SESSION II

PRACTICES ON EFFECTIVE APPLICATION OF RULES
Monitoring, Investigating, Oversight and Imposing Sanctions and Penalties

Coordinator: Sirs and madams, good afternoon. We are now starting Session II – Practices on Effective Application of Rules: Monitoring, Investigating, Oversight and Imposing Sanctions and Penalties. As Moderator, we would like to invite Ms. Mindel De la Torre. Since 1998, Ms. Mindel De la Torre chairs the Telecommunication Management Group – TMG, a consultancy firm with headquarters in Washington. Amongst her duties, she provides guidance on business opportunities to international organizations, in issues related to liberation and trading in the telecommunications sector, including issues on licensing, resolutions and imposition of sanctions to regulatory agencies worldwide. She worked with leadership in developing American positions to ITU, and is Vice-Rapporteur to UIT-D Development Office, Question 18/2, in the migration of current mobile systems to IMT 2000. Before becoming associated to TMG, Ms. De la Torre headed the Telecommunications Division of FCC – the US regulatory agency. She has also worked in the Department of Trade and in the General Council of National Administration and Information on Telecommunications.

We would like to invite to join the Panel: Ms. Doreen Bogdan-Martín, Chief a.i. of the Regulatory Reform Unit – ITU/BDT in Geneva. Doreen Bogdan-Martín is member of ITU/BDT, Reform Unit leadership. She is an authority in world knowledge about telecommunications rules.

We would like to invite Ms. Gabriela Urquidi Morales, Legal Director of Bolivian Telecommunications Superintendence. She was born in Cochabamba, Bolivia and is graduated in Law by the *Universidade Católica* of Bolivia, in San Pablo, with Specialization in Administrative, Tributary Law and Civil Procedure. She also took other Post-Graduation courses. We also invite Ms. Aida Elvia Vasconez Villalba, Ecuadorian Telecommunications Superintendent. Ms. Aida Elvia Vasconez Villalba is the General Legal Director of the Ecuadorian Telecommunications Superintendence. She graduated at the *Universidade Central* of Ecuador, *Faculdade de Jurisprudência* of Law College. Doctor in Jurisprudence, Political and Social Sciences, she is an Attorney to the Court and Claim Courts of the Republic. She is also Expert in Telecommunications Law and Management, at the *Universidade Andina Simão Bolívar*, with headquarters in Ecuador. She took several courses at the International Telecommunications Union.

We would like to invite Mr. Edilson Ribeiro dos Santos, Superintendent of Radiofrequency and Enforcement of the Brazilian National Agency on Telecommunications – ANATEL, Brazil. Dr. Edilson is graduated in Accounts by the *Fundação Visconde de Cairú*. He also graduated in Law at the *Universidade de Salvador*, State of Bahia, and holds Post-Graduation degree in Economics Law by the *Fundação Getúlio Vargas*. He reorganized oversight in Brazilian Ministry of Communications, as Department Director, and implemented oversight in Brazilian National Telecommunications Agency – ANATEL, as its General Director. Since 2002, he has worked as Superintendent of Radiofrequency and Enforcement.

We would like to invite Ms. Nídia Madriz Araya, Business Managers to Costa Rica Institute of Electric Power – ICE. Dr. Nídia Madriz Araya graduated in Statistics at the University of Costa Rica and in Business Management with focus on Enterprise Management. She is concluding her Master course in Industrial Engineering at the *Universidade Interamericana* of Costa Rica. Since 1999 she works at UEN, Telecommunications Planning and Market, in the field of Strategic Planning, Formulation and Control of Strategic Plan. She is member of the Entrepreneur Intelligence Group and Internal Advisor in Issues associated to the Telecommunications Industry. When working at the Telecommunications Sub-Management, she represented by sector at the Management Committee on Entrepreneur Intelligence.

We would like to invite Ms. Helena Xavier, partner to *Xavier, Bernardes, Bragança Advogados*. Dr. Helena Xavier is founder partner to *Xavier, Bernardes, Bragança Advogados* in São Paulo, Rio de Janeiro and Brasília. Active attorney in Administrative Law, Economics Law and Competitiveness, IT and Telecommunications Law. She taught Economic Law and Administrative Law at the Law School of the University of Munich. She wrote "*Regime Especial da Concorrência no Direito das Telecomunicações*" [Special Regiment of Competitiveness in Telecommunications Law]. She is Vice-President to the Brazilian Association of Informatics and Telecommunications Rights. She is also member of the Advisory Board to the Brazilian Association of Telecommunications and the Governmental Action Committee of Telebrasil.

Continuing with our activities, we grant the floor to Ms. Mindel De la Torre, who shall lead Session II this afternoon. The dynamic of this Session will be the same of this morning.

Mindel De la Torre – Moderator: Good afternoon. Good Afternoon. Good afternoon. I will now speak in English. The first thing is that the dynamic of the panel is very different from this morning. This morning, it was all men and now, Dr. Edilson has the luck of being up here with only women. So, there is gender equality at the ITU, it just isn't balanced yet. They haven't figured out how to balance it out. It is a pleasure to be here. I thought that the sessions this morning were extremely interesting, with lots of excellent questions. Hopefully, in our session this afternoon, we can continue with that sort of momentum and the different ideas that everybody had.

The session of this afternoon is on "Monitoring, Investigating, Oversight and Imposing Sanctions and Penalties". As everybody said this morning, it's extremely important for the regulator to maintain its credibility and to be able to regulate effectively, in order to have all of these different functions function well. We have different countries represented here and they're going to tell us a little bit about their particular experiences. We also have Mrs. Bogdan-Martín, who is going to explain a little bit about what is happening at the ITU and some of the issues that could assist us. So, I'll just turn the word over to her.

Doreen Bogdan-Martín – Regulatory Reform Unit – ITU/BDT: Thank you, Mindel. Good afternoon. I want, basically, to borrow a few minutes of this panel to tell you a little bit more about what Mr. Zavattiero mentioned this morning and talk about what the BDT does to help regulators to achieve effective reform. Many of you may be familiar with the Istanbul Action Plan, which is our Road Map in the BDP and was approved by the 2002 World Telecommunication Development Conference. It comprises six programs: the regulatory Reform Program, Technologies and Networks, E-Strategies and E-Services, Economics and Finance, Human Capacity Building and a Special Program for the least developed countries.

For the purpose of this meeting, I just want to tell you about what's being done in the Regulatory Reform Program. We organize meetings, such as this one. We organize an Annual Global Symposium for Regulators; we have publications; best practices; model guidelines; case studies and reports; we have a Global Regulators Exchange, known as G-REX, which is a special forum for regulators and policy-makers; and through our website TREG, one can find a wealth of regulatory information and data from all of the ITU Member States, which comes from our Annual Regulatory Survey.

The data that we collect in our survey allows us report on trends in the sector to access what is happening. As Mr. Zavattiero mentioned this morning, there are 124 Regulators today, up from 33 when we first started our Regulatory Survey. We can also the trends on liberalization. The major trend, in the past 10 years, of course, has been the introduction of competition in the provision of ICT services that were previously provided under monopoly operators. Of course, the vast majority of countries today have at least opened up one market segment, or more, to competition. And the greater the level of competition, the more important it becomes the Regulator's ability to enforce its decisions. We can also access the privatization trend. It's a trend, which started in the Americas, and has spread throughout the world. Today, 47% of the ITU Member States have, partially or fully, privatized their operators.

I mentioned our publications. Each year, we publish an Annual Regulatory Report, which is known as "Trends in Telecommunication Reform Series". Trends provide valuable inputs and viewpoint strategies on issues and themes that affect regulators and policy-makers. Past editions of *Trends* have targeted key regulatory issues, such as universal access and interconnection. And this year's edition will focus on licensing and convergence and how countries can move from one licensing regime to another. So, if any of you have interesting licensing stories that you like to share with us, I'll be happy to speak to you about that.

Mr. Zavattiero also mentioned the dispute study that the ITU undertook with the World Bank last year. The study addresses the challenge of disputes between incumbents and new operators, consumers and other market players. It looks at how you develop a meaningful national dispute resolution process, models for alternative dispute resolutions and techniques that can be used in the dispute resolution process. This study is available on our website and we're using this study to develop training modules and we'll be carrying out a first training on dispute resolution in September.

The Global Symposium for Regulators is our annual gathering, which brings together our national regulatory authorities from both developed and developing countries. It's the global venue for Regulators to share their views and experiences, as part of the worldwide community of Regulators. The 2003 GSR was perhaps the most important GSR that we have organized because the world Regulators agreed on a set of best practice regulatory guidelines for achieving universal access to ICT and these guidelines were transmitted to the World Summit on Information Society.

And between our meetings, we rely on G-REX, the global regulators exchange, and it keeps our dialogue doing. G-REX is a password-protected website that's reserved for national regulatory authorities and policy-makers and was launched in 2001. It is a classic example of how the ITU can play a catalytic role, by forging synergies between its members.

The hot line is the most popular feature of G-REX. It allows regulators around the world to pose their queries and pressing issues that they face and seek input from their colleagues all over the world. They not only ask questions, but they also provide very useful replies to their colleagues; it exchanges a current line between regulators from both developed and developing countries, from every region in the world and in three languages. Every question and every response is posed in English, French and in Spanish; and it enables people to share information on a constant basis. This is something that was never available, before we launched G-REX. One recent posting – I think it was two weeks ago – included an exchange between Botswana, Colombia, Costa Rica, Denmark, Hong-Kong, Nigeria, Peru, Uruguay and Zambia. That gives you an idea of the range of countries, all contributing on the same issue.

