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TELECOMMUNICATION REFORMS IN THE AMERICAS: NEW LEGISLATION AND THE REGULATORY FRAMEWORK

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MODERATOR—ALESSANDRA REYES

PANEL INTRODUCTION

MODERATOR, ALESSANDRA REYES
MCI

Good morning. My name is Alessandra Reyes. I would like to welcome you to the panel on *Telecommunication Reforms in the Americas*. I am a Washington College of Law LL.M. graduate of 1993, and I received my J.D. degree from the Universidad Católica Andrés Bello in Caracas, Venezuela. I am currently working at MCI Communications Corporation Department of International Commercial Affairs. I would like to welcome our panelists today who are distinguished figures in the telecommunications fields in Argentina, Venezuela, and the United States. It is an honor to have them here speaking before us, especially those who will speak on behalf of Argentina and Venezuela, countries that have started the trend toward privatization in the telecommunications field in Latin America.

Let me introduce our panelists. We have Eduardo Benitez from Venezuela. Eduardo works for CANTV-GTE in Washington, D.C. We have José Sariego, General Counsel at MasTec, Inc., which is located here in Miami. We also have Carlos Zubiaur from Telefónica de Argentina and Ivana Kriznic from Telecom Argentina. We also have Luis Matías Ponferrada, a former colleague of mine from the LL.M. program at the Washington College of Law, who now works for Abeledo Gottheil Abogados, a law firm in Argentina. And we have Ronald Pump from AT&T in the United States.

I would like to start off the panel with Eduardo Benitez, who is also my co-organizer of this panel. Eduardo is an LL.M. candidate at the Washington College of Law. He is currently Director of Latin American Telecommunications Policy at CANTV-GTE. Eduardo has an extensive background in telecommunications. He has served as manager of the Interconnection and Regulatory Affairs division of Telcel-Bell South in Venezuela. He has also supervised switching

operations for CANTV. Eduardo is a lawyer, graduating from Universidad Central de Venezuela Law School, and he also has a T.S.U. degree with a specialization in telecommunications and electronic technology from the Polytechnic University of the Army in Venezuela. So, I will now hand it over to Eduardo.

THE ADMINISTRATIVE PROCESS IN TELECOMMUNICATIONS

PRESENTATION BY EDUARDO J. BENITEZ
DIRECTOR OF LATIN AMERICAN TELECOMMUNICATIONS POLICY, GTE-CANTV

INTRODUCTION

As a guideline for this discussion, I am going to use a project dealing with regulatory processes in telecommunications that I am working on with the Section of International Law & Practice of the American Bar Association for CITEL, an inter-American telecommunications commission, and a specialized body of the Organization of American States.

Why are administrative procedures relevant for the telecommunications business? Basically, because if you go to any country, such as Argentina or Venezuela, you have to ask for a license, which means you need to deal with administrative agencies. There is, as you know, a relationship between the regulator and the regulation that is set forth under the law. In the past, telecommunications regulations in Latin American countries or, for that matter, anywhere around the globe, including Western Europe, were not governed by any special forms of administrative procedures but for the general rules of administrative law that are applied to any other are subject to government involvement. Fortunately, because of the trend toward privatization and the opening up of the telecommunications sector with the increased participation of lawyers in the process, the system is now changing to include greater administrative procedures in the telecommunications regulatory process.

I. GOALS OF ADMINISTRATIVE PROCEDURES

A. Access to the Process

The first goal of administrative procedures is to provide access to the process. Access to the process is something everyone wants to get out of an administrative procedure because it provides an opportunity to assert rights and to protect interests. To provide access, a fair, transparent, and well-developed regulatory process and procedure must be created. Additionally, provisions for adequate legal representation before the regulatory authorities are necessary to provide proper access to the proceedings.

As lawyers, we should be acquainted with how to go about representing clients in a reliable way. There are several different types of administrative proceedings. Rule-making, the process by which the regulatory body creates regulations is, to me, the most important type of proceeding. Lawyers also have to deal with such things as licenses, concessions, authorizations, and permits—the instruments that any company must obtain from a government in order to legally exploit or provide a telecommunication service. The goal of any telecommunications lawyer working for any telecommunications firm is to effectively secure these instruments.

Once the administrative body is in place, it uses a portion of its power to manage its affairs and to create rights. The procedure that allows us, as practitioners, to gain access to these mechanisms should be based on a set of principles that guarantees fair access to the law-making process. One of these principles should be as follows: when a proposal is made, the regulatory body should allow amendments or deletions to the proposal before allowing the proposal to be adopted or transferred for consideration. This is something that everyone is trying to obtain in any regulatory framework and in any administrative process. It essentially means that the government should provide everyone with the information in such a way that everyone can have access to the process regarding issuing licenses, obtaining concessions, or even appealing a decision made by the regulatory body.

B. Flexibility, Independence, Expediency, Consistency

Flexibility is another desirable characteristic in any process that re-

sults in the creation of guidelines and regulations. Administrative procedures should be written so as to enable the administrative agency to adapt to new circumstances, especially because telecommunications is a field of rapidly changing technology. Sometimes, governments will draft regulations so that there are means for adapting to changed circumstances. For example, public hearings provide an opportunity to adapt regulations to reflect regular changes in the marketplace.

The administrative agency controlling the procedures should also have independence from such entities as former monopolies and the political whims of the sovereign state. There is no reason to create regulations simply because the government controlling the administrative procedures decides to add a new regulation.

In addition, Latin American governments should create procedures for expediting the regulatory process. Currently, there can be a considerable delay in some countries between the time a party provides his or her input in the regulatory process and the time the government implements regulations. Nonetheless, implementation of administrative decisions should still be carried out officially and reasonably. However, political influences affecting regulatory decision making should be subordinate to the responsibility of protecting rights afforded to parties during the regulatory process.

Consistency is a colleague of these issues. By this, I mean that if the administrative agency decides that today it is not going to privatize a particular type of service, tomorrow it cannot say that it is going to give this concession to someone else. If the administrative agency is going to grant a concession or issue a license in a competitive environment, it should be consistent. It should not combine contradictory concepts and elements which lead to a lack of confidence among the regulated and, consequently, affect the normal development of the sector. All administrative proceedings should be guided by the principle of consistency.

II. NECESSARY ELEMENTS FOR THE ADMINISTRATIVE PROCESS

A. Public Hearings

The regulatory body requires the proper tools for reaching fair decisions and drafting appropriate legislation. One such tool is public

access to the process, including a mechanism for public hearings. In both Argentina and Venezuela, there is a trend toward allowing both the regulator and those affected by regulations to participate more fully in the creation of new regulations. Venezuela, for example, is trying to create mechanisms to allow the private parties affected by regulations to participate in this process in a way that allows them to provide their point of view and influence the regulation. This is the whole idea behind public hearings.

B. Limitation of Administrative Discretion

Latin America has administrative procedures that confer rights and authorities to the presidential body to enact regulations. For instance, in my country, Venezuela, the president has the right to enact regulations for any law, including, of course, telecommunications law. This discretionary right of the presidential body is absolute; therefore, public hearings are not required. Nevertheless, because of the current trend toward privatization, Venezuela tries to convene public hearings in order to make sure that everyone is afforded an opportunity to participate in the process.

Even in the United States, where regulations are tested in public hearings and extensive periods of public commentary, there are still "escape clauses" drafted into the regulations, which allow the government to subordinate private interests to other interests, such as national security interests. Of course, this is an old tradition practiced by all legislative bodies. Even in the United States the government includes, in FCC regulations for example, requirements that are enacted on behalf of the public welfare, requirements that challenge major telecommunications providers. All governments, therefore, exercise some discretion when drafting administrative procedures. Discretionary regulations are not just a problem facing Latin American countries.

Both Canada and the United States grant a judicial-like power to administrative agencies. This power is quite similar to the common law doctrine of *stare decisis*. A judicial power in regulatory bodies is advantageous because the regulatory agency is considered a quasi-judicial body, meaning that those affected by the regulations can challenge decisions made by that agency.

I should mention that the French civil code tradition is the process

followed in most Latin American countries. Unlike the civil law tradition, systems like the United States and Canada separate the judicial and the administrative powers of an agency. The quasi-judicial status of United States and Canadian administrative agencies inherently distinguishes between these two powers. In Latin America, regulatory process can take almost any form. The power of a minister, or a president, to create regulations is fully discretionary.

As mentioned earlier, common law countries, such as the United States, utilize public hearings, and the end result of the regulatory process is an order. Adjudication is the process used by the FCC and other regulatory agencies in the United States to form an order. Under the adjudication process, an order can be challenged. The FCC conducts hundreds of panel procedures resulting in numerous discussions and disputes before licenses are granted. This is especially true in the area of broadcasting, where a person who tries to obtain a licensing base can be challenged by anyone before an FCC licensing panel. In Latin American countries, there is not an established set of terminology or procedures for regulations. This creates problems.

