to telecommunications networks.¹⁶⁴ Although a country may designate a primary public telecommunications operator, it must ensure that other countries have access to the public network to provide services such as long distance telephony.¹⁶⁵

The NAFTA also places limitations on each country’s ability to create monopoly providers.¹⁶⁶ The NAFTA specifically states that each country must ensure that any such monopoly does not abuse its monopoly position through anticompetitive practices.¹⁶⁷ In addition, each nation must guarantee that reasonable monetary rates are implemented for access to and use of services provided by monopoly operators.¹⁶⁸

Canada in particular has used this exception to restrict the operation of telecommunications networks.¹⁶⁹ The provision of domestic communication services by satellite has been restricted to a company called Telesat Canada.¹⁷⁰ Only Telesat can receive a license for a station that transmits and receives domestic communications signals.¹⁷¹

The next major exception in Chapter 13 states that the open trade provisions do not apply to the distribution of radio and television programming via cable or broadcast.¹⁷² In the past, the Canadian government has used this exemption to deny foreign companies from participating in broadcasting.¹⁷³ However, the Canadian government has recently permitted two telephone utilities controlled by the United States’ GTE Corporation to engage in broadcasting.¹⁷⁴ Canadian officials stated that the general prohibition on foreign participation in broadcasting is still in place though.¹⁷⁵ Canada allowed the exception because of the companies’ “many years of operation” in Canada.¹⁷⁶

160. *Id.*

161. *Id.*

162. *NAFTA Stairway*, *supra* note 21.

163. *Id.*

164. *See NAFTA*, Ch. 13, *supra* note 8.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See NAFTA Stairway*, *supra* note 21.

170. *Id.*

171. *Id.*

172. *See Canada Lets Utilities Controlled by GTE Enter Broadcast Field*, WALL ST. J., Aug. 7, 1996; *Canada Permits Broadcasting by GTE-Controlled Utilities*, WEST’S LEGAL NEWS, Aug. 12, 1996, available in, Westlaw, 1996 WL 449745 [hereinafter *Canada Permits*].

173. *Canada Permits*, *supra* note 172.

174. *Id.*

175. *Id.*

176. *Id.*

Canada has also used the exemption for radio and television distribution to prohibit telephone companies from moving into the area of broadcasting.¹⁷⁷ However, the decision to allow the GTE controlled telephone companies to broadcast went against this rule as well.¹⁷⁸

Excluding radio and television broadcasting from the provisions of Chapter 13 facilitated a third significant exemption to the NAFTA's liberalization of telecommunications: Canada's "cultural exemption".¹⁷⁹ This cultural exemption states that Canada may regulate any industry that has an impact on Canadian culture.¹⁸⁰ Chapter 13's exclusion of radio and television broadcasting has enabled Canada to regulate broadcasting as an industry that affects Canadian culture.¹⁸¹

C. CANADA'S CULTURAL EXEMPTION.

The effect of telecommunications technology on culture in general has been extensive.¹⁸² Traditionally, communications services like television were restricted by channel capacity of the broadcast spectrum.¹⁸³ But today, such services are "increasingly delivered by satellite and cable, enabling unlimited channel capabilities."¹⁸⁴ The result is that culture is now broadcast "across thousands of miles to the farthest reaches of the globe..."¹⁸⁵

However, Canada perceives this increase in broadcasting capabilities as a threat to its own national identity, and of particular concern to Canada is the United States.¹⁸⁶ For America, the cultural industry is a huge source of exports but many of those exports end up in Canada.¹⁸⁷ Because culture generates so much revenue for the U.S. economy, America views culture as a commodity like any other exportable good.¹⁸⁸ However, Canada views culture much differently; for Canadians, culture is not just a commodity but "an embodiment of their national identity..."¹⁸⁹ Canada feels as though this national identity is becoming less distinct because of the inflow of American culture.¹⁹⁰ For this reason, Canada insisted upon a cultural exemption in the NAFTA.¹⁹¹

177. *Id.*

178. *Id.*

179. See NAFTA, ch. 13, *supra* note 8; NAFTA, Annex 2106, *supra* note 152.

180. NAFTA, Annex 2106, *supra* note 152.

181. Austen, *supra* note 24.

182. Van Harpen, *supra* note 25. Braun & Parker, *supra* note 27.

183. Van Harpen, *supra* note 25, at 181.

184. *Id.*

185. Braun & Parker, *supra* note 27, at 155.

186. Van Harpen, *supra* note 25. For additional background information, see Baker & Wallace, *supra* note 24.

187. Braun & Parker, *supra* note 27, at 156.

188. *Id.*

189. *Id.* at 157.