Another service that we offer, via G-REX, are virtual conferences, where regulators, policy-makers and other invited guests can meet through a dedicated conferencing service, which enables them to share power-point presentations and other documents in real time. The most recent G-REX virtual conference was held just two weeks ago, with regulators from nine countries, including ANATEL, and it was on the topic of "spam" and the challenges facing regulators and what regulators can possibly do to combat "spam".

We've also hosted virtual conferences on interconnection dispute resolutions and on public access. All of the information on our activities, meetings, publications and case studies can be found on our website. You can see that under "events", we have this meeting and if you click on there, we have access to all of the presentations that we've had so far and you can download them from there.

We've also recently added a news corner, on our TREG website, where we're posting regulatory developments. So, if anybody has a new regulatory development that would like us to post, just let us know. Also from TREG, you can access much of the data that we collect on our Annual Regulatory Survey, including regulatory profiles, which give you a snapshot of all the ITU Member States. You can see the level of competition, the structure of the regulator, universal access policies, as well as links to national legislation and other important documents.

Thank you for your attention. If anybody has any questions, maybe we can take them up at the coffee break, after this session. Thank you.

Mindel De la Torre – Moderator: Thank you Doreen. I'm sure that was informative to many people who do not realize what ITU does for a lot of the regulators. I think you should encourage them to take advantage of the ways that they allow people to share experiences. I think that's one of the most valuable things they do.

Our next speaker will be Gabriela Urquidi. She's the Legal Director of the "Telecommunications Superintendence de Bolivia". She's already had her introduction, but she's got a presentation as well.

Gabriela Urquidi – Legal Director of Bolivian Telecommunications Superintendence: Good afternoon. I want to share with you Bolivian experience on control and compliance in

application of sanctions. I want to briefly explain who sanction topic is structured in Bolivia, and then explain the problems and challenges posed to us.

In Bolivia, the Legislative Power establishes the behaviors to be considered as infringements and the sanctions to be imposed over the transgressor. The Executive Power rules the level of sanctions, their amounts and forms. The regulatory entity, i.e., Telecommunications Superintendence enforces laws and Decrees. The Judicial Power – in the event of a mandatory execution – supports the execution of the sanctioning theme.

Let's take a look on its legal framework. We have the Administrative Procedure Act, which sets forth general administrative procedure; the Sectoral Regulation System Act (Sirese, in Spanish) which created sectoral regulation systems, among which the one for telecommunications; the Telecommunications Act, which establishes sanctioning issues, which are infringements and violations to Sirese Act on Telecommunications, or Regulations, Contracts or any other applicable rule; furthermore, it sets forth the kind of sanction, which are formal warning, seizure of equipment, fines and temporary suspension of habilitation. Concerning regulations issued by the Executive Power, there is the Regulation of Administrative Procedure Act to Sirese, which establishes procedures applicable to fix sanctions in that system. Furthermore, there is the Regulation on Special Sanctions and Procedures for Violations against the Legal Regulatory Framework in Telecommunications, which assorts infringements and sanctions, and defines and ranks sanctions. Concerning the support that Judicial Power is expected to provide in executing sanctions, we have: the Judicial Organization Act, which sets forth the competencies of administrative judges; the Administrative Procedure Act, which establishes that, although administrative entities may execute their resolutions, in the event of mandatory execution they should appeal to the Judicial Power; and, finally, the Telecom Act, which establishes the mandatory judicial collection of fines.

Which major procedures may lead to sanction? Users' claims, controversies between operators, investigation of denouncements of labor issues, revoking caducity and cancellation of concessions, licenses, authorizations and registers, in the event of failure in complying with contractual obligations.

In Bolivia, infringements are ranked by illegal provision of services against the telecommunications system, against users' rights, against operators' rights, against the regulatory authority's duties, against public moral and copyrights, infringements set forth in contracts and other infringements.

Here we may observe the wide range of applications and sanctions from 1997 to 2004. As we see, in a given stage several sanctions were imposed because of a 2-stage legality campaign. One stage led several individuals to join legality framework and succeed in being granted authorizations. The other measure imposed sanctions to those who had no rights granted. Currently, there is a new provision about the regulation on sanctions. We have an alternative procedure to solve conflicts where, without refusing to impose sanctions, some agreements may be reached through conciliation, whenever public interest is not concerned.

Here we show the composition of infringements: for illegal provision of services. Most of them deal with the issue of incompliance with instructions set forth by the regulator. It means, in its instructions per se, or for having failed in submitting the required information.

For example, in telecommunications system, anti-competitive practices. Additionally, the issue of copyright. Telecommunications Superintendence in Bolivia is in charge to grant that broadcasting operators and signal distributors broadcast their programs with the corresponding rights. Well, there is also the issue of users, and others.

In sanctions ranking, we have what we call in Spanish *apercibimiento* that means an official warning; the seizure of equipment, i.e., the material loss of equipment; the cessation of habilitation to perform the activity; and, finally, fines. Concerning fines, was established a system proportional to revenues for each operator. We have created the system of "day fine". For one day, fine is calculated as 1/120 of annual regulation fee charged against the operator over gross operational revenues. What's the distribution of sanctions? Most sanctions imposes were seizure. Furthermore, we have imposed fines, mandatory and progressive fines; we have applied formal warnings and, to lesser extent, temporary suspension of habilitation.

Which problems and challenges are currently posed to Bolivia? First, to follow process pursuant to law. Administrative procedure demands that for imposing sanctions, we should follow a given process, as in any legal system. Thus, it implies in a given process, implies in transferring offices, in a response, in an eventual openness in terms of evidences, a period of argumentation and a sanction. For illegal providers of services in radio-television, or an illegal long distance provider that, let's say, transmits in IP, a given procedure should be fully followed to impose any sanction. You should understand that when we notify them about the infringement, illegal services providers disappear, thus hindering the procedure conclusion.

There is also the issue of asymmetric information. Regulatory processes entail highly complex topics as, for instance, the issue of fees price or technical problems. There is an asymmetry of information between information held by operators and information held by regulators. Furthermore, we must work with the required speed to effectively regulate market.

Our verification capacity to check material truth is limited. Bolivian administrative procedure pursues material truth. What does material truth mean? It means to check what really happened. And the means for that sometimes are not enough neither is the information available. It leads to high costs of verification. Usually, verification brings high costs.

How do things work in practice? In practice, urgent orders have been issued – like cutting given lines to avoid illegal traffic, etc. What is the problem? We have been challenged about the application of such urgent orders, since they may be judged unconstitutional because thereby sanctions would be imposed without following the due process. When adopting an urgent measure, let's say suspending the provision of telephone numbers services for alleged illegal services, when we cut the line we are, in practice, directly imposing the sanction.

We have difficulties in charging sanctions against illegal [providers] because, when we impose the sanction, they disappear and we have to find them to collect fines, and that brings extremely high costs to the collection process.

There is also the legal nature issue. Our regulations and sanctions establish day-fines, as I said, calculated based on the regulation fee for each service operator. Regulation fee, the

basis for calculating the day-fine, is calculated over the total gross operational revenue. In some cases, to settle some disputes we have operators discussing, for instance, about some aspect of signal distribution service. When we have to impose sanctions, I calculate the sanction over total revenues, which may imply in long-distance revenues, mobile revenues and other revenues. So, we would be biasing the application, mainly concerning proportionality.

In order to have our sanctions executed by force, we need the Judicial Power assistance. For instance, in equipment seizure, to seize the equipment of a given operator, we need mandates to be issued, because we cannot enter a domicile, an office, by force, without mandate for alienation. In many parts of the country, judges refuse judicial aid and do not want to issue mandate for alienation. The judges' interpretations vary all over the country. Some say yes, others say no, others say that yes, under some circumstances. So, it lacks uniformity in application.

Finally, in some small sites, in rural areas for instance, there are few judges, and people are all friends. Then, it is very hard to have one of such judges issuing a mandate of alienations to enter a radio station that may belong to a friend. And to carry out that police duty requires for support of Public Power because to seize equipment, for instance, Public Power is required and sometimes it is not willing to cooperate.

Finally, on behalf of Bolivian Telecommunications Superintendence, I would like to thank this invitation and say that it is very important to share experiences, pursuing best practices that should benefit everybody – "Responsibility is to do what is assigned to us, in the best way, in benefit of collectivity". Thanks.

Mindel De la Torre – Moderator: Thank you very much. That was a very interesting speech and I really appreciated on knowing all the different challenges you face. I think you are not the only one who is facing those exact challenges. Now, we'll continue the way we did this morning. We'll take three questions from the audience and then we go back to Gabriela. Does anyone have a question?

Participant: Gabriela, Bolivian situation is very similar to our situation in Panama. I would like you to talk a little more about the conciliation procedures you have, if it is ruled by law or if the commissioner uses the expert before entering a suit. Thanks.

