CURRENT ISSUES ON THE EFFECTIVE USE OF REGULATION, POLICY AND LEGISLATION IN TELECOMMUNICATIONS

OPENING

Master of Ceremony: We would like to explain some points concerning the dynamics to be followed in this seminar. After making up the Panel to each session, the works will be conducted by the moderators who, in their turn, will grant the floor to each panelist. Each panelist will be granted 15 minutes to deliver their speech and, then, the moderator shall start the debate. The panelist will answer up to three questions and, following, moderator shall grant the floor to the next panelist. By the end of each session, there will be a debate involving all members of the Panel.

We would like to inform that there are microphones at the middle and lateral sides of this room. I would like to request the participants who want to use the microphone to identify themselves, since the event is being recorded. We would like to ask you to turn off your mobile phones.

Now, we start the opening session of the seminar: "Current Issues on the Effective Use of Regulation, Policy and Legislation in Telecommunications". We would like to invite Mr. Juan Zavattiero, Chief of ITU Regional Office to Americas, participate in the Panel. Mr. Juan Zavattiero is Uruguayan and Electrical Engineer. Graduate from the University of Montevideo, he has been Chief of ITU Regional Office for 12 years.

We would like to invite Mr. José Leite Pereira Filho, Councilor to the Brazilian Regulatory Agency to Telecommunications – ANATEL. José Leite Pereira Filho holds PhD and MSc degrees in Telecommunications Engineer by the Naval Post-Graduate School of California,

United States. He has also graduated in Telecommunications Engineering by the Pontifícia Universidade Católica of Rio de Janeiro and in Navy Officer, by Naval School. He was Counselor to the International Telecommunications Union – ITU, in Geneva, Switzerland, holding the office of Senior Engineer, in charge of several worldwide technical cooperation projects.

To start the seminar "Current Issues on the Effective Use of Regulation, Policy and Legislation in Telecommunications", we wish to grant the floor to the Chief of ITU Regional Office to Americas, Mr. Juan Zavattiero.

Juan Zavattiero – Chief of ITU Regional Office to Americas: Good morning. On behalf of ITU, I would like to welcome all participants and thank ANATEL for taking such great initiative of organizing a seminar, where Americas' countries may exchange their views and experiences on "Current Issues on the Effective Use of Regulation, Policy and Legislation in Telecommunications". I would also like to welcome all participants from other regions, who are attending this seminal.

Following, there will be the Meeting of ITU-D Rapporteur Group, on "The Competence of National Regulatory Agencies on Telecommunications to Enforce Laws and Regulations". The group is currently development the best practices in regulation and discussions held today and tomorrow should provide excellent inputs to their works.

Due to huge changes taking place in telecommunications, international community has become organized to regulate them. Just ten years ago, there were 33 Regulatory Bodies worldwide. Currently, there are 124. Almost 80% of American region countries have established national regulatory authorities. To make a regulatory body functional is one thing; to make it effective is another thing. And one key towards effectiveness is the enforcement power of such bodies. The Regulatory Bodies should be endowed with power enough to impose their authority, and with human and financial resources required to exercise such powers.

Our discussions are to be basically focused on: use of powers and the role of different players – Regulator, Legislator and Judicial Powers; practical utilization, in several countries in the region, concerning monitoring, oversight, survey and penalties; enforcement of regulations related to radioelectric connections and spectrum; challenge posed by "Voice over IP" and network safety.

We will discuss about the compliance with license obligations and how to effectively deal with consumers' and similar issues. We will observe settlement of conflicts and several techniques that may be used. Both the organizations responsible for policies and the Regulatory Bodies recognize that settlement of conflicts is an increasingly goal to telecommunications policy and regulation.

Failure in settling conflicts in expedited and effective way may lead to delays in introducing new services and infrastructures. The blockage or reduction in capital flow by the investors in telecommunications has limited the competency, thus leading to higher prices and lower quality of services. It also leads to delays in the sector's liberalization, and its technical and economic development as well.

ITU and the World Bank have performed a detailed analysis on settlement of conflicts, and we are glad to say that Mr. David Satolla, of World Bank, is here and will inform us some findings of his studies. As you are aware, ITU has programs addressed to assist the countries in better facing the challenges brought about by reform processes. Let me give you some samples. \

The annual report prepared by ITU, which analyzes the latest regulatory trends [is] carried out on an annual basis. The latest issue of the annual report was focused on key topics related to regulation, such as universal access and interconnection. The 2004 edition shall focus on licensing processes in years of convergence.

The World Symposium to Regulatory Organizations, now in its 5th year, is the entry door to the world of Regulators worldwide. The meeting held last year gathered Regulators from 80 countries, aiming at discussing how national regulatory organizations could promote universal access to information and communication technologies. The Regulators agreed several best practice guidelines, to reach universal access. They were further submitted to world leaders, who met during the World Summit on Information Society, held in December 2003, at Geneva.

Another sample of such assistance is the Global Regulators Exchange – G-REX, which provides an on-line forum to national regulatory agencies to exchange best practices, as a way to face regulation-related challenges. G-REX relies on a *call line*, through which the Regulators pose their doubts on the topics and receive responses from their counterparts all over the world. My friend, Mrs. Doreen Bogdan, Chief to ITU Regulation Unit will later talk about such important tools that will be made available to you.

Finally, I would like to say a little about a topic that is relevant especially to the region of the Americas, and has to do with updating the Blue Book on telecommunications policies, resulting from a joint effort by ITU and the Anti-American Commission of Telecommunication – CITEL, which dates back to 1992. By that time, there were very few Regulators, the privatization wave was starting and most markets were served by monopolist operators. The third issue of said Blue Book, expected to be approved by the regional by the end of 2004, will be focused on a completely different environment.

It is worth to highlight that such Blue Book is intended to be a tool to all countries in the region, to assist in the sector's management and reform process. It comprises high-level options and each edition was focused on current challenges, resulting from fast movement of industry and information and communication technologies.

The regulator agencies' power of enforcement will be one of the major topics in this issue. It should also cover subjects such as network safety and "Voice on IP", topics that will also be discussed herein. Tomorrow we will have the opportunity of listening to Mr. Clovis Baptista, Executive Secretary to CITEL, who is also here and shall provide us further information on the Blue Book updating.

As you will notice, we have very important issues to solve and, thus, I would like to wish success to the works to be held over these days. Thank you very much.

Master of Ceremony: We would like to thank the words of Mr. Juan Zavattiero. Now, I would like to grant the floor to Councilor José Leite Pereira Filho, of Brazilian Regulatory Agency to Telecommunications – ANATEL.

José Leite Pereira Filho – ANATEL: Dear Mr. Juan Zavattiero, Chief to ITU Regional Office to Americas, ITU Representatives, all representatives who came from very far to attend this meeting in Rio de Janeiro, sirs and madams.

Brazil has always been highly interested in cooperating with the International Telecommunications Union and, in that sense, has housed several events. Brazilian management is very pleased in housing telecommunication events promoted by the International Telecommunications Union.

That is particularly true for this event, which is focused on two very relevant topics to the telecommunications sector: rules enforcement, which is the first workshop that starts today, and Voice over IP. We judge this opportunity as highly relevant to representatives of the Americas. It is very interesting to have a country in the region housing because it facilitates other countries to come.

We consider both topics extremely relevant. Enforcement is a crucial item to reach the three strategic objectives in telecommunications industry. I believe they are also the strategic objective for all countries attending this meeting. The objectives are: universalization, competitiveness and services quality. Universalization clearly is a crucial item, because each country aims at taking communication services to all regions in the country, to every population, regardless their localization. Competitiveness is also crucial since, after telecommunications services privatization, which is the only way to reach reasonable prices to telecommunications consumer. Therefore, competitiveness is a crucial item. And, surely, we do not want telecommunication services, even at low prices, with poor quality. So, we also believe that granting services quality is essential, mainly in services rendered to population in general. For services mainly focused to firms, corporations, we think they do not demand for much quality-related regulation. However, for services such as basic and mobile phones, which directly reach citizens who cannot grant the operator's service quality, we think the contracts should bear specific clauses on the matter, so that quality may be demanded and services delivered should hold, at least, the required minimum quality standards.

Still on enforcement, previously to privatization, when State-owned companies used to provide services, services oversight used to be almost totally restricted – at least in Brazil – to inspect radioelectric spectrum and check if it was being correctly used. The oversight of services, per se, was not great, because companies were State-owned. Today, after privatization, the situation is totally different. The focus now is on enforcing services, so as to grant the above-mentioned objectives: universalization, competitiveness and quality. In Brazil we rely on a General Plan on Universalization Goals, with strict goals inspected all the time by our oversight sector. Concerning quality, also for both mass services – basic and mobile phone – we have quality goals duly set forth in regulations and contracts. They are also one of the most intensives duties of surveillance in ANATEL.

Obviously, our oversight services are not limited to quality and universalization. I would event say that there is a huge challenge in inspecting disputes among companies. Usually,

such disputes results from contracts on interconnection and means rental, specially the local loop unbundling. Therefore, oversight in Brazil is focused on three issues: General Plan of Universalization Goals, General Quality Plan and also on disputes among companies concerning interconnection means rental and unbundling.

Concerning the second topic, which is also subject of a workshop to be held this week, Voice Over IP, we consider it a very relevant topic, because it is likely to have high regulatory impacts, besides impacts on consumer, not less considerable. For regulation-related impacts, I can observe at least three points worth of notice when discussing "Voice Over IP". The first concerns the Universalization Facilities. Currently, a topic of discussion is whether "Voice Over IP" should be a telecommunication service or a value-added service, considered an Internet-based service in almost all countries. It clearly impacts on universalization, since Universalization Facilities is supported by companies that render telecommunication services. If "Voice over IP" is not considered as a telecommunication service, it will surely affect the Universalization Facilities.

There is also the issue of emergence phone numbers. This is rather a technical issue. Furthermore, there is the issue of telephone privacy, when it is waived due to legal sentence. "Voice Over IP" should solve this issue in a technical way, so as to allow, grant and endow trustworthiness to such waive of privacy. Thus, there are evident regulation-related issues that, I believe, will be discussed during the workshop on "Voice over IP", as well as the several advantages to consumers, mainly those related to long-distance telephone services, where telephone calls price should be much lower than current prices. Therefore, these two topics are extremely relevant.

On behalf of Brazilian Telecommunications Administration, I would like to highlight our best wishes for the smooth and successful flowing of both workshops. We are making our best efforts to provide assistance in any logistical arrangement required for the meeting. I would like to thank once again the presence of all those who cooperated to the event, welcome the participants. Than you very much.

Master of Ceremony: We thank the words by Councilor Leite. We would like to ask Mr. Juan Zavattiero to take his seat in the auditorium. Councilor José Leite, please remain at the Head Table to serve as Moderator to Session I. Thanks.

SESSION I

"Legislation: Effective Enforcement Power under the view of Regulator, Legislator and Judicial"

Master of Ceremony: To make up the Head Table to Session I – "Legislation: Effective Enforcement Power under the view of Regulator, Legislator and Judicial", we would like to invite Mr. Robert Earl Thomas Harvey, Legal Director to Public utilities Regulatory Agency in Costa Rica. Graduated in Law at the University of San José of Costa Rica and Public Notary Officer at the University of San José, he is the Deputy Director to Specialized Legal Board of the Public utilities Regulatory Agency in San José, Costa Rica. He worked as Legal Assistant and currently is Legal Advisor to the Directorate of the Public utilities Regulatory Agency in San José. He attended several conferences and seminars in several countries.

We would like to invite Mr. Luis Gerardo Canchola Rocha, General Director of Contentious Issues to the Mexican Federal Commission on Telecommunications. Mr. Luis Gerardo Canchola Rocha was born in the City of Mexico, graduated in Laws and became a professional Lawyer in 1994. He holds a Master Degree in Corporative Economic Law by the Pan Americana University. For 13 years, he performed his duties at banking sector, in the fields of legal advisory and contentious. In 1997, he was appointed General Director to Contentious Issues, Mexican Federal Commission on Telecommunications, and still holds that office.

