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Privatization

In the world and in Brazil and some comments on the privatization of Companhia Riograndense de Telecomunicações (CRT) in the State of Rio Grande do Sul.

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I – INTRODUCTION

This paper presents one brief analysis about privatization in the world, in Brazil and about a peculiar situation in the State of Rio Grande do Sul, where this subject has recently emerged.

I intend to do a case study on a privatization lawsuit in RS, with an analysis about CRT's (Companhia Riograndense de Telecomunicações - the State telecommunications company) privatization and about some judicial processes which have taken place involving this subject.

In order to introduce the subject, there is a concept about privatization, from the so-called "Blue Book" ¹:

"Privatization is the transfer to private entities of the shareholding required to control and formulate the business policy of a state-owned company, such as a telecommunications operating company."

¹ "Telecommunication Policies for the Americas (The blue Book)" - Telecommunication Development Bureau (BDT), International Telecommunication Union (ITU), March 1996, p. 13.

II – PRIVATIZATION IN THE WORLD

Privatization is one subject matter current and important all over the world. The wave of privatization started in 1970 and spread globally because seeking of results substituted the socialist ideology.

The first questioning of State intervention became apparent in the 1970's, after the first oil shock, with the deterioration of the macroeconomic condition, the slow-down in output growth and the intense dispute for markets and scarce results between private entrepreneurs and State-owned enterprises.

Old concepts such as the market should be substituted for the State failed and collapsed, because it became clear that the flaws produced by government activities could be worse and cause more damage than the defects of the market.

Privatization seeks to reduce or minimize: low performance in the financial area, in the commercial or in the administrative field, dependence on subsidies and other governmental revenue transfers, the process that places political decisions as a priority where it would be better to have technical criteria to serve for public interests.

Privatization is part of a bigger process that intends to eliminate the practice of economical policies that limit internal and external competition, such as market restrictions and tariff barriers that submit citizens to deal with higher prices and low quality services.

During the 80's around US\$ 250 billions in assets were transferred from the public sector to the private one in many different activities and countries around the world.

England led that process, transferring to the private sector more than US\$ 70 billions in big monopolies in several competing sectors.

The 90's decade showed a privatization volume higher than US\$ 500 billions (value of sale), double of the 80's amount.

Some examples of those privatizations:

- electricity – ENEL, Italian; Endesa, Spanish; National Power, English;

- petroleum enterprises – Elf Aquitaine, French; ENI and AGIP, in Italy; Repsol, in Spain;

- telecommunication companies – France Telecom; STET, Italy; Telefonica, Spain; Deutsche Telekom, Germany; BT, England and Televerket, Sweden.

By the continuity of the privatization progress, other countries have succeeded England and have assumed leadership in this process. In 1992, around US\$ 69 billions had been exchanged throughout privatizations and Germany was the champion, with US\$ 12 billions. All over the world, Eastern European countries (34%), Latin America (26%) and Western European countries (21%) made up more than a 80% of the privatizations.

Privatization results have been considered good. An analysis of the World Bank, published in 1992, has examined the results in twelve privatizations in four countries, from 1984 to 1988, involving aviation companies and telecommunications, seaports and electricity concessionaries. In 11 out of the 12 cases, the results were positive.

World Bank compared the performance of the public enterprises after the privatization to an estimation of what would happen if they still were under governmental authority, isolating the influence of

circumstances that could not be related to those results (general improvement in economics, for example).²

The privatization consequences were that the enterprises became more profitable, 26% in average, than if they were under state management. These results were due to the increase in investments, to higher productivity and to the wage system directly related to the performance of the worker.

In summary, the results were the following: consumers benefited because the market became competitive; the workers increased their productivity and, consequently, their wages; the State income revenues provided investments in important social fields; entrepreneurs made up investments and the obtained results have stimulated them to continue participating in the privatization process.

III – PRIVATIZATION IN BRAZIL

Motivation on privatization in Brazil was a little bit different from what has occurred in England, Germany and Chile. In those countries we can say that the privatization program was oriented

² “Welfare consequences of selling public enterprises”, by Ahmed Galal, Leroy Jones, Pankaj Tandon and Ingo Vogelsand. World Bank, Country Economics Department, Washington DC, June 1992.

by some ideology, under the idea that it is not a role of the State to be the direct provider of the majority of goods and services. It is up to the administration to allocate resources from the taxation to guarantee citizens basic rights.

In Brazil the concept of results (equilibrium in the public revenue) has prevailed in relation to ideology, considering the difficulties for the government to continue to act like a provider, producer and regulator. The State was not able to provide fundamental social rights, such as education, health, justice and public security, because of the enormous public debt.