C. Procedural Transparency and Effective Public Participation

Procedures should be open and mechanisms should guarantee the participation of all interested parties in the process. In some cases, such as public auctions, the government does not provide all of the information needed for many parties to effectively participate. In these cases, the government should be required to fully disclose all information regarding the participation requirements and procedures of the auction. Such a requirement would greatly increase the transparency in the regulatory process.

Governments should provide all information in a clear and easily obtainable format so that information on the administrative procedures and the bidding process, for example, is readily available to all those interested or affected. National newspapers and, in some cases, international newspapers should be used to provide notice of the process to the public. Procedures should be designed to be as simple as possible. This means that the process of creating new regulations or granting inspections should be easy to follow. In the past, procedures were made unnecessarily complicated. Fortunately, there is now a trend toward simplifying the process.

D. Provisions for Adequate Legal Representation Before Regulatory Authorities

Given the complexity of the regulatory process, companies can benefit by employing lawyers to represent their interests before administrative bodies. Generally speaking, in most Latin American countries there are standardized criteria, depending on the administrative procedure, that must be satisfied before legal representation can be provided. In some cases, the interested parties will conduct the proceedings by themselves. In practice, however, the major telecommunications providers, especially in the United States, Canada, and now, I guess, in Argentina as well, use lawyers. The administrative process should not hinder legal representation.

E. Enabling Acts Consistent with the Idea of Public Service

Concessions have been, and still are, the enabling act most widely used by governments as a means for transferring the right to provide a telecommunications service legally reserved to the State. It is important to remember, however, that concessions are temporarily allocated. This means that concessions are granted to the telecommunications provider on a temporary basis. Nonetheless, a concession is considered a valuable instrument granted to a company. In Panama, there is a new law that creates two different types of concessions: concession type A granted for the provision of temporary exclusive services and concession type B granted for the provision of other telecommunications services. By adopting two forms of concessions, Panama is tailoring the concession concept in such a way as to adapt to new trends without changing its regulatory authority or administrative procedures.

Some lawyers in the international community suggest that this kind of characterization will harmonize competing interests in a regulatory authority. In essence, they believe that a government can grant concessions without altering its administrative authority because a licensing procedure is, therefore, not needed. In my opinion, these governments are saying that there is no need to change the concept of administrative authority to meet changing circumstances. I believe that this is the wrong approach.

There are many important differences in enabling acts. For example, there are differences in the characterization of needs when issu-

ing licenses. Generally speaking, national governments are now focused on establishing concessions, but at the same time, they are ignoring the consideration of whether the authority of an administrative agency should be absolute. However, this view is changing, and Latin American governments are beginning to examine the absolute discretion of administrative agencies. The absolute authority of administrative agencies is a recurrent problem for any telecommunications lawyer in the course of representing clients. For political reasons, however, governments will always retain absolute discretion over such things as the granting of concessions.

F. Carefully Balanced Tariff Review

Brazil has presented legislation that allows a five-year period from the beginning of a concession contract whereby a new operator can set its own service rates. However, this is a rather insignificant benefit for the following reason. If, for any reason the government finds that during this five-year period competition or the public interest is adversely affected by this provision, the government has authority to set rates as it sees fit. Once again, the government retains a substantial portion of the regulatory power; in this case, a discretionary power to impose tariffs. In Canada, for example, the regulatory authority has broad power to suspend, reject, and change the rates proposed by operators. In Venezuela, as well, the minister has a rather unlimited discretion to place tariffs on telecommunication services.

The setting of tariffs requires a careful balance between the public interests represented by the regulatory agency and the interests of the private telecommunications provider. Unless new tariff rates receive widespread approval, the entire privatization process could be affected.

G. Clear Guidelines for Technical Inspections

I would like to comment on another issue—technical inspections. A technical inspection is a simple procedure, but if it is performed by technicians that are not adequately trained to conduct the inspection, it can cause problems for telecommunications companies. A technical inspection of an operating facility can result in sanctions on the operator. Consequently, because technical inspections can lead to

punitive procedures, it is desirable for the regulatory agency to establish specific requirements for inspectors and establish clear procedures for technical inspections.

CONCLUSION

There is a theme for creating a telecommunications network, and yet, there is a balance to be drawn. Policies in Latin America affect competition worldwide. Nearly all of the countries in the Americas have decided to privatize telecommunication services. In Central America—Nicaragua, Guatemala, and others are privatizing their PTTs. In South America, almost all countries have privatized their services. But if Latin America does not revise its regulatory process in the same manner as the rest of the world, Latin America is going to lose market power and market assets.

The appropriate procedures for one country, however, are not necessarily the best procedures for another country. Each country has its own unique circumstances. Each country has to carry out the process in a way that allows it to adapt to its own realities. For example, you cannot expect to successfully implement a regulatory process based on common law in a traditionally civil law country without changing all the laws of procedure. Nonetheless, I believe that changing the procedural laws is the necessary step for Latin America, and I think the Latin American countries are beginning to realize this. Thank you very much.

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ALESSANDRA REYES: Thank you Eduardo. The next panelist is José Sariego. José is Senior Vice President and General Counsel of MasTec, Inc., an international telecommunications contractor with operations in the United States, Argentina, Brazil, Chile, Peru, and Spain. Before joining MasTec, José was Senior Corporate Counsel and Secretary of Telemundo Group Inc., a major Hispanic broadcasting network here in the United States. As many of you know, he was also a partner in the Miami office of Kelley, Drye & Warren, an international law firm. José has also worked as a professional journalist with *The Miami Herald*. I would like to introduce Mr. José Sariego.

PRACTICING TELECOMMUNICATIONS LAW IN THE AMERICAS

PRESENTATION BY JOSÉ M. SARIEGO
GENERAL COUNSEL, MASTEC, INC.

INTRODUCTION

My name is José Sariego. I am General Counsel of MasTec. Let me tell you a little bit about our company, so that you will know why I am here and why I was asked to participate on this panel. We are a telecommunications contractor, which means that we install transmission conduits, which are the lines that go on telephone poles and the lines that go into your homes. In other words, we install all of the arteries in the telecommunications industry; you might think of us as the cardiovascular system of the telecommunications industry. We do not send the signals; we provide the transportation network so that telecommunication services can reach the ultimate consumer. We are literally in the trenches of the telecommunication wars in the United States, Latin America, and elsewhere in the world. We are mercenaries because we will work for any of the clients here today. In fact, many of you are our clients right now—Telefónica de Argentina, AT&T, CANTV-GTE. We therefore have a vested interest in what is going on in telecommunications. We welcome the privatization, deregulation, and the other exciting things that are happening in the industry because these will create tremendous opportunities for us, both here and abroad. These are exciting times for us in the telecommunications industry. We do not have to look very far to see that new initiatives are being undertaken in Latin America, Europe, and elsewhere around the world.

Ross Perot, while campaigning for the United States presidency in 1992, said that after the signing of NAFTA, there would be a "whooshing" sound of jobs going down south. Well, the "whooshing" sounds of today are not jobs going south, but the telecommunication players rushing to Latin America, India, and China, trying to be the first ones "on the block." Investment bankers and lawyers follow close behind. Today I would like to talk to you about practicing law in the Americas. I would like to give you a sense of some of the challenges, risks, and opportunities that your clients face, whether

these clients are telecommunication companies or companies providing services to telecommunication companies.

I. DEALING WITH CLIENTS

Whenever tremendous opportunities like these present themselves, my experience with clients is analogous to "two dogs in heat." The clients want to get down there and do the deal! They say, "Let's get down there quickly and get things done before a Bell South or Telefónica walks in and steals this wonderful opportunity." I view my role as the guy who comes out of his house with a garden hose, the guy that cools things down a little bit. But, by the same token, you do not want to put out the fire because if you do, you will be known as a deal killer. You all know what that means to your legal career. If you have the reputation of being a deal killer, you will never work again.

Thus, there is a fine line which you must walk in order to both carry out an order and do your job properly. How do you go about doing that? Well, my role model—I don't know if any of you are familiar with the X Files—is the FBI agent Fox Mulder. He is so laconic all the time. If a spaceship lands on the White House, it is just another day at the office. If a monster comes out of the swamp, it is just part of the job. I think that this is the approach that we need to take as lawyers when these opportunities present themselves. You have to detach yourself. You have to look at the situation objectively. You are the guy who has the little voice in the back of his head saying, "What's going on? What if?" You must present all the possible consequences to the people that really don't want to hear them. It's quite a challenge.

