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Argentina and the Telecommunications Industry: The Difficult But Necessary Path Toward Liberalization

Vanessa P. Rubinstein*

I. INTRODUCTION

In the last ten years, Argentina has made tremendous efforts to become a legitimate and viable economy. Although Argentina has made substantial progress through its economic reform package, Argentina has still not achieved the prestige and economic prosperity it seeks. Due to the size of the telecommunications market and the positive externalities achieved across many industries, it has become increasingly clear that a well developed telecommunications infrastructure and industry is essential to the economic growth of the country and to achieve prosperity in the twenty-first century. Yet, Argentina’s efforts to modernize its telecommunications infrastructure have achieved mixed results at best. These disappointing results stem primarily from a failure by the government to liberalize Argentina’s telecommunications markets.

To overcome obstacles of economic, political and social instability, Argentina must meet the challenge of fully liberalizing its telecommunications-
tions. The privatization of the national telecommunications company, Empresa Nacional de Telecommunicaciones ("ENTeL"), demonstrated, in part, Argentina’s initial commitment to liberalize the telecommunications industry. However, while the Argentine government outwardly supported the liberalization policies, the last decade has revealed the government’s hidden protectionist approach. Argentina’s commitment to liberalize is in question because contradicting legislation works to liberalize and restrict market access simultaneously. While some laws promise to allow competitors to enter the market without restricted access, other resolutions or decrees are discriminatory in nature and, among other restrictions, create obstacles for domestic and foreign competitors to penetrate the local market for basic telephone services.

This article provides a synopsis of Argentina’s telecommunications industry and examines the compelling reasons why Argentina must effectively liberalize the industry while eliminating its hidden protectionist policies. Part II presents a historical overview of the Argentina’s telecommunications industry and analyzes Argentina’s domestic laws requiring liberalization. Part III explores the main economic policy reasons for why liberalization of the Argentine telecommunications industry is essential. Part IV offers recommendations to better achieve effective development, liberalization and competition in the telecommunications industry. This article concludes that Argentina must completely liberalize its telecommunications industry for basic services, thereby abiding by its domestic legal commitments and maximizing economic growth.

II. ARGENTINA MUST EFFECTIVELY LIBERALIZE ITS TELECOMMUNICATIONS INDUSTRY TO HONOR ITS LEGAL COMMITMENTS

This Part examines Argentina’s legal commitments to the liberalization of the telecommunications sector. Subpart A describes the government’s privatization of Argentina’s telecommunications sector during the 1990s, which resulted in a market controlled by a duopoly\(^1\) of Argentine companies. Subpart B analyzes Argentina’s constitutional jurisprudence, case law and legislation governing telecommunications liberalization. This Part concludes that while Argentina has made moves to liberalize the telecommunications market for basic services, Argentina has not taken decisive steps needed to effectively promote competition and access in this industry.

A. Evolution of Argentina’s Telecommunications Industry

The evolution of the telecommunications industry is indicative of Argentina’s commitment to liberalization on a domestic level. Prior to 1990,

\(^1\)For the purposes of the paper, the word duopoly will be used interchangeably with monopoly since under either system there is no market competition. A duopoly is simply the creation of two geographically separated monopolies.
the telecommunications industry was controlled and operated by ENTeL. ENTeL was fraught with problems including outdated telecommunications technology, exorbitant costs, poor telephone services, and incompetent personnel. For example, during the 1980s, a potential consumer could wait between five to ten years before getting access to a telephone and installation costs averaged US$1,500. Given the outdated technology and poor quality of telephone services, the Argentine government needed to drastically change the operations of the nationally run company.

In 1989, Carlos Menem was elected President of Argentina, and along with Domingo Cavallo, the economic minister, he developed an economic reform package. The reform package included the sale of twenty state-owned enterprises, including ENTeL. By privatizing ENTeL, the government hoped to demonopolize and deregulate the telecommunications industry and thereby realize efficiency gains and social benefits for the public.

To privatize the telecommunications industry, the Government created four corporations pursuant to the State Reform Act, also known as Law No. 23.696 and Decree No. 731. The newly formed companies were Sociedad Licenciataria Norte (“SLN”), Sociedad Licenciataria Sur (“SLS”), Sociedad Prestadora del Servicio Internacional (“SPSI”), and Sociedad de Servicios en Competencia (“SSEC”). Under the State Reform Act, the government

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3 See id.

4 See Jose Jr. Tavares de Araujo & Luis Tineo; Harmonizing Competition Policies Among Mercosur Countries; International Competition Policy, ANTITRUST BULLETIN, Mar. 1998, at 45,46.

5 "Demonopolization relates to the number of participants or service providers in a determinate activity where the process is generally developed by the government." See Practicing Law in the Americas: The New Hemispheric Reality; Telecommunication Reforms in the Americas; New Legislation and the Regulatory Framework, 13 AM. U. INT’L L. REV. 971, 980 (1998) [hereinafter Telecommunications Symposium]. In contrast, “deregulation focuses on the removal of privileges grants to some market participants as well as the elimination of discriminatory practices.” Id. at 982. See also Roberto Dromi, El Mercosur y el Derecho Internacional de las Telecomunicaciones, in ECONOMIA GLOBILIZADA Y MERCOSUR, 165, 175 (Ciudad Argentina, 1998).

6 See The Chosen Model for Argentina, supra note 2.


8 See AVELINO ROLÓN & CREMASCHIM LOPEZ GABRIELAM, TELECOMMUNICATIONS LAWS IN LATIN AMERICA 1 (1994).
granted basic services licenses to SLN, SLS, and SPSI a “service in competition”
license to SSEC.

President Menem decided to divide the telecommunications industry for basic services into two sections, separating the market between the northern and southern part of the country, with each company having access to half of the Buenos Aires market. SLN was given access to the majority of the northern region to provide basic telephone services to the urban and interurban areas. SLS was given access to the rest of the areas not given to SLN. The government gave SPSI the right to provide international basic telephone services, international data, and telex services, leased point-to-point for telephone services, data transmission services, and value-added services. SLS, SLN, and SPSI were granted monopoly privileges lasting seven to potentially ten years. The license granted to SSEC allowed it to provide national telex and data, mobile radio and land radio telephone services but included no monopoly privileges.

The Argentine government initiated an international bidding process established by Decree No. 62/90 in 1990, resulting in foreign private companies assuming control of the telecommunications industry. SLN sold 60 percent of its shares to Stet S.p.A of Italy and France Cable et Radio S.A. (subsequently renamed as Telecom Argentina Stet-France Telecom S.A. (“Telecom”)) and SLS sold 60 percent of its shares to Telefónica de España, (later renamed Telefónica de Argentina S.A. (“Telefónica”)). SPSI became Telintar S.A. and SSEC became Startel S.A. As a result of the sale, the government endorsed a change in telecommunications policy from monopoly at the national level to monopoly at the regional level. The change in telecommunications strategy served to increase investor confidence since more effective and efficient services were expected to follow.