Some factors have justified the Brazilian program of privatization, which was called Programa Nacional de Desestatização – PND (National Privatization Program), regulated by Law n. 8.031, dated 04-12-90, and by several Decrees, connected to the performance of the governmental structure itself: there are studies saying that Brazilian state-owned enterprises' productivity index were very low when compared to the private industries in the same sector/field. Besides, even with the increasing in investments made up by the government, in a higher volume than the private sector, the production has not increased in the same proportion.

It is possible to say that the government objectives with Privatization Program were to reduce the role of the state in the economy and allocate more resources to social investments. Also, the intention was to reduce the public sector debt, to encourage increased competition and hereby raise the standards and efficiency of Brazilian industry and strengthen the capital markets and promote more widespread share ownership.

Regarding to the way how the privatization program has been settled in Brazil, it is important to mention the following article:

“The possibility of privatization – In the first two years of the Collor administration (1990-91), sensitive sectors such as oil (Petrobrás) and telecommunications (Telebrás) were excluded from the privatization program. They were considered sacred cows not to be touched, lest opposition from nationalists derail the entire liberalization agenda. By early 1992, however, a new attitude appeared to emerge, and the debate of privatization of telecommunications began in some earnest, although political instability slowed down and gave it mute tones.

“Because Brazil’s 1988 Constitution does not allow for outright privatization of public utilities, such as Telebrás and Embratel, a constitutional amendment is required.”³

³ “Telecommunications in Latin America” – Eli M. Noam, New York, Oxford University Press, 1998, p. 241.

Then, in 1995, it was published the Constitutional Amendment n. 08, ending the national telecommunications monopoly. Before that amendment it was up to the federal government to explore telecommunications services and in 1995 it has been allowed exploration of this kind of service through authorization, concession or permission, in the terms of the law.

The General Telecommunications Law came in July 16 1997, Law n. 9.472, and it is interesting to highlight some fundamental principles: substitution of the state monopoly on telecommunication service by a system of broad, general and fair competition, where the state leaves behind the role of entrepreneur and assumes the role of Fiscal and Regulatory Body on telecommunication field.

To fulfill this important paper, on regulation, the Agência Nacional de Telecomunicações (ANATEL) – National Regulatory Agency – was created, as a special organization, with administrative independence, financial autonomy, with no hierarchical subordination, with senior officials appointed for a fixed term and removable prior to the expiration of this term only for a grave fault or serious crime.

Nevertheless, competition in telecommunication services is not a goal in itself. The goal is the satisfaction of the social interest, but competition may lead up to that.

Regarding to competition and public or social interest, as well as adjusted to the ideas and purposes of the Brazilian privatization program, "The Blue Book" expends on these ideas:

"The public/social interest would , in general, be better satisfied by a policy of competition in the provision of telecommunication services. The public will benefit from the possibility of choice, services will be better tailored to demand, prices and conditions of service provision will improve, and the overall economy of the country will reap the benefit of the entire process. Competition may certainly be introduced into the different telecommunication markets to different extents, to be assessed by each country's policy makers and regulators. Available experience shows that different factors have been taken into account by those carrying out such assessments, involving items such as competition policy (especially relating to how the former large monopolies are divided up or consolidated), the future shape of the markets (which is affected by the weight and importance of the various parties involved) or the need to develop the infrastructure." ⁴

However, the great potential of privatization in Brazil is not just the creation of a competitive environment or to reduce

costs and lead up to higher efficiency. It is also the significant decrease of the public debt.

Indeed, the results that have been seen about privatization in Brazil are very positive, concerning principally to the best performance of the privatized enterprises under private administration. It has been realized that the production and turnover have increased, the costs and indebtedness have decreased and several efficiency indicators (such as productivity) have gotten better after privatization. That is the case, for example, of USIMINAS and CSN (Companhia Siderúrgica Nacional).

About telecommunication services, a report by Federal Deputy Renato Johnsson (from PSDB, state of Paraná), mention that privatization of enterprises under Telebrás authority could mean an increase in the income revenue between R\$30,000,000,000,00 and R\$40,000,000,000,00. It could provide, at the same time, faster answers to demands development of the Brazilian telecommunication sector and considerable increase in the number of qualified employment. Thereby, Federal Government will obtain resources to reduce public debt and Brazilian telecommunication sector will be on the same level as developed countries.

⁴ "Telecommunication Policies for the Americas (The blue Book)" - Telecommunication Development Bureau (BDT), International Telecommunication Union (ITU), March 1996, p. 09.