I like to play a game that drives all of the business people crazy—twenty questions all of which start with, "What if?" "What if guerrillas burn down our transmission facilities?" "What if the government is overthrown?" "What if currency speculators drive the currency down?" "What if an alien spaceship does land on the White House?" After you go through this process, you start to narrow down the real issues involved. Many of the issues that you would typically raise as lawyers are beyond your control, such as whether there is a revolution, a civil war, or an earthquake. There is nothing you can put in a document to cover these events. So why worry about it? Get to the essence of the deal. Try and focus on the deal because that is where

you can add value to the transaction. That is where you can make sure that the documentation actually reflects the deal and reasonably protects your client, without obstructing the process.

II. REPRESENTING COMPANIES OVERSEAS

I am somewhat of a newcomer to the international law field. But during the relatively brief time that I have spent practicing international law, I have heard a lot of myths about practicing law in Latin America, much of which has to do with the unfamiliarity that American lawyers have with the foreign legal process, foreign counsel, and foreign cultures. What I suggest is that rather than looking for the differences, we should look for the similarities. Embrace the differences. Look at them not as fundamental differences, but simply as a different viewpoint. We might even learn something from both the lawyers who do business in Latin America and from their cultures.

I believe that the steps in representing companies in Latin America or overseas—in the telecom industry or in any other industry—are basically the same as in the United States. The steps are very fundamental. You need to find a good lawyer. I am general counsel; therefore, I do not work on a lot of these deals myself. I have to go out and find lawyers. Find yourself a good lawyer who you can trust. Do what they say. Do not say, "Well, gee, that's not the way we do it in the United States." You are not in the United States; you are in Argentina, or Brazil, or wherever it may be.

A. Due Diligence

Then you must practice due diligence. It is important that you control the due diligence process because due diligence can be an annuity for your outside counsel. It is the type of thing that if you let people "go crazy," they will make a life's work out of it. But how much due diligence do you really need to practice? Do you really need to go back to the pre-Colombian period of these countries and try to understand the whole development of the social culture? Do you really need to look at every piece of paper that was ever generated by the target, or the acquisition, or the transaction that you are involved in? My suggestion is, probably not. Your role as a lawyer is to make those determinations and control the process. You must make sure that things are done efficiently and quickly.

B. Documentation

Another challenge for lawyers is in the documentation area. I was trained as a U.S. lawyer, which means that a 100-page agreement is not that significant. This is what I would expect for any transaction. Consequently, when I first started working in Latin America, I viewed a 10-page agreement as unacceptable. It did not weigh enough. It was not big enough. I have even been told that Latin American and European lawyers have two sets of agreements: one that they give to the United States lawyers and one that they use locally because the United States lawyers expect so much more paperwork. I have taken that approach and used it in domestic circumstances. I would suggest that you adopt the same attitude as that of my five year-old: whenever I ask him do to anything, he always asks me, "Why?" Go through your documentation. Go through your checklist. Ask: "Why are we doing this? What protection does this give to my client?"

C. Structuring the Deal

Most of the time, the best protection is a structural one. Structure the deal in such a way that there is a deferred purchase price, for example, or an escrow, or an "earn out"—something that you can hold back. A dollar in your hands is worth a lot more than a dollar in your opposing party's hands. Focus on structural issues. I am not suggesting that you ignore representations, warranties, indemnities, et cetera, all of which are important, but at some point they become somewhat redundant and slow things down. All they really do is create more legal fees and more complexity. You must focus on what kind of protection your client is really getting.

D. Looking at the Big Picture

As a final point, do not get too caught up in the deal. Again, this is difficult to do because the business people have a vested interest in the deal's success. They will be personally offended if the deal does not go through or if some fundamental point that they thought was very important is not reflected in the deal or is negotiated away at some point. But that's the job of a lawyer—to step back and take a look at the big picture. Some of the most hotly contested issues do not mean anything by the end of the day because they concern events

that may never happen.

Another of my favorite games is to think of all of the worst-case scenarios. As lawyers we are all very creative. That is how lawyers are trained. I will wake up at night and think about these terrible things which are never going to happen. You can easily incorporate five pages of text into documentation that attempts to conform the deal to something that is simply unrealistic. Try not to get too caught up in the deal. It is difficult, as a general counsel, when my boss says, "We're going to do a deal, and, by God, it's going to get done." It is your role to step back and add some objectivity to this decision. You are going to take a lot of abuse because you, like other lawyers, may slow things down. Others may not have the big picture in mind, but that is your job. If you do it right, you will be irritating a lot of people, but that is what comes with the territory.

That is my advice to you. I don't know whether it applies to every situation, but think about it, and apply it where you can. You will certainly sleep better at night. I know I do. Thank you very much.

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ALESSANDRA REYES: Our next speaker is Carlos Zubiaur. He is the Chief of Staff of the Office of General Counsel of Telefónica de Argentina. He holds a law degree from the University of Buenos Aires School of Law and is currently a professor at a masters degree level in Argentina in the field of telecommunications. He has been a speaker in several international seminars and has written several articles on administrative law.

PRIVATIZATION, DEMONOPOLIZATION, AND DEREGULATION IN THE ARGENTINE TELECOMMUNICATIONS MARKET

PRESENTATION BY CARLOS A. ZUBIAUR
TELEFÓNICA DE ARGENTINA

INTRODUCTION

Good morning, everyone. My name is Carlos Zubiaur, and I am the Chief of Staff of the Office of General Counsel at Telefónica de

Argentina. Before I begin my discussion about the restructuring of telecommunications in Argentina, I would like to thank the University for contacting the Argentina Telecommunications Law Association and inviting me here today to speak on this distinguished panel. Second, I would like to extend my appreciation to the law school for the translator it has provided, which will assist me with my English language difficulties.

Argentina began restructuring its telecommunications infrastructure seven years ago. Since then, significant changes have occurred. Most importantly, public services that were once operated by the government are now privately owned. Not surprisingly, this process of privatization has influenced the telecommunications market in Argentina, as it has in all of our countries. In fact, two other processes in addition to privatization—demonopolization and deregulation—continue to play a crucial role in the shaping of the Argentinean telecommunications market. As such, these three concepts—privatization, demonopolization, and deregulation—serve as the basis of my exposition today.

I. BASIC ELEMENTS OF PRIVATIZATION, DEMONOPOLIZATION, AND DEREGULATION

I will first distinguish between these three concepts before specifically addressing the topic of telecommunications in Argentina. People sometimes confuse these three concepts, which can operate in different fields and may, or may not, come together in different degrees.

Normal privatization consists of the transference of certain possessions that once belonged to the public sector. Essentially, what was once publicly owned now becomes privately owned. Activities that were once carried out by the government, such as property and investments, are granted to the private sector.

Unlike privatization, demonopolization relates to the number of participants or service providers in a determinate activity where the process is generally developed by the government. The monopoly undergoes the legal process of demonopolization. This process is influenced by different "active" subjects, such as the nature of the marketplace and the public interests affecting economic activity. Often, these public interests vary depending on the type of underlying busi-

ness activity.

Demonopolization occurs independently of the process of privatization. However, demonopolization can be accomplished by transferring ownership to the private sector. Demonopolization can also occur through government action, private sector action, or through a process of privatization without demonopolization. I will talk more about these processes later in my presentation.

In comparison, deregulation generally refers to the elimination of obstacles that condition, limit, or generally make it difficult to gain access to certain markets. Specifically, deregulation seeks to dissolve conditions that limit access to production activity and/or products. Such conditions typically exist when an activity has traditionally been undertaken by a state-owned enterprise. In short, one could view deregulation as the development of a marketplace with a goal toward eliminating obstacles. Next, I will discuss these concepts within the context of Argentina.

II. PRIVATIZATION IN ARGENTINA

Privatization began in Argentina in 1989 through a legal framework known as the Law of Reform of the State. This legislation established a procedure whereby the executive is given the power to initiate structural modifications in telecommunications and other sectors of the economy. The annex to this law lists several government institutions subject to privatization, with a provision allowing for the broadening of the list.

The state telecommunications company Entel enjoyed a position on the list. Using the legal procedures set forth by the law, the executive took steps to privatize this public telecommunications enterprise by dividing the country territorially into a northern and southern service region. Next, the southern service region of the country was widened. Then, the service regions were subdivided by service type. Within a particular region, newly formed and privately owned corporations began offering a particular type of service. Thus, the public telecommunications enterprise, once owned and operated by the government, was converted into independently owned and operated corporations or partnerships through an international bidding process in 1990.

The government received the proceeds from the sales in the bid-

ding process. On November 8, 1990, the bidding process ended, and private companies began offering telecommunications services. However, the state retained a portion of the shares in the corporation, and a portion of this state-owned stock was made available to the public by placing it on the New York Stock Exchange. The remaining portion of the state-owned stock was sold, under special conditions, to the employees of the former state-owned enterprise. Hence, three kinds of stock ownership were created: shares bought during the privatization period, shares offered for sale on the stock market, and shares offered to the former employees of the state-owned enterprise.