Gabriela Urquidi – Legal Director of the Bolivian Telecommunications Superintendence: For sure. Last year, a Supreme Decree was issued establishing specific procedures used by public utilities regulatory entities. We had the opportunity of discussing the regulation, when it was being outlined. However, we faced the following difficulty. Whenever a procedure was started, they had to impose sanctions if the behavior was proved. In some cases, the purpose was not imposing sanction, but ceasing the behavior. In extreme cases, we pursued imposing sanctions. Then, it was decided that, once presented whether a controversy between companies or a user's complaint, a conciliation stage starts. For example in the event of controversy between companies, both parties are summoned and have 15 working days to reach conciliation. What's the limit for conciliation? Conciliation is not allowed when public interest reasons are involved. And the existence or inexistence of public interest reasons is established by the Bolivian Telecommunications Superintendence.

For users, the situation is more complex, because market is in concurrence. So, when a claim is filled, it gives birth to a conciliation stage between the user and the company. Usually, conciliation is harder, unless the company has in fact initially incurred in serious fault. But that is a little more complicated. We are having good results in conciliation of operators.

Participant: There is a difficulty in what you refer to as equipment seizure, or equipment confiscation, or material arrest of equipment. Such difficulty is related to structural failures in the judicial system or, rather, to lack of regulatory clearness concerning the rules the typify behaviors that result in equipment arrest or seizure?

Gabriela Urquidi – Legal Director of Bolivian Telecommunications Superintendence: Well, here we have two problems. On one hand, the Administrative Procedure Act dates back to 2002, and Specific Procedures were issued by the end of 2003. So, judges are somehow in unacquaintance with the normative issue. The rule is not explicit, neither reads: "In the event of seizure, the judge must appreciate". But administrative entities may execute administrative resolutions by themselves and may request the assistance of legal power. However, it does not clearly state that, in this specific case, Telecommunications Regulation establishes the mandatory legal assistance, neither expressly states "assistance for equipment seizure". And the Judicial Organization Act states that there are the judges to administrative issues who would, obviously, be the ones to assist. Then, it is not explicitly, clearly and effectively written. But, in light of a reasonable interpretation, judges should help us. So, on one hand there is the issue of lack of knowledge and, on the other, the issue is not clear.

Participant: My question: Is there any aspect concerning morale and good uses, let's say, in general? I do not know if that is the correct word. In the real aspect of sanction and control over those areas, have you had any experience in that sense? The regulation that allows controlling services of entry into telecommunication contents is effective?

Gabriela Urquidi – Legal Director of the Bolivian Telecommunications Superintendence: Well. In Bolivia the issue of telecommunications, the provisions on contents, are still incipient. We have some provisions with power of law, which establish general principles about content. For example, from 7:00 a.m. to 10:00 p.m., programs should be suitable to children. What is suitable to children? It should respect moral principles and good uses, etc. That on one hand. On the other hand, there is a competence granted by law, in the sense that we should ensure that broadcasting operators and signal distributors broadcast their programs and distribute signals with the corresponding right. In this last, eh have faced many problems, mainly related to sportive events – World Soccer Championship, *Libertadores da América* Championship, and other championships, such as Formula 1. These are extremely relevant topics, where denouncements are abundant, and we have to perform verification efforts and have imposed several sanctions. In the field of content, concerning moral and good uses, as I said, regulation is very general. There are several general articles setting forth values instead of concrete facts. But that is now under development. We are outlining a new Telecommunications Act to be submitted to the Executive Power and, through it, to the Congress. In that Act, the topic of "contents" is broadly developed.

Mindel De la Torre – Moderator: Thank you for those very interesting questions. Before I came down to Brazil, I was looking through the FCC website to see what kinds of sanctions the FCC had put on recently and a lot of them have to do with content and appropriate language. So, I think that's something the regulators face quite often. Now, we'll move on to

our next speaker – Dr. Aida Elvia Vasconez Villalba. She's a Doctor of Jurisprudence, Lawyer of the Tribunals, Judge of the Republic, at the *Telecommunications Superintendence*, in Ecuador.

Aida Elvia Vasconez Villalba – Ecuadorian Telecommunications Superintendence: Good afternoon. I will talk about processes of administrative appreciation of telecommunications-related infringements. So, I will briefly refer to the structure of telecommunications and, then, to the process of appreciation, both in its investigatory stage and the effective decision of the appreciation process, the resolution that sets forth resources in administrative matters, as well as the legal appeal. Concerning telecommunications sector's structure, in 1995 the Special Act on Telecommunications was reformed and the Regional Telecommunications Council – CONATEL was established. CONATEL is the entity that rules telecommunications services, grants concessions, authorizes celebration of contracts and establishes tariffs, among other duties. Its executing organization is the Ecuadorian National Telecommunications Secretariat – SENATEL, the entity that celebrates their respective contracts. We also have the Ecuadorian National Council on Broadcasting and Television, which rules broadcasting and television means, systems and services. Its executing body for this discipline is the Telecommunications Superintendence. The Council authorizes contracts celebrations and concessions, issues regulations and its respective technical normative. That is the regulatory part.

In terms of control, the only entity that performs such duties is the Telecommunications Superintendence. Furthermore, it is the only entity that appraises infringements and imposes the corresponding sanctions since 1992. The legal framework wherein the Telecommunications Superintendence is developed is the Political Constitution of the Republic, the Special Act on Telecommunications, the Broadcasting and Television Act and the Act on Electronic Commerce, Electronic Signatures and Data Messages. Concerning the constitutional framework, Art. 222 of the Political Constitution of the Republic grants the Telecommunication Superintendence the power of controlling telecommunication services, both in public and private institutions, to ensure that services are provided pursuant to law, and meet the general interest.

Now, advancing to processes of administrative appreciation, we have the investigatory stage. Each and every contract authorizing regulatory entities are ruled and supervised by the Telecommunications Superintendence, i.e., any title granting habilitation. In that duty, the Telecommunications Superintendence relies on three specialized units, as follows: Telecommunications Board, Board of Radiocommunications and Broadcasting and Television. The technical reports allow establishing if a given operator is violating some legal, contractual or regulatory provision. So, applicable rules and reviewed and all evidences about the infringement are compiled. Among evidences, there are: confession of any of the parties, a given communication sent to the Operator Company; police investigations; public or private tools; pictures and videos; finally, the evidence means set forth in our code of civil procedure.

After reviewing the legal rules and establishing the infringement perpetrated by the operator or telecommunications service provider, the appreciation process starts, through the issuance of the so-called "*Boleta Única*" [Unique Coupon]. The "*Boleta Única*" contains the transgressor's name, circumstantiated list of facts, reasons of fact and right; the violation is typified. The alleged transgressor is granted eight days to present its defense.

The process culminates with the issuance of its corresponding resolution. For that, the Superintendent has 15 days to issue the resolution. If the alleged transgressor rebuts, the rebuttal is appreciated, both in technical and legal aspects. If the infringement is spoiled, the Superintend issues the resolution, without sanctioning. But, if the fact is proved, the Superintendent issues the respective sanction. Both infringements and sanctions are set forth in legal rules. The Superintendence may impose the following sanctions: reprimand, fine and temporary cessation of service and cancellation of concession.

There is one exception to fixed telephone services contracts, where the regulator – CONATEL – has established sanctions for quality control, mainly to fixed telephone services, different from those set forth by law. Currently, the sanctions for fixed telephone services range from US$ 100,000 to US$ 1 million. After issuing the resolution, the Superintendent – if sanction deals with economic issues – grants 30 days to have the corresponding values settled. Otherwise, it starts the seizure of goods, if the violator does not settle payment in due time. The resolution issued by the Superintendent must be duly motivated and make explicit reference to legal provisions that grounded it. Furthermore, it should solve every point claimed by the alleged transgressor and other basis that allow the Superintendent to issue the resolution. The resolution is so clear that it does not leave room for interpretations. We forward it to technical and legal reviews, by people not involved in sanction, so that judges – exclusively in the events of trial – may clearly settle it. As soon as the Superintendent issues the resolution, the transgressor has the administrative resource of reviewing the resolution. It consists in having the alleged transgressor submitting new evidences to spoil the infringement perpetration. There are instances where the Superintendence revokes the resolution after review, because of the new evidences attached to the process. Otherwise, the next stage is the judicial appeal. The Special Telecommunications Act has a provision whereby is established that resolution issued by the Telecommunications Superintendent causes execution in the administrative. However, it may be contradicted besides the District Court of Administrative Contentious or, also, constitutional appeals may be invoked.

In terms of trials of constitutional appeals, from 1992 to nowadays, we have never lost one single trial, we won all of them. This aspect allows us to say that resolutions issued by the Superintendence are legitimate and legal. Furthermore, we are supported by the People Public Defense Office, the Consumer Court, and may also rely on the Anti-Corruption Commission that is watching over to avoid the companies to seek for biased ways. So, all users have the culture of complaint, which in fact prevents operator companies to render the services as they wanted; rather, they are to comply with laws, regulations and contracts. There is also the provision that allows us to seize equipment and close broadcasting and TV stations that work without the due authorization. We do not face any sort of problem concerning police's cooperation, we seize equipment and the transgressor is not granted any sort of concession. That is also a violation, subject to 2 – 5 years of confinement. We may say that, now, there is not even one single pirate radio in Ecuador. All stations work only upon receiving the respective authorization. That is all. I do not know if there is any question.

Mindel De la Torre – Moderator: Thank you very much for your presentation. As you heard from the double round of applause, everybody is very impressed with the fact that

you've only lost one case in the past 12 years. That's a big accomplishment. So, now, we'll open the floor again to questions.