190. *Id.*

The NAFTA's cultural exemption has its origins in the Canada-U.S. Free Trade Agreement (CFTA).¹⁹² Article 2005 states that "Cultural industries are exempt from the provisions of this agreement..."¹⁹³ The definition of a cultural industry under the CFTA, Article 2012, includes any "enterprise engaged in...radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services."¹⁹⁴ The NAFTA adopts this definition in Annex 2106 which states that any measure that pertains to cultural industries shall be governed according to the provisions of the Canada-United States Free Trade Agreement.¹⁹⁵ Annex 2106 also states that the "rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States."¹⁹⁶

In Canada, this portion of the NAFTA is regulated by the Canadian Radio-Television and Telecommunications Commission (CRTC).¹⁹⁷ The CRTC is responsible for allocating spaces on the broadcasting spectrum (similar to the FCC in the United States).¹⁹⁸ It is also responsible for enforcing Canadian ownership rules which state that "a license to operate a broadcasting station, or permission to operate a network of broadcasting stations, can be granted only to a Canadian citizen, or to a Canadian corporation controlled by Canadians."¹⁹⁹ In addition, the CRTC administers content rules "which stipulate the minimum amount of broadcast time which must be devoted by broadcasters to material of Canadian origin."²⁰⁰

V. Effect of Telecommunication Exemptions on Canada's Telecommunications Industry.

The exemption that has had the most significant impact on Canadian Industry is the cultural exemption.²⁰¹ Spokesperson for the Friends of Canadian Broadcasting, Ian

191. *Id.*; NAFTA, Annex 2106, *supra* note 152. Canada's rationale for demanding a cultural exemption begins with the assumption that culture and economy are "inextricably intertwined, so changes in one will necessarily effect changes in the other." Braun & Parker, *supra* note 27, at 161. The NAFTA facilitates the economic meshing of the United States and Canada so protection of Canadian culture is important to maintaining Canada's national identity, distinct from that of the United States. *Id.*

192. Van Harpen, *supra* note 25, at 170-171. Canada-U.S. Free Trade Agreement, art. 2005, Jan. 2, 1989, 27 I.L.M. 281 [hereinafter CFTA].

193. CFTA, *supra* note 192, at art. 2005.

194. *Id.* art. 2012.

195. NAFTA, annex 2106, *supra* note 152.

196. *Id.*

197. MacDonald, *supra* note 25.

198. *Id.*

199. *Id.* at 255.

200. *Id.* In addition to the CRTC, Canada has the Canadian Broadcasting Corporation (CBC) *Id.* The CBC is owned by the Canadian government and it maintains networks in both French and English. *Id.* Its broadcasting network extends to all of Canada in both radio and television. An important mission of the CBC is to "provide national and local programming in news and public affairs." *Id.*

201. *Id.*; Van Harpen, *supra* note 25, at 174.

Morrison, estimates that the "economic benefit to private Canadian television broadcasters and networks from federal protectionists policies is close to \$200 million."²⁰² The cultural exemption has mitigated the "economic threats to producers" and has had a "positive effect upon the Canadian economy."²⁰³ The cultural sector "employs about 360,000 Canadians, a labor force which has grown by 122% over the last ten years, twice the growth rate of the general labor market."²⁰⁴

However, for the most part, the cultural exemption has not been effective against the influx of American culture into Canada.²⁰⁵ In television programming, a number of American series are broadcast.²⁰⁶ "63% of Canadian television viewing time is spent watching non-Canadian programs, primarily from the United States."²⁰⁷ "85% of Canadian television viewing devoted to drama is spent watching non-Canadian programming, the great majority from the United States."²⁰⁸

Canada has stated that the aim of the exemption is not to keep foreign products out, but to "ensure the survival of Canadian cultural industries."²⁰⁹ So the continued cultural presence of the United States could be viewed as neutral in light of Canada's own growth in the cultural industry. However, in the past few years Canada's actions have shown that achieving a lower percentage of American products is also a goal of the cultural exemption.²¹⁰

In 1995, Country Music Television (CMT), which is owned by American based Westinghouse, was taken off Canadian airwaves.²¹¹ CMT first went on air in Canada in 1984 and had approximately 2 million viewers when the CRTC decided to take CMT off the air.²¹² In its place, New Country Music, owned by a Canadian company was licensed

202. Van Harpen, *supra* note 25, at 174.

203. *Id.*

204. *Id.*

205. MacDonald, *supra* note 25, at 254.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Boone, *supra* note 24; Austen, *supra* note 24.