III. DEMONOPOLIZATION IN ARGENTINA

Every process of privatization can be accompanied by a process of demonopolization or deregulation. In the case of telecommunications services in Argentina, we must distinguish between the three types of services affected by demonopolization: basic telephone service, mobile or cellular telephone service, and value-added service.

A. Basic Telephone Service

Basic telephone service is the most active form of fixed-service telecommunications in Argentina. This service is offered by two companies, which operate through territorial applications. The first company, Telecom Argentina, operates in the northern region of Argentina, and the second company, Telefónica de Argentina, operates in the southern region of Argentina. Both of these companies were formed during the bidding process in 1990.

These companies were granted an exclusive license to offer services in their respective regions. Thus, within each of these two regions, only one operator exists, forming a regional monopoly. Consequently, demonopolization at the national level was converted to a monopoly at the regional level. These regions of exclusivity apply equally to international phone service. Telintar, a company jointly owned by Telecom Argentina and Telefónica de Argentina, also has exclusive rights to provide telephone services. Although demonopolization has not, in fact, completely occurred in our country, there is a certain comparative competition between Telecom and Telefónica. In particular, there is competition for licenses in cellular or

mobile telephone services in the same region of exclusivity for fixed telephone services.

B. Mobile and Cellular Phone Service

Before privatization, there was only one company, Movicom, offering mobile telephone services. These services were limited to the areas of Buenos Aires and its suburbs. After privatization, a new company obtained a license to operate in the Buenos Aires region while Movicom retained its rights to provide mobile phone services. Thus, the two companies provided telephone services in the same area.

Licenses for mobile phone service for regions outside of Buenos Aires were issued in the same manner as for fixed phone services, that is, the country was divided between a northern and southern region. Service rights, however, were not exclusive to the licensee. For each of the regions, one license was issued to the competing fixed telephone service provider. In other words, the right to provide mobile telephone services in the southern region was granted to the northern region fixed telephone service provider, Telefónica. A second license was granted to another company through public auction.

As a result, six companies offer mobile telephone service: two in Buenos Aires, two in the southern region, and two in the northern region. This has created a certain level of competition in mobile phone services, but it also has resulted in some difficulties since, as you all know, only one company may at a given time transmit at a particular broadcast frequency for mobile telephone services when there is more than one service provider in the area. Hence, in the areas of fixed telephone services and mobile telephone services, the process of demonopolization is not complete. Regions still retain their rights of relative exclusivity.

C. Value-Added Service

The third type of service affected by demonopolization is value-added service. Unlike fixed and mobile telephone services, the process of demonopolization has been completed for value-added services. The market for value-added services is totally free from monopolies. Participation in this market is conditioned solely on obtaining a license from the government, which acts in a regulatory

capacity. Overall, there is competition and freedom of the market in this sector.

In conclusion, the demonopolization process has operated in a limited capacity in the fixed or basic phone service sector and mobile telephone service sector, while the process has operated in a more complete manner in the value-added service sector.

IV. DEREGULATION IN ARGENTINA

Let us now move on to a discussion about deregulation. Conceptually, I said that deregulation means the elimination of obstacles that make entry into a market difficult. Furthermore, deregulation is a judicial construct that protects a company within a new judicial framework that looks toward freedom in the marketplace. This process however, does not occur overnight and involves two processes that are ideologically opposite from one another. Moreover, it is important to realize that deregulation actually results in new regulations. New regulations are necessary within a new market-oriented environment.

A. New Regulations

I believe that we need to replace non-market oriented state regulations with new regulations that will eventually lead to a growing marketplace. This includes regulations determining who can and cannot enter the market, regulations addressing the rights and obligations of those who have entered the market, and above all, regulations directed at the persons operating businesses within the new marketplace. When new services are offered by a company, regulations will be stringently applied because there are few market participants. This burgeoning market will be heavily regulated until such time when a true market exists and the next phase of deregulation can begin. In other words, as the market continues to develop, the obstacles that restrict its access are accordingly removed to allow greater freedom.

B. The Role of Telecom and Telefónica in Deregulation

In Argentina, deregulation is a bit more complex because there are two companies, Telecom Argentina and Telefónica de Argentina, which have been granted temporary exclusive licenses that prevent

others from participating in the process. Regulations are needed to prevent these companies from abusing the market where they are the only participants. We must not only protect the users of the telecommunications services, but also ensure that these service providers conduct their business in a manner that allows the state to effectively implement further deregulation in the future. Today, guidelines are in place in Argentina to address these needs. In fact, these guidelines set both quantitative and qualitative goals, which are periodically checked by the Argentine government.

On November 8, 1997, the licenses granted to Telefónica and Telecom expire. At this point, both of these companies may request a three-year extension, which has, in fact, already been granted. Therefore, the new date for the end of exclusiveness in the marketplace is now November 8, 2000. At that time, demonopolization can fully proceed, and there will be a system of relatively free competition. There is certain to be a debate as to what role the state should take regarding this future deregulation.

C. Concerns Regarding Future Deregulation

Must the state allow the telecommunications market to operate freely without intervention? Must there be guidelines for incremental deregulation, or should the state continue to actively regulate the process by drafting more regulations? In sum, what position should the state take? Furthermore, in what manner, or by what process, should the state enforce these market regulations?

All of these questions are food for debate in my country. How Argentina decides to regulate depends on whether the regulations are designed to ensure freedom in the market or to set forth guidelines for proper behavior. In addition, Argentina must consider whether it should pursue an active regulatory role or simply let the market flow freely. I think that we have to bear in mind the fact that domineering lenders exist. The next phase of deregulation must take into account the influence of these pre-existing or future lenders who can manipulate the marketplace by drawing from large financial resources. Furthermore, we need to consider how to regulate the market to prevent abuses from occurring when new relationships are formed.

In sum, all of the concerns that I have just shared with you are being discussed today in Argentina. Future efforts will be directed, in

part, toward establishing an environment that will meet the needs of the business community. In Argentina, we seek to ensure that businesses are not "thrown overboard" on a day-to-day basis by rules and regulations that threaten investments. The demands of a free marketplace will play an important role in forming the basis for future deregulation in Argentina. This new phase will probably start in the year 2000, and what I have outlined today is the basic framework from which my country will restructure its telecommunications market.

CONCLUSION

On a final note, I want to address the role that lawyers have played over the past seven years during Argentina's process of privatization, demonopolization, and deregulation. I can say that in all of these areas, lawyers have certainly demonstrated their capabilities and meaningful skills. Clearly, one saw the seminal role that they played during the privatization of Entel, which was the first significant effort at privatization that Argentina undertook in 1990. Again, this process was initiated at a time when Argentina did not have experience in privatization, and as many of you may recall, was experiencing an unstable economic period. Indeed, the role of lawyers in Argentina's telecommunications field during this period was quite important.

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ALESSANDRA REYES: Continuing with the dynamics of competition in Argentina, we have Ivana Kriznic. Ivana works for Telecom Argentina, the other basic telephone service company in Argentina. Ivana is a member of the Argentine Telecommunications Law Association. She holds a bachelors degree in political science from the Universidad del Salvador and a law degree from the Universidad de Buenos Aires. She also holds a postgraduate degree in telecommunications management from the Universidad de San Andres and the Instituto Tecnologico de Buenos Aires.

TOWARD LIBERALIZATION IN ARGENTINA

PRESENTATION BY IVANA SONIA KRIZNIC
TELECOM ARGENTINA

INTRODUCTION

I am honored by the invitation to speak on this panel on telecommunications liberalization in the Americas. I thank the American University, Washington College of Law and particularly Eduardo Benitez for the opportunity to share with you the Argentine experience in this field.

As a member of the Argentine Telecommunications Law Association I would like to tell you about our current activities. The Association was founded in 1991 and consists of more than one hundred Argentine lawyers belonging to telecommunications companies, law firms, and governmental departments, such as the National Communications Commission, which is similar to the FCC in the United States. The President of the Association is Jorge Zirpoli, Director of Legal Affairs of Telecom Argentina. Fernando Borio, General Secretary of Telefónica de Argentina, and Luis Kenny, Director of Legal Affairs of Movicom, are its vice presidents.

The Association is devoted mainly to academic activities, such as preparing seminars and conferences to keep its members informed of the new realities of technological developments and the experiences of other companies worldwide. To this end, Scott Blake Harris, who served as Chief of the International Bureau at the FCC, will give a talk in Buenos Aires in a few days at a conference organized by the Association.