Participant: I have a question about the *"Boleta Única"*. You said the user is entitled to a legal contestation. So, I do not understand. For instance, I grant a license to transmit e megabytes data. I may have technical evidences that instead of 2 megabyte, you are transmitting 10 megabytes data, but there is no contestation. If the regulator can say "I checked and there are 10 megabytes data, instead of 2 megabytes", there is no direct contestation and sanction will be imposed. Is that or not?

Aida Elvia Vasconez Villalba – Ecuadorian Telecommunications Superintendence: Yes, really. Whether the alleged transgressor refutes it or not, we issue the resolution. Our reports are endowed with mandatory power. It is like when you cross the red light and the police is there and sees you, but has not photo, neither the X-ray, but it joins credibility enough. We join such credibility. In Ecuador, we have the respective power to impose sanctions on the person, and our resolutions have really reached the expected success. We have not imposed only small sanctions. We have imposed sanctions on poor quality of services, and such sanctions amount up to one million dollars, and we have won all trials. But we have also imposed sanctions amounting to US$ 200, the maximum amount allowed by law to mobile phone services. That affects the companies, because while we impose sanctions on them, which are publicized and they loose, to some extent, the amount of actions. That jeopardizes them and, then, they say: What should I improve? We have not yet built up a sort of confidence with operators, because we say: Look, this service is not good, you have to improve it. In the beginning, there was some resistance, but now they are even grateful to us. They know that we want them to provide high-quality services with fair prices. Inclusively, we have been surveyed by the media and companies where we join credibility, because they know we defend the user and solve their problems in a timely manner.

Mindel De la Torre – Moderator: No more questions now? Then, I'll ask a question. How do you deal with issues of confidentiality? In a lot of countries, we have the operators who wish to have the information that is being sent to the regulators as being confidential. How you deal with that in Ecuador?

Aida Elvia Vasconez Villalba – Ecuadorian Telecommunications Superintendence: Well, we have the respective reservation in our Political Constitution of the Republic, and also in the Telecommunications Special Act, whereby operators are obliged to deliver services in confidentiality. Telecommunications violation is prohibited. In fact, we had a problem with a fixed telephone operator that, due to investigations on a kidnapping, had interrupted telecommunications and we had to impose them a sanction, because telecommunications privacy is a guarantee.

Participant: When you fine your operators, where does that money go? Is that already dictated in you law?

Aida Elvia Vasconez Villalba – Ecuadorian Telecommunications Superintendence: The proceedings of fines are collected by the Telecommunications Superintendence and invested in equipment, because you know that technology develops and we always need to purchase equipment. As services delivered improved, we have to purchase equipment and it is very expensive. Therefore, fine proceedings are addressed to purchase equipment.

Participant: My question is linked to the previous one: Whereto do you send the equipment?

Aida Elvia Vasconez Villalba – Ecuadorian Telecommunications Superintendence: Here, we must differentiate the kinds of equipment. Broadcasting and television pieces of equipment become Telecommunications Superintendence's assets and are auctioned. On the other hand, pieces of equipment seized from telecommunications services are safeguarded by the police, so support the respective criminal trial, because one cannot provide telecommunications services without the due authorization, subject to 2 – 5 years of confinement.

Mindel De la Torre – Moderator: Well. Thank you very much. That was very interesting and now we'll move on to our next speaker, Mr. Edilson Ribeiro dos Santos, who is the Superintendent of Radiofrequency and Enforcement in ANATEL.

Edilson Ribeiro dos Santos – Superintendent of Radiofrequency and Enforcement in ANATEL: Good afternoon. You could notice I am very comfortably seated at this table, in Monday afternoon, with a shiny sun out there and here I am. But that is how things go. We have to fulfill our missions and that is why we are here.

This afternoon I brought you some practical pieces of information concerning the enforcement work in Brazilian National Telecommunications Agency – ANATEL. In a few words, I intend to show how we play that role in the Brazilian National Telecommunications Agency.

First, we have the general structure of the Agency. On the top, we have the Administrative Board and, besides it, an Advisory Board, which executes a sort of social control on the acts performed by the Agency, by its Board. There is also an Ombudsman office, which inspects ANATEL actions, issuing semi-annual reports about the Agency performance and informing them directly to the Ministry to which the Agency is bound, to the *Casa Civil* (Chief of Staff Office) of the Presidency of the republic, the Federal Senate and the Federal House of Representatives. The Ombudsman is directly appointed by the President of the Republic, and is not hierarchically subordinated to ANATEL National Board of Directors. Among the Counselors, we have a chairperson, who is a member of the Executive Council and also heads the meetings held by the Administrative Board. Some committees are established to deal with specific temporary issues. Currently, ANATEL has the following Committees: Protection to Consumers, Use of Spectrum, Free Competition, etc. Furthermore, we have an Executive Superintendence, which acts a liaison between the Executive Superintendents and the Administrative Board, with basically deliberative duties. Finally, there are several Executive Superintendence Offices, in charge of ensuring the Agency's effective development, and of materializing the deliberations made by the Administrative Board, pursuant to the pertinent legislation.

Amongst the superintendence offices, there is the Superintendence of Radiofrequency and Enforcement, currently headed by me. One of its duties is enforcement, i.e., to make things happen. This superintendence has two general management units; it takes care of two very different aspects. On one hand, enforcement. On the other hand, at the General Management on Certification of Engineering of Spectrum, we are in charge of certifying products and effectively managing radioelectric spectrum.

For what really interest us here, we have the General Enforcement Management. For you to have an idea, it stands for 51% of the agency's staff, in number of professionals, and manages 35% of the Agency's financial budget. It is divided into a General Management of Enforcement and Regional Supervision, in charge of managing, controlling and planning enforcement actions at several Brazilian States. We have a Management of Engineering of Spectrum, in charge of all technology to oversight, monitoring, following-up broadcasting content, following-up the network performance in the field of telecommunications, etc. There are also 11 regional offices, all over Brazil, in charge of executing such duties in the field, and generating the expected results. Whenever required, the regional offices are also empowered to initiate the corresponding processes resulting from likely incompliance or behavioral bias, nationwide. Associated to such regional offices, the smallest States have operational unites, with lower intensity of telecommunications services. There, the structure is a little bit different.

For Brazil, enforcement comprises telecommunication services. We check from services executed by the operator, until its trading to users and how users employ such services. It means to say from trading to the quality of services being provided. We have the network, which is part of implementation and working and that was addressed by Dr. Leite earlier. It has much to do with the issue of network desegregations and the competitive process intended. So, this activity will demand extremely hard work. We are also in charge of resources on orbit, numbering and spectrum, with poor manageable resources and that demands very intensive enforcement efforts. There is also the part of products, with certification and homologation of products. First, to grant products compatible with each service being used. Secondly, to grant products' quality to final user, with safety and quality of the product itself. Inclusively, some countries use it as an extremely important tool for industrial policy.

In ANATEL, enforcement works in two major groups. On one hand, there is follow-up and control of contractual and legal obligations of contracts. It concerns services quality and performance. On the other hand, we have field gauge, direct oversight of performance or information being provided and, inclusively, the follow-up on the use of radiofrequency spectrum.

Initially, follow-up and control duties are being performed by several technical superintendence offices, associated and responsible for controlling services. Field activity is performed by the Superintendence of Radiofrequency and Enforcement, through regional offices. Follow-up activities have to do with statistical analysis, auditing, follow-up of performance indicators and reasonability trials, for example. In field activities, there are oversights, surveys, inquiries, spectral analysis, evaluation of technical parameters, trial of products made available in the market, etc. Therefore, such duties are now divided in the Agency and, hopefully, after reforms they will be assigned to a single superintendence, to have harmonious procedures in relation to enforcement aspects.

Afterwards, we have a process of planning accomplishment. The first thing we do when we are outlining the planning is to make consultations to the strategic planning, or to the Administrative Board, to know the exact focus to be adopted in enforcement. We listen to all technical superintendents, demand generators, including the Ministry of communications, due to the part of broadcast content, which is competence of the Ministry of Communications, rather than of ANATEL. We make consultations with control bodies – Federal Government Auditing Court and the Federal Secretariat of Control – analyzing their

previous reports to check for any recommendation on actions to be developed by the Agency's Enforcement superintendence. Furthermore, we refer to statistical analysis to previous period, pursuing to identify interferences of clandestine radios identified by that tine, in order to allot the required resources to fight such situations.

Then, we survey enforcement needs, which occasionally do not match resources available. Although the Agency has its own resources, sometimes budgetary resources are not enough. Then, we compare the needs against available resources, to set priorities to enforcement actions, aiming at matching the suggestions and the resources available. However, when setting priorities, we take into consideration some crucial aspects. The first one concerns the service legal nature, and the second is the service's scope of interests. Thus, whenever dealing with public regimen services, effectively of collective interest, it is assigned higher priority in enforcement activities. And private services of collective interest have huger effect than the others, which will be addressed in the event of denouncement of radio interference or abnormal use, etc. Furthermore, the Agency assigns weights to variables such as its strategic objectives, i.e., universalization, quality, continuity, fair tariffs, competitiveness, besides the fees managed by the Agency that are extremely important to the Agency's survival. All such aspects are assigned with a given weight, and the conciliation between the weight of strategic objectives and the weight of legal nature of services sets forth the priority ranking at the level of enforcement planning.