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9 The definition of “service in competition” is unclear. However, it does include all telecommunications services not included in the category of basic services. See ROLÓN & GABRIELAM, supra note 8, at 2.
10 See id.
11 See id.
12 See id.
13 See id.
14 See id.
17 Telecommunications Symposium, supra note 5, at 982.
President Menem decided to convert the state-owned monopoly to a privately held duopoly for various reasons. Selling off the telecommunications industry to two companies allowed the government to create a market check in which the state could evaluate the performance and progress of two companies of comparable economic size and market area.\textsuperscript{19} Comparing the performances, services offered and technological advancements of each company allowed the government to determine if any region was being under-serviced. This monitoring feature became an important device since pure market forces did not drive the market. Although consumers may have preferred free entry to the market by any competitor, the government believed a duopoly would provide the capital-intensive investments necessary for the development of the telecommunications market.

The Argentine government granted each company an exclusive seven-year license for basic services in their respective regions. The seven-year licenses were supposed to end November 7, 1997.\textsuperscript{20} As an added incentive, however, the government also agreed to provide each company with the option of a three-year extension as long as certain minimum standards for basic telephone services were met.\textsuperscript{21} These standards included providing services for areas that previously had no telephone service, meeting target levels for service quality, market penetration and public and semi-public services.\textsuperscript{22} The services covered in the exclusivity agreement also included “telecommunication[s] services such as data, telex and leased station-to-station circuits for telephones, and data transmission.”\textsuperscript{23}

As part of the conditions of the agreement, the government set forth mandatory goals to be achieved by the telephone companies. Decree No. 62/90, which approved a public auction for the privatization of the telecommunications industry for basic services, also set forth the requirements for quality, development and growth in the industry. In particular, Sections 10.1.8.1 and 13.5 list mandatory conditions for the auction and authorize the government to extend the licenses for exclusive control of the basic services market for an additional three years as long as the mandatory requirements are met.\textsuperscript{24}

Conflicting information exists as to whether the obligatory goals stated in Decree No. 62/90 were met in order to legally grant the extensions for Telecom and Telefónica. In the findings of Decree No. 264/98, the Na-

\textsuperscript{20} See Decree No. 62/90, supra note 15, art. 13.4.
\textsuperscript{21} See id. art. 13.5.
\textsuperscript{22} See The Chosen Model for Argentina, supra note 10.
\textsuperscript{23} See Villegas Areval & Spjut, supra note 19, at 85.
\textsuperscript{24} See Decree No. 62/90, supra note 15, arts. 10.1.8.1 & 13.5.
tional Ombudsman, the Ombudsman for the City of Buenos Aires, IMPSAT S.A., Keytech S.A., the province of Neuquén and the Consumer Action League all protested the granting of the extension since various requirements were not achieved. Notwithstanding these complaints, the government granted the extension licenses, seemingly endorsing a protectionist policy toward the telecommunications market and turning its back on prior commitments to liberalization.

Though Argentina has shown progress toward liberalization over the past ten years, the process remains incomplete. While Argentina did make the decision to liberalize and privatize the government run monopoly, it has recently backed away from opportunities to advance the process of liberalization. Even if Argentina did not violate any existing specific legislation when it granted Telecom and Telefónica a three-year extension to monopolize the telecommunications industry for basic services, as the next subpart explains, its actions were arguably unconstitutional. The government also has the legal authority to accelerate the liberalization of the telecommunications industry.

B. The Argentine Government Has Not Undertaken The Necessary Steps To Liberalize Its Telecommunications Industry

A legal framework exists in Argentina demanding the liberalization of the telecommunications industry. This analysis of the Argentine legal system begins with the Argentine Constitution since it carries the most authoritative weight with respect to domestic obligations and embodies a strong general policy of promoting a free market economy. Section 1 is divided into two subsections: Subsection (a) describes the pertinent constitutional provisions regarding the area of telecommunications and Subsection (b) analyzes the contentious issues that arise from applying the constitution to telecommunications liberalization. Subsequently, Section 2 examines

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25 "(1) The Ombudsman is an independent body created within the sphere of the National Congress operating with full autonomy without receiving instructions from any authority. The mission of the Ombudsman is the defense and protection of human rights and other rights, guarantees and interests sheltered under this Constitution and the laws, in the face of deeds, acts or omissions of the Administration; as well as the control of public administrative functions.

(2) The Ombudsman has [the] capacity to be a party in a lawsuit. He is appointed and removed by Congress with the vote of two-thirds of the members present of each House. He has the immunities and privileges of legislators. He shall hold office for the term of five years and may only be re-appointed on one occasion.

(3) The organization and operation of this body shall be ruled by a special law." CONST. ARG. art. 86 secs. 1, 2, & 3, translated to English, (visited Jan. 22, 2000) <http://www.uni-wuerzburg.de/law/ar00000_.html>.

26 IMPSAT S.A. is a telecommunications company from the Pescarmona Group.

27 Keytech S.A. is a telecommunications company.

legislation relevant to the liberalization of the telecommunications industry. Part B concludes that significant shortcomings exist in the current legislation, which requires more effective liberalization.

I. The Argentine Constitution Requires Liberalization of the Telecommunications Industry

(a) Constitutional Provisions Affecting Telecommunications

The Argentine constitution sets out the general framework outlining the laws that govern free market rights, property rights and promotion of foreign direct investments. Article 42 states that consumers of goods and services have rights protecting their freedom of choice and economic interests. To the extent that natural and legal monopolies exist, the government must regulate them. Moreover, public services, such as telecommunications, require close attention by regulatory entities since it is a monopoly.

Article 14 provides that all inhabitants of Argentina have the right to participate in the development of an industry. Furthermore, inhabitants have the right to buy or sell goods or services. In addition, Article 17 protects property rights of individuals or companies against adverse possession by the government. The property rights protect, for example, government contracts, such as licensing agreements.

In addition to the protection granted to inhabitants' rights under Article 14, Article 20 confers foreigners the same civil rights given to the Argentine citizens, such as the right to participate in any given industry, business or profession. Article 16 further complements these provisions by ensuring that all inhabitants receive equal protection under the law.

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29 See Const. Arg. art. 42.
30 A natural monopoly occurs where the cost of producing each additional unit of a good or service is constantly declining with respect to consumer demand; to obtain the lowest production costs for consumers, it is necessary to have anti-competitive markets. See Thomas G. Krattenmaker, Telecommunications Law and Policy 344-345 (1998). In other words, a natural monopoly arises with certain industries, such as water and telecommunications, as a result of the nature of the infrastructure whereby only one company can develop the public services in a given area. This natural monopoly lasts only as long as the technological limitations prevent the given industry from being operated in a free market context or if no ready market substitutes exist.
31 See Const. Arg. art. 42.
32 See id.
33 Civil rights are distinguished from political rights to the extent that the former are constitutional protected natural and personal rights whereas the latter refers to the rights to participate in government. See 1 German J. Bidart Campos, Manuel De La Constitución Reformada, 476-488 (1998).
34 See Const. Arg. art. 20.
35 See Const. Arg. art. 16.
Article 75, Section 18 provides that foreign investment must be encouraged, to which end Congress is allowed to grant the privilege of a temporary monopoly under extraordinary circumstances.36