During the first months of this year, the Association and an Argentine university jointly developed the first postgraduate course on telecommunications law open to Argentine lawyers. Due to the success of the course, the Association is planning another one for next year, and we are now updating the curriculum to include the latest topics. In this respect, the Association desires to broaden the international perspective of next year's course. Contributions from foreign legal experts are welcomed.

I. THE HISTORY OF ARGENTINE TELECOMMUNICATIONS LIBERALIZATION

Following Carlos Zubiaur's speech, I would like to introduce the main issues regarding the future steps toward liberalization of the telecommunications industry in Argentina. As my colleague has explained, Argentina was one of the first to begin deregulation. When the privatization of the state-owned telephone company took place in 1990, few countries had preceded us. At that time, the only foreign examples that could be considered useful guidance were the measures derived from the divestiture of AT&T, the duopoly regime of British Telecom and Mercury in the United Kingdom, and the multicarrier system adopted in Chile.

At the beginning of this decade, Argentine political authorities envisioned three priorities: expansion of the basic telephone network, improvement of service quality, and the creation of a modern digital network. To achieve these goals, the government granted two licensees exclusive temporary contracts to provide basic telephone services. The exclusivity period will be extended until 2000 if the basic telephone companies meet the objectives set forth in the List of Conditions in their concession. The companies have petitioned for an extension and the regulatory authorities should make their decision no later than next month. The decision to grant exclusivity was based on the belief that a liberalized landscape could not be achieved instantaneously at the beginning of the nineties. On the contrary, such an aim required a transition period to garner the huge investments required and to set the necessary conditions for a fully competitive marketplace in the short run.

The policies that were implemented seven years ago have been successful. We have met our quality and expansion objectives, and the most well-known international telecommunications and broadcast companies have confidence in the stability of the proposed telecommunications framework and are participating as stockholders or operators in the Argentine marketplace. They include, to mention just a few: AT&T, TCI, USWest, GTE, BellSouth, Motorola, COMSAT, McCaw, Telecom Italy, France Telecom, Telefónica of Spain.

As I mentioned before, nowadays we are going through a period of transition. I would like to share with you a brief overview of where we are today.

II. THE JANUARY 1997 GOVERNMENTAL DECREE

Last January, the national government issued a decree that established a set of rules including, among other measures, rate rebalancing, interconnection, and the basis for a tender of PCS to be held this year. The decree and the regulations established thereunder have resulted in various lawsuits by different plaintiffs, each suit grounded on a broad variety of considerations and aimed at a different remedy. Despite the lack of a final judicial decision concerning each of these topics, I will refer briefly to them because they are necessary steps to facilitate a pro-competitive environment in the near future.

A. Rate Rebalancing

To the extent a service's price is set below its directly attributable costs, revenues have to be obtained from other services to make up the difference. In the telecommunications field, local service costs are often geographically averaged over broad regions that encompass relatively easily served urban areas and hard to serve rural ones, so that a system of implicit subsidies is embedded within a carrier's rate structure.

Traditionally, long distance service prices are used to keep local rates low, that is, to subsidize them. The same was happening in Argentina as the rates underwent rebalancing. The new tariff schedule was intended to reduce cross-subsidies and to put prices in line with costs. Its effects were planned without regard to revenue.

Not only in Argentina, but also in many other countries who are facing or have faced similar problems concerning rates, local tariffs are a socially sensitive issue, and any potential increase leads to a political debate. The rate rebalancing was challenged by the ombudsman and by consumer associations and users who seek the revocation of the new rate structure. On the other hand, there are provincial authorities, organizations, and consumers who have brought legal actions in support of the rate structure.

No matter what the final ruling of the Supreme Court turns out to be, rate rebalancing is a necessary step toward liberalization because prices that do not reflect costs are inconsistent with the goal of an open market.

B. Interconnection

There is no doubt that a clear interconnection regulation should be established in advance in order to enable newcomers and incumbents to forecast what investments will be necessary for the infrastructure. In this area, regulatory agencies play an essential role as policy makers who translate the general principles into specific rulings.

Certain core principles of interconnection are generally adopted in the majority of the countries seeking fair competition. For instance, all carriers have a duty to provide interconnection with each other, and the terms of interconnection must be non-discriminatory. In addition, there seems to be a preference for negotiated interconnection agreements, in which the carriers rely on the regulatory body to act as referee where voluntary negotiation has failed.

There is a good chance that interconnection disputes will reach the courts so that judges may frequently find themselves involved in this area. Nonetheless, the majority of interconnection controversies seem linked not so much to legal theories as to business strategies because for an entrant the choice between building or buying local infrastructure depends on the price of interconnection. Consequently, legislators, regulators, and judges must take into account economic and technical features as well as legal considerations when dealing with the terms and conditions for access between firms that will compete with each other and will also use the facilities of one another to round out their own. For this reason, legal advice is often needed in this field, and a good knowledge of the economic and technical matters involved is desirable because, as it is commonly said, "the devil is in the details." Despite the outcome of the present ruling on interconnection in Argentina, the best interconnection provisions will be those that enable new entrants to grow without necessarily taking business away from incumbents and without impairing the economics of universal service programs.

C. New Services

A tender for two PCS licenses in the city of Buenos Aires and its surrounding areas was floated at the beginning of 1997. Many companies took part in the bid, but successive modifications to the list of conditions resulted in some delay. For the benefit of consumers and despite the prior delays, it is expected that a successful execution of a

PCS auction will be reached in the near future.

PCS appears to be a competitive service ready to skim off lucrative customers from cellular services in the short run, and, once the exclusivity period is over, also from basic telephone operations. Another source of competition may come from low and medium orbit satellite systems planned for launch next year.

Direct broadcast satellite TV has started recently, and its service coverage is focused mainly on areas where cable systems are not available. One company is in operation already, and according to the media announcements, a second is planning to enter the market soon.

III. THE FUTURE OF ARGENTINE TELECOMMUNICATIONS LIBERALIZATION

The future of Argentine telecommunications liberalization can be forecast by analyzing the current international economic and technological trends.

A. International & Regional Regulations

As the social, political, and economic systems of different nations become more interdependent, so too will their telecommunications frameworks. Consequently, a lawyer specializing in this field deals not only with domestic laws, but also with bilateral and multilateral treaties as well as international and regional rules and recommendations. The United Nations and the Organization of American States have special fora for telecommunications, UIT and CITEL, respectively. An international association of lawyers belonging to telecommunications companies, like AHCIET, promotes a fluid interaction between professionals of different countries.

The importance of international decisions is demonstrated by the agreement signed in Geneva last February under the auspices of the World Trade Organization. The WTO accord is the most remarkable commitment toward global liberalization, especially regarding the removal of impediments to foreign investment.

Moreover, regional regulation in the Americas is becoming increasingly important because there is a current tendency for all domestic regulations to comply with Mercosur guidelines. Mercosur is presently a tariff union whose members are Argentina, Brazil, Para-

guay and Uruguay. Chile and Bolivia are associate countries, but not yet full members. Mercosur is expected to adopt an agreement on trade in services, which will include an annex on telecommunications.

B. Global Alliances

The great opportunity of the future seems to be in the provision of integrated telecommunications services on a worldwide basis. That kind of synergy can only be reached through global alliances consisting of virtually every telecommunications company on the globe. I once read that global alliances are like a game of musical chairs because nobody wants to be without a chair when the music stops. Despite the media announcements of record size strategic agreements, lawyers should cautiously analyze the true extent of the commitments each participant is willing to undertake. The instability of global alliances is typical in an era of rapid change. A new alliance forces other companies to consider alliances of their own. Sometimes, announced alliances are later abandoned. In turn, a collapse in one association raises questions about all of the other deals.

Virtually all Argentine telecommunications companies participate directly or indirectly in a variety of alliances and collaborative relations of different shape and scope. We should be ready for all sorts of corporate marriages as the various contenders try to invade each other's markets, but it will be several years before we really know which of the deals will be successful.

C. Consumer Demands

The telecommunications industry is characterized by a great difficulty in predicting which new product will be the most lucrative in the marketplace. It is impossible to know in advance which of the broad variety of new services becoming available will find consumer acceptance. Consequently, there is a high degree of risk in all of the marketing strategies.

The bundling together of services emerges as an important competitive tool for the future. Providers can attempt to lock in customers for life by bundling services. Competition will bring out innovative mechanisms and channels for sales and dynamic forms for cooperation between companies, ranging from co-branding to verti-

cal integration, because the customer demands a single point of contact and one consolidated bill. Sometimes these marketing ideas may collide with the pro-consumer legislation established in the last Constitutional Amendment (1994). Preventive legal advice is vital to avoid such a case.

D. Technological Developments

Despite the technological developments announced daily, a significant market change will only take place when the right technology is married to the right service at the right time. Consequently, no one can accurately predict the ultimate success of today's developments. Lawyers should keep up to date with technological issues in order to forecast the kinds of services their clients are willing to introduce. However, lawyers must bear in mind that regulatory concerns may pose obstacles to the execution of innovative developments.