We would like to invite Mr. Luciano Juan Luis Barchi Velaochaga, officer in charge of legal matters at OSIPTEL, Peru. Luciano Juan Luis Barchi Velaochaga is Legal Director to OSIPTEL, Peruvian telecommunications regulatory agency, since May 2002. He is a lawyer by the Law and Political Sciences College of the University of Lima, and holds a Master Degree in Civil Law by the Peruvian *Pontifícia Universidade Católica*. As Legal Advisor, he worked at the Executive Directorate to the Privatization Promotion Commission – COPRI and the Special Committees on Privatization at CENTROMIN PERU S/A, Mineira Regional de Boyavar S/A and Legal Manager to the Commission on Informal Property Formalization.

We would like to invite Dr. André Fontes, Judge to Federal Regional Court, 2nd Region, Rio de Janeiro and Espírito Santo. Dr. André Ricardo Cruz Fontes is Assistant Professor to the University of Rio de Janeiro – UNIRIO and Judge of the Regional Federal Court, 2nd Region, Rio de Janeiro and Espírito Santo. He holds Master Degree in Civil Law by the University of the State of Rio de Janeiro – UERJ and is undertaking his Doctorate in Civil Law at the University of the State of Rio de Janeiro – UERJ. He is speaker to several national and international conferences.

We would like to invite Dr. Floriano Azevedo Marques, founder partner of *Manesco, Ramires, Perez, Azevedo Marques Advocacia*. Dr. Floriano Azevedo Marques Neto has over 13 years in experience in consultancy and Judicial Contentious in Administrative and Regulatory Law. He was outstanding in privatization and Public utilities grants in Brazil, mainly in the fields of telecommunications, electric power, roads, water supply and sanitation. He is Doctor Professor in Administrative Law to the Law College of the University of São Paulo – USP. He is also Professor to the Post-Graduation Courses in Continuous Education of Getúlio Vargas Foundation, in São Paulo. He wrote several books,

among which is worth to notice "Agências Reguladoras – Instrumento do Fortalecimento do Estado" [*Regulatory Agencies – Tools to Strengthen the State*]

Continuing with the activities, we grant the floor to Councilor José Leite, who will lead Session I.

José Leite Pereira Filho – ANATEL: Welcome speakers to Session I of our Seminar. Initially, I will grant the floor to each speaker for 15 minutes. I believe that no later than by 11:00 three speakers will have delivered their lectures and, then, from 11:00 to 12:30, another two speakers. After the presentation of each speaker, the participants will be allowed to make their questions. As previously said, each speaker will answer up to three questions, soon after the presentation. After all speakers have finished their presentation, the session is opened to participants in general. Now, I will grant the floor to Mr. Thomas Harvey.

Robert Earl Thomas Harvey – Regulatory Agency to Public utilities in Costa Rica: Thanks. Good morning. I have prepared some transparencies to support the brief lecture I have been requested to deliver you this morning. Printed material will be timely delivered. I have named the lecture like that because of space, rather than for any other reason. It is a brief name, very general. I have prepared an agenda, as follows.

These are the topics I shall address this morning. I will develop each topic so as to give an idea on it. The materials referred to thereby are set forth in Costa Rica legislation, in details, and the homepage of the Regulatory Authority provides the regulation I will refer to.

Although it is not in my presentation, I would like to present some background on telecommunications services regulation in Costa Rica. Costa Rica relies on a regulatory agency since 1928. It is one of the oldest Regulatory Agencies in America. Based on the North-American model, in 28 Costa Rica brought Mr. Julios Krieg, Engineer Chief to the Regulatory Authority in Tennessee Valley. The oldest participants shall recall that in Tennessee Valley was built an extremely important infrastructure, a very important hydroelectric plant at that time, and such infrastructure did not only provide electric power to the valley, but also water for irrigation and flood control. The director to such infrastructure and works was seconded by President Roosevelt, in response to the request by Costa Rica Government, to right the legislation basically aimed at ruling electric power in Costa Rica.

When in 63 it decided to grant legal permission to the State-owned Electric Power Company to execute also telecommunication services, that regulatory organization, previously in charge of electric power, was also granted the power of ruling telecommunication services and, since 63, that is how it works. The legislation has obviously changed. Latest update was in 1996, and is still in force. Now, Costa Rica Congress is discussing a law to change the State-owned company that render telecommunications services, to face the American Free Trade Agreement with the United Status, recently signed at the capital cities of Central America and Washington. The process in at both Congresses, hence Costa Rica and the United States, as well as at the Congress of Central American countries, when legislative bodies should enact the Free Trade Agreement, which includes opening telecommunications in Costa Rica – the only country where telecommunications services are not totally open or privatized. After this summary background, I will develop the topics.

The legal and technical framework basically applicable to regulatory authority is set forth in Law 7593 of 9 August 1996. The second provision is the Executive Decree 29.732 MP, of August 2001, the second regulation to Law 7593. The first regulation dated back to February 1997 and was totally reformed in 2001. Finally, that Executive Decree 30.110 dated February 2002 sets forth technical rules and standards to service provision. I should explain that each service ruled by Costa Rica regulatory agency is multi-sectorial. It does not rule only telecommunications; rather, it rules several services. This rule is specific to telecommunications. The law is general to all services. Decree 29732 is also general; it is the regulation to the law governing several issues, both on procedures and funds.

The duty of regulatory authority is to rule the telecommunications services indicated in the law. For Costa Rica, when in 1996 it decided to reform the regulatory agency, there was a long-lasting discussion about whether the Regulator regulated all telecommunication services, or only some. The private company that renders services on trucking, paging, radio broadcasting, Internet, some of which are State-owned, fiercely opposed to becoming regulated. Then, Regulatory agencies rule over the State-owned company, i.e., the Costa Rica Institute on Electric Power. That is the reason for saying "ruled by law", because the institute used to be ruled by law since 1963.

We hope that the opening process provide full powers to the regulatory agency to rule over market as a whole, rather than one single prevailing operator. It is extremely necessary for the reasons stated by ANATEL Councilor – it would be impossible to think on modern telecommunications without good competence, universal service and service quality. Furthermore, there should be an arbiter, not only for discrepancy issues, but also to grant users quality compatible to prices and technological advances. Thus, this duty is generic to all Public utilities ruled, but I have presented here specifically to telecommunications, since it is the topic to this seminar.

The regulatory agency is assigned with several duties. Inspect accounting books, financial and technical oversight is not easy, but is essential. To support such duty, the regulatory agency is somehow compelled to great efforts, because information asymmetry, technological speed and other details well known to you, cause Regulatory agencies to be a step behind regulated agencies, in many aspects. That is so because service delivers are experts in delivering services, and Regulators think they are experts in regulating. These are different issues, and there are operational details unnoticed to regulators. Sometimes, economic rationality points out the relevance of making an effort to have experts in more than one filed of services delivery, not only in some, but in most relevant ones.

The Regulator's power to inspect, review, make physical oversights, is also supported by the enforcement power it holds.

These are the duties to be briefly analyzed here. As a State-owned organization, the Legislator judged it was necessary to make cross-control to avoid fiscal evasion by public utilities services providers, or private-owned services companies. Therefore, that duty, which is not typically regulatory, is exercised by Costa Rica regulatory agency. Another key duty in regulation is to settle battles and dispute among users or clients of services regulated. For Costa Rica, as we should further observe, the ruled organization has the power of seizing any equipment used in a fraudulent or abusive way to render the service, besides closing companies that do not comply with the provisions set forth or issued by the Regulator. And,

obviously, the Regulator of Costa Rica may assess, review, adjust the tools used to measure the amount of services – minutes, pulses, kW, cubic meter, etc. – of activities ruled by them.

The power of issuing rules is crucial to any Regulator. If it cannot set technical and some legal rules, the work becomes almost impossible. Furthermore, in face of universal access and reasonable investments, the Regulator may require demand surveys, in order to provide enough services and due and permanent services supply. It may also undertake sanction measures, ranging from fines to the first penalty, to ceasing permissions granted to render services. Concerning economic regulation, Costa Rica Regulator fixes prices and fees to all services and should observe costs, expenses, investments and others, through duly regulated companies or by creating model companies as reference to the issue of prices and fees. Currently in Costa Rica, to economic regulation and fees establishment, there are two approaches: return tax to most services and price cap to some services.

Now, technical regulation is basically what develops and manages the National Numbering Plan, a key feature of telecommunications services; approves terminal equipment and grant technical compatibility to equipment and no distortion in network, prevent disturbances related to technical incompatibilities in services provided; furthermore, it monitors, inspects and watches over systems and facilities used to render services.

Settlement of claims and disputes is relatively easy. There are three procedures: previous management, which happens in almost every country worldwide and that means to appeal besides services providers on any claim of insufficient, inefficient or inexistent services. Depending on the response by the service deliver, the client appeals to the Regulator agency, in Costa Rica, and it starts the procedures, basically. Another is the alternative settlement of conflicts. Here the parties, under arbitrage by the Regulator, try to reach some amicable solution. If that is not possible, it should start what is called in Costa Rica "ordinary administrative procedure", which takes from one to three months, since is a procedure. Dispute with no administrative forum. The parties litigate and the Regulator listen to both parties' arguments; by the end, it takes the final decision that reveals the merit, expedient and other documentations and evidences provided to it.

I am late. I have basically presented this part. The Administrative procedure, as I said, must have oral and private summons of the parties, lawyers, witnesses and experts may attend and present accusation and defense evidences. Field oversights, technical evidences and others may be performed. And if the Regulator decides to accept the claim, it may order economic indemnity to damages caused to the client or signatory. And if the parties are not satisfied with the Regulator's decision, once established the suitable administrative resources against administrative acts in Costa Rica, they may appeal to judicial ways to settle the conflict, in judicial forum. Thanks.

José Leite Pereira Filho – ANATEL: Thank you, Dr. Thomas Harvey. I know you have much more material to present, and this material may be explored during debates. Therefore, I would like to ask the participants if there is any question to Dr. Thomas Harvey.

Participant: (Problems with the audio) I have a question, as follows: you have talked about the Plan of Numbering, which is under your responsibility and so on. However, you did not say anything about the Plan of Duties and Assignment of Frequency, and all that, and I know that is a major issue in your country. Then, who is in charge of that? Because I know there is

a conflict in CEE. Tell me about the situation, if possible. And you have talked about technical jeans and so. What is happening to technical means? Who does that? Because, if I remember, there are no technical jeans and other things. Thank you.

Robert Earl Thomas Harvey – Regulatory Agency to Public utilities in Costa Rica: My pleasure. In Costa Rica, both management and control over radioelectric spectrum are assigned to a Ministry. Part of the changes under discussion deals exactly with that – it is crucial to have the spectrum regulation under the Regulator's duties. Current legislation in Costa Rica has followed what used to happen in Latin America where, for security reasons, the Ministry of Government, i.e., the Ministry of Interior, ruled the spectrum. Costa Rica has not taken that step towards modernity, and radioelectric spectrum remains ruled by an office of our Ministry of Government that, furthermore, faces serious economic constraints because it is, let's say, a low level office.

Concerning technical means, I did not understand your question. However, our regulator agency has just established a second consultancy exercise about technical oversight, and purchased equipment enough to monitor several services. I do not remember the amount paid for the equipment purchased to monitor all services delivered, including some aspects of radioelectric spectrum, although the regulator authority is not legally in charge of ruling over that discipline.

José Leite Pereira Filho – ANATEL: Any other question?

Aída Vascones – Ecuadorian Telecommunications Superintendence: I would like to ask you which parameters are considered for indemnity damages caused to service incumbents or users.