(b) Issues Arising from Applying Relevant Constitutional Provisions to the Liberalization of the Telecommunications Industry

The framework of the Argentine Constitution generally supports a free market economy. Application of many constitutional provisions reveals that Argentina should liberalize its telecommunications industry. The rights of consumers protected by Article 42 imply that open competition within markets is a constitutional requirement in Argentina, otherwise consumers will be denied the freedom of choice that only competition can ensure.37 Article 14 grants inhabitants the right to pursue a profession in any industry. Also, inhabitants have the right to participate in commercial activities and use, sell or donate property in this pursuit. This article, which has not been amended since its creation in 1853, implies that the framers of the constitution favored a free market economy. Moreover, the absence of a constitutional amendment concerning this article demonstrates the continued support for a market-oriented economy. The purpose of Article 16 is to extend equal protection of the law to all inhabitants, which in effect prohibits the government from unduly discriminating in favor of one individual or entity over another by granting rights to one group and not another. As a result, potential competitors should be allowed to participate in the telecommunications industry without the government passing discriminatory legislation in favor of existing competitors. Indirectly, the equal protection principles provided under Article 16 are reaffirmed in Article 20 for foreigners. Thus, under Article 20, foreigners should be protected from discriminatory legislation that restricts their access to the telecommunications market as well.

The aforementioned articles of the Argentine Constitution establish a flexible legal framework to support a free market economy in which competitors can enter the telecommunications industry for basic services. It is per se unconstitutional for the state to grant monopolies in any industry unless the monopoly is temporary and adequately regulated pursuant to Article 42. Subsection 1 examines the telecommunications industry in 1990 and 1997 to determine if an extraordinary situation existed to justify granting of the duopoly or subsequent extension. Subsection 2 analyzes the unconstitutionality of not permitting citizen participation in the privatization process.

36See Const. Arg. art. 75 sec. 18.
(1) An Extraordinary Situation Existed in 1990 Justifying the Granting of a Duopoly but not in 1997

An examination of economic and political reasons assists the analysis as to whether the duopoly granted in 1990 and 1997 were reasonable under Article 75, Section 18 of the Constitution. In 1990, the telecommunications industry was extremely under-developed, lacking adequate infrastructure and up-to-date technology. As a result, the government believed that a guarantee of some form of a monopoly was needed during the early stages of development in order to attract foreign companies to invest capital into the infrastructure of the telecommunications industry. Thus, the government’s grant of a duopoly was arguably reasonable due to the outdated technology, the overall abysmal quality of the telecommunications and, since the government limited the duopoly to seven years, the satisfaction of the constitutional requirement of a temporary monopoly under Article 75, Section 18.

By contrast, the rationale explaining the extraordinary condition in 1990 was no longer applicable in 1997. The telecommunications industry was sufficiently developed and could have kept up with the rapid technological changes in the industry by allowing regional and world competitors to enter the market. In fact, the technology available in the telecommunications market was comparable to the similar markets in developed countries. As a result, whereas in 1990 foreign investors were wary of the Argentine telecommunications market, many companies were interested in 1997. Therefore, the rationale for creating a duopoly in 1990 no longer applied since no inducement was necessary to attract competitors to the Argentine telecommunications market seven years later.

Although the lack of technology and infrastructure no longer justified the granting of a duopoly, other factors may have warranted a continuation of the duopoly as an extraordinary condition. The additional analysis necessary to determine if an extraordinary situation existed in 1997 focuses on the interpretation of the extension terms of the concession agreements and responses from other governmental agencies and telephone service users. This subsequent analysis demonstrates that an extraordinary condition did not exist in 1997.

First, the terms of the concession agreements gave the government the option to grant the extension only if obligatory goals were met; the extension was not an automatic right. In Decree No. 264/98, the government concluded that Telecom and Telefónica only satisfied a majority of the obligatory goals. Did completion of most of the obligatory goals comply with terms of the concession agreement? The language of Section 10.1.8.1

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38 See Telecommunications Environment Since 1989, supra note 2.
of Decree No. 62/90 is ambiguous as to whether all or a majority of the obligatory goals must be met to qualify for an extension. To resolve this statutory ambiguity, Argentine jurisprudence advances a method of interpretation which disfavors the party granted the monopoly privilege. In other words, the government's argument that meeting a majority of the obligatory factors qualifies Telecom and Telefónica fails because the statutory language of 62/90 is ambiguous and must be interpreted in a manner that promotes a free market system in lieu of a monopoly.

Second, since granting the extension was not mandatory, the government had other interpretative options. Judges, consumer associations and governmental agencies, such as the public defender, strongly believed that the requirements were not achieved by the telephone companies. Assuming that the objective of the constitution is to protect principles of consumers' rights, the free market, and competition, what better evidence exists that the government acted incorrectly than the fact that all the consumer associations were fighting against the government and principal competitors, such as IMPSAT S.A., were seeking judicial action to enter the market? As discussed in the next section, numerous administrative problems occurred since the government made a rushed decision and did not act with the necessary transparencies, such as holding public hearings. In total, because Article 75 Section 18 of the Constitution mandates that granting a monopoly must only occur under extraordinary circumstances, the 1997 extension appears to be unreasonable.

(2) The Regulatory Framework Violates the Constitution by not Requiring the Inclusion of Consumer Groups in the Decision-Making Process

Not only does the constitution require the opening of the telecommunications market, but the regulatory structure used by the government to oversee the current telecommunications duopoly has also been viewed as unconstitutional. The regulatory framework that controls the competitors in the telecommunications industry in Argentina is enforced by numerous government decrees establishing regulatory bodies. In 1990, Decree No. 1185/90 established a government agency called the National Communications Commission (“CNC”), which possesses regulatory power over the entire telecommunications industry except for radio broadcasting. The CNC’s primary regulatory function consisted of issuing licenses, authoriza-

40“Dock Sud” CSJN 155 Fallos 12, 468 (1929) (Arg.).
42See Dromi, supra note 5, at 81.
43See Decree No. 1185/90, June 28, 1990, B.O. 28/06/90.
44See Villegas Areval & Spjut, supra note 19, at 81.
tions and permits to facilitate telecommunications services.\textsuperscript{45} In addition, the CNC monitors the telecommunications service, approves important technical plans and reviews the annual work plans of the licensees to ensure compliance with mandatory goals.\textsuperscript{46}

A major limitation of the position of the Secretary of Communications and CNC, however, is their dependence on the government. The Secretary of Telecommunications, responsible for creating the CNC enforced telecommunications policy, is a position appointed by the President of Argentina.\textsuperscript{47} Similarly, the President also appoints the six members of the CNC.\textsuperscript{48} This lack of autonomy in the regulatory enforcement body creates a framework susceptible to pressure from the President.\textsuperscript{49}

Moreover, legal scholars and recent case law argue that this regulatory structure is unconstitutional. Article 42 of the Argentine Constitution states that regulatory bodies must have some participation by consumer associations.\textsuperscript{50} Agustín Gordillo, an Argentine legal scholar and authority on administrative law in Argentina, explains that there is a political and legal necessity to hear the concerns from the public prior to making decisions which affect consumers or the community.\textsuperscript{51} Some legal scholars interpret this as a constitutional requirement that a regulatory body have direct consumer participation.\textsuperscript{52} Under this view, since the structure of the CNC does not include this communication and interaction from consumers, it is unconstitutional. Other legal commentators, however, believe that the consumer participation requirement is met by merely holding public hearings.\textsuperscript{53} Nevertheless, even under the more lenient interpretation, the CNC, by failing to make public hearings mandatory, has not upheld its constitutional duties. Such an issue arose when the CNC undertook a review of whether

\textsuperscript{45}See id. A company may not provide any type of telecommunications services without first obtaining a license from the CNT. Furthermore, the CNT has the power to change the term of a license in order to adapt to changing market conditions.