After that, we allocate the required resources to carry out each duty, duly prioritized. For information, only, in 2003 we have performed 497,000 hours of enforcement. For 2004, we estimate 660,000 hours of field work at enforcement level. He have spent resources amounting to R$ 19 million, and for 2004, the expected delivery amounts to R$ 30 million. Concerning technological resources, ANATEL has its radio-based monitoring system, with 83 radio-monitoring stations, out of which 29 are mobile and 56 fixed units, all over the country. All such stations are connected to a national center in Brasília, where we may control the units. Out of the 56 fix units, 23 are installed and 33 are still to be installed. All mobile units are operational, generating the expected outputs. There are three kinds of unit. We have Unit 1, Unit 2 a two Units 3, one in São Paulo and another in Brasília. The difference is the monitoring capacity of each unit. This is the system currently in use and, no later than by the end of 2004, all 56 fixed units will be operational. From thereon, we shall start planning the system complementation. That was a first stage, and it must be expanded. I would like to greet the Ecuadorian representative, because we agree in that it is a continuous and endless process. Equipment must be constantly renewed and, soon, we will review with ITU the possibility of assembling a satellite-based monitoring station here in South America. We urgently need it.

Another resource is the so-called RNR – National Radiometry and Videometry System. It allows following-up the contents of broadcasts and subscribed TV. The Ministry of Communications – in charge of inspecting contents – is the major user of this system developed by ANATEL. However, there is an adjustment and agreement term with ANATEL, whereby ANATEL inspects on behalf of the Ministry and, in the event of any irregularity, it issues the irregularity document and informs the Ministry to initiate the corresponding administrative process. It is another extremely interesting system. It is fully operational. It has 12 assisted platforms, i.e., with a person physically operating it, additionally to 15 unassisted platforms, controlled by the assisted platforms. It means that all Brazilian States are covered by one of such stations. They are fully controlled by Brasília and, from Brasília, one may fix missions in any Brazilian State, regardless where it is. For

instance, from Brasília one can order the record of a given program in Acre, with absolutely no interference by anyone, and results may be obtained directly in Brasília. It is another tool used in enforcement.

Afterwards, we issue the guidelines that take into consideration the Agency's policies, its tactical and operational strategies – approved by the Administrative Board, which establishes the parameters to be adopted by enforcement to conduct its operational planning. Based on such guidelines, an operational plan is issued to each Brazilian region, setting what and when should be done, and with whom operations will be performed. The set of guidelines, jointly with its operational plan, makes up the Agency enforcement plan. The guidelines are aimed at establishing basic parameters to prepare the Annual Enforcement Plan, fitting it to the needs of the remaining superintendence offices and the mission of the Brazilian National Telecommunications Agency. The guidelines are typically divided into: general, operational and tax-related. General guidelines have longer time, usually 4 to 5 years. Operational guidelines are for the following year, and tax-related guidelines concern oversight on collection of taxes related to the fees that allow for the Agency's operations, additionally to FUST that is addressed to universalization, and FUNTEL, addressed to technological development and also originated by telecommunications operators' revenues. Thank you very much. That is what I had to say.

Mindel De la Torre – Moderator: Thank you. I think that it would be interesting to find out from the group here how many agencies have 51% of their people dealing with enforcement and oversight work and how many agencies have 35% of their budget being spent on that. I think that's very rare. I think you're unique. Does anybody have any questions from the floor, please?

Fabiana Guedes: I work for GVT, a Brazilian operator. You have mentioned the Annual Oversight Plan. The Plan is public, but you have also mentioned operational plans. I would like to know if operational plans, by State, are also public.

Edilson Ribeiro dos Santos – Superintendent of Radiofrequency and Enforcement in ANATEL: No, because oversight also entails surprises. Some missions may be public and others not. Now I have 28 agents in mission at São Paulo and only today we came to know what they were doing. Then, sometimes that sort of confidentiality is crucial to have a successful mission and, thus, they are not publicized. Guidelines are public, but operational plans aren't.

Mindel De la Torre – Moderator: Perhaps I can just ask another question to you. When an operator asks that the information that they provide you is confidential, what does ANATEL do to maintain that confidentiality or to determine whether the information that the operator sends you should be confidential or whether it should be part of the information that's given to the public?

Edilson Ribeiro dos Santos – Superintendent of Radiofrequency and Enforcement in ANATEL: Initially we faced some trouble in relation to the treatment provided by operators to confidential matters. It is worth to stress that, in Brazil, the competence to exploit telecommunications services is assigned to Brazilian State. It is constitutional competence, of origin, for exploiting telecommunication services in Brazil. Brazilian State may execute it directly or through authorization. That is the rule. Since companies had permission, authorization or something like that, they understood they were the ones to decide on the

confidentiality of information provided to the regulatory entity. For me, it seems a distortion of objective and understanding, because who can exploit is the State and, therefore, it is entitled to any information from that operator, regardless its nature. The only rule that may guide operators is to say: "This information, here, is treated as confidential". Then, the Agency shall establish if, in the light of the regulatory body's view, the information is confidential or not. In Brazil, at the level of the Administrative Board's decision, the only confidential information deals with frequency bands, which are used exclusively by the Armed Forces, due to national security reasons. What may be asked is that, if an administrative process has not yet been tried, the information should remain confidential. However, after trial it is accessible to everybody. So, the operator should inform that is provides confidentiality to a given issue, and the Agency judges if it is really confidential or not, using its own assumptions established in law, i.e., national security, national economic process, etc. Public welfare and interest shall prevail in the decision about the confidentiality of any information.

Mindel De la Torre – Moderator: Thank you very much. Are there any more questions? Ok. Then, we'll take our coffee break now and be back here at 4:30 p.m.

(Coffee Break)

Mindel De la Torre – Moderator: We'll go ahead and continue. We have two more speakers this afternoon. The first is Nídia Madriz Araya. She's the Business Administrator of ICE, in Costa Rica. ICE is the government-owned monopoly and telecommunications provider. So, she'll be speaking from a different point of view than the other speakers we've had today.

Nídia Madriz Araya – ICE: Good afternoon. I am from Costa Rica Institute of Electric Power and Telecommunications. Before I start my presentation, I would like to explain that I work specifically in the field of strategic planning to the sector. I am not a lawyer and I believe my presentation will be quite different.

Costa Rica Institute of Electric Power is a state-owned monopoly made up by four subsidiaries, amongst which the telecommunications sector. There will be an eventual partial openness of market as of January 2006. Therefore, we must seek information enough to, let's say, sustain how we should be regulated, who regulators should work in fact – if market will be opened to competitors. In fact, up to now, we are the only ones.

My presentation is structured in three parts. In the first one, I will provide brief information on the country, general features. The other concerns our regulation as operators under monopoly, in a historical view, explaining why regulation is justified to a company with monopoly nature and state-owned. The third stage refers to how operators supervise and oversight. Finally, I would like to disclose some figures concerning the company results. When I was structuring my presentation, I thought it would worth to disclose such figures, since you know that in the 90's the privatization processes started in Latin America, and I would like to inform you the results achieved, as a monopoly, up to now.

In terms of general information about the country, Costa Rica is a very small country. It has 51,100 km^2, and population of 4.2 million inhabitants. Its GDP per capita, as of 2003, was US$ 4,192.55 and, the exchange rate for last week – because we have daily devaluations –

was 426.99 = US$ 1. For the major indicators on telecommunications, we have a fixed teledensity of 27.29 lines for every 100 inhabitants, and a mobile teledensity of 18.67 lines for every 100 inhabitants.

This transparence discloses how telecommunications industry is currently made up, in fact. The major player is the State. Within the State, there is a Ministry of Governance; there is the ICE and a subsidiary, a company that bought ICE – RACSA – and is of private nature; there is the Regulator to telecommunications and the Legislative Power, or Legislative Assembly. However, on the other hand, cable operators, technology providers and value-added services operators started to appear, and they are working in the industry with no regulation.

Amongst the responsibilities of any regulatory aspect, I would like to show here, very briefly, how different players hold some responsibility in regulatory aspects. The Regulatory Body has the responsibility of: approving services fees; interconnection rate; and oversight services quality. The Legislative Assembly sets forth license rights to any local, long distance, international, data, rented lines and mobile services. Then, the Ministry of Governance is responsible for assigning frequencies and licenses to every radiolocalization, cable TV, satellite-based fix services and satellite-based mobile services.

Now, let's talk about how telecommunications services regulation happened over history. As explained by the compatriot this morning, ICE Telecommunications emerged as a telecommunications company in 1993, and was under the electric power sector. So, it has been regulated since its establishment. Originally, it was the so-called "National Electric Power Service" and, currently, it is the "Regulatory Authority for Public Utilities".

Basically, there are three reasons that justify regulation over a state-owned company, a monopoly. First of all, according to law, telecommunications [services] are provided – as monopoly – by a state-owned institution (ICE) that, since its establishment, has been regulated. Secondly, users' interests are to be protected, to grant costs reductions that are reflected in lower tariffs, ensuring compatibility between services provided and their prices. Thirdly, companies' competitiveness should be fomented, according to changes in their environment, watching over quality, quantity, timeliness and trustworthiness of services provided.

Thus, the Regulatory Body is exactly the Regulatory Authority of Public Utilities (ARESEP). It is an autonomous entity, bound to the Legislative Assembly, financed through canons and contributions paid by public utilities operators and Governmental budgetary allotments.