Robert Earl Thomas Harvey – Regulatory Agency to Public utilities in Costa Rica: That is an excellent question. It is not easy. The law establishes that Regulator should consider for sanction purposes, from five to twenty times the damage caused. And it is very hard to establish, in economic terms, the damage caused! If it is about electric service, it is very easy. If someone wins a TV set, I may use the value of such TV set and apply it. However, when we are talking about telecommunication services during one day, two days, half an hour, fifteen minutes… how can damage me measured? Well. The legislator is not so stupid. There is a rule that establishes that, once damage cannot be quantified, one should estimate it by taking into consideration aspects such as revenue, it use – if domestic, it is one thing, if commercial or industrial , it is a different thing – and it does not solve the issue, isn't it? Sometimes, it is extremely hard to establish how damage would be quantified. We have faced many problems when establishing the damage to huge telecommunication companies because, whether public- or private-owned, they earn much money. So, fines have very low thresholds. There is no millionaire fine, so we have faced real litigations at courts. We are expecting to see which court will determine a fair and reasonable way to fix indemnities in telecommunications. That is what I can say.

Dr. José Leite Pereira Filho – ANATEL: Any other question? We still have time for another question.

Participant: Good morning. I am a lawyer and here I represent CONATEL, Paraguay. My question is: you have mentioned a cross control, specifically to control tax liabilities to

telephone services, to the system of interconnections. My question is if Costa Rica relies on a datacenter or if you refer to cross control among institutions that rule over tax system and the regulator entity. Thanks.

Robert Earl Thomas Harvey – Regulatory Agency to Public utilities in Costa Rica: If I understood well, you want to know if there are databanks relating taxpayers to Public utilities providers and how such coordination is made. Furthermore, you ask if cross control is on basically fiscal or tax issues, or if it has other nature. The answer is that Costa Rica is a country with very complicated mandatory social coverage and there tax evasion is high. There are always expert individuals who succeed in evading taxes payment. It is not very pleasant to pay taxes and fees. Therefore, the State of Costa Rica pursues, by all means, the support of such institutions to avoid tax evasion. It does not that collection has improved, it remains the same. However, there is legal obligation. We work in coordination with the Ministry of Economics, the Institution of Social Security, … of Labor and Health and also with the Ministry of Work, which performs oversights, aiming at preventing [the institutions] to breach labor laws. That is how takes place the coordination between regulator authority and the Ministry of Economics, through cross-reports and a public databank that manages, at State level, all institutions. All institutions must have a databank for entities regulated by it, or taxpayers and, therefore, each institution assists in updating the databank.

José Leite Pereira Filho – ANATEL: Thanks, Dr. Thomas Harvey. Now, I would like to grant the floor to Dr. Luis Gerardo Canchola Rocha, General Director of Contentious Issues in Mexico.

Luis Gerardo Canchola Rocha – Mexican Federal Commission on Telecommunications: Good morning. Mexican Constitution, in its Art. 28, deals with Governmental and State power to grant permissions to private [companies], whether to render Public utilities or to exploit State goods. Art. 28 of Mexican Constitution status that, in events of general interest, the State may grant services delivery and exploitation of State goods whenever established, in respective laws, the conditions and modalities to grand efficacy in services delivery, as well as social use of goods, always preventing concentration phenomena that might affect public interest. That is the milestone in Mexican legislation that allows us, as a State, to fix and enforce such conditions on services delivery and export of State goods.

In our country, in Mexico, legal nature of permission is a discretional administrative act and, as we all know, in other countries such legislations have the authority of mixed act or authority of permission as contractual administrative act. In Mexican legislation, permissions are discretional administrative acts, where the State sets forth conditions – as previously mentioned – to render services pursuant the permission. That is a relation of public right between the State and the awarded company. As we can observe, State rules the discipline and controls the use of State goods. Such public right relation with awarded entities takes place through laws, issued by the Congress, and Regulations, Decrees and Resolutions issued by the Executive Power. Such regulation is aimed at ensuring public interest, use of public wealth to social actions, and due attention to services, i.e., services delivered with required quality. The Federal Act on Telecommunications in Mexico establishes three kinds of permission – permission on frequency band, permission on telecommunications public networks and permissions on orbital positions.

Now, concerning authorities, there are two entities: the Secretariat of Communications and Transportation, which heads the sector and is basically in charge of establishing policies and programs, as well as granting and revoking concessions and permissions. The Federal Commission of Telecommunications is a decentralized institution, hierarchically independent from the Secretariat, with technical and operational autonomy. Basically, the Commission is in charge of ruling and promoting telecommunications development, through oversights and verifications.

Within this framework, I will present, as a sample, how COFETEL works in such oversights and the procedures taken until sanctions are applied. COFETEL basically rules and verifies for compliance with permission grants. Since it is a decentralized organization, Federal, it currently lacks delegated centers and, therefore, the regional offices of the Secretariat itself assist us in inspecting each State. On the other hand, COFETEL, both at Federal scope and in support to the centers, performs such acts of inspecting the institutions awarded with permissions and concessions. After oversight acts are performed, their findings are forwarded to COFETEL. COFETEL, as oversight and control entity, performs and assesses the oversight act's findings. If it judges there were administrative faults, breach to titles and permissions, COFETEL issues a document of sanction proposal. Such document is forwarded to the sector head, because it is the only holder of power to enact. The sector head starts a sanctioning procedure and, later, it makes the decision, imposing the corresponding sanction to the transgressor.

Here, I would like to make brief reference to penalty procedure. In our country, once COFETEL forwards its penalty proposal, the Secretariat reviews it and, if it judges it pertinent, if considers it as a violation, starts a procedure. The procedure is started under the terms of the Federal Law of Administrative Procedure, which is a Mexican law to rule administrative procedures throughout public administration. That law establishes that the Secretariat, or general authority, should start the procedure by notifying the transgressor about its violations, providing it 15 days to submit evidences and arguments. Then, the Secretariat either considers the evidences as insufficient, or accepts them. If evidences are accepted, the Secretariat orders its release and, under the law, the authority is then granted 10 days to decide if it transgressor is to be punished or not. That is the procedure for penalties.

Now, let's talk about penalties established in law. The Federal Law of Telecommunications establishes three kinds of penalties: fines, revocation and loss of goods, which are transferred to the State. Concerning fines, Art. 71 of said Law classify several behaviors in three kinds of economic penalties. As we can observe, from 10,000 to 100,000 minimum wages as penalty for most serious behaviors. Then, from 4,000 to 40,000 for other kind of behavior. The first one comprises: render telecommunication services with no permission; incompliance to obligation in terms of network interconnection. The second group basically comprises trading company working with no permission; or when services are interrupted, with no justification, to populations where the transgressor is the only awarded to provide such services. Finally, from 2,000 to 20,000 minimum wages, basically in events of breaching tax laws and, in general, violations perpetrated by licensees against law or regulatory and administrative provisions resulting from law and issued by the authority.

Concerning revocation, the Federal Law on Telecommunications foresees two kinds of revocation: those with immediate causes, i.e., analyze the behavior and, immediately, revoke the permission. These are applicable to non compliance to rights granted in concessions or

permissions, within 180 as of the concession grant. The other instance is when some licensee refuels to connect with other operator or in the event of change of nationality. Furthermore, it comprises cession, record or transfer, without authorization by the authority, concessions or rights granted to it. A second instance of revocation requires three previous actions and, in the fourth, revocation takes place. Basically, these are instances of full or partial interruption of services, with no justification or authorization by the Secretariat; execute acts that hinder the work by other licensees; incompliance with obligations or conditions set forth in concessions titles or permissions; and failure in providing the Federal Government with counterpart services previously establishes. These are the revocation instances set forth in law and executed by the Secretariat, which currently grants and revokes permissions and concessions, pursuant to our legislation.

Finally, Art. 72 sets forth the reasons for the Nation to seize goods and considers goods and equipment employed, whether to render concession or permission services, when invading or obstructing general communication ways, are reason enough for loosing the equipment to the Nation. It is also a procedure contemplated in the Law of Administrative Procedure and that the Secretariat, as the authority in charge of applying penalties in our country, to perform them.

Now we should take a brief look on the problematic brought about by such regulation in our country. Currently, as I have said, COFETEL analyzes and proposes penalties, and the Secretariat enforces them. This procedure leads us to the following issues: it takes long time from the visit to the penalty enforcement. That is because, on one hand, the authority assesses after inspecting. That generates a document to be forwarded to the Secretariat. The Secretariat starts a penalty procedure, and these are lengthy periods. There are repeated procedural stages due to the double assessment of behavior. Inclusively, in some instances, such assessments are contradictory. Sometimes, COFETEL issues the report and proposes a kind of penalty, and the Secretariat judges it is not subject to penalties, and so such contradictions arise.

Finally, with the kind of system we have in Mexico, the private sector has more opportunities to refute. Since there are more procedural stages, the private-owned company may, at any stage, refute it. For instance, when COFETEL issues the proposal of penalty, such act is not subject to impugnation. In general terms, a supportive appeal may be issued. That is a tool excessively used in our country. Each authority act gives raise to impugnation that hinders even more our work towards applying penalties.

Another problem faced in our country is the weakness of the regulatory body for not applying directly the penalties it proposes. It means that private companies do not respect authority. I could mention that I have great experience with licensees. It is incredible how when an Inspector of the Ministry of Economics comes, the licensee becomes afraid, and when an Inspector of COFETEL comes, they really close their doors and do not let him/her in. It is really a troublesome situation, and we must use public power – which also complicates our work – to reach the licensee. And that is mainly due to the lack of power as regulator agency. That is a serious problem.

Another problem we face concerns penalties established in law. The fines are very low in comparison to transgressions. Sometimes the licensee checks the penalty and says: “I’ll do that. Later I pay the fine”. That is a serious problem.

Another issue is the lack of specialization in courts concerning telecommunication matters. I could say, since I deal with all pleas and impugnation, we have serious problems in Mexico. Courts do not know the issue. I work half time in the office and half time at courts explaining to the judges how we should work. That is very hard. At least in Mexico, judges are usually superficial in their solutions. Sometimes it is easier to pronounce a sentence. If, as a judge, I face a grant breach, then I grant further appeal (*"recurso de amparo"*) and hold the resolution. In our country, further appeal is granted when concession is violated and the procedure is put back, returns to the authority that must solve it. However, we can observe that, sometimes, one tries to settle the procedures through alternative ways, which means serious problems.

Another issue is the delayed procedures in licensees' requests, which complicates our timescale and also allows licensees to claim lack of competence or delay in answering. Such lack of response in our country induces action. For instance, a licensee requiring concession to a portable television, if authority takes two to three months, when they go visiting the licensee, it is already working. These are problems experienced that makes regulatory entities work more and inflict more penalties.

To finish with the issue of current problems, I should mention the lack of human resources. We have been claiming that, in a country with highly relevant income issues, we as telecommunications authorities, jointly with the Ministry of Economics, are fighting for additional resources to allow us to rule telecommunications in our country.

Finally, I would like to mention the challenges, the actions being performed and our hard work to find a solution to the problems we face. We are working in a new regulation to the Federal Commission on Telecommunications. That new regulation basically reassigns duties to SCT and COFETEL, and empowers COFETEL to impose penalties and decide the penalty procedure, since the beginning of oversight act to the punishment by the regulatory authority. Proposals have been made to the Federal Law on Telecommunications. As you know, democratic change in our country has brought about problems in the Houses at the Congress, which, unfortunately, are delaying the issuance of General Provisions and reforms to the Law. However, there are old projects we hope to be approved this year. We are proposing, under reforms to the Law, to increase the amounts of penalties, the escalation of which is not established in law. The law previous to Federal Law of Telecommunication is the Law of General Ways of Telecommunication, which used to rule all telecommunication means, while the Federal Law of Telecommunication is a specialized law. Currently, securing, as foreseen in previous Law, is not comprised by Federal Law. Then, it makes things harder because it allows saying that securing should not be applied, thus bringing some legal problems. We are proposing the inclusion of securing in law. We also advocate granting COFETEL direct power, like happens to the Secretariat, to impose obligations to the dominant operator. That is based on an experience we are now living, where law grants the right to the Secretariat to start or impose obligations to the dominant operator, in the event of a resolution by COFECO – the authority that rules competence – declaring such operator as dominant. The, here we also have an instance of doubled procedure. Until it is approved, we may impose obligations. These are very special cases and, up to now, despite some procedures, we cannot impose penalties under our legal guidelines and because the authority, in the Secretariat and COFETEL, is not empowered to apply penalties directly.