At present, analysts generally point out that multimedia services, Internet, and wireless systems are likely to become the "killing" applications of the near future. The superhighway will pave over distinctions between traditionally segregated phone and cable services, since integrated fiber/coax broadband networks are capable of providing all kinds of interactive and multimedia applications, such as Video on Demand, Video Conference, Home Shopping, and the like.

Satellite-based systems of low and medium earth orbit, known as LEOs and MEOs, will provide even more global competition in remote areas if capital markets continue to support them. Wireless systems could be highly significant in competition for existing markets, even for basic telephony, such as fixed wireless distribution systems or PHS in Japan. Another nascent source of competition for existing telephone companies is the emerging use of voice communications over the Internet.

Taking into account the rapid technological changes, regulators should refrain from favoring any particular application. Nor should they lock service definitions into "technological boxes," as today's inventions may become obsolete tomorrow.

IV. A NEW ARGENTINE TELECOMMUNICATIONS ACT

Harvesting the full benefits of a competitive market requires much more than a set of regulatory rulings. It is essential that a country's communications policy be guided by the highest authority. In Argentina, we are now at a stage where congressmen are called upon to pass updated national legislation regulating telecommunications and broadcast services as well as would-be multimedia applications. Our current law was issued in 1972.

A new act will mean re-regulation, essentially a new set of rules designed to foster competition. The experience of other countries shows that relying solely on market mechanisms will not be enough to bring about the sort of consumer benefits that are expected in a highly competitive environment.

I would like to point out the essential provisions that, in my opinion, should be included in a new telecommunications act.

A. A Symmetric Opening

Because they have grown up at different times and under completely different circumstances, the telephone and cable industries are regulated in different ways in Argentina. The rationale for prohibiting the entry of the telcos in the broadcast sector and vice versa is linked to the exclusivity period granted to the former under the List of Conditions of the privatization process.

At present, cable companies are well positioned against telcos to provide integrated services. Argentine cable systems rank third in penetration rate in the Americas after companies in the United States and Canada. In Argentina, the number of homes receiving pay television is comparable to the number of households served by telephone companies. Cable networks are already upgraded to the extent that they can offer high speed Internet access through cable modems.

At the end of the exclusivity period in the year 2000, the removal of restrictions is necessary since there will be no room for privileges in the marketplace of the twenty-first century. Therefore, a symmetric legislative opening, such as the one adopted by the Telecommunications Act in the United States, will prove to be the best option to set the basis for full competition. In this respect, any and all legal barriers to entrance in the telecommunications, broadcast, and pay televi-

sion markets should be removed. For the sake of impartiality, the new act should provide for a symmetric treatment of competing systems, namely cable and telcos, regarding contributions to universal service funds, tax payments, and interconnection duties.

B. A Redefined Regulatory Body

Legislative action removing the legal and economic barriers to entry is necessary but not sufficient. Even a pro-competitive law is not synonymous with a free market because a free market can not be expected to appear miraculously at the mere approval of a new piece of legislation.

The regulatory authority plays an important, indeed a critical, role in managing a smooth transition from a closely regulated monopoly to a customer-driven market. At the beginning of the process, when all the basic rules must be set forth, regulators act like an extension of the Congress. The role of the regulators should be reshaped to be more like that of referees in a fair play competition. In Argentina, the powers and organization of the regulatory agency have been redefined several times since the date of privatization. At present, there exist two main regulatory bodies: the Secretary of Telecommunications, who makes the policy, and the National Communications Commission, which is dependent on the former and in charge of enforcement.

In the CITEL forum, we are currently analyzing administrative proceedings and comparing different regulatory structures. I fear that there is no conclusive evidence as to which method is best, since no regulatory framework is perfect, and each country's regulatory framework must comport with its country's unique traditions and legal system. Therefore, the Argentine regulatory body should be redefined, once again, to fulfill the needs of a free market environment.

C. Sound Antitrust Provisions

As the recent experience in the United States illustrates, liberalization is likely to result in the merger and consolidation of several players in search of the management synergy and capital resources to lead the industry. Because a myriad of mergers, take-overs, and joint ventures are reshaping the environment, regulators feel the need to closely monitor potential unfair practices.

In Argentina, the existing telecommunications framework provides some guidelines concerning unfair competition. For instance, there are guidelines related to the prohibition of cross subsidies, separate accounting requirements for competitive and non-competitive services, regulation of parent-affiliate relationships as to spectrum capacity, and some limitations on controlling interests in companies that provide similar enhanced services. Nevertheless, a more general perspective is required.

Congress is now discussing an amendment to the existing general antitrust law. According to the projected bill, certain types of mergers would require approval in advance by antitrust authorities because there is a fear that such combinations could create dangerous monopolies. The risk of such an antitrust mechanism is that even if a company eventually wins antitrust approval, the likely delay could impair the prospective merger and the uncertainties could undermine stock prices. There is still lot of work to do in the antitrust field in order to formulate sound antitrust provisions capable of smooth interaction with telecommunications rules.

D. Expanding Universal Service

The new act should also include guidelines for expanding universal service and assuring widespread deployment of advanced telecommunications infrastructures. Basically, the act should ensure that a minimum level of universal service support is provided for two main groups of recipients: low-income residential users and those living in high cost areas.

If private companies are to furnish public services to some of their customers at rates that do not cover the costs, universal service programs must account for the difference. Universal service programs of any type require funding. The question is how to fairly distribute the burden of financing universal service in the new competitive world. Appropriate resolution of the universal service funding issue is critical to the development of fair competition. Every player, in proportion to its business weight, should contribute to this fund. Mechanisms should rely on broad-based, competitively neutral sources.

A solution to the issue of universal service is vital to a country like Argentina that still falls short of the ideal tele-density level. For instance, the United States has seventy lines per hundred habitants. In

Argentina, that ratio is not more than twenty. Argentina needs to seek a tele-density ratio of at least 30 to 40.

CONCLUSION

At the end of the exclusivity period, Argentina's new legislation should provide for a pro-competitive, deregulatory, national policy framework designed to accelerate private sector deployment of advanced services by opening all telecommunications and broadcast markets.

Hopes are high among industry players, consumers, and policymakers that the substantial benefits of a pro-competitive environment are coming soon to Argentina. My country is ready for an age of unparalleled growth and transformation in the most vital industry of the twenty-first century, where gains in efficiency will deliver a big pay off to the entire economy and promote the nation's growth and international competitiveness.

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ALESSANDRA REYES: Our next speaker is Luis Matías Ponferrada. He is a Washington College of Law LL.M. graduate of 1993 and received his J.D. degree from the University of Buenos Aires Law School in 1989. He is currently an associate at the firm Abeledo Gottheil Abogados in Buenos Aires, Argentina. He also has a postgraduate degree from the Telecommunications Law Program at the University of Buenos Aires School of Law.

INTEGRATION OF TELECOMMUNICATIONS SERVICES IN LATIN AMERICA

PRESENTATION BY LUIS MATÍAS PONFERRADA
ABELEDO GOTTHEIL ABOGADOS

INTRODUCTION

I would like to talk about the issues and developments surrounding the future integration of telecommunication services in Latin America. Since our other panelists have provided a well-informed discussion of the status of telecommunications in Argentina, I will focus

my discussion on Brazil, Uruguay, Paraguay, and Chile. Before I begin this topic, however, I will briefly describe the telecommunications market and infrastructure in each of these countries.

I. TELECOMMUNICATIONS MARKETS & INFRASTRUCTURE

A. Brazil

Operating as a monopoly since 1974, Telebras has been the main provider of telecommunication services in Brazil. Telebras owns ninety-four percent of all centers of telecommunication services, which are basically telephone services, and also operates ninety-one percent of the national public local networks. Telebras controls submerged cables with links to Europe, North America, and other Latin American countries. Telebras also provides data transmission services, in addition to video and sound telecommunication services. The local network includes fifteen million lines and two million cellular phone service customers. For the year 1995, Telebras's income exceeded US$ eleven billion in gross revenues.

Telebras's subsidiary, Embratel, is a provider of international and long distance service and furnishes Telebras with the antennae for transmission in Brazil. Telebras's other subsidiaries include twenty-seven local carriers. Embratel's domestic long distance service is provided through a domestic satellite system, called Brasilsat, which consists of three satellites and five systems leased to Intelsat. The uplink to these satellites, for long distance service, is routed through seventy-one stations supported by almost 2,000 kilometers of fiber-optic cable. For local phone service, the network is 200,000 kilometers.