ARESP has three core objectives, as follows: pursue balance between user's needs and the interests of public utilities providers; ensure that public utilities are provided according to the principle of service equivalent to cost; and formulate and enforce requirements on quality, quantity, timeliness and trustworthiness of services provided in an optimum way. The Regulator has three core powers: establishing tariffs, issuing rules and regulations in terms of quality, and attention to claims and denouncements made by users.

Now, talking about enforcement, in fact there are pieces of information that ICE should submit to the Regulatory Authority concerning the company condition: market, service

quality, infrastructure, financial results; proposal on tariffs in several systems; programmed investments; estimated revenues; and estimated expenses. Here, we are saying that this is a model of broad regulatory duty, because it is a monopoly company. Many objectives work around what would be the protection to universal service. In Costa Rica, there is great concern with social in relation to services provision.

We could say, in summary, that supervision is focused on enforcing the provisions on services provision, as established by their respective laws and regulations; the execution of non-profitable activities or investment per se, within its territory and in matters under its competence; indiscriminate access to services, to whoever requires it; guarantee that services are rendered in short-time, in face of increased demand; and provision of equal services to all clients, with fair and reasonable prices.

In the field of enforcement, one could say it has three major aspects: on financial and accounting records of the Institution and any information related to its results; on the quality of services in comparison to equipment, systems, compliance with established fees, etc.; and grant that services received by the user are compliant with the Institution's supply and commitment. This point deserves attention when talking about opening the industry, as of 2006, by accepting other players.

In respect to the company results, it is worth to stress that we have performed a comparative analysis of results, in our field of work, against the results of major Latin American companies, in competitive environment scenario, from 1990 to 1995, and it reported very similar results. It is about state-owned monopoly versus companies undergoing opening or privatization processes. In relation to staff, in 2003 we had 4,956 employees. In terms of lines / employees, in 2003 there were 390.85 lines/ employee. Fixed density is equivalent to 27.29 lines to every 100 inhabitants. Mobile density is equivalent to 18.67 lines to every 100 inhabitants. Completed calls exceed 60%. Concerning prices of services, here we have prices for basic fixed telephone services amounting to US$5.6 to residential versus US$ 4.6 to commercial, as of 2002. For fixed telephone services, one can observe that average price of pulse, in dollars, is about US$ 0.01. In terms of international telephone services, you can observe how services prices have decreased. Almost all tend to be the same in 2002. In relation to monthly fees of mobile phones, they have all decreased. In 2002, the tariff was equivalent to US$ 8.34. And the price for minute of call, in dollars, remained in US$ 0.08. Concerning revenues, they behaved as disclosed here.

As you can observe, in the field of prices, our prices are very competitive; we have a good teledensity ration, both for fixed and mobile phones. When competitiveness is opened, we think major problems will arise in the field of value-added services because, in fact, they are services that – in terms of price – are not subject to the same principles that are now applied to profitability and cost, because prices should be fit the benchmarking results.

Then, proper mechanisms should be established to grant the country, on behalf of regulators, the need for gathering enough information. First, to establish laws and regulations to assist in fomenting market growth; prevent companies from distrusting market now; and grant universal service, upon the contribution of all. Some time ago, in a capacity-built training, we realized that the problems with existing regulations are not as great as people say, as people tell us. If you do not have all aspects clear, we will have a great problem with the different operators that may come to enter the market. Thank you very much.

Mindel De la Torre – Moderator: Thank you very much for that different perspective. Does anybody have any questions?

Philippe Mege: Thank you. I would like to know if there are opportunities for somebody, or any other operator, wanting to join the market. That is a regulation problem, since liberalizing just for the sake of liberalizing is fine if there is no market to other operators. That is what usually happens in Africa. That is the problem in Guinea and all those countries. For instance, investments in mobile cost millions of dollars. So, I would like to know if there is opportunity for another operator trying to come in the market.

Nídia Madriz Araya – ICE: Yes. In fact, we know there are operators wanting to join mobile service, global communications and Internet for fixed telephone. Some time ago, we held a market survey with an ITU advisor, and we made our calculations and analysis on the capacity we have to receive other operators. We have already foreseen that.

Mindel De la Torre – Moderator: One question that I might have is if have ARESEP ever fined ICE, i.e., have they ever imposed any sanctions on ICE, in the sense that it is a government-owned monopoly and sometimes it is hard to actually sanction in a situation like that. So, I just wonder if you are aware of any.

Nídia Madriz Araya – ICE: As Thomas explained this morning, it hardly happens in the field of telecommunications. However, there was a recent event – I believe last year – when the GSM mobile system started and caused many problems and, therefore, the company was compelled to lower the price charged per minute. It is a sample.

Robert Earl Thomas Harvey – Costa Rica Regulatory Agency on Public Utilities: I would like to add that the company went on strike for several days and some services were not received. The Regulatory Authority ordered them to reimburse the users for services that were paid but were not provided.

Nídia Madriz Araya – ICE: That is an important fact. Here, we also have all provisions by the Regulatory Authority.

Mindel De la Torre – Moderator: Anymore questions? No. Well, now we'll go on to our last speaker, Helena Xavier, who's a partner at Xavier, Bernardes, Brangança Advogados, here in Brazil. I think they are located in three cities, including Rio. She's going to give us a slightly different perspective on how ANATEL is regulating in some of the enforcement and how it deals with competition.

Helena Xavier – Xavier, Bernardes, Bragança Advogados: In fact, my view is legal. I will try to provide in-depth view on issues discussed this morning, in institutional light.

Here we have some important acronyms. If somebody wants to review the transparencies later, it's OK. I found a minor error. It is not Secretariat of Economic Defense, but Secretariat of Economic Rights, with the competence of effective economic defense.

Now, let's talk specifically about ANATEL legal nature, because the regulator's legal nature that establishes its possibility of working effectively. ANATEL is a special autarchy. What

does it mean? It has institutional autonomy with several features. It is a juridical person of Public Right, established through specific law, with its own bylaw and regulation approved by the President of the Republic. Hierarchically, it does not depend on any other authority, whether from administration or the Executive Power. There is no hierarchical subordination to any entity with political competence, and there is a fixed mandate to officials in respective bodies.

ANATEL is assigned with some duties imposed by constitution – 1988 Constitution, Art. 21 – and pursuant to the Amendment of 1995, which sets forth the establishment of a regulatory body in the field of telecommunications, with institutional feature. Therefore, it is to perform those duties listed in the 1988 Constitution, Art. 174 as characteristics of a regulatory body – inspecting, motivating and planning, where planning is optional to private sector and bound upon public sector. Here, in the regulator body's duties, I performed frequency amplification to stress between granting power and the body of "composition of conflicts".

Since ANATEL is a juridical person of Public Right, with no hierarchical subordination to any other entity – therefore, its direct relation is not with the Legislative Power, but with acts issued by such Power, i.e., the law – the Law applicable to ANATEL is Administrative Law instead of Private Law. We live in a Democratic State of Right, Pluralist, with basic structuring values as follows: labor, free initiative and pluralism, amongst others. They are stated in our Constitution, Art. 1.

Therefore, ANATEL complies with the legislator's wills, mediated through law. ANATEL's structure of powers and competences is specific to Public Right. It holds powers and obligations. For its mission, ANATEL is obliged to exercise its powers for public interest – and public interest, as mentioned this morning, is not a general and abstract entity; rather, it is the specific purpose of each kind of functional power. Therefore, public interest is inalienable and that's the reason, and this technology that justifies its supremacy. It brings practical consequences. A consequence is that ANATEL effectively enjoins prerogatives, the first of which is the assumption of legitimacy of acts, which are assumed as legitimate – according to law – until otherwise established by a court.

However, it also involves some restraints: insusceptibility of application, by ANATEL bodies, in administrative decision-making, of procedures of acting typical to private entities, since ANATEL bodies have no autonomy of will. They exist by force of law, and strictly within the scope established in law. Different from us – individuals – public bodies do not exist before a law, neither beyond it, but only to the extent of specific powers set forth by law. Thus, there are no grounding criteria that cannot be mediated through legal rule.

It makes us understand the nature of ANATEL normative acts, and their relevance to ANATEL effective work. ANATEL normative acts are not legal regulations, are not source of right to be imposed to courts. That is so because the Constitution sets forth which are, in fact, legislative acts and the regulatory body's duties. Inspecting, motivating and planning is rather different from establishing rights and obligations. It means enforcing and motivating relationships for building up, through private contractual means, for companies competitors one to another. And it means planning – optional to private sector and binding only to public sector. But it is understood that motive is not originated because ANATEL normative act establishes rights; rather, it results from hierarchical subordination that other public bodies may have to ANATEL directive bodies.

Nevertheless, normative acts – by force of three basic principles in the legal culture of a Democratic State of Right, such as Brazil – produce practical and effective effects that are extremely relevant. One of such principles is the so-called self-bounding of Public Administration, which cannot decide (a) for this case and (b) for another, without reasoning its decision. And, if logical pertinence is found, it must decide for (a) in the second case, also, i.e., it is bound to itself. The second principle is protection to confidence on Public Power acts. It is another basic principle because, regardless the precedence of any concrete case that allows for comparing motivation, the single public announcement of an act may cause effects that claim the application, for the first time, to a concrete case. And, finally, the principle of isonomy, which is the common factor that allows for consolidating partial understandings.