Approve the Law of Ways. Here, there are also many instances of dual application of law in time and space, in legal terms. Sometimes it entails confusion in applying the law. Although it has not been enacted, private companies use it for their benefit, thus jeopardizing us. Another relevant aspect is to include penalties for failure in complying with bidding processes. Our current law does not provide for penalties for regulations in bidding processes, and that is against the global law on administrative procedures. Then, we are asking for enactment for such instances. Thirdly, it would be necessary to issue new regulations on telecommunications. Regulations are provisions that facilitate the application of a given law. The telecommunications regulation in force results from the previous Law of Ways. When the main law is revoked, the regulation that depends on it becomes without effect. That allows licensees to claim anything in their benefit, provided that it comprises such provisions whenever they are not specifically revoked. Here, the problem is that current law states that it derogates previous law in any issue unforeseen thereby. Then, we are opening spaces to interpretations that licensees use in their benefit.

And, finally, there is the fight against piracy. In Mexico, piracy is a very serious issue for all sectors. The President of the Republic has asked for the cooperation of all organizations, in different disciplines, with managerial organizations, to implement programs and enact changes in laws to fight piracy. In our country, piracy is too strong and we are pursuing ways to put an end to it.

Despite circumstances in our country, we believe in the relevance of telecommunications, inclusively to GPD and the Federation revenues. We are fighting to strengthen COFETEL and furnish it with more resources.

In general, that is my presentation. Thank you.

José Leite Pereira Filho – ANATEL: Thank you, Mr. Canchola Rocha. Any question?

Participant: My name is Angélica. I am from the Dominican Republic, Dominican Institute of Telecommunications. I am highly interested in knowing better the problems you have faced concerning this issue – further appeals ("*recursos de amparo*") – which court knows it and what happens when disciplines are related to the competencies of COFECO and COFETEL. I have heard about further appeals due to the lack of decision by the organization, due to administrative silence, etc.

Luis Gerardo Canchola Rocha – Mexican Federal Commission on Telecommunications: In Mexico, Judicial Power has some districts to administrative matters, which are the authority derived from Judicial Power that is empowered to analyze all further appeals. Further appeals in our countries are related to violations against individual rights, and are provided for in our Constitution. Here, private companies basically claim lack of competence, or claim lack of grounds and motivation of a resolution, and further appeals are being excessively used in Mexico. The former President of Court, which recently left his office, proponed a reform to the Law on Further Appeals in our country, where would be included a figure – which I relieve exists in many countries – that sets forth penalties to lawyers and licensees who try further appeals, knowing they will make a point. There is no such figure in our country. Then, legal authority considers that private companies must be heard. It makes our situation harder and there is an uncontrolled abuse, which delays decisions by administrative authorities and jeopardizes judges, whose workload increases a

lot, since anyone may fill further appeals in any circumstance. But the authorities are the ones to sanction and settle further appeals. There is another jurisdiction, the so-called review procedure ("*recurso de revisión*"), where a Higher Court – which is a collegiate court made up by three magistrates – reviews the sentences pronounced by judges and issue a final sentence. In events of issues of law, it reaches the Highest Court. However, the decisions called indirect further appeals are referred to that second jurisdiction. We are talking about two, three or even four years to settle an issue. It is very complicated.

Concerning competency, the issue COFECO is facing is exactly its statement. COFECO is the authority that establishes the creation of monopolies or monopolist practices, and punishes them. Hence, it is connected to COFETEL because Art. 63, within our law, establishes that COFETEL, or the Secretariat, may impose obligations that COFECO defines as being dominant. What happened is that COFECO has declared it dominant, and Telmex y Telmex filled further appeal. During further appeal, COFETEL started working on obligations, so that COFETEL issued and imposed obligations. However, since previous appeal was still pending, when Telmex won its further appeal against COFECO, COFEC resolution collapsed and, of course, our procedure that was terminated also collapsed. Now, there is a new issuance by COFECO and its impugnation is being decided by the juridical authority.

José Leite Pereira Filho – ANATEL: Thank you, Mr. Canchola Rocha. Any question? Thanks. In fact, there were two questions in one, and now there is time only for one question, otherwise we will be late. Another question, please.

Participant: Pietro Solares, of Bolivian Telecommunications Superintendence. One issue is the lack of budget to COFETEL. Then, I would ask: how is COFETEL financed? And, on the other hand, if you are thinking about any changes on regulations. Should you not think about establishing a regulation fee to be paid by service providers?

Luis Gerardo Canchola Rocha – Mexican Federal Commission on Telecommunications: Well. As I said, in our country, COFETEL holds legal nature of a decentralized body. Surely, any political party in our country aims at, among others, providing it with more autonomy. In Mexico, to be a decentralized body implies, under legal and administrative view, that it does not have any own budget. Our budget is the sector head. Every year, the Federal Government assigns revenues to it and the Secretariat, on its turn, allots the Commission's budget. During 2001 and 2002, we have worked hard besides the Ministry of Economics to have a share of the Treasury revenue, resulting from fines and biddings, directly allotted to COFETEL budget, despite its decentralized nature. We have also requested them to transfer to COFETEL a share of its own collection. That is not provided for in law. That is what we have negotiated year after year. Last year we had little success. However, some bills that we have commented and that are under review, there is one requesting to change COFETEL legal nature from a decentralized to a centralized body, with its own assets. That would allow establishing, in law, how the authority might get revenues. However, it is still under analysis.

José Leite Pereira Filho – ANATEL: Thanks, Mr. Luis Gerardo Rocha. I would like to grant the floor to Mr. Luciano Velaochaga, and have this session finished at 11:00 a.m. Let's leave the questions to the end, to avoid delaying the timetable.

Luciano Juan Luis Barchi Velaochaga – OSIPTEL: Good morning. I would like to thank, on behalf of OSIPTEL and myself, the invitation to this Seminal. In my country, people use to say when things go wrong: "The only place where such a thing occurs is in Peru". Such people should come to events like this, and they would notice that many things that happen in Peru also occur in many neighboring countries. Surely, part of what I am going to report is familiar to you. I will start by presenting a brief history of OSIPTEL. This morning, I would like to talk about the ruling duty of regulatory agencies, and the crisis of legal security – how does such ruling duty, which is obviously general and not exclusive to regulatory agencies, influences on the concept of legal security. First of all, I would have to make some clarifications about OSIPTEL, in order to provide the audience with clearer view and understanding about some issues to be further commented.

Firstly, Peru has its framework law on regulatory agencies that, obviously, comprises OSIPTEL. What is amazing is that people use to talk about the framework law on regulatory agencies and, however, most of them – including OSIPTEL – do not realize that their acronyms do not even mention the regulatory duty. [In Spanish] OSIPTEL stands for Supervisory Agency on Private Investments in Telecommunications. Many reasons have led me to make this reference. For example, something similar happened in privatization. The organization in charge does not make reference to the term "privatization". However, the regulatory agencies – including OSIPTEL – are assigned with some duties. Which functions are assigned to OSIPTEL? First of all, supervisory duty. Secondly, regulatory duty, normative, oversight and enforcements duties, settlement of disputes and claims by users of services ruled by it.

I will basically focus on normative duty. That comprises the exclusive power of issue laws – within the scope and disciplines under its competencies. For OSIPTEL, its discipline is telecommunications – regulations, general rules and mandates or other particular features concerning interests, obligations or rights of entities or activities supervised by such users. If you analyze the framework law as a whole, you will notice that OSIPTEL normative duty is client-oriented. Our clients are operators and users. OSIPTEL is in charge of settling users' claims – a duty that is not assigned to all organizations. And this is one of the most troublesome issues, because it exposes more the regulatory agency in face of users' claims.

Concerning normative duty, it empowers to issue – exclusively and within its competence – general rules and regulations applicable to all administered bodies under the same conditions. That means that, on one hand, we may issue rules applicable to anyone undergoing a given situation. Furthermore, there is the possibility of issue more particular rules. Let's say that, in practice, the most usual rules have been the mandates. Mandates are related to "interconnection". Here, Peruvian rules set forth that interconnection is mandatory and provides the parties, firstly, and operators the possibility of signing contracts autonomously. If the contract is not signed only because negotiations failed, OSIPTEL may issue a mandate. In private law, it is known as compulsory contracts or binding contracts. It means that OSIPTEL, through a rule, establishes and imposes an interconnection relation between the concerned companies. As we will further discuss, it has some implications on normative aspect.

I will briefly explain the concept of legal security that I intend to use. Then, we will discuss in details the issues concerning OSIPTEL. First of all, I would say that objective legal security results from the clearness, plenitude and stability entailed in the rules making up a give legal regimen. It is very important – the concept of clearness, plenitude and stability of

rules. Legal security postulates the existence of definite right, which allows individuals to estimate and calculate the outputs of conflicts and contingencies that may eventually disturb its economic planning of resources. The previsibility provided to us by such legal security is extremely important, in order to allow us to know what can be expected from a given situation.

Because of OSIPTEL clients, this may be seen under the view of companies or users. On the companies' side, I have here a survey carried out in 1995. You may say it is too old. However, in 1995 we were facing a huge terrorism-related problem in Peru, so this is an essential issue to observe the survey transcendence. However, when private company's executives are surveyed, in fact one of the crucial issues stressed by them as aspects entailing obstacles to investment, concerns failures in legal or juridical framework, and in enforcing institutions. One way or another, these are the topics that bring us to this seminar – normative aspect and to enforce such rules. Thus, 38% the survey audience emphasized such aspects as the most relevant that impaired private investment. It is also useful to observe the importance of legal security concerning rules.

On the user's side, here we also face a great problem, because normative aspect is obviously crucial to inform users on their rights and for them to exercise such rights. Following we will analyze some problems entailed by likely lack of clear rules.

There is a Spanish writer, Perez Luño, who highlights the major conditions comprised by the concept of legal security – structural correctness and functional correctness. Structural correctness refers basically to granting exposure and formulation of rules and institutions integrated to legal regimens, mainly concerning issuance of rules. Functional correctness refers to have the rules' addressees complying with rules and, surely, the work of authorities in the field of enforcement. Once again we return to two issues gather us here – normative duty and enforcement.

Following the author, I will emphasize the major aspects entailed by normative duty. For each aspect, I will comment how things are or were in my country. The first aspect mentioned by the author refers to law promulgation. It reads: "What is established in law should not only be a general precept, fair and equitable, but also subject to due promulgation". It means that, for due use and enforcement of law, it must be known by all of its addressees. And the possibility of coming to know the rule, here Peruvian rules, basically concerns its publication. As we mentioned, OSIPTEL holds normative duties, which are enforced through resolutions issued by OSIPTEL Steering Committee, its highest jurisdiction. Then, OSIPTEL would meet the precept of the enacted law by publicizing advertising it in Peruvian Official Gazette, which is the official gazette through which laws have binding power as of their publication.

We have faced some problems, basically in particular laws, concerning approval of contracts or issuance of mandates because, obviously, they are broad texts and we face budgetary problems. If there is the advantage of receiving contributions through companies' regulation, there is obviously the issue of efficiently managing resources. And what we have got concerning particular laws is that the resolution is published and, for mandates and approved contracts, they are published in our webpage. Someone would say: what for? They are particular laws, ruling only involved parties. What happens is that, according to non-discriminatory principle, the only way for other people to perform the required verification is to know either the contracts or the mandates. Therefore, they are interested in knowing them.

So, in that light, we have succeeded in, instead of having them published in Peruvian Official Gazette, because it is expensive, having them published in our webpage. The resolution is published and we only make reference to where the rule may be found.