\textsuperscript{46}COMISIÓN NACIONAL DE TELECOMUNICACIONES, PRIVATIZACIONES Y TRANSFORMACIÓN DE LAS TELECOMUNICACIONES, 14 (1994) [hereinafter PRIVATIZACIONES Y TRANSFORMACIÓN].

\textsuperscript{47}See CICERO, supra note 37, at 80.

\textsuperscript{48}PRIVATIZACIONES Y TRANSFORMACIÓN, supra note 41, at 13.

\textsuperscript{49}See CICERO, supra note 37, at 82.

\textsuperscript{50}See CONST. ARG. art. 42. Consumer associations are created to protect consumer interests. Some major goals of consumer associations are the following: to oversee compliance laws, decrees, and regulations of enforcement authorities, to propose actions to protect consumer interests, to defend consumers against enforcement agencies, private groups or in court, and to inform consumers concerning relevant market information. B. DAVID JAFFE & G. ROBERT VAUGHN, SOUTH AMERICAN CONSUMER PROTECTION LAWS 23 (1996).

\textsuperscript{51}AGUSTÍN GORDILLO, 2 TRATADO DE DERECHO ADMINISTRATIVO, ch. 10 at 3 (2d ed.).

\textsuperscript{52}See generally JORGE LUIS SALOMONI, TEORÍA GENERAL DE LOS SERVICIOS PÚBLICOS 400 (Villela, ed. 1999).

\textsuperscript{53}See GORDILLO, supra note 51.
Telecom and Telefónica had fulfilled requirements for a three year extension of their duopoly.

2. Argentine Legislation, Resolutions, Decrees and Case Law Governing the Liberalization of the Telecommunications Industry

Aside from the constitutional provisions espousing the promotion of competitive industries, the Argentine Congress passed a number of laws governing the telecommunications industry. Law No. 19.798 enacted in 1972 ("Telecommunications Law"), the State Reform Act and subsequent decrees have contributed to the process of liberalization by facilitating the transition from a protectionist to a competitive telecommunications industry. The passage of the State Reform Act in 1989 started the government's transition to a free market system. This law authorized the privatization of ENTeL and was immediately followed by Decree No. 731/89 and modified by Decree No. 59/90 to establish the general guidelines for the privatization process.

On a more recent level, Decree No. 264/98 established a transitional plan for the liberalization of the telecommunications services governing the November 1997 to 2000 time period. Then, following the completion of the exclusivity extensions, Law No. 25.000 and Resolution No. 16.200 set forth established rules regulating a liberalized market after November 2000.

(a) Telecommunications Legislation Regulating the November 1997 - 2000 Time Period

On March 1998, the President issued Decree No. 264/98, ostensibly in an attempt to liberalize the telecommunications market at the end of the exclusivity period. The effect of the decree, however, was to extend the pre-existing duopoly. Even though obligatory goals were not met under the concession agreement, President Menem justified the granting of the extensions since a majority of the goals were accomplished. Despite complaints from various consumer associations and individuals regarding the extensions of the exclusive licenses, Menem proceeded to enact this decree

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54 Article 4 of the Telecommunications Law No. 19.798 of 1972 establishes that it is a Federal Executive Power to grant licenses to third parties, (different than state-run parties) with a precarious status, to install and provide telecommunications services. See Law No. 19.798, Aug. 23, 1972, B.O. 23/8/72.
56 See Decree No. 59/90, Jan. 1, 1990, B.O. 26800.
57 PRIVATIZACIONES Y TRANSFORMACIN, supra note 46, at 9.
58 See Law No. 25.000, July 27, 1998, B.O. 7/27/98. Law No. 25.000 incorporates into Argentine law the fourth protocol annex to the General Agreement on Trade of Services.
60 See Decree No. 264/98, supra note 28.
even though an important case at the appellate federal court level, *Martín Youssefian v. Secretaría de Comunicaciones*, which could significantly undermine the validity of the decree, was still pending.  
If one assumes that the exclusivity extensions were legitimately granted, Decree No. 264/98 is a positive step towards the liberalization of the telecommunications industry. However, shortcomings in the language of the decree serve to heighten rather than remove barriers to entry. The strength of Decree No. 264/98 is that it provides a transition plan for the liberalization of the telecommunications industry during November 1997 to 2000. Article 1 of Decree No. 264/98 declares that licenses shall be granted in the telecommunications industry for basic telephone services beginning on November 8, 1999. Article 5 and 6 set forth the license requirements for basic phone telecommunications services. Licenses will be granted to two new operators for local, long distance and international telecommunications services by November 8, 1999. Thus, a general and fairly comprehensive framework is established to grant competitors the licenses required to compete in the market in November 2000.  
The goal to liberalize the telecommunications market by allowing competitors access to the market fails, however, because of various restrictive provisions in Decree No. 264/98. For instance, Article 5 states various requirements that limit the scope of potential operators, such as the condition that new licensees must be corporations "whose shareholders must include a current operator of mobile tele[communications] services, a cable TV company operating in the major cities of Argentina and Independent Operators of telephone services, a.k.a. the 'telephone cooperatives.'" As a result, the language of Decree No. 264/98 is under-inclusive. CTI and Movicom are the only new companies that qualify for the licenses. Evidence of the continuance of a protectionist policy is confirmed by many potential competitors that filed suit against the government challenging Decree No. 264/98. For example, IMPSAT S.A., a potential competitor for basic telecommunications services, filed suit against the Argentine government requesting an executive order to repeal Decree No. 264/98 since it was denied market entry. Keytech, S.A., another possible competitor filed a complaint about the governmental barriers to entry imposed by Decree No.
264/98, reinforcing the argument that the government has hedged its liberalization goal by including protectionist provisions.

In addition to limiting access to the field of potential competitors, the restrictions of Decree No. 264/98 also violate Articles 14 and 16 of the Argentine Constitution. Contravening Article 14, competitors are inhabitants of the country and are being denied the right to participate in the telecommunications industry. In violation of Article 16, potential competitors are not given equal protection under law because the restrictive terms create barriers to market entry. Thus, the aforementioned constitutional violations are compelling evidence that prove that certain provisions of Decree No. 264/98 are unduly restrictive and that the government supports a partially protectionist telecommunications policy.