Therefore, ANATEL regulation aims at allowing the compliance with telecommunications laws, also within the scope of protection to economic order and rights of users since they are, ultimately, the reason for ANATEL's existence. Secondly, its mission is to induce competitiveness. Its regulation legitimates its own enforcement power, because it parameterizes working criteria, through guidelines. It means to say that it does not announce acts aimed at checking for failures, but it has its guidelines, whether in the scope of enforcement or in the substantive plan, that legitimate its activities. And, finally, it should grant the exercise of rights for all players in the sector, transparently and indiscriminately.

As Grantor Power, ANATEL practices normative acts on bidding processes, awards, provision and use of services; it practices individual and concrete administrative acts, such as celebration of concession contracts, approval of standard contract to incumbent and values for tariffs; it practices enforcement acts on concession contracts; and practices sanctioning acts by establishing, for instance, the intervention on the concession holder management or, in maximum serious events, the caducity of concession.

As a body of conflicts composition, it is empowered with specific competence to intervene, through administrative act, restricted to conflicts between operators. This is something that people do not realize and, then, criticize ANATEL for omission in sectors where ANATEL does not hold competence, neither of decision for of instruction. Here, I refer to conflicts with users, where ANATEL only mediates criteria and sanctions imposed to operators, but holds no satisfactive duty, which must be pursued by other means. There are two means that may lead to effectiveness of action in the sector, i.e., the Council of Users that exists in the Regulation for Commuted Fixed Telephone, and the Ombudsman whose competence is extremely comprehensive, because its action is not coercive, is not an action with irreversible consequences and it allows the Ombudsman to make highly valuable criticisms and qualitative interventions, without the compromise of formal procedure and, eventually, avoiding that disproportion sometimes entailed by the mechanisms of strict legality, if they are not duly measured according to each concrete case. So, the Ombudsman has this generalizing duty, however very valuable in the light of criticisms and recommendations. Sometime effectiveness is even more effective, not through sanctions that nobody obeys – because it is not even expensive – but through recommendation, that establishes an opinion that allows for acceptable behaviors and parameters of relationship.

Generic discipline is established also through normative acts, whether of legal nature or of technical character. Concerning technical character, I would emphasize equipment issues,

because this competence of ANATEL includes not only network equipment and terminal equipment, but also the product and the feature of inter-operability of the network. It – jointly with the concept of interconnection set forth in our law, which is an obligation of general character and not only for people in dominant position; and also combined to the concept of connection and the concept of access – explains why our law did not deal with desegregation, since it dates back to 1997, when the issue was known all over the world and, in Europe, became bounding only in 2002. Our law did not deal with this topic because it solved the issue of small-size users of equipment – like small providers of Internet access, or medium- or big-size providers, as those members of the vertical chain – through the competence of ANATEL in demanding inter-operability to equipment, with no need of disaggregating isolate parts of goods or duties. The duty of ruling is also performed through individual and concrete administrative acts.

Concerning the duty of motivation and planning, ANATEL has two very important independent duties. One is to approve: General Plans of Authorization to Private Services; the Plan of Spectrum Resources Allotment; Structural Plans to Networks; Numbering Plans and celebration of concession contracts.

Its duty of motivating competitiveness and defending the economic order also happens through normative acts and concrete acts. This competence is legitimated in Art. 5, 6 and 71 of general law, and these macro rules are further complemented through specific rules to concession holders, to private service operators, as well as by rules shared by both of them.

For controlling structures of concentration and repression of infringements, ANATEL relies on acts addressed to operators in general. By the way, ANATEL competence is not definitive because CADE holds definitive competence. In anyway, ANATEL has acts addressed to operators in general, and acts addressed specifically to concession holders. One sample is the competence set forth in Art. 73, which is broadly reversely interpreted, but, in fact, ANATEL has the final word in issues of sharing an infrastructure wanted by given telecommunications operator.

For enforcement and control duties, ANATEL inspects both legal and technical aspects. Enforcement comprises services execution and respect to users' right. However, it also comprises compliance with rules on protection to economic order. In relation to its power of imposing sanctions, it is restricted to violations of subjective rights of users, and to violations of the General Telecommunications Act. In matters of economic concentration or violations to economic order, CADE holds definitive competence, as expressly set forth in law.

Which are the critical points in our systematic? One, which is in the order of the day, is that by concentrating duties, the grant of impartiality may be jeopardized. On one hand, ANATEL is the regulatory body to public regimen companies and private regimen companies. On the other hand, it really means power concentration, almost in the sense of political power of State, regulatory duty, grantor power duty and the duty of a body of composition of conflict. However, I would like to bring your attention to the fact that concentrating [power] in one single regulatory body means guarantee about the system impartiality, through self-bounding, protection to confidence and isonomy, as previously mentioned. If enforcement and concession competencies are separated, it will be no longer possible to separate opposite criteria in the decision, because criteria will surely be totally different and, even if they were legal criteria, they would not allow comparisons because

there are two subjects of right. Thus, it would be through the obligation of reasoning, eventually qualified, because in our system it is illegal to practice an act aside the precedence line by Public Administration, but it is not illegal to have bodies of different entities practicing different acts.

Another critical point refers to celerity, efficiency and effectiveness in face of slowness in procedures. In fact, we think that one of the critical points is the reduced adoption of the tacit act of granting in procedures basically of verification nature. And in conflicts composition procedures, the so-called "arbitrage", distribution takes, at least, from seven months to one year, and for representation infringement, at least one year to one and a half year. I am talking about time established in rules, not about real time.

The third critical point is the issue of celerity, efficiency and effectiveness in face of competence conflicts. I'd like to say that there is no conflict of competence with CADE. They may come to exist. That's the forecast. But, now, they do not exist because ANATEL holds regulatory competence, which surely has preferential effect in decisions to concrete case. But, in terms of concrete case, all of ANATEL's acts related to economic order, although preconditioned by regulatory acts, are subject to mandatory final review by CADE.

In terms of instruction, there is no conflict, neither with the Secretariat on Economic Right, nor with the Secretariat of Economic Affairs, because Art. 19 of the General Telecommunications Act reads that, in telecommunications, all legal competences of instruction and opinion are assigned to ANATEL. CADE is in charge of final decision. Thus, there is no competence conflict. Conflict may exist in concrete case, because talking about telecommunications does not provide any response to the industry issue; does not respond to business issues that prioritize convergent interest, thus jointing equipment and service; does not respond to the issue of technology, i.e., how would technology assist in deneutralizing rules on competence. Therefore, there is room for joint actions by ANATEL and other entities on protection to competitiveness, but in issues that are not strictly bound to telecommunications. The issue is not theoretical: it is about concrete action. Neither is it a problem of regime: it is about a problem of application.

Negative conflicts with the National System of Protection to Consumers result from some immature interiorization of the system, since ANATEL does not have any satisfactive competence, neither could have it, because that would be ambitious since we already have the National System of Protection to Consumers. In anyway, sometimes possibilities are not fully put to good use. For example, I have never seen an action to refute given criteria set forth in concession granting contracts, which use to be demanded for tariff issues. It doesn't mind. What minds is the preliminary injunction because, as we have already discussed, preliminary injunction now remains in force for years. Under no circumstance it would be worth to make a declaratory demand, which is an action that probably does not take so much time as revoking a preliminary injunction. Our jurisdiction is plain and, therefore, valid in court for any discipline. Similarly, the most convenient option is to appeal to administration, because the Judicial Power must enforce rights, but not manage them.

Finally, ANATEL efficiency, with effective guarantee of appreciation by the Judicial Power, depends exactly on what I have just said. In the lack of legal criteria, in the lack of behavioral parameters set by ANATEL, instead of efficiency we have a renouncement in favor of the Judicial, which is obliged to intervene upon request by any interested part, as set

forth in our Constitution. And here we have the list of all problems brought about by this issue, and that may result from the lack of clear legal criteria, as you may know. Juridicity works for that, to have pre-determinable decisions instead of decisions made known just for some few privileged entities. Thank you very much.

Mindel De la Torre – Moderator: Thanks. Are there any questions?

Philippe Mege: You have mentioned transparence in law. It is an extremely important word. I think we should discuss the meaning of transparence, because it may bring about conflicts and so on. Within the framework of Brazilian law, is there any definition on transparence? Everybody talks about transparence, transparence, but they say different things. That is a word with different meanings in the light of economics, of law. So, everybody talks about transparence – ILO, European Union, etc. Transparence for my purposes means different things than for you, for your interests. So, I think that this legal void of transparence.

Then, I have another question, which deals more with concessions.

Helena Xavier – Xavier, Bernardes, Bragança Advogados: Well. The word transparence is broadly used in our legal system, for dissemination purposes. We have formal dissemination, through publication in official bodies, and there is also the substantial dissemination, by disclosing the work of bodies vested in public authority. Such disclosure consists in mechanisms for anticipated participation, mainly through public consultation processes, on all normative acts by ANATEL with divulgation. Only people without time does not get acquainted because, in fact, ANATEL production is very dynamic and in great amounts, with qualities that I wouldn't rank as perfect – because I have my criticisms – but are punctual.

Publicity, or transparence, is also applicable to concrete cases, through the obligation of providing reasoning to decisions that affect individual and concrete interests. According to our law, reasoning must be true, coherent, accurate, integral and transparent, as common factor.