The second issue mentioned by the author concerns the expressed law. It means that law should be clear to prevent it from leading to error. It is about the need for the rules to be understandable and to abolish ambiguous, mistaken or unclear expressions, aiming at formulating clear and accurate laws. Here, there is a problem with users, rather than with operators. It is about the basis of technical language. Telecommunications, I relieve, is characterized by a terminology totally unknown to users, common and usual individuals. Here, we have faced several issues because technical language, such a sophisticated language, does not reach users. That makes users complain – and many times they do complain – with no exact knowledge on the rules, because they do not understand them, thus overloading the claims settlement court. Additionally, within the plan of operating companies, if rules are not clearly set, some conflicting situations arise, and that is a problem because, usually, rules may be differently understood by operators, thus generating another conflicting situation. Obviously, our duty is also solving conflicts generated by the companies and, here, arising out misinterpretations of rules that, theoretically, could have been avoided. What has been done to solve it? For general rules, the Congress established that any Bill should be followed by a cost-benefit analysis, so as to deeply know the rule and its consequences. Unfortunately, that cost-benefit analysis is very poor in the Congress. Usually, they are limited only to say that this Bill does not imply in expenses to Federal Revenue and, then, they would rest cool. There is no survey on rule's consequences. For OSIPTEL, previously to issuing the rule, it should publish a rational that explains the reason for the rule and, basically, presents a study on the likely consequences of such rule.

Another aspect I should deal with refers to pre-publishing bills, in order to have them considered by public in general and hear their comments.

Another issue emphasized by the author concerns full law. Under no circumstance, the susceptible behavior of concealing legal transcendence should require for normative answer. Basically, the rule should fill in gaps, i.e., all situations are to be previewed. Usually, within the legal plan, one uses to refer to the principle that judges cannot prevent from managing justice by effect of law, and it is basically covered by the principle of extensive interpretation, analogy and parity of general principles of law. However, it should be clear that this situation of filling in gaps, at least for regulatory agencies in the scope of previous study, should be observed in details, since it may further entail issues of conflict with operator companies.

Another issue concerning strict law is that the guarantee clause is complemented by the principle of normative hierarchy, and thus establishes rules of preference of law sources. Within the juridical plan, for those who are not lawyers, we use the so-called pyramids. It means that there are hierarchical rules, so that the less hierarchical rule cannot change the high-hierarchical rule. It entails a problem concerning autonomy of regulatory bodies, since they issue resolutions less hierarchical then the law. The regulatory agencies in Peru have no constitutional ground, are not autonomous administrative entities in Constitution, hold functional autonomy. However, concerning rules hierarchy, there is a problem because they are under what would be the Congress' and Executive Power's normative in two issues – basically concerning laws regulation and the possibility of the Congress assigning them with general nature. Under such assumptions, OSIPTEL is subject to the likely intervention of the Legislative Power and, basically, of Executive Power, through rules of higher hierarchy. For

Judicial Power control, there is the possibility of popular lawsuits. Popular lawsuits are mechanisms that may be affected by the issuance of any less hierarchical rule – for OSIPTEL, the resolutions by its Steering Committee – understood as violating the Constitutions. So, there is an open way, through the Judicial Power, whereby such rules hierarchy is controlled.

I should also refer, here, to the possibility granted to consumers – much more than to companies – to invoke further appeals, as happens in Mexico, thus denaturalizing further appeals. The way for appealing in Peru is as follows: first jurisdiction is the operator company itself; second jurisdiction is OSIPTEL Court of Claims Settlement. After exhausting the administrative way, users may appeal to Judicial Power, through the Administrative Contentious. Usually, users denaturalize the figure of appeal and directly invoke the appeal. In our experience, we have not faced any problem with further appeals. We usually win. There is a further appeal applied by a consumer and that was refused, inclusively by Judicial Power, considering it was not the way, but nevertheless was referred to the Constitutional Court. The Constitutional Court judged it grounded. It is not the forum to present several errors in that resolution but, besides that, there is the resolution that, for the first time, is in favor of user and OSIPTEL must pay. However, the normative aspect, in its recitals there are some aspects previously approved by OSIPTEL concerning the conditions of use of contracts with incumbents, which is now changed by that resolution issued by the Constitutional Court.

Since my time is over, I would like to refer to two issues I should mention before closing my speech. OSIPTEL, in its normative role, is obliged to pre-publish the bills in order to make them available to public in general and allow them to issue the rules before such bills become sound resolution. The last aspect concerns rules stability. It is a problem that concerns me a lot, because now in OSIPTEL there is a huge amount of rules. Probably, many employees at OSIPTEL do not know all of them, neither operator companies – mainly the small-size, with no permanent legal advisory services – nor big-size companies, and it is hard to know the existing amount of rules. In light of that, we are outlining a system on rules simplicity, so that we may reduce the number of existing rules because what minds is not quantity, but quality of rules. Thank you very much.

José Leite Pereira Filho – Moderator: Thank you very much. I would like to have a break now and have the questions after the break, since the meeting is much delayed. I would like to suggest restarting the meeting at 11:20. Thanks.

(Break)

Coordinator: Sirs and madams, we shall now continue the activities held this morning. Counselor José Leite.

José Leite Pereira Filho – Moderator: Welcome back from coffee break. Now I would like to complement the questions to Mr. Luis Gerardo Canchola Rocha and Mr. Luciano Velaochaga, before granting the floor to other two speakers. Then, please the first question to Mexico representative.

Participant: I was asking Mexico delegate what happened to the power of police. I do not know about his country, but in Europe no oversight may be performed without authorization

by the Judicial Power and police to enter the facilities. How does it happen in Mexico? That is my first question.

Luis Gerardo Canchola Rocha – Mexican Federal Commission on Telecommunications: Well, administrative authority in Mexico is empowered to inspect and perform verifications, as I mentioned in my lecture, as well as to apply sanctions. Here comes the Judicial Power. I said that in administrative laws, when particulars do not accept a visitation, instruction or order by the regulatory agency, sometimes the administrative authority appeals to the police to ask for help and to have their entry allowed inspecting the company. It means that authority – here the Federal Commission on Telecommunications – should issue a visitation order. Such order is received by the particular and, obviously, must be duly based and justified. Then, the sanctioning process may be started by the administrative authority. The police power is invoked in the event of opposition to the visit, i.e., when any infringement has been perpetrated. However, in terms of telecommunications regulation, we only appeal to police intervention if there is any impairment to the work of that administrative authority.

Participant: In Europe, oversights may be held with no previous notice. If something is found, they come with an order issued by a judge, enter the facility and do whatever necessary, respecting the order. So, user is not informed. And, furthermore, according to European directives, if an infringement is observed, the material is seized and the person is directly imprisoned. So, I believe talking with all speakers about what happens in Europe. We have European directives since 2002. There are 7 directives. They are supra-national laws and every European country should apply such laws. Thus, it is the same for everybody. In 1996, for instance, when independent regulatory agencies were established, Germany had to change its Constitution. Thus, everyone is abided by the same regulation, if one may say that. I would like to ask if you, as lawyers, have seen the 7 directives to 2002, to be applied to 27 European countries. We celebrate bi-lateral contracts with Africa and Middle West and, thus, he must have uniform laws to settle conflicts between countries. Then, I ask: Do you know those laws?

Luis Gerardo Canchola Rocha – Mexican Federal Commission on Telecommunications: I do not know them. I would like to clarify the first question. I am not taking about the notice that I will visit them. What happens is that when we visit them, not to violate their grants, then the authority must justify it is empowered to do so. That is how it happens in our country.

Participant: Sorry. In Europe, when a technical oversight is performed, and things like that, there is no need for justification. That is the law in Europe. I can perform a routine oversight, I have the right to check what is happening, as a police officer has the right to stop me and check my documents. That is the power of police. Why can the police officer stop me to check my documents and I cannot do that in telecommunication, which is much more important? So that is the legality of law because, according to European Constitution, everybody is entitled to communicate in equality.

José Leite Pereira Filho –Moderator: I would like to thank such an interesting question about European situation, but we will have time to deeply discuss it during further lectures. Since we are late, I would like to grant the floor to Dr. André Fontes, Judge of the Federal Regional Court, 2nd Region, Brazil.

André Fontes – Judge of the Federal Regional Court, 2nd Region: Good morning to all. I though I would have the privilege of being the last speaker, mainly after Dr. Floriano. But I believe such privilege was transferred to him. The regulation-related problems faced by Brazilian courts are far beyond theoretical considerations provided by Brazilian books. Since this audience is mainly made up by non-Brazilian citizens, I would like to recall you that, in Brazil, there is a radical separation of the Judicial Power from the other Powers. Therefore, Brazilian administrative contentious, with no exception, may be open and freely appraised by the Judicial. In Brazil, any restriction in that sense would be utopia, since Brazilian tradition is characterized by the total lack of restraints to any person, as any of us now, whether Brazilian or foreign citizen, to appeal to the Judicial claiming that a given service is not working. There is no restraint.

Thus, we would have to face a major issue, i.e., the possibility of co-existence of both regulatory and Judicial systems. In Brazil, I believe, we have not yet reached the stage named "regulation". We are in a situation that I would call as "intermediary". Maybe we now have great managers of Public utilities and their related activities, intending to be regulatory institutions. And will explain why I am making such a categorical statement that seems to have been surprisingly provided to all.

The Agencies – that is how they are called at Federal level – suffered a mortal blow when such institutions' defense systems were unified by attorneys or lawyers belonging to Central Administration, which strongly affected their independency. Now, regulatory institutions do not rely on an independent defense, executed by them, following their own guidelines. Their attorneys are connected to other attorneys and to all regulatory entities, subject to greater control by the Central Administration. In my view, anything that affects the independence of an institution – or regulatory entity – is against the idea of regulation. And what avoids the conflict between the institution and Central Administration may be the most sensitive issue under discussion in our country.

This fact is worsened by another, which I would call "excessive judicirization" or, even worse, a "judicialization" of administrative matters in Brazil. Administration is practical and that is how it should be treated. What we see now is the subjection of public administration to an extremely restrict juridical regimen, thus limiting and biasing the behavior to those for which it had been established. And it brings about another issue also faced in Brazil, related to the so-called regulatory duty. For some, it is presented as something new, different from anything, thus hindering judges and courts in submitting it to some sort of control. As currently presented in Brazil, in a didactic way with strong literature and theorization, the activity is far from what Brazil traditionally relies on, i.e., concepts, traditional terms of Administrative Law. That is exactly the academic background of judges in general, since they were installed in their offices long before the establishment of such institutions.

Brazilian legislation, which is now – although late – concerned with the issue of privatizing Public utilities and managing concession grants, ignores that regulation is far beyond that. It is not bound to public issue; it is not related to exclusively public activity; it is much more than that. In its connections with legal protection to users and economic agents, through bidding processes, it should go through ways free of interference from or damaging connection with such activities. Rather, we have observed in Brazil that agencies have worked as a way of legitimating of damages to users. We have noticed that agencies have

been used to increase prices that cannot be increased in normal conditions, because of conflicts between users and concession holders. Indirectly, agencies use that mechanism to fix amounts that, typically, are dissonant with the realities they were expected to deal with. I am not directly referring to ANATEL, which is an institution that deserves my highest respect. I was most pleased in immediately accepting ANATEL invitation, not only for the respect I have for it, but also for the admiration of its members. But, that is a reality.

I am not referring just to the problem of such agencies being won by economic agents. What we see now is something much more serious, which directly reflects on the system of protection to users. I will give a practical sample. Regulatory agencies, eventually jointly with economic agents, concession holders and others, have its claims, conflicts, issues solved at Federal Judicial level. But, the problems between concession holders and users are solved at a different Justice. Brazil has 26 States, but one single Federal District, that, in practice, would correspond to the 27th State. Each State has its State Justice that, in practice, applies the agencies' guidance concerning consumers as, for example, extending the time for describing telephone bills. The result of such a simple example is that, currently, most litigations involving users at Rio de Janeiro State Justice, mainly deals with telecommunications-related matters. There would be a simple solution for the Agencies to apply – because one duty assigned to Agencies is prevent, avoid, try to solve conflicts before they occur –but they increase and worse conflicts, based on their work in settling practical issues.