211. Boone, *supra* note 24.

212. *Id.*

213. *Id.*

214. Baker & Wallace, *supra* note 24.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

and put on the air.²¹³

CMT filed suit in Canada but the Supreme Court of Canada dismissed its case.²¹⁴ CMT had argued that the CRTC ruling violated the open access provisions of the NAFTA.²¹⁵ CMT then filed a petition with the United States Trade Representative (Mikey Kantor) protesting its eviction.²¹⁶ Kantor wrote a letter to the Canadian Trade Minister asking for a review of the CRTC decision.²¹⁷ Canada responded by arguing that the NAFTA's cultural exemption allowed them to regulate broadcasting.²¹⁸

CMT then joined other members of the American broadcast industry who demanded that the United States sanction Canada in retaliation for its protectionist cultural policies.²¹⁹ The cultural exemption allows for blockage of Canadian exports of an equivalent value from entering the United States.²²⁰ The Federal Communications Commission took a retaliatory step by asserting its right to block pending and future licenses from Canadian controlled companies.²²¹

Canada's response came from the CRTC which recently doubled the number of 'specialty' channels available on Canadian cable systems. Twenty-three new channels were approved to begin service in the next three years.²²² These new specialty television channels were licensed without taking any current U.S. channels off the airwaves.²²³ CMT has also returned to Canadian airwaves in the form of a merger with New Country Network.²²⁴ This recent step reveals that Canada has focused on increasing its own cultural share in the broadcasting sector rather than decreasing the U.S. share.

VI. Conclusion.

Although the telecommunications provisions in the NAFTA left a number of exemptions in place, the existing provisions have "made significant inroads into an area that was one of the most highly regulated in international trade."²²⁵ The NAFTA has incorporated the general themes of non-discrimination and transparency into the telecommunications industry.²²⁶ The specific NAFTA provisions in Chapters 9, 12, and 13 comprise important policies that are directed at achieving "open access and technical and procedural harmonization."²²⁷ The policies implemented by the NAFTA reflect the importance of the telecommunications industry in international trade today and in the future.²²⁸

219. *Id.*

220. See NAFTA, Annex 2106, *supra* note 152.

221. Baker & Wallace, *supra* note 24.

222. Morton, *supra* note 24. Schneider, *Canada Erects Barriers Against Yankee TV*, Sunday Oregonian, (1996).

223. Morton, *supra* note 24.

224. *Id.*

225. Field, *supra* note 2, at 1150.

226. NAFTA, ch. 13, *supra* note 8.

227. Field, *supra* note 2, at 1150.

228. *Id.*

For Canada, this liberalization of telecommunications has had a significant impact on its telecommunications industry.²²⁹ Canada's communications market has expanded greatly due to growing Canadian based companies, and foreign companies alike.²³⁰ The result has been greater productivity for telecommunications suppliers and better services at lower prices for consumers.²³¹ Only product variety has the potential of decreasing due to the NAFTA's standardization policies.²³² But, standardization has made Canada more attractive to foreign telecommunications providers who have found that Canada's communications infrastructure is compatible with their own telecommunications equipment.²³³ Canada has also continued to make efforts at liberalizing its policies beyond the areas that were liberalized by the NAFTA.²³⁴ Most recently, it has allowed foreign controlled companies to enter into the broadcasting sector in Canada.²³⁵ Even Canada's cultural exemption seems to be relaxing in telecommunications; Canada's policy of reducing the level of foreign broadcasts has apparently been replaced by a policy of increasing its own broadcasts.²³⁶ In light of the positive effects that the NAFTA's liberalization of telecommunications has had on this industry, it is likely that Canada's steps towards further liberalization will have a similarly positive effect on Canada's telecommunications industry.

229. *Fact Sheets*, *supra* note 16.

230. *Id.*

231. *Id.*

232. *See Standard-Setting*, *supra* note 14.

233. *Id.*

234. *Canada Permits*, *supra* note 172. *Canada Lets*, *supra* note 172.

235. *Canada Lets*, *supra* note 172.

236. *Id.*