The number of phones per one hundred persons in Brazil is 9.7, compared with a phone density of twenty in Argentina. In relation to other Latin American countries, Brazil's telecommunications system is not as advanced in terms of the degree of digitalization implemented in its communications network. The network in Brazil operates at fifty percent of its capacity as a fully digitized network.

The gradual opening of the telecommunications market in Brazil to private investors began in 1996, when concessions were granted for mobile cellular phone service, satellite service, and data transmission services. Bell South was granted a concession for providing

services in the area of Sao Paolo, for which the company bid US$ 2.45 billion. This was US$ 900 million more than the second highest bid, which was offered by AT&T. The high price paid for the concession reflects the strategic importance of being the first foreign company to offer telecommunication services in Sao Paolo, a region of almost seventeen million persons. Since it was granted the concession, Bell South has become one of the leaders in providing cellular services in the Southern Cone. The company is also at the forefront of telecommunications in the Buenos Aires region, through its subsidiary Movicom.

Other foreign companies are also offering cellular services in Brazil. For example, a concession in the area surrounding Sao Paolo was won by the Swedish company Telia, which paid US$ one billion. Various groups, however, are currently challenging this concession in court. Additionally, Bell Canada won licenses in Brasília and six other states in Brazil, which cost US$ 304 million. Finally, similar concessions were also granted in the states of Bahia and Sergipe in the northern part of Brazil, which cost US$ 230 million.

These are the initial steps for privatization of cellular phone services in Brazil. The government of Brazil, by selling off portions of Telebras and its subsidiaries, expects to bring in approximately US$ forty billion in revenues. On the other hand, Embratel has set forth a US$ five billion investment plan with goals set for the year 2000. Of this investment, sixty-five percent will be directed toward improving basic telephone services, eight percent in international and data transmission services, and the remaining twenty-seven percent allocated to other telecommunication services.

B. Uruguay

Like its Brazilian counterpart, basic telecommunication services in Uruguay are provided by a state-owned monopoly called Antel. Currently, there are approximately 650,000 lines in all the territory of Uruguay which, for a country of three million people, means that there are twenty phones for every one hundred persons.

In the early 1990s, during the early privatization trend in Latin America, the government issued a public referendum asking whether Antel should be privatized. The majority of the population voted to reject privatization of this enterprise. However, even though it is a

state-owned monopoly, Antel has maintained a solid infrastructure with strong investments in recent years. As a result of increased investment, Uruguay's network has been digitized, and "800" and "900" services and international direct dial data services are now available.

Cellular phone service in the city of Montevideo is open to competition (between Antel and Movicom). Cellular phone service operates by having the calling person pay a surcharge for the particular cellular service in addition to the basic fee for telephone services ("Calling Party Pays"). Regarding Internet services, Antel has decided to give this type of service a high priority by offering it at a low cost to subscribers.

C. Paraguay

In Paraguay, as in Uruguay, telecommunication services are provided by a state-owned monopoly called Antelco. Unlike Uruguay, however, this country is one of the most underdeveloped in telecommunication services in Latin America. There are only four phones per one hundred persons in Paraguay. In contrast, most of the surrounding countries have a phone density of between fifteen and twenty. The cost of installing lines in Paraguay is one of the highest in the continent, and the country only has approximately 100,000 lines, although the non-attended demand is of approximately one billion lines. The cost for installing a residential line is US$ 800 and the cost for a commercial line is US$ 1,600. Paraguay recently implemented a project to install 80,000 lines, which was estimated to increase the phone density from four to 6.1 by the end of 1997.

During the closing months of 1996, a group of technical advisors to the government concluded a project to reform ownership of Antelco. The new structure would vest seventy percent ownership in private parties, twenty percent ownership would be retained by the government, and the remaining ten percent ownership would be given to employees of Antelco. The net worth of Antelco is approximately US$ 500 million, but an investment of US$ 800 million is needed to increase the phone density to the average for South America, fifteen to twenty phones per one hundred people.

The gradual opening to the private sector in Paraguay includes plans for a bid on the installation of a fiber-optic network covering

Asunción, Encormación, and Cuidad del Este, three main cities in Paraguay. There is already private sector competition for Internet services in Paraguay among Infonet, Planet, and Uninet, the first Internet services licensees. By the end of 1996, there were three thousand users of the Internet in Paraguay.

D. Chile

Like Uruguay, Chile has a relatively high phone density ratio of sixteen phones per one hundred people. Unlike the other countries discussed thus far, however, Chile is one of the most deregulated countries in Latin America. In 1990, a private company, Compañía de Teléfonos de Chile ("CTC"), provided ninety-five percent of local service. A company named Compañía Nacional de Teléfonos ("CNT") owned the additional five percent of the market. A state-owned company, Entel, provided seventy-five percent of the long distance and international service in Chile, and Chilesat occupied the remaining twenty-five percent of that market.

In 1995, Chile became one of the most deregulated countries in the world. The Chilean market is divided into three sectors: local service, long distance and international services, and value-added services. In the local, long distance, and international services sector, any company may obtain a license to install and operate networks. Value-added service providers have to pay interconnection charges to these networks operators. The result of this market re-structuring was a price war on international and long distance services, benefiting consumers with lower prices. Certain competitors in the market, however, have been unable to recover their sizable investments, which may lead to mergers and acquisitions in the near future.

The new market structure in Chile did not significantly impact CTC. It still maintains a market share of ninety percent in the local service sector primarily because the large investment requirements and comparatively small return on investment make it less attractive for foreign competitors to compete in this market. In the long distance and international services sector, Entel is still a major player, but its market share has dwindled to forty percent. Remaining market share in this sector is taken by CTC, Chilesat and Bell South. In an effort to strengthen its market position, Entel plans to invest US$ 500 million over the next five years to install end-user service networks.

VTR has a minority share of the long distance market, but has the capability to reach end-users through its basic cable and telephone network. This company owns forty-four cable systems covering over 1.5 million households.

CTC, in a joint venture with TCI owns Asociación Metropolis-Intercom, the second largest cable operator in Chile, who now plans to provide Internet services via cable modem. There are currently between two and three thousand users of the Internet in Chile, but it is expected that by the end of 1997 there will be over 100,000 users of Internet services.

With this background, I would now like to discuss the challenges for future integration of telecommunication services in these countries.

II. TELECOMMUNICATIONS UNDER THE MERCOSUR AGREEMENT

Mercosur is a trading block including Brazil, Argentina, Uruguay, and Paraguay, which was created by the 1991 Treaty of Asuncion. This treaty was first enforced in 1995 with a single common intra-zone tariff for a variety of products and services, and a free trade zone (zero-tariff) will be established by the year 2000. The formation of a common, single foreign tariff will hopefully be established by January 1, 2001; however, for Paraguay and Uruguay the date is January 1, 2006. Mercosur is intended to encompass other South American countries via free trade agreements. Chile, Bolivia, and Peru would be the first countries to join. The final goal is to form a South American Free Trade Area in no more than ten years.

The challenge of integrating multinational telecommunication services under the Mercosur agreement is characterized by a growing trend toward deregulation and increasing competition. The block of four countries— Brazil, Argentina, Uruguay, and Paraguay —represent a population of more than 240 million people. The question of whether these countries can form a fully-integrated telecommunications region with the necessary transparencies in national authorities and technical interconnectivity between different communication structures remains to be answered.

A. Stages of Telecommunications Integration

Four stages are identified for initiating the integration process under Mercosur. The first is to procure a survey of the telecommunication resources in each of the member countries. Such a survey will provide, *inter alia*, information on the degree of development in each of these countries, volume of services offered, technologies and standards adopted, private and public services offered, the nature of regulations and the market environments, and existing monopolies.

The second stage will focus on the policy interests influencing the telecommunications infrastructure in a particular sector, considering the different market realities in each of the member countries. A common policy concern is the establishment of standards for infrastructure and technology compatibility.

A third stage, but not necessarily third in time, is the establishment of permanent working groups—actually, these groups already exist—formed and organized within Mercosur's legal system. Within this framework, Subgroup Three, a subgroup of Group Eight, which is responsible for creating technical regulations, is the group in charge of the telecommunications sector. Subgroup Three issues recommendations to the Common Market Group, which is comprised of economy ministers' delegates from each of the participating countries. The decisions reached by the Common Market Council (formed by the Economy Ministers) are binding on each of the member countries.

The fourth and final stage is a result of the regulations adopted in stage three. The goal is to harmonize the developments of each of the separate regions. This will not only benefit business and commerce, but will also enhance technological development in each of the member countries and increase the links between the peoples of each of these countries.