We should bear in mind that we used to say that State was a problem, used to talk about the fight of individuals against the State. In Brazil, that is very serious. We have a figure much more complex than the State, which is a sort of State Power, called Public Administration. The State is much lesser than the power of Public Administration in our country, with its several manifestations. That is the challenge being faced. Brazilian Regulatory Agencies hold a culture that rules being issued by them worth the same as legal rules. Therefore, the fights faced by the Legislative Power to establish minimum and maximum thresholds are identical – or very similar – to those rules established by regulatory institutions. They are not. Regulatory Agencies are legitimated only based on theoretical reasons – a fact that is not criticized in Brazil – by the procedures they adopt. And such procedure is exactly what legitimates them. They cannot have more value in their activities than laws established in Brazil. So, what happens? If a legislator sets a deadline and does not justify it, because it results from major fights, that should not happen concerning acts issued by agencies that, when ruling situations, should argue that such normative act has no legal nature, is an administrative act. And those fights that happen in the Legislative do net happen in Agencies. The arguments used refer to technical discretionary nature. We know – because we are not that naive – that such data are frequently superficially produced, with no criteria. My academic background is in the technical field, and I remember very well how technical rules used to be elaborated in given areas, sometimes following arguable criteria. One example is the solution by Public Administration, like that for telephone bills, which was established by supposedly technical reasons, required due to longer time that should be granted to telephone companies. The consequences are so serious that the Judicial Power becomes in their hands, like a business, a counter, waiting for legitimating situations of agencies in face of users. By the end, both Judicial Power and the Consumer Defense Entities stay in the hands of that decision supposedly technical and issued by an agent, with deliberations usually lacking reasoning.

Then, I am very skeptic and critical in relation to some behaviors, and do not believe in any solution at the Judicial if there is no recognition that agencies should be clearly validated. It would be necessary to say: "The rule is this, because of that. We are not legislators, we do not hold mandate granted by people. People did not give us any power of attorney to do whatever we want. We must say that is like this because of that". It would be necessary to explain to people that Regulatory Agencies were established to be a solution rather than a problem. What happens now is exactly the opposite. Regardless how you think that the issue is due to Judicial's decision, in this or that sense, the Judicial is facing the same problem as that economic agent with difficulties in its contract and appeals to the Judicial to have the problem solved. We cannot imagine that the solution would be to close the doors or a solution – that seems utopist to me – of establishing courts assigned with specific competence in telecommunications-related matters. You know that telecommunications right is more dynamic than any other and, maybe, one of the most dynamic ones. There will be no law, whether in Brazil or worldwide, capable of following the pace of economic movements, under no circumstances. To expect a judge to keep that pace in a specific way is nothing more than utopia. In Brazil, what has been recently done was to appoint judges with specific duties concerning money washing crimes, because of the terrible problems it brings to the country. Except for that, what exists is a tentative to establish agrarian courts – which have not yet been implemented – and courts involving environmental issues – which are not totally implemented. And, if we want a specialized judge, we must choose someone with specific background. We cannot choose judges in Brazil. In our system, courts provide a theoretical solution, and I cannot assign it to a given judge. Forum Shopping that exists in some regimes does not exist in our country. No regimen in Roman–Germanic system would accept that – to choose a court for technical reasons, etc.

Then, I am not here advocating for the Judicial Power, because above all I am a curious person, involving regulation issues. I do not believe, additionally to consumers-related issues, that we can imagine that deadlines randomly fixed by regulatory institutions and how it leads to random behaviors could have any meaning. I remember that, above all, there is also the free initiative of corporations in Brazil. We cannot let an agent, with restricted powers, have more power than what is established in Constitution – the freedom for corporations to work. Therefore, free competitiveness, consumer and regulation must be conciliated.

And that will be reached if the Agency – a technical institution – may follow its path of grounding its decisions, pursue technical criteria and, above all, do not become closed and focused exclusively on its options, arguing that it is a technical solution. What frequently happens in courts are discussions on acts issued by the administration without any reasoning. Usually, it provides only some information, almost a repetition of the opinion report, and agencies are providing us solutions without really presenting their reasoning.

Problems faced by Brazil are very similar to those faced by other countries. The major issue is that, in Brazil, there is not one single Justice; rather, there are several justices. The second issue concerns the excessive theoretical datum in Brazil, based on foreign literature, when our regulation is abided by stricter criteria. We are very concerned about concessions, and thus ignore that technical discretionary nature is much broader. Therefore, we urgently need deeper considerations, studies and more advances. But, with such alternative for the Agency to be restricted to the issue of its decisions, for reasons it states to be reasons of fact, with no technical statements with sound grounds, we will never reach any solution. It would be very

hard to think that any of us may come to have an issue – which we claim to result from injustice – not assessed in Brazil. And it is much harder to believe that the solution would be to establish mechanisms and restrictions. Like in Mexico and Peru, where exists the phenomenon of further appeal, in Brazil we have a parallel phenomenon, named "preliminary injunction" [*mandato de segurança* in Portuguese] with the same function, or almost all functions as the further appeal. Even if such mechanism did not exist, there are others, very powerful because they may be alternately applied. And all of them, with the possibility of preliminary solutions, which could immediately cease any kind of activity, including activities related to public utilities. Just to inform you, many civil works in Brazil have been suspended because of preliminary decisions. Those were huge works, with extremely high values, higher than millions and millions dollars, which have been suspended through a preliminary sentence issued by one single judge, arguing that such provision did not meet another provision in our Constitution. Any investigation, regardless how simple it would be, will surely disclose failures in this or that system. It is impossible to have an organization with such technical power so subject, vulnerable, sensitive to argumentations. And it happens due to lack of participation. I say that, to an institution, any participation is always welcomed and shall always be questioned because, if it does not happen, our mechanism leaves no alternative other than impugnation.

Our developments in Brazil concerning telecommunications are worth of admiration. That is true. One year ago I referred to a French man who had to return to France and, then, should pay his telephone bill in advance to avoid leaving any debt in Brazil. He could not do that, because mechanisms are so general that lack any casuistic, topic solutions to allow a user to pay in advance a bill, due to a sudden travel. I am providing this practical date because the regulations sensitive issues are exactly those related to user and competitiveness. These are the ones that, due to lack of reasoning, lead to exacerbate the concept of public administration, like as if the institution "regulatory entity" could have such a power of affecting the life of everybody, changing their lives, with no control over it. Even more complex is that literature has not adopted mechanisms for solving those issues. The solution is all assigned to the Judicial and we have observed increasingly problems in the Judicial Power, which cannot solve other things, like in telecommunications, because of the overload of matters referred to Justice, mainly the Federal Justice. Frequently, a judge analyzes a criminal case, soon after a case of trademark and patents, later a case involving social security issues, then a case involving telecommunications and so on. The judge then must be an expert in all acts, because lawyers are very well oriented in their assertions and provide extremely technical and accurate arguments. The ideal would be to have Regulatory Agencies performing such technical mission of considering in fact social claims, instead of believing that consumers' problems are micro-economic problems, with no interest to the Agency, as if the Agency had nothing to do with the user's issue. That is set forth in our Constitution, and both Regulation and users' rights are comprises in the same constitutional plan, additionally to the competitiveness plan. So, the Agency's acts cannot ignore its users, competitors and the administration structure. We use the same concepts – power of police, administrative act, authorization, etc. We are dealing with an old new thing. Thus, debates will surely happen and, since my time is over, I close my lecture. Thank you.

José Leite Pereira Filho – Moderator: Thank you, Judge André Fontes. I could warn you about time just once, because if I were to warn the second time I could be in serious

problems. I would like to grant the floor to Dr. Floriano Azevedo Marques and, then, open the session to questions.

Floriano Azevedo Marques – Manesco, Ramires, Perez, Azevedo Marques Advocacia: Good afternoon to all. First of all, I would like to say that, speaking after Dr. André and the other members of the Head Table is really a privilege. Nevertheless, privilege is something that entails some difficulty, because there is not much left to say after issues have been so nicely approached here.

Basically, I would like to say that I have prepared a presentation less aimed at exposing peculiarities of Brazilian legislation telecommunications, and more focused on approaching the issue here – i.e., enforcement – based on Brazilian experience. However, as I could notice here, our experience is very similar to the experience of other countries. I would also like to say that enforcement, as I should deal with it here, refers to enforcement in telecommunications, in contexts facing competitiveness, with private operators working in the sector, a matching between public interests and interests of market agents.

If we were to work with the dimension of enforcement in a scenario like that reported by Dr. Thomas, of regulation prevailing over State operator – like we have here in Brazil in oil industry – enforcement problems would be different. But I will basically deal with my analysis on enforcement issues in telecommunications, where are market players and competitiveness.

When dealing with enforcement, I think we have to make a break. The discussion about the Regulatory entity's work involves an intrinsic aspect, internal to its decisions. It implies in analyzing to which extent such decisions are proper, adjusted to the needs and conjuncture of the market ruled, to know if they gather the conditions required to be legitimated besides their regulated entity. Thus, first dimension is internal. The second is extrinsic, external – if the Regulatory entity is empowered to impose its decision.

It is crucial to have both dimensions clear, because not only in Regulation, but in anything requiring for State authority, if decision is not entailed with minimum legitimacy, power will not work. Enforcement power is extremely limited to insure observance to decisions, and make them effective. Therefore, it is necessary to understand that as more compatible such decisions with market needs and as more empowered to – in extreme situations – impose its authority, as more effective the work and decisions of Regulatory entities. Without both dimensions, enforcement framework lacks effectiveness concerning the Regulatory entity's work.

Due to exclusively analytical reasons, when talking about the work of a regulatory entity, I use to see six different works within the scope of its work. There are six powers that, jointly, make up the set of the Regulator's work. The first duty is regulatory, normative, of issuing rules – lower than law – to rule the regulated entities' work in general. In such dimension, effectiveness is expected to be higher as more capable is the Regulator in issuing rules compatible with law, with the broader structure of legality. In a second plan, not lesser important, issue rules compatible with market needs. In other words, there is no use in believing that the Regulator will be effective in its normative decisions if it issues rules incompatible with market's reality. To rule within a competitiveness environment, implies in ruling in articulation with the needs of those entities regulated. And when I say regulated

entities, I mean operators, economic players, consumers, users. There is no use in Dr. Leite and ANATEL issuing a wonderful rule on unbundling, if it is not entailed with technical, economic and market conditions, compatible with the context wherein it is inserted. Its capacity of effectiveness will be much lesser if it is a rule that imposes public objectives with some degree of adhesion to market reality.

The second duty of Regulators, which I use to call *awarding function*, i.e., of granting licenses, outlining market, granting concessions, granting rights to operators willing to work in this market, will have its effectiveness increased as highest is the capacity of the Regulator in viewing the market and articulate the objectives of competitiveness and universalization. The duty previously mentioned – which I call arbitral, because deals with arbitrage of conflicts, solving conflicts internal to the regulated sector – effectiveness increases as increases the Regulator's mediatory capacity of composing, balancing interests, working with fairness, working with equity among conflicting parties. On the other hand, specifically for Brazil, where Regulator's arbitral duty is mandatory – whether by law or by contract – its capacity of pronouncing a sentence that can be executed by the Judicial.

Concerning the oversight duty in Regulation, I think the major issue for its effectiveness is to provide the Regulator – operationally and organizationally – with means to execute oversight. Such oversight will not be effective if the regulatory entity is not endowed with tools, human and material resources to execute its oversight work. To escape a little from the telecommunications industry, I will give an example in the field of oil. One day, I was reading about the problem of a regulator in Brazilian oil industry who must control fuel sales and had 12 inspectors to control fuel trading all over Brazil. It seems obvious that the economic agent willing to circumvent the regulation is induced to do so, because with only 12 inspectors, the change of being caught is very small. So, here we see an effectiveness-related problem, more concerned to organizational and means capacity.

When everything goes work, there is still the duty of sanctioning, applying penalties. It is more effective as more it observes the following issues: firstly, legality. There is no use in trying to punish quickly, without complying with minimum legal precepts of grant of subjection to State regulation. Above all, punishment must be proportional. It means that one must find a suitable balance between heavy punishments to disincentive the behavior and, on the other hand, avoid exorbitant punishment. There is no use in applying punishments higher than the company's revenue. That fine will never be paid. So, proportionality mechanisms to punishments applied are crucial to the Regulator's effective work.