(b) Case Law Analysis Revealing Protectionism in the Telecommunications Policy

(1) Description of the Youssefian case

Despite government claims to the contrary, an overview of the procedural history of the Youssefian case reveals the government’s protectionist policy regarding the liberalization of the telecommunications industry. At both a trial and appellate court level, Youssefian, a user of telephone services, requested a public hearing because the government planned to make a decision significantly impacting consumers social welfare regarding a national public service. The main issue was whether the government was required to hold a public hearing prior to granting an extension of the exclusivity Licenses for Basic Telephone Services. The appellate court used the equitable remedy of a preliminary injunction to stop the government from granting the exclusivity extension until the substantive issue of the case could be resolved. In the final ruling, one trial court judge and three appellate court judges ruled unanimously in favor of the consumer, holding that the government must have some form of consumer participation, such as a public hearing, prior to granting the exclusivity extension. The appellate court reasoned that the Secretary of Communications breached its legal duty to hold a public hearing to discuss the possible extension of the exclusivity period. The court found two sources of authority...
for its ruling. First, the legal requirement to hold public hearings in the telecommunications industry is mandated by Article 30 of Decree No. 1185/90. In addition, the court relied upon article 42 of the Constitution, which provides that entities regulating public services require consumer participation.\footnote{"Youssefian," CNFed. 178 E.D. 793 (1998) (Arg.).} Despite the appellate court ruling on June 23, 1998, the government appealed the decision to the Supreme Court and the case has not yet been decided as of January, 2000.

(2) Protectionist Implications from Decree No. 264/98 and the Youssefian case

The provisions of Decree No. 264/98 demonstrate the strategic tactics of the government to refrain from complete liberalization of the telecommunications industry. According to Article 23, Decree No. 264/98 is effective, however, to the resolution of the Youssefian case and the “procedural impediments” (which means equitable remedies such as injunctions).\footnote{See Decree No. 264/98, supra note 28 art. 23.} In effect, Article 23 permits the President to issue a decree which sets up the conditions liberalizing the telecommunications industry during the exclusivity extension period and implicitly endorses the validity of the exclusivity extensions since licenses for basic services were not granted until October-November 1999. One may argue that the government was not acting in a protectionist manner but was attempting to reach a compromise between the consumer’s goals and Telecom and Telefónica by reducing the exclusivity extension from three years granted by Decree No. 62/90 to two years under Decree No. 264/98. This argument fails since Resolution No. 16.200/99 restricts new licensees from entering the market until November 8, 2000, so in effect the exclusivity extension is not shortened.\footnote{See Resolution No. 16.200, supra note 59 art. 3.} Even if the eventual outcome of the Youssefian case supercedes Decree No. 264/98, the government’s strategy to prolong the duopoly becomes effective because the longer it takes the Supreme Court to adjudicate the case, the longer competitors are prevented from entering the market. Even if the Youssefian case is heard tomorrow, January 29, 2000, and ruled in favor of the consumer and the extensions are determined to be invalid, Telecom and Telefónica still benefited from the duopoly for an additional two years. Thus, the government’s protectionist strategy is realized through conditions set forth in Decree No. 264/98.

In addition to the terms of Decree No. 264/98, the procedural history of the Youssefian case reflects the reluctance of the government to allow competitors to enter the market at the end of the exclusivity period. Despite the courts’ valid holding and reasoning, the government selected a procedural maneuver by appealing two times so that the cases would not become
binding, meaning that the case would not supercede the validity of the Decree No. 264/98. That the government’s appeal from the appellate courts decision on June 23, 1998 has not been heard as of January 2000 is perhaps not surprising. Whereas Administrative Law Appellate Court N. 4 is recognized as being one of the most independent administrative law courts in the country, the Supreme Court appears more susceptible to political pressure since Menem appointed all of the justices. Thus, the government’s goal of freezing the case has been accomplished because the Supreme Court has not begun any hearings since the appeal, over one and a half years ago.

The delay in hearing the case is beneficial to the government for two reasons. First, administrative law declares acts invalid which do not adhere to the prescribed administrative procedure or laws. In other words, a monopoly extension for which the government does not follow its administrative procedural requirements (i.e. holding public hearings) demands a return to a free market system. Applying this concept, the act of the government granting the extension to Telecom and Telefónica becomes null and void if the Supreme Court holds that the government did not meet its constitutional obligation of incorporating consumer participation in the decision-making process. As a result, the government benefits by delaying the case and prolonging the duopoly in case the extension is determined to be inoperative. Second, if the Supreme Court postpones the adjudication of the case, the issue in the case will become moot in less than ten months since the exclusivity extension period will end November 2000. Once again, the government has prolonged the extension despite its constitutional violations. Thus, the government strategically chose to appeal the legally valid and binding case in hopes of avoiding its constitutional obligation of having consumer participation prior to the granting of the exclusivity extension.

In conclusion, the government purposely granted the extensions in lieu of conducting the extension analysis under more transparent procedures, such as by holding a public hearing. Furthermore, the strategies implemented in the Youssefian case reveal and the provisions of Decree No. 264/98 demonstrate that the government had an opportunity to accelerate the liberalization process in 1997 and failed to do so. As consumer participation, such as public hearings was not considered on this issue, the granting of the extension was illegal under this interpretation of article 42.

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74 See generally HORACIO VERBITSKY, HACER LA CORTE (1993).
75 See GORDILLO, supra note 51, at 2 fn.1-2.
76 See id. at ch. 6, p. 8.
77 The underlying rationale for this constitutional guaranty is to protect consumer rights so that their interests are considered and evaluated prior to the government deciding significant issues which significantly impact social conditions, as in the telecommunications industry. See GORDILLO, supra note 51.
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(c) The Guidelines Set Forth in a Resolution Undermine the Recent Legislation Promising Full Liberalization

In contrast to the disappointing government protectionist policies in 1997, more recent legislation affecting the telecommunications market in the year 2000 and beyond appears somewhat more promising. On July 22, 1998, the Argentine government passed Law No. 25.000, whereby Argentina promises to take specified measures to open the telecommunications services to competition. As a whole, Law No. 25.000 vows not to impose barriers to entry on access to the market and national long-distance service among other things. Though it remains to be seen if the government will enforce Law No. 25.000, it appears to be a reasonable attempt to liberalize the telecommunications market in most areas.

In executing a liberalized telecommunications policy, the Secretary of Communications issued Resolution No. 16.200/99, which describes specific guidelines for new entrants in the telecommunications industry beginning November 8, 2000, thereby implementing several laws, including Law No. 25.000. Resolution No. 16.200/99 imposes obstacles, thus dampening enthusiasm for the recent legislation. A potential competitor must meet certain conditions and requirements listed in Article 6 of Resolution No. 16.200 in order to obtain a license. For example, a competitor is required to have net assets greater than US$100,000,000 to obtain a general license, a foreign competitor must include capital from a local Argentine partner that has a direct or indirect holding of at least 10 percent and "the obligation to sign an agreement with the State of Argentina." These conditions impose entry obstacles for some potential competitors and new entrants.