Philippe Mege: I would like to ask, but not under technical view. Here we have lawyers and I would like to ask their opinion. For instance, a Government decides to grant concession for 10, 15, 20 years, on an important technique that brings development to the country. I am referring to economics view. Then, economic study is performed, consultations, etc., with transparence, and a final solution is found. However, Government says: "Stop! I am the Master and decide for an auction." So, it is the regulator's power against the State's power. What do you think, as lawyers, since that it is a national sovereignty affair? After so many studies, with consultancy services and so on, Government decides for something different. What do you think about it?

Kiang – Bhutan Telecommunications Authority: Thank you, Madam Chair. I am Kiang and I work for Bhutan Telecommunications Authority. Most of you must be wondering where Bhutan is now. It is in the Himalayas. It's actually morning back home in my country. I've really enjoyed the wide range of experiences that have been shared here. During the last couple of years, we have seen very fast developments in technology. We're talking about converged legislations, converged regulations. Are you also looking towards enforcement

practices, which are going to be converged? Isn't our task, as regulators, going to be more complex than before?

From the panel, there was not much mention on competition and different problems for enforcement practices, such as monitoring and sanctions. Maybe the panel members would like to share their experiences in this context, in a competitive environment scenario. Thank you.

Mindel De la Torre – Moderator: Thank you. Those were excellent questions and if different panelists are interested in answering, I think that would be very interesting.

Helena Xavier – Xavier, Bernardes, Bragança Advogados: Exactly. I have tried to bring attention to the issue of convergence as a new factor of imbrication, or overlapping of several markets that used to be relevant markets but, due to convergence, may establish new realities, not only in the light of market, but may challenge rules that have not been thought to be challenged one against another. Thus, the need of practical concordance may require for work even harder than we have faced and, despite that, with levels of satisfaction that are total.

However, in Brazilian Law, our current regime provides entities with specialized competence. ANATEL is endowed with specialized competence in telecommunications matters, what means something as complex as specialized competence in public assets management matters, be it public service or radiofrequency spectrum. It is also an entity with specialized and unique competence to oversight and grant access to market. ANATEL may condition access to market in several ways. The simplest way – the act of previous statement – is under ANATEL competence and, therefore, it may monitor the whole system and is also endowed with competence in terms of interoperability, compatibility and certification of products and equipment, considering the Networks Structural Plans and Numbering Plans.

But ANATEL is also endowed with power of granting, which is classical power, but very important. The power of granting access to market is the power of practicing the administrative act equivalent to a visa for entering the market. That power may be of celebrating a concession contract. Today, that is not so relevant, because services have all been granted. They have been purchased in privatization, with concession contracts in force until 2025. Therefore, we do not have that kind of experience. But we have experience in bidding process to access to mobile services, which are private. Here, ANATEL has very special specialized competence because in this matter, the law establishes two criteria that allow it to close access to market, i.e., restrict the access. One criterion is technical impossibility. We know how spectrum is used and we reality need to check if it may be used by everyone, or if the access of some excludes the access of others. But the law also sets another criterion, which is the hypothesis of pulverizing operators that may come to jeopardize services provision, what clearly comprises the hypothesis that the volume of investments required demand operators to be entities available to afford somehow high investments, with minimum continuity of 18 months, i.e., time for deactivating private services. In such instances, ANATEL may limit the number of operators and select then through bidding, where the price of granting is just one criterion amongst others, and is not mandatory. Since 2001, when bidding several bands and remaining SMP bands, ANATEL has always followed the same criterion, because it is the same power of granting, i.e., it is the same entity granting access to service. The criterion used to be highest price and, therefore, it

was bidding in its own sense, because the remaining criteria were required for any interested part.

Thus, for telecommunications per se, it is very well structured. But, in face of the doubt on how will take place the integration of contents services through mobile terminals, it is a problem that will surely require for joint efforts – by ANATEL and by the Secretariat of Economic Right, because production, sales and distribution of contents are not under ANATEL competence, neither are specific competence of any other body; rather, it is a generic competence of the body on protection to competitiveness. In anyway, the final decision is up to CADE. Thus, there are few hypothesis of conflict. The tools for elaborating data, technical reports and legal reports are already in place and, if properly used, final decision is likely to be accepted by all interest parties, even if interests are contradictory.

Mindel De la Torre – Moderator: Thank you. If I could put down your question into a little bit more practical application, my understanding of the way that ANATEL currently works is that every *superintendência* looks at the possible violation of whatever area they oversee. So, if that's the way it is and it is compartmentalized by *serviços públicos* and *serviços privados*, how do you deal with the issue of convergence, since your particular superintendence is in charge of all of them. How do you see it working in the future, as the services start to converge?

Edilson Ribeiro dos Santos – Superintendent of Radiofrequency and Enforcement in ANATEL: The issue of competitiveness, worldwide, is crucial for regulatory agencies. It is not a Brazilian or American specificity; it is a global specificity. Europe has not yet succeeded in having competition in site, like in the United States we do not have broad competition in site, like nowhere in the world has. What we have observed is competitiveness in telephone services, but with different technology – mobile competing with fixed telephone services. Specifically for Brazil – I believe it may be compared to some countries represented herein – mobile is, inclusively, promoting universalization. Few years ago, one could never imagine that would happen and now it is happening thanks to the technology available.

The second point concerns convergence. Here, ANATEL is extremely concerned. We are now, jointly with internal consultancy, analyzing a way to try to reorganize the Agency, taking into consideration aspects of convergence, i.e., how it would be at operational level, which would be the Agency role, in order to face the new reality that is about to be fully operationalized. It seems to me that the core point in this issue is the problem of relevant market. We have broad technological convergence and the actions by regulatory agencies should be oriented by such relevant market and, within the relevant market, the level of competitiveness established in such relevant markets. Then it could be established more action by the regulatory entity, or less action, as such competitiveness is established. But we must see that I practice and adopt required measures to consider the phenomena to come. I am sure that it will come and that is why we must adopt measures to become structurally adjusted and capable of timely responding such issues. That is my view on these aspects.

Gabriela Urquidi – Legal Director of the Bolivian Telecommunications Superintendence: In the topic of competence regulation, in 2001, by the end of 2000, the market was opened to long distance competence and local service. Since then, emerged problems with interconnection, with anti-competitive practices, provision of tariffs below

cost. As I said during my presentation, one issue in enforcement is the problem of access to information and the asymmetry of information required by such behavior. I could say that the most difficult problem in enforcement is to have details and the required information to enforce.

Aida Elvia Vasconez Villalba – Ecuadorian Telecommunications Superintendence: We have opened our market in 2000, and it is still incipient. There are some anti-competitive practices that we have succeeded in controlling. We agree that, in convergence of services, the total infrastructure of operators should be used towards lower costs services. However, we have a legal framework that does not allow us to do so. The Special Telecommunications Act in Ecuador sets forth concessions for services, not for network. Then, Ecuador is analyzing the possibility of reforming the law, so that services may be provided through law.

Helena Xavier – Xavier, Bernardes, Bragança Advogados: While listening to the responses of our colleagues, I remembered a practical sample of convergence in our Law and in our market, which is access to Internet through fixed telephone. When privatization was being prepared, at the time, the controlling shareholder, i.e., the Federal Government, issued through the Ministry of Communications issued several rules that, by that time, set forth rights and obligations, not for legal order, but for instructions of the companies. The rules issued previously to privatization resulted in the establishment of commercial practice to companies and industrial practice, namely, the issue of convergence. Here I refer to the so-called "Regulation on Remuneration for the Use of Networks". We have here a representative of a mirror-company, which provides commuted fixed telephone services under private regime and that is likely to have had its first clients from 1999 or 2000 one, and who had to win the market competing with concessionary companies originated in the sound TELEBRÁS system. But, for TELEBRÁS system, while public, a rule was issued on remuneration of local traffic, based on the principle that local traffic is equivalent and, therefore, remuneration is feasible only after a 55% unbalance. Since the new companies had few clients, they induced public service clients to make calls, by giving incentives to free access providers. In fact, the outgoing traffic overcame the 55% threshold and, thus, new companies were allowed to receive remuneration for the use of networks. There were few clients, but high traffic and high revenues in industrial segment. It is a typical sample of convergence that is being conducted, for now, as the application of a rule of the game. The theory of excessive onerousness, set forth in our Civil Code, has not yet been evoked, but it will be, according to general rules, a typical case of convergence, no longer an issue of regulation, since our Law does not allow for conditioning rights and obligations through technological practices. Therefore, the natural path to be followed is the Civil Code path. For now, that unbalance has not yet been judged as excessively onerous and, thus, the practice is being respected. But while such practice is not considered as distorted in market – at least, that is what can be understood from legal decision and the parties involved in the processes known – I think this is a practical and interesting example on what is currently happening in Brazil.

Mindel De la Torre – Moderator: Well. I think this was an excellent panel. I want to thank the panelists and the audience for being so interactive. I appreciate ANATEL and ITU for inviting me to Rio. That was great. I thank you all again.

Coordinator: We would like to thank, once again, the presence of all. During this first day of the seminar "Current Issues on the Effective Use of Regulation, Policy and Legislation in

Telecommunications", I would like to inform that ANATEL is inviting you to a cocktail party, on the 23rd floor. We would also like to inform that the program and enrollment forms to the workshop "Voice over IP" are available on the accreditation desk. The seminar will be held next Thursday, 22, in this room, starting at 9:00 a.m. Thanks once again for your participation and we wait for you tomorrow, in this room. Thanks.

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