Finally, there is a duty I use to call "recommendation". I will not analyze it deeply because it concerns the relation Government – Regulator. In the Exchange between the work of sectoral policies under Government's responsibility and regulation work, effectiveness greatly results from the institutional arrangement between the Regulator and the Government. Then, you may notice that, in every manifestation of the Regulator's power, there are different conditions for effectiveness. In general, I can choose a Decalogue to Regulator's effectiveness. There are some keys that help increasing he Regulator's effectiveness. Firstly, the Regulator should be aware that as faster and more agile is its decision – once found viciousness, once found conflict, once found failure – as better will be its efficiency. Nothing fits better to weaken the Regulator's effectiveness than when the Regulated perceives the Regulator as inactive, or when the Regulator's time to take action is slow enough to justify vicious practices.

Secondly, the balance in managing its competencies, its powers. So, firstly we have efficiency and secondly we have what I call proportionality – to find the right medicine, in the right dosage, to a concrete situation. That is extremely relevant towards the Regulator's effectiveness.

Thirdly, current regulation implies in a State Regulation that avoids distance from the Regulated, interacting with the regulated sector. As greater the Regulator's capacity in verifying, obtaining information on the issue and peculiarities of the regulated sector, as more permeable it is to interests and conflicting needs in the regulated sector, as more effectively it will be.

The fourth issue is compliance to legal precepts in the Regulator's action – respect to legality. Usually, it refers to respect to that legality established by the Regulator itself. Frequently, the Regulator – which is empowered to issue concrete acts, issue normative acts – thinks it can change normative acts through concrete acts. Well, if it issued a rule, if lower than law, it really must comply with its own rule, even if the concrete act and rule are issued by the same entity, same body, same persons. That is important because, otherwise, the Regulated entity and the Justice may always appeal to the Judicial to void the act.

The fifth issue – as disclosed by Dr. André – is the extreme relevant of having the Regulator's work always soundly grounded. If it is not grounded, who is affected by the decision must be granted the benefit of doubt. The entity subject to State authority is thus granted the right to doubt about the appropriateness of the decision, since it is not duly grounded, with due reasoning.

Finally, the Regulator shall rely on clear, accurate and objective structures to apply sanctions. I remember that, when we used to render consultancy services to ANATEL, preparing telephone services concession contracts, there were players caring more about privatization process, highly concerned with the degree of details states in the concession contracts, at the chapter dealing with sanctions. And we insisted, and ANATEL firmly held this role, stating that there is nothing more important than a good, clear, explicit and objective chapter on sanctions. It is very important that regulated entities exactly know the penalties to be applied, the proportion and under which situations, if it biases its behavior.

Surely, it is not a cake recipe. Argumentations will always exist. However, if the Regulator reaches such objectives, there will be less arguments about its decision and, therefore, its decisions will be more effective. Therefore, it seems important to me that regulation effectiveness shall be pursued more in reaching regulation objectives than in the degree of imposition it may hold in its sanctions. I always say that there is nothing worse to regulation than a Regulator that applies many fines, even if all of them are collected. If it is compelled to apply fines, it is because regulation objectives are not adequate. We must bear in mind that the major duty of any Regulator is not applying fines; rather, it is to shape the regulated sector and reach regulation objectives. Application of fines is the remedy, which must be effective to correct the behavior of whoever does not follow regulation's objectives and purposes. Sanctioning mechanisms must be objective enough to disincentive the Regulated entity's biased behavior.

And, to finish my lecture, I will mention the last issue. Judicial control, for us in Brazil, is not a problem because it is a reality. Since Constitution sets forth the principle non-obliteration of judicial relief in face of any conflict, we must live with the reality that conflict may always reach the Judicial. Obviously, the judicial control entails some problems. It is undoubtedly important, since it avoids abuse of power, but also brings us some perplexities. First perplexity is the issue of specialty. One of the reasons that lead to establishing regulatory entities is the need for allocating, within the State, some specialty, technical expertise, to make regulation more efficient. The paradox is in the fact that, if that structure is built, the expertise and specialty is allocated in the Agency and, ultimately, the conflict is settled by the less specialized entity in the State, i.e., the Judicial. As Dr. André mentioned, judges frequently have to know all fields, all peculiarities of every entity of the economic activity.

Such paradox is disclosed in a need of, on one hand, endowing the Agency with capacity to make its decisions technically explicit. And, on the other hand, it moves towards specializing Judicial bodies to better respond demands received involving sectoral regulation. I am not skeptic, on the opposite, but I think that an almost unavoidable way to the Judicial is to become organized around the establishment of Specialized Courts, at least to deal with issues involving Agencies and specialized regulation. I do not dare saying that w should have Special Courts. In Brazil there is a discussion about providing special forum to assess the decisions by Regulators, such as decisions by Ministers, by the President of the Republic. That would be even very complex to the Judicial administration. But, at least, it is important to have Specialized Courts.

And I guess there is still another paradox, which seems clear to me, related to the timing to settle conflicts in the Judicial. The Judicial works to solve conflicts in its own time, i.e., the judicial time. A part of the conflict is solved in the Judicial because the parties give up litigating. Judicial time is very slow, especially in Brazil. And the time for regulatory decisions is long. If I wait five years to settle an interconnection conflict, it is likely that such interconnection is no longer relevant, because technology made it out of date. That is the second paradox – escape from the Regulator's decision, which must be expedite and is thought to be expedite, and take it to the Judicial, where the decision may be anything, but expedite. Here arises the problem – being now faced in Brazil – of having conflicts in Judicial solved through writ of power, anticipatory orders, and preliminary injunctions. It means that conflict settlement is not solved within the scope of Regulator, when it reaches the Judicial is pronounce a provisional and emergency decision, which becomes permanent due to the incapacity of both Regulator and the Judicial in solving the conflict.

I would like to finish my presentation by posing some issues, in summary: first, it is important to constantly develop the interlocution with the regulated sector; it is important to have, in decisions, coercing orders, duly underlying the decision, so that when calculating cost/benefit, the Regulated entity becomes convinced to comply with the Regulator's decision. In professional life, we use to see the Regulated entity asking its lawyer: "But if I do not comply with this decision, how much is the fine?" And the lawyer answers "Five million". The Regulated entity performs some calculations, finds it cheap and notes it gains much more if it does not comply than if it complies. Thus, it is important to rely on a sound structure that thwarts the behaviors. But it should not work only because of the high level of fines applicable. It will work if the perpetrator knows that fine will be quickly applied, the

conflict will be decided with the Regulatory authority and, above all, the Regulated entity will loose, in medium-term, if it does not comply with the decisions.
Another issue is how important would it be, in Brazil, in having clearness – and ANATEL has worked hard in such dimension – in combining penal sanctions (fines, warns, suspension of grants) with premium sanctions, i.e., incentives the Regulated entity is granted for complying with the decision. For instance, ANATEL has clearly done that when imposing premium sanctions to anticipation of universalization goals by incumbent companies.

Finally, it would be worth noticing that Regulators, to strengthen their effectiveness, try to avoid the so-called decision-making vacuum. Nothing can jeopardize more the effectiveness of Regulators' decision than non-decision, delay in deciding. And, at least for us in Brazil, it is ultimately important that the Judicial, realizing the new texture of conflict brought about by independent regulators, may be equipped and organized for that. Dr. André spoke well about the impossibility of recruiting, to the Judicial, people trained in deciding conflicts. However, if such people are assigned to specific areas, it could allow them to accrue knowledge enough to optimize the Judicial's decision when conflicts are referred to it. I thank you all and apologize for my delay. Thanks.

José Leite Pereira Filho –Moderator: Thank you very much, Dr. Floriano. I hope the interpretation team has understood at least 80%, since they are outstanding lawyers and, speaking in Portuguese, I believe some difficulties may have arisen. But the general idea was duly informed. So, it is time to grant the floor to participants, to make questions to any speaker. I believe we may spend about 10 minutes in this debate.

Participant: I am the former President of Rio de Janeiro Justice Court and, now, I head the Institute of Juridical Survey and Studies of the *Universidade da Cidade*. The presentations have concerned me when they presented as solution the establishment of Specialized Courts to analyze that sort of conflict. And I have also become worried in face of the apparent paradox. When the need for greater independency to Regulatory Agencies is sustained, the need to provide reasoning to regulation acts is simultaneously sustained.

I think that, instead of establishing Specialized Courts, it would be better to have specialized judges. That is what my institute intends, in partnership to the Institute of Brazilian Magistrates. Surveying the market of judges, I found out the lack of knowledge, by the judges, about Regulation Laws and, mainly, Telecommunications Laws. Thus, we have outlined a Specialization Course on Telecommunications Laws, gathering the three parts – lawyers, magistrates and bodies of the Public Prosecutor's Office. It seems to me that it facilitated taking care of specialization.

The last issue of concern is that, when pleading that administrative acts should be motivated, the discretionary nature of such acts is left aside and, thus, the judge is allowed to enter the essence of decision, since motivation binds the act. To me, it seems to highly weaken the regulatory freedom. I think that administrative acts, to be efficient, should hold great deal of discretionary nature, thus allowing the judge to merely analyze its convenience and timeliness. Otherwise, it should lead to that immobility brought about by delayed judicial decisions.

José Leite Pereira Filho –Moderator: We have heard the comments on an issue that seems very important to me, i.e., motivation versus discretionary nature, and I ask if anybody wants to make any comment.

André Fontes – Judge of the Federal Regional Court, 2nd Region: Regulation should be a neutral power in Republic. It is set forth in Constitution exactly for that purpose. But in Brazil it is dealt with like mere public policy. Governments come and governments go, and treatment is never standardized. How could I endow acts with efficacy, effectiveness, respect, vigor, if the creator itself does not consider its creation as true?

Secondly, somehow administrative acts in Brazil are not always used for the most suitable purpose. Brazilian people know the extent of damage and injuries Brazil, and the Brazilians, suffered due to the inadequate use of administrative acts. There are several different examples – companies, citizens, public administration itself. So, this consideration that it absolutely deserves any kind of protection, value, is possible only if the act is adjusted with competence rules and minimum rules that legitimate the act. Public administration acts, mainly regulatory ones, are legitimated by procedure. This procedure causes and legitimates it. Well, if procedure is not observed, how could someone, in the final result of such act, trust it? There are several regulatory acts that I would call "eccentric". They are not even real. They are so absurd, so completely out of reality, that I would call them "eccentric". The administration does not understand it, neither the Regulated entity, nor the consumer. Nobody understands. Here, the question is: Who will be in charge of validation. You should think about the answer.

José Leite Pereira Filho –Moderator: I would like to ask Dr. Floriano to wait a little because, to have mixed cultures, Dr. Thomas asked the floor and I would appreciate listening to his comments.

Robert Earl Thomas Harvey – Regulatory Agency to Public utilities in Costa Rica: The motivation of administrative acts is a right of inhabitants of several States, to be informed about the reasons that led the administration to decide whatever it has decided. If the act lacks motivation it may be charged, through administrative or judicial ways. It should be emphasized. Now, discretional nature, according to doctrine, means that administration, in face of several options, chooses the one it judges to best solve a given situation. But it must have a reason to know why it has chosen A instead of B, or C instead of D. Thus, I do not see any conflict, in the light of juridical philosophy, in having all acts motivated. It is not about writing a book to say take I have decided for A or B, but disclose the reasons that led me to choose this way, instead of the other. At least in Costa Rica, motivation is a constitutional right granted to its inhabitants, so that administration should explain [why] it adopted any measure or decision. And the decision may even be of doing nothing. Thanks.

José Leite Pereira Filho –Moderator: I would like to hear Dr. Floriano about the same paradox.