In addition to being disappointingly protectionist, the requirements in Article 6 of Resolution No. 16.200 appear to violate Argentina's commitments to the World Trade Organization ("WTO") and Argentine laws meant to defend and attract foreign investors. Violations of international agreements are serious because they constitute violations of both international and domestic law. The Argentine Parliament specifically passed two laws enacting international commitments made to the WTO into national laws. First, on a general level, Law No. 25.000 states that the access to the market for local, long distance, national and international services will be unrestricted as of November 8, 2000. It is important to note that Law No. 21.382 specifically contradicts some of the conditions required in Article 6 of Resolution No. 16.200 since it states that foreign companies do not

78 See Law No. 25.000, supra note 58. See also Chaumeil, supra note 15, at 166.
79 See supra note 74.
80 See Resolution No. 16.200, supra note 59 art. 5.
81 See Chaumeil, supra note 16, at 177.
82 See id. at 178.
have an obligation to seek capital from and a partnership with a local Argentine party. Second, pursuant to Law No. 24.425, Argentina approved the Final Act of the Uruguay Round Agreements which incorporate the WTO's undertaking of activities, such as multilateral commercial negotiations, decisions, declarations, ministerial understandings and the Marrakesh agreement. Under Law No. 24.425, Argentina specifically committed to the WTO to prohibit restrictions on the access to the telecommunications services market and its local treatment. This specific commitment, which became Argentine national law, requires liberalization of the telecommunications industry. Thus, Law No. 24.425 also contradicts the entry guidelines imposed by Article 6 of Resolution No. 16.200.

The 1994 amendment to the Constitution established the supremacy of treaties to national laws or resolutions in Article 75, Section 2. Thus, the supremacy clause preempts the National Congress or any governmental province from implementing laws or resolutions that contradict the text or intent of a treaty. As a result, Resolution No. 16.200 is invalid since, in addition to Law No. 21.382, it violates Argentina's commitments to the WTO to allow competitors open access to the telecommunications market for basic services free of any government imposed barriers. In an effort to promote foreign capital, the Congress passed Law No. 21.382, which regulates foreign investments in Argentina, stating that foreign companies are not subject to any requirement to opening up a business with a local partner. This law provides that foreign and local investments receive the same protection.

In sum, Argentina has made progress by enacting legislation regulating the liberalization of the telecommunications industry as of November 2000. Nevertheless, it is too early to determine if Argentina will abide by its domestic and international legal commitments to liberalization. On the positive end, as of December 12, 1999, the government has granted nine licenses for Local Basic Telephone Services to nine different companies, allowing the companies to officially enter the market and compete as of August 11, 2000. Despite these new licenses, Argentina has repeatedly

84 See Law No. 24.425, Jan. 5, 1995, B.O. 05/01/95.
85 See Dromi, supra note 5, at 168.
86 See Chaumeil, supra note 16, at 178.
87 See Const. Arg. art. 31.
88 A related issue regarding the discussion of preemption is whether since all privatizations are carried out pursuant to provincial laws, the adoption of clauses in contradicting a treaty would be preempted. See Dromi, supra note 5, at 81.
89 See Chaumeil, supra note 16, at 178.
90 See id.
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missed opportunities to effectively open the market and continue some level of protectionism. Resolution No. 16.2000 highlights this point since, instead of truly opening the door to all competitors on a non-discriminatory basis, the legislation creates burdensome obstacles for foreigners to penetrate the local Argentine telecommunications market.

III. POLICY REASONS ARGENTINA MUST LIBERALIZE ITS TELECOMMUNICATIONS INDUSTRY

This Part explores the policy reasons that the Argentine government should liberalize its telecommunications industry. Subpart A analyzes Argentina's strong economic incentive to promote activities that lead to the growth and development of the country, including trade with foreign countries. Argentina has an economic interest in pursuing a liberalization policy since such a policy facilitates the advancement of the telecommunications industry and creates positive externalities to other industries. Subpart B presents Argentina's political commitments to international organizations to support, on varying levels, the implementation and effectuation of a free market system, especially in traditionally protected areas such as telecommunications. This Part concludes that Argentina must liberalize its telecommunications industry in order to maximize opportunities for economic growth and development.

A. Liberalization of the Telecommunications Industry is Critical to the Economic Development and Growth of Argentina

A number of economic benefits are achieved through the liberalization of the telecommunications industry. First, liberalization leads to the development of services, infrastructure and technology within the telecommunications industry and enables Argentina to remain competitive in the international marketplace. Second, liberalization of the telecommunications industry fosters the growth and expansion of other industries and overall economic development in Argentina. Third, liberalization of the telecommunications industry will positively impact the development of international trade and economic growth in Argentina and the Mercosur region.

First, liberalization leads to a well-developed telecommunications industry. The theory of trade liberalization postulates that the environment

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92 See Stephen Miller & David Hudson, Communications Technologies and Their Implications for Latin America, in BANK OF AMERICA'S GUIDE TO TELECOMMUNICATIONS IN LATIN AMERICA 21, 37 (1997).


94 See id.

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created by exposing domestic firms to international competitors will serve
to induce lower prices and prompt higher quality goods and services.95  Applying
this theory on an industry specific basis, telecommunications liberal-
ization becomes a conduit for growth since it fosters increased
competition resulting in advanced technology, better services and greater
infrastructures.96  This expansion is explained in part by the idea that greater
information will be acquired as communication between companies im-
proves, thereby facilitating the development of business opportunities.

Statistical evidence demonstrates the benefits of liberalization achieved
in the telecommunications industry.  The development of the telecommu-
nications infrastructure has greatly expanded considering that Argentina’s
capital investments for basic telephone services increased from US$371
million in 1992 to US$2,445 million in 1995.97  A specific indicator re-
fecting the development of the telecommunications industry infrastructure
is the number of telephone lines installed.  In 1991, Telecom and Telefónica
installed a total of 241,393 new lines.98  By contrast, both companies added
727,271 new lines in 1995, representing a per annum increase of 40 per-
cent.99  Also, from 1983 to 1998, the telecommunications market for new
products and services multiplied seven times.100  Finally, the average num-
ber of days to fix a telephone line improved significantly.  A telephone user
of Telecom had to wait an average of 30 days in 1990, compared to three
days in 1996; similarly, a consumer of Telefónica waited an average of 16
days in 1990, compared to just a single day in 1994.101  As a whole, these
statistics reflect the improved services and infrastructure achieved as a re-
sult of liberalization.  A developing country, such as Argentina, should
avoid the problem of having a technologically deficient industry, a serious
problem endured throughout Argentina’s history.  To avoid these problems
of the past, Argentina’s liberalization program thus enables its telecommu-
nications industry to keep pace with the rapid technological advancements
achieved by competitors in the global marketplace.102  Thus, an open market
strategy continues to provide Argentina access to the almost daily techno-
logical advancements made in the telecommunications industry.