As we have already said, it is the responsibility of governments to reach agreements on the standards of regulations in each country. These agreements should address, *inter alia*, new services and technologies, as well as the establishment of a joint position on certain issues to be discussed in international organizations. Argentina has identified specific issues that should be considered by the Mercosur body: the establishment of rules for the interconnection of networks, the harmonization of criteria for the regulation of satellite systems,

harmonization on the use of radio frequency bands; regulation of digital broadcasting and HDTV, the establishment of frequency bands for itinerary stations, and a joint certification to ensure equipment and technology compatibility or to avoid undue requirements on hardware from one region to another.

B. The Sintonia

How are telecommunication companies contributing to this multilateral consensus? Perhaps the Sintonia is the most relevant. Created to serve business needs for communication between Argentina, Brazil, Chile, and Uruguay, it is considered to be the most important Latin American effort for international integration of data transmission and a variety of other telecommunication services. Formed by Telintar in Argentina, Embratel in Brazil, CTC-Mundo in Chile, and Antel in Uruguay, this project is based on a fiber-optic cable network ("Unisur") with capacity for fifteen thousand channels of digital voice and data transmission at a baud rate of 640,000 bytes per second. By the end of 1996, twenty firms were already using this network, but it has a capacity to serve many more businesses and can include video conference calls in its services. In the future, extension of the network into other Latin American countries is planned. One such country is Bolivia, where the network cables would be run through the gas pipeline network.

The services provided through the Sintonia are ultimately intended to create a transparency for clientele doing business between each of the member countries. These countries, however, continue to apply tariffs independently. In the future, if we wish to encourage broader integration of telecommunication services, these tariffs must be reconciled.

Another form of private involvement in the Mercosur agreement is the agreement between Embratel and Nahuelsat, an Argentine provider of satellite telecommunication services, to join operations in the Ku and C frequency bands including DTH (Direct-to-Home TV) and the creation of corporate networks services.

CONCLUSION

In February of 1997, the World Trade Organization ("WTO") arrived at an agreement on telecommunication services. This agree-

ment set forth a plan for utilizing telecommunication services between member countries by taking into consideration whether such signatory countries possess the means for participating on a global level. In the case of the United States, European Union, and Japan, this agreement was initiated immediately. For Latin American countries, however, this agreement will not go into affect for another three years. In the short term, we should not expect a fully integrated basic telephone service in Latin America because, among other reasons, integration of these networks is exceptionally difficult at a technical level. We can, however, expect further advances in data transmissions and Internet services in the Mercosur environment. The gradual harmonization of policies and legal frameworks in a global scenario of increased deregulation and competition will create the adequate conditions for the expansion and growth of investments in the region.

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ALESSANDRA REYES: Our final panelist is Mr. Ronald Pump. He is also a Washington College of Law graduate and holds an LL.M. degree from New York University in trade regulation. Ronald is currently the Director and Senior Attorney of AT&T's Law and Government Affairs department in Washington, D.C. Ron has a long history with AT&T; he has acted as Regional Director and Senior Attorney of the Middle East and North African International Public Affairs department and was a lawyer with AT&T's antitrust department. Prior to joining AT&T, Ron was an associate with Shearman & Sterling's corporate finance, banking, and antitrust group.

FINANCIAL & BUSINESS ISSUES IN TELECOMMUNICATIONS REFORM

PRESENTATION BY RONALD E. PUMP
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INTRODUCTION

My focus has primarily been in the finance area, so my comments will pertain primarily to this aspect of telecommunications. The previous speaker spoke briefly about the public referendum that rejected

an effort to privatize telecommunication services in Uruguay. I remember when that phone company was for sale. The problem was that the government was asking for too much money. They could not find a buyer at the price they were willing to sell, and, of course, they were worried about the political fallout that would ensue if they were to sell at such a low price. This is what ultimately led to the public referendum.

I once heard the President of Honduras say that the real problem with privatization in Central America is that none of these countries offers large enough markets for telecommunication services. What is needed, in his opinion, is the sale of a Central American telephone authority. Unfortunately, because of national security interests and the historic animosity in this region, that will never happen. This does not mean that in the future, as the financial difficulties associated with so many different market interests are resolved, there will not be some combination of phone companies in this region.

One can only be encouraged by all of this activity in telecommunications. The opportunities for lawyers are truly incredible. I don't think there is a faster growing area of the law in Washington D.C. than telecommunications. Some of these telecommunications companies employ over one hundred lawyers, and many of these attorneys represent both publicly and privately owned Latin American telephone companies. Because the United States system is open and transparent, there are many opportunities to present comments on some of the very critical issues. One such issue is accounting rate reform.

I. FINANCIAL ISSUES

A. Accounting Rates

The Federal Communications Commission ("FCC") of the United States has basically mandated that accounting rates must be lowered. In my opinion, the real reason for this mandate is that it works an American subsidy into the market. For instance, if one makes a call from the United States to Buenos Aires, Argentina there is a question of who pays for the connection—the Argentinean or the United States phone company? The FCC, in all its wisdom, has decided that, for example, the rates should be $0.19 and not $1.90. This is a big is-

sue and, as yet, it is uncertain how this will ultimately be resolved. American phone companies obviously support accounting rate reductions because if the rate is lower, people will make more calls. In theory, lower rates lead to higher revenues.

As attorneys, we must be aware of the different roles of government in the telecommunications field. Within the context of the General Agreement on Trade in Services ("GATS"), for example, the independence of the regulator remains a critical issue. For example, in some countries, the government still owns fifty-one percent of the stock in telecommunications companies. The question is, therefore, when the government appoints a regulatory body, will concessions and opportunities for fair hearings be influenced by political pressures? Thus, before making any recommendation to a client, an attorney needs to make sure that the regulator is not biased during the decision making process so as to preclude the client's opportunity for a fair hearing.

B. Interconnection Rates

Another issue in the new marketplace is interconnection rates. This is a very important topic and one over which regulatory economists fight every day. An interconnection rate is the rate that the client must pay the local monopoly as a newcomer to the market. The cost for being interconnected determines whether the client will make money. There are all sorts of theories used to calculate the interconnection rate. One approach, favored by AT&T, is the Total Service Long Run Instrumental Cost, or TSLRIC. This approach determines what the fair rate should be for interconnection with a network facility.

II. BUSINESS ISSUES

A. Electronic Commerce

An area of telecommunications law practice that is truly exploding is electronic commerce. Issues regarding the Internet—privacy and pornography for example—have become major issues and are cluttering up United States courts.

B. Universal Service Obligation

Universal service obligation is another important issue. When a telecommunications provider wins concessions, it does not want to provide services to remote areas of a region. But it may be that the concession requires this type of service. I participated in a telecommunications service business venture where, as part of the concession agreement, we were required to provide services to remote areas of South Africa that had never been serviced before. This proved to be a very difficult and expensive proposition because no one had any idea how difficult it was going to be or what the terrain would be like in terms of trenching. It is not a good idea to accept a contract like this. An attorney must check out the terms of the agreement very carefully, making sure to understand where service commitments and obligations lie.

C. Unfair or Illegal Business Practices

The International Herald Tribune lists a number of companies offering telecom services. Many of these companies offer services at rates cheaper than probably any of the better known telecommunications companies can provide. This is a good example of some of the difficulties that arise as a result of the new technology and economics driving telecommunications—unfair business practices.

When I was in the Middle East, for example, callback companies were illegal in Egypt. As soon as the government could shut these enterprises down, however, another would open up three blocks down the street because the technology is so simple. We have this problem in the United States as well. There are large numbers of these illegal businesses. For example, Indian-American immigrants will buy up a whole block of service to make calls back to India. This is taking up a big chunk of our business, although it is perfectly legal and AT&T sells them bulk capacity.

There have also been many problems with re-routing "900" services. People do not realize that when they make a "900" call, it may actually be going to the Dominican Republic. As a result, they end up with a rather costly phone bill. There have actually been a lot of scams with this service as well, causing a number of problems. A consumer will get a call saying that he has won a vacation somewhere and is required to call a "900" number. When he calls the

number, there is no actual vacation, and instead he is billed for a thirty-minute call to the Dominican Republic.

Not all examples of entrepreneurship and new technology foster unfair or illegal business practices, however. For instance, resale, switched resale, and paging services are all growing business issues that arise in the telecommunications field. As another example, I have friends who have franchises in coin operated telephones. This is a very lucrative market because in the United States, the coin telephone market is totally deregulated. Basically, a group of wealthy investors buys into these telephones; for example, they might buy all of the coin telephones in a major shopping center. These are just some of the examples of where a little entrepreneurship, deregulation, and technology all come together.

CONCLUSION

The Free Trade Agreement of the Americas does have a telecom component to it. I think telecommunications has really sort of come into its own special category in this hemisphere. If the United States ever gets around to negotiating with Chile, we should create telecom agreements, whether on the fast track or slow track. The opportunity to get some of the regulatory issues resolved must factor into the agenda.

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ALESSANDRA REYES: I would like to thank you all for being here.