Floriano Azevedo Marques – Manesco, Ramires, Perez, Azevedo Marques Advocacia: I will try to be brief. First, concerning specialization of the Judicial, I think this is a mean to specialize the judges. In Brazil, the Judicial is moving towards specialization. In the past, the judge used to be responsible for any juridical issue in the District. Now, we have criminal judge, civil judge, family judge, bankruptcy judge. I think it would be important to provide

even some kind of specific training to individuals who will deal with such issues. Now, concerning discretionary nature and motivation, I believe Dr. André and Dr. Thomas have perfectly addressed the issue. As more discretionary is the act, as more motivation is required. I would like to mention one example. In North-American right, the due substantive legal process results from the need of controlling the decisions by independent entities. Everybody knows that I am one of the persons that advocate for autonomy and independency to Agencies, but I think it makes them to have motivation for their acts, inclusively to explain the alternatives they have and their option. So, I think that motivation is vital and does not reduce discretional nature; rather, it allows for have such discretional nature controlled.

José Leite Pereira Filho –Moderator: Now our Frenchman will speak, in Spanish.

Participant: Thanks. I am very interested in the debate and everything else. For us, in Europe, any decision is made upon consultation with everybody. No regulator decision is made without consultations to the public and all actors. That law is the same in the European Commission and in the Parliament. All actors are entitled to voice. Then, this is a very useful mechanism. Every country in Europe relies on a General Council on Telecommunications and Information Society, made up by experts who provide advisory services. Furthermore, there is a State council that provides the Judicial view and reaches consensus. There is consensus and, when the law is issued, everybody agrees with it. Something that astonishes me is when you talk about interests. If there is any interest, it should be the user's interest, nothing else. It is written in laws. You talk about interests of market, the philosophy of liberalism. However, under the law, the only interest to be considered is the user's interest. Furthermore, every law process brings something named "sovereignty of the country". In France, for instance, all consultations had stated that there was no need for auctions, bud the Government decided there was. And that for attention to public, rather than for consumers' interest. And it seriously failed. See what happened to telecommunications industry worldwide. Furthermore, there is something I cannot understand – penalty fines. In Europe the Regulator imposes fines, pursuant to law. For instance, in France there is an operator that was fined in 20 million Euros, not to mention the judicial. Why do you always mention the judicial? It should follow the lays and that is what should be done. Within the laws framework there are applications, which we call Decrees. The Regulator is the only independent one. When we face judicial issues, we appeal to Luxemburg Court and, then, one should wait for 5 years, and so on. According to the amount of fines, it is necessary to have them paid in 15 days and fix up things. The Telecommunications Law comprises administrative articles to decide on fines and sanctions. However, everything is very simple, because if you appeal to the Court of Luxemburg, you may wait for five years. However, all these lessons were learnt after practices and practices in regulation, rather than from liberalization. Regulation means more laws and more structures to have implement laws. This would allow for developing flexibility. Regulators must have flexibility.

José Leite Pereira Filho – Moderator: Well, another comment from audience.

Participant: Thanks very much. Good morning. I am the Secretary-General of the Colombian Ministry of Communications. I believe here we have an issue to be defined. Finally, it would be necessary to establish the role placed by regulation in face of the normative juridical schedule. I believe we should think about it and work it hard because, ultimately, regulation is an intervention of State on its economy. And is an intervention

oriented to balance the market with a basic purpose, of protecting users, protecting consumers, besides generating economic balance to companies, in order to grant services supply. Then, here we have, in legal framework, as said Luciano Barchi, a conflict – where do we put the regulation rule? A schedule is prepared based on political constitution and where the hierarchy of rules decrease, depending on who issued them. And there is where huge conflicts come about. And surely the issue is not because ordinary judges are – or are not – qualified in technicisms unique to telecommunications law. Rather, it is because the same judicial structure somehow leads to have the supremacy of citizens' rights – set forth in political constitutions – imposed over another kind of technical rules and, in fact, the most serious problem faced by regulators all over the work is to issue rules that, accordingly to political constitution, may timely respond to such a dynamic market as telecommunications. I believe we – regulators, judges, legislators – should undertake strong efforts here because bottleneck, basic obstacles can be found here. We may build capacities to our judges; qualify the regulator entity in constitutionality of rules; but if there is no change in juridical structure, and without establishing the roles played by regulator in this juridical framework, we will remain facing the same problems. Thanks.

José Leite Pereira Filho – Moderator: Thank you. We still have another intervention of participants.

Helena Xavier: My name is Helena Xavier. I am partner to Xavier, Bernardes, Bragança Advogados. As a lawyer, I am also concerned about improving institutions and applying laws, the raw material to my work. Specialization follows that path, since it is believed that whoever holds knowledge, mainly on frameworks, in a give discipline, can pronounce, implement and make effective decisions more suitable to principles of law, reality, justice and practical proportionality. My question is: How would that work in telecommunications, since Telecommunications Right are strongly impregnated with Administrative and Private Rights. There are counterpart issues involving Tax Rights, like *pró Fistel* and *Pró Fust* contributions, for example. There are commercial contracts that are one of the major vehicles of disturbance in the relations of competitiveness in market, supply of equipment, requirements of specification, financing terms that, sometimes, include cash financing to star market operations. There are also issues on Property Right, like the rights of transference. I could list here all chapters of the Civil Code – a mandate with no representation, essential to any turn key contract to launch a new undertaking. Well, I have disclosed my perplexity because sometimes perfection in fact requires for broadening instead of narrowing very specialized knowledge, but with no dialogue with remaining issues.

However, in the light of the Judicial, I recognize one cannot go from an issue related to intellectual property to another on criminal issue, or turn key issue in a huge private bidding process of telecommunications, not to mention public bidding processes. That is the reason for my question. Thanks.

José Leite Pereira Filho – Moderator: Thanks. I would like to ask the officers of the meeting, speakers, if anybody wants to respond the intervention.

André Fontes – Judge of the Federal Regional Court, 2nd Region: I do not believe the solution would be graduating judges, or establishing courts, to telecommunications-related matters. Any Congress, in Brazil, Peru, Mexico, Costa Rica, shall conclude to establish – for the core topic discussed – a judge, a Specialized Court. That seems to be a completely unreal

and utopist solution. I think that finding the solution is the reason for our gathering here. What should be strengthened is regulation, rather than courts. Regulation is regulation. That is the issue. I do not believe that courts will solve anything by qualifying judges. Judges hardly follow laws ordinarily issued in Brazil. I cannot follow the decisions by Brazilian Supreme Court as frequently as I would like. I believe that any solution found here, stating that Brazilian, Peruvian, Mexican and Costa Rica authorities have established a court to telecommunication issues, legislators will receive it as if they had not heard anything. I think this is not a real solution. We are poor and developing countries. We lack resources. We do not get money to a Judicial because we, in Brazil, unfortunately tend to believe that everything goes to the Judicial. There will be no solution decided by the Judicial, because we do not have one judge for each citizen. Judges are not everywhere. That is utopia. I believe the solution is to avoid the Judicial. I think the Judicial should not be used. And for that, we must have good examples.

Here in Brazil we have some practical and good examples. The Maritime Court, despite being an Executive body, have some protections that judges have, in practice, reached something impossible, i.e., to have the Judicial recognizing that administrative procedures have grounds, sustainability, because they are object of full adversary system, with accusation, defense, decision, in a way that has been respected by courts. Maybe that is not a good example, but is an example. So, I think the ideal would be to reinforce regulation activities, so that the Regulatory Agency may reach its mission and the Judicial becomes lesser used for such issues. If a decision is remitted to the Judicial, followed by reasoning, debates, it may convince for its rigor and efficacy, for its own decision, rather than because it is supported by another judicial decision, like a crutch. Therefore, I believe the solution for this event is to protect, esteem ANATEL and other Regulatory Agencies in their mission. And the Judicial, like a surgeon, would appear eventually – ideally never – to solve issues of this nature. I would like to call the attention to this issue and make clear that I am not sustaining judicial postures. It is exactly the opposite.

José Leite Pereira Filho – Moderator: Thanks, Dr. André. I would like to grant the floor to Dr. Floriano and, then, to Dr. Thomas Harvey.

Floriano Azevedo Marques – Manesco, Ramires, Perez, Azevedo Marques Advocacia: First of all, I would like to clarify two issues. Here in Brazil we also have the process of public consultation for every decision, and it is being very used. ANATEL challenge is no longer public consultation, but increased participation in our public consultations. A second issue concerns fines. Here in Brazil the Regulator also applies fines. The problem is that the discussion about fines is referred to the Judicial, whether because some juridical failure in its application, or because if the punished part fails in paying it, the regulator entity must appeals to the Judicial, because it is the only body empowered to take money from someone's assets to pay the fine. So, there is this interface.

Now, respecting the debate, I would like to say that things are not that easy. It is pretty easy to say that the only interest relevant should be the user's interest. I guess nobody here disagrees with that. But which user? For Brazil it is very serious. Which user? The medium-class user that has access to services and wants lower fees? The user with no access to services, although it is granted in Constitution, and urges for universalization policies, which demands another user to fund such policies? Or the user that exploits network telecommunications services and, therefore, wants to enter into competitive markets? Or the

user that uses telecommunications services to render value-added services, access to Internet and economically exploits the service? Or the corporative user, which wants most vantages at lower costs, thus jeopardizing universalization policies? There are several interests to be balanced. Think in user is the same as hiding behind that elocution – meets public interests. Which sector of civil society? In contemporaneous regulation we cannot forget that society is absolutely conflictive and has several interests being relieved by the Regulator, otherwise we will remain hiding ourselves behind generic and empty elocutions, which surely do not solve the problem of effectiveness in Regulator's work. I would like to thank once again and pass the word.

José Leite Pereira Filho – Moderator: Thanks, Dr. Floriano. Dr. Thomas Harvey, I would ask you to make your comments. I know you were to talk for twenty minutes, but I would ask you to shorten it because of our delay, we are very tired and some people want to go to the beach.

Robert Earl Thomas Harvey – Regulatory Agency to Public utilities in Costa Rica: I will be very brief, but I believe it is something that should be said. Maybe because in Costa Rica the regulatory organization [is] multi-sectoral, one may have a broader view on it. To think strictly in telecommunications and say it should rely on a Specialized Judicial Court seems very simple. But, why wouldn't there be a specialized court to environmental sanitation, electric power, public transportation, air transportation, sea transportation and all remaining activities that the State is interested in ruling? Then, we must have Specialized Judicial Courts for almost every market services, whether infrastructure-related or not. To have a Specialized Court in telecommunications, we would have also Specialized Courts in other activities with similar economic relevance. Thank you very much.

José Leite Pereira Filho – Moderator: Few minutes now to Dr. Cachola.

Luis Gerardo Canchola Rocha – Mexican Federal Commission on Telecommunications: I promise to be very brief. I would like to say something about Specialized Courts. For sure the Congresses of each country are not specialized in each discipline. At least in my country, they establish commissions by segments, which are in charge of studying and analyzing funds. Therefore, such experts are qualified in those matters to reach an agreement on law. Obviously, the purpose of Regulators – I believe it is true for all the participants – is to enforce laws and to have less conflicts. However, reality is different. We should remember that all of us are in courts and there is always a prevailing one, i.e., the participation of competence. There are powerful agents that, surely, appeal to courts to obtain more expedite justice. I would like to restate that, at least in my country, I could mention several judges that delay for years and all actions by particulars to delay a sentence. I am in favor of establishing courts, yet if courts are not specialized in the discipline. I could mention thousands further appeals and sentences where, by lack of knowledge on technical issues, resolutions are delayed and, therefore, the problematic of impossibility of applying our right to develop telecommunications in our countries. Thank you very much.

José Leite Pereira Filho – Moderator: Thanks, Luis Gerardo. I would like to thank the speakers for their brilliant speeches. I thank the audience for its active participation in discussions. I wish you all a nice lunch and that all problems are solved after reflections during lunchtime.

Coordinator: We will now have a break for lunch and will return by 2:30 p.m., to Session II – Practices of Effective Application of Rules: Monitoring, Investigation, Oversight and Sanctions. Thank you very much.