95 See Tavares de Araujo & Tineo, supra note 4, at 46.
96 See Richard Simonson, Telecommunications in Latin America, in BANK OF AMERICA’S
GUIDE TO TELECOMMUNICATIONS IN LATIN AMERICA 3 (1997).
97 See Michael Flight, Argentina — Telecommunications Value Added Services, 1997
NATIONAL TRADE BANK MARKET REPORTS, Apr. 1997, at 1, 13.
98 See COMISIÓN NACIONAL DE COMUNICACIONES, DATOS OPERATIVOS Y ESTADÍSTICOS, at
99 See id.
100 See Evolution of the Telecommunications Market (visited Nov. 1, 1998)
101 DATOS OPERATIVOS Y ESTADÍSTICOS, supra note 98, at 34.
102 See Key Risk Factors: Credit Assessment, in BANK OF AMERICA’S GUIDE TO
TELECOMMUNICATIONS IN LATIN AMERICA 47, 50 (1997).
Second, the liberalization of the Argentine telecommunications industry leads to the growth and expansion of other industries and is a fundamental component of a country's overall economic development. The modernization and development of the telecommunications industry produces positive externalities by supporting the growth of other industries; this phenomenon occurs since telecommunications is an essential vehicle contributing to the birth and expansion of other industries. On a national level, economic growth is impeded and investment by governmental and private sector is disadvantaged without access to modern telecommunications technology. Advanced communication systems and competitive telecommunications costs facilitate the creation of new businesses. As a result of this recommended liberalization, the monetary investment in this telecommunications industry will support the technological advancement and infrastructure of the telecommunications industry.

Third, telecommunications liberalization leads to decreased communications costs which in turn leads to increased cross-border trade for Argentina between Mercosur members and Chile. The rationale is that the development of communication links between neighboring countries promotes an increase in cross-border trade. An extensive international communication system will probably only be established if the costs are low enough to justify such actions. One important factor facilitating international trade is the close proximity of bordering countries helping to maintain relatively low costs for cross-border transactions. However, proximity alone will not maximize a reduction in telecommunications costs. Rather, an open market in the telecommunications industry will also assist the reductions in costs.

Another benefit from a telecommunications policy of liberalization is the transfer of information, which may also lead to increased trade. Regional development depends on the inexpensive communication costs to facilitate the exchange of information. Greater investment in telecommunications infrastructure and lower costs for companies to gain

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104 See Communications in Mercosur Inexorable Advancement of Successful Advancement, Argentine, Sept. 1998, at 18. See also Dromi, supra note 5, at 167.
106 See id. at 6.
107 See id.
108 The goal for companies is to keep telecommunications costs at about 4 percent of total operating costs, resulting in exporting companies establishing more communications links with neighboring countries. See id.
109 See id.
access to this infrastructure will lead to more growth in the bilateral trade.\textsuperscript{110} A developed telecommunications industry supports the inter-regional trade of goods and services and, thus, promotes regional integration and growth.\textsuperscript{111} Thus, as bordering countries’ communication costs decrease, so will the barriers preventing or discouraging the exchange of goods, services, and information, thereby facilitating cross-border trade.\textsuperscript{112}

B. Argentina’s International Commitments to World Organizations Support the Liberalization of its Telecommunications Industry

For policy reasons, Argentina must abide by its international commitments to remove the obstacles and barriers to entry in its telecommunications industry. Argentina should honor its international commitments to the WTO\textsuperscript{113} and the International Telecommunications Union (“ITU”)\textsuperscript{114} to improve Argentina’s credibility and integrity as a country that follows through on its commitments. Otherwise, a pattern of dishonoring international commitments may weaken Argentina’s credibility in the international arena and may jeopardize business opportunities and economic growth, in addition to violating domestic legal obligations to follow through on its international commitments to these organizations. Thus, it is in Argentina’s interest to abide by its international commitment since international investors are more apt to invest in a country and region that is in the process of establishing a well-developed and liberalized telecommunications industry.

Upholding one’s international commitments is extremely important since it increases investor confidence, improves foreign direct investment and distinguishes Argentina from other Latin American

\textsuperscript{110} This increased trade with bordering countries is evidenced by the rate of growth of international traffic between the Mercosur members which has risen from 10 percent during 1990-1992 to 25 percent during 1992-1994. \textit{See} Tarjanne, \textit{supra} note 93.

\textsuperscript{111} \textit{See} Chasia, \textit{supra} note 96.

\textsuperscript{112} \textit{See id.}

\textsuperscript{113} The WTO is a judicial entity whereby its members conferred this regulatory power pursuant to the Marrakesh Agreement. \textit{See} Dromi, \textit{supra} note 18, at 166. The WTO’s goals are to promote fair trade through regulation, encourage freer trade by the lowering of trade barriers and to eliminate anti-competitive practices. These goals are established in conjunction with the World Bank, and are intended to achieve clear and coherent political and economic policies on a worldwide basis. \textit{See id.}

\textsuperscript{114} The ITU is the preeminent body for regulating the international telecommunications industry. It is, in fact, the only organization with a “mandate to oversee global telecommunications.” Alexandra M. Field, \textit{INTELSAT at a Crossroads; International Telecommunications Satellite Organization}, \textit{25 LAW & POL’Y OF INT’L BUS.} \textit{1335, 1337} (1994). The ITU is a “specialized agency of the United Nations whose members are national governments.” \textit{Id. See also} Dromi, \textit{supra} note 5, at 168. The ITU’s mission is to promote the mobilization of human and financial capital in order to develop the infrastructure and technology of the world-wide telecommunications industry. \textit{Id.} at 170.
countries that do not respect international obligations. Argentina presented the WTO with a list of commitments to develop and deregulate its telecommunications industry. Moreover, Argentina promised to allow competitors open access to the telecommunications market for basic services as of November 2000, so any anti-competitive measures would serve to violate this commitment on a broad level. Argentina's international pledge sent and continues to provide a strong signal to the world regarding its commitment to the development of the telecommunications industry, striving for the highest quality service at the most efficient prices. In addition, Argentina has made commitments to the ITU to follow their standards of free competition in the telecommunications industry for basic services and technological recommendations.

In sum, honoring these commitments to liberalize the telecommunications industry will aid Argentina for important economic policy reasons. Argentina will be able to build stable relationships with foreign countries that will support the inflow of capital, which in turn will lead to further strengthening of foreign relations and even greater capital inflows as Argentina earns international respect as a nation committed to free trade.

IV. RECOMMENDATIONS

Argentina should create, and most importantly enforce, a concrete plan to deregulate the telecommunications industry for basic services. Although, Telecom and Telefónica's exclusive licenses expire in November 2000, Argentina must still enact competitive safeguards and legislation to assure the international business community that the telecommunications industry will indeed be deregulated. A more detailed plan should be created explaining the specific steps in deregulating the telecommunications industry and minimizing barriers to entry for competitors. The following three recommendations outline several actions that the Argentine government should take in order to develop the telecommunications industry, promote competition and increase foreign direct investment.

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117 Competitive safeguards are measures implemented to prevent "employment of non-competitive practices, such as cross-subsidization, the use of information for non-competitive practice ends or suppression of information, among other factors." See Argentina Vows Commitment to Basic Telecommunications, ARGENTIME, Sept. 1998, at 19.
A. The National Communications Commission Should Be An Independently Run Agency With the Autonomy To Regulate The Telecommunications Industry

The objectives of Argentine regulatory agencies are to ensure competition in markets and regulate the activities of government-sanctioned monopolies. Regulatory authorities accomplish these objectives by protecting consumer rights, monitoring the performance of contractual obligations and regulatory guidelines, promoting the expansion of industries and increasing the number of consumers, and controlling the quality of services. Accomplishing these goals, in turn, promotes and assists the development of a competitive environment in the telecommunications industry. However, it is highly unlikely that these objectives can be attained without the CNC being autonomous. In other words, to operate effectively and efficiently, the CNC must run as an independent agency, protected against direct influences of the executive branch and the companies it regulates.

First, the CNC must be independent from political influences. The legitimacy of the regulatory entity is jeopardized if it receives orders or direction regarding its functions from outside political forces. To prevent outside influence, financial funding must be guaranteed separate from the decisions or actions of the regulatory body. Second, the regulatory body must be isolated from pressures exerted by the companies it regulates. To realize this goal, professionals selected to fill the positions of the CNC must have the requisite knowledge, technical understanding and independence from political parties and private entities. The selection process must be transparent to avoid the dangers of appointing friends of the President who are more likely to lend political favors and support. In addition, mechanisms must be in place to incorporate consumer participation in the selection process.

Regrettably, since the onset of the privatization of the telecommunications industry in 1990, the CNC has been and continues to be susceptible to the undue influence and pressure from the executive branch. The Argentine President appoints the President of the CNC and the five other members of the commission without congressional approval and participation from con-

118 See CICERO, supra note 37, at 76. See generally GORDILLO supra note 47, ch 6 at 12-16.
119 See GORDILLO supra note 51.
120 See id.
121 See id.
122 See id.
123 See id.
124 See id.
The term is for five years with the option of re-appointment for one additional term.

By contrast, in the U.S., the Federal Communications Commission ("FCC"), the equivalent to the Argentina’s CNC, has several mechanisms to preserve the independence of the regulatory body. While the President of the U.S. appoints the five Commissioners of the FCC, the Senate must also confirm these positions. In addition, a maximum of three Commissioners may represent the same political party and none may have a financial interest in FCC related business. Finally, the term of the FCC’s President is limited to a five-year term, except when filling an un-expired term. This structure protects the authenticity of the regulatory entity so that it can perform its essential functions. Argentina should enact similar mechanisms to maintain the independence of the CNC, such as requiring congressional approval of the President and the other members of the CNC.

B. Create a Strong Regional Organization to Develop and Coordinate Liberalized Telecommunications Policy for Argentina and the other Mercosur Members

Argentina should work along with Mercosur members to integrate their telecommunication industries. For various reasons, a country is most easily able to trade with its neighbors due, in part, to reduced transaction costs. As the prestige and power of Mercosur increases, it will in turn look to Argentina to purchase more goods resulting in business and economic development for Argentina. Also, Argentina should develop a strong regional plan with Mercosur because it provides Argentina access to an expanded and growing market representing a population of more than 240 million

\[\text{125}\text{In Argentina, the majority of regulatory bodies lacks independence. Virtually all members of regulatory agencies are appointed by the President. For example, the President appoints: five positions -- along with communications with the previous Congress -- to the Ente Nacional Regulador del Gas, ("ENARGAS"), four positions to the Comisión Nacional de Correos y Telégrafos, ("CNCT"), three positions to the Comisión Nacional de Transporte Ferroviario, ("CNTF"), and three positions to the Comisión Nacional de Transporte de Automotor ("CoNTA"). See CICERO, supra note 36, at 80.}\]


\[\text{127}\text{See id.}\]

\[\text{128}\text{To quantify the importance of the telecommunications industry to the economy of Latin America, the ITU estimated that, as a whole, developing countries in Latin America needed to invest US$466 billion from 1993 to 2000 in order to keep pace with growth projections. See Tarjanne, supra note 93. As business communities and populations in Latin America grow, ITU estimated that Latin America’s percentage of the global market for telecommunication services will increase from 6 percent in 1995 to 10 percent by 2000. See Miller & Hudson, supra note 92, at 21, 37. For Argentina to take advantage of the sizable growth potential of the telecommunications market, the government should liberalize the telecommunications industry to continue to attract foreign capital flows.}\]

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people. Thus, the growth and prestige of the Mercosur region will subsequently lead to economic expansion in Argentina.

Argentina should participate with the other Mercosur members in creating a strong regional organization to establish and coordinate a telecommunications policy that opens regional competition for basic telephone services. This policy will consolidate regional interests and will assist the implementation of international standards and recommendations on a regional and sub-regional basis. Furthermore, coordinated policies at the Mercosur level will enable party members to implement common tariffs and coordinate liberalization plans. Many spill-over benefits should occur from a coordination of telecommunications policies on a regional basis, such as increased cross-border trade and investments. In addition, a coordinated effort between the four Mercosur governments will have a positive impact on the ability for telecommunications companies to coordinate plans, build alliances and create a strong union when negotiating settlement rates with United States providers. The creation of a strong regional organization lends itself well to the coordination of a telecommunications policy among the Mercosur members and will serve to bolster economic and business development to Argentina and the Mercosur region.

C. Enforce Quality and Technological Standards Recommended by International and Domestic Regulatory Bodies

The Argentine government should enforce the quality recommendations and technological standards for the telecommunications industry created by ITU and the CNC. All competitors should have access to transparent procedures that are issued or endorsed by governmental authorities. Transparent procedures provide all the relevant information regarding administrative procedures or other requirements that must be adhered to by the countries within the market. In other words, the standards must be clear and accessible so that current and future market investors can understand and comply with the international and domestic standards and recommendations.

The Argentine government or a government agency should also create a compliance system to check market investors’ adherence to the related international and domestic telecommunications standards. It is critical that all investors within the telecommunications market are regulated on a systematic and periodic basis. Furthermore, in order to create a fair and competitive environment, it is important that all telecommunications

129 See Tarijanne, supra note 93.
130 See id.
131 See Katz & Alexander Dichter, supra note 105, at 1, 10.
132 See id.
133 Telecommunications Symposium, supra note 5, at 975.
participants are required to comply with the same technological and quality standards. If certain market participants are given special exemptions, new market investors will not be able to compete effectively and artificial barriers to entry will deter future competitors from entering the market.

V. CONCLUSION

Argentina has made progress in its attempt to liberalize its telecommunications industry for basic services over the past ten years by privatizing the industry, creating legislation attempting to fully liberalize the market and establishing a regulatory body. Notwithstanding these efforts, Argentina has missed several opportunities to accelerate the opening of a competitive market and in some instances has even taken steps to undermine the liberalization process by preventing or restricting competitors access to the market. In essence, Argentina undermines its stated commitment to liberalization with legislation containing restrictive or discriminatory provisions serving to impose obstacles for competitors to enter the market, thereby delaying the start of a competitive telecommunications market.

By departing from its practices in the past, Argentina has the potential to become a leader in Latin America and take bold steps to fully liberalize its telecommunications industry. Argentina must improve or create new legislation ensuring the complete liberalization of its telecommunications industry and even more importantly, it must consistently uphold its domestic rule of law and honor its international commitments to liberalization.