IV – PRIVATIZATION IN RIO GRANDE DO SUL

1. Antônio Brito Government – Movimento Democrático Brasileiro Party (PMDB) – 1995 to 1998

After the Constitutional Amendment n. 08 of 1995, it became possible to have legislation about privatization on the telecommunication field. So, in the State of Rio Grande do Sul we had Law n. 10.607 of December 28th, 1995, that described the State Reform Program, including privatization of public enterprises.

This legislation contains the reasons why the government decided to implement privatizations in the State and could be resumed by the fundamental goals and objectives, which are described in the first article.

Those goals and objectives are:

1. To have a new structure on the exploration of economical activities by the State;
2. To contribute to diminish the State public debt;

3. To allow retaking of investments in the societies and activities that will be transferred to private sector / private initiative;

4. To allow public administration (State Government) to concentrate its efforts in activities where the State presence is needed, to assure social welfare.

It is possible to say that the PMDB party intended to give a different approach to the State economy and administration in relation to what has happened in the past, changing the public administration from a bureaucratic one to a managerial one.

Upon this subject it is interesting to quote Luiz Carlos Bresser Pereira⁵, whose ideas are adjusted to the PMDB's program:

“One of the major reforms the Cardoso administration is committed is the administrative. The basic proposal is to change Brazilian public administration from a bureaucratic administration to a managerial one. The emergence, in the nineteenth century, of a bureaucratic public administration replacing the patrimonialist forms of administering the state represented a great progress. But it did not make sense anymore when the state had added to its role providing public education, public health, public culture,

⁵ “Strategy and structure for a new State”, Revista do Serviço Público, ENAP, Ano 48, n. 1, Jan-Abr 1997, p. 24.

social security, science and technology incentives, infrastructure investments, environment protection. The managerial public administration emerged as an answer to the crisis of the state, as a form of coping with the fiscal crisis, as a strategy of making the administration of the huge services the state took on less expensive and more efficient, as well as a device to protect public patrimony against *rent-seeking* or sheer corruption. The new public administration is outcome and citizen oriented, it assumes that politicians and civil servants are entitled to limited degree of trust: it uses as strategy decentralization and the incentive to creativity and innovation; it controls public managers through the device of a management contracts.”

Regarding these ideas, the Law n. 10.607/95 created a “Fundo de Promoção da Cidadania” (Citizen Promotion Fund), of which inheritance is made by the resources provided from sales of public enterprises, among others income revenues. These resources are going to be used in investments in social areas, education, health, sanitation, public security and infrastructure investments (article 9th).

In the specific case of telecommunications, we had a Law, n. 11.004, of August 19th, 1997, giving authorization to the State Government to sell its full participation in the State Telecommunication Company, CRT.

The process took two stages and the State of Rio Grande do Sul has sold 35% of its participation in the company in the first stage to a consortium of companies: Telefonica International SA, RBS, TASA, CTC and CITICORP.

In the second stage, in June 1998, before privatization of Telebras System (Sistema Telebrás), the State Government has sold 50.12% of its participation in CRT, in an auction sale, for the highest bid. The winning consortium in the privatization was TELEBRASIL SUL Participações S/A, in which participated Telefonica International SA, TELEPARBS, TASA, CTC, BBV, PORTELCOM and IBERDROLA.

The sale value of the transaction reached R\$ 1,176 billions, 26.9% higher than the minimum price stipulated.

A study of FEDERASUL (Entrepreneurial Associations Federation of Rio Grande do Sul), which is about some alternatives to increase tax collection in the long term by the Government without burdening the taxpayers, concluded that the privatization process of the public enterprises should be a great solution.

That study based its conclusions upon the results of CRT's privatization because it has brought benefits to the State as well as to society and the taxpayers. The report says that examples such as the privatization of the telecommunications system provided a significant increase in State revenues. For the society, one of the benefits of the privatization was the decrease in the price of the telephone services.

State revenues have increased with the selling of the CRT's shares and by the increasing of investments in the company. The increase, in fact, was around 20% from 1996 to 1997 and continued in the years that came after, reaching a real growth around 27% in 1999.

To have an idea about the situation in the State, in terms of benefits to the State government reserves, only CRT has collected, from August 1998 an average of R\$ 27,633 millions per month. In comparison, CRT used to collect, from January 1997 to July 1998, before privatization, an average of R\$ 23,625 millions per month.

Only in the first semester of the last year (2000), CRT made up investments in an amount around R\$ 153 millions and the forecast is that the investments will be, up to the end of this year, more than R\$ 681 millions, increasing the private telephone lines in service to 410 thousand and the public telephones to 14 thousand. From August

1998 to June 2000, the total number in home telephones developed in 30.8%, going from a total of 1,299,211 to the present 1,699,946. The cost of local calls, with taxes, increased 5.54% in this period, while inflation, in the same period, was 15.6%. It is possible to say it has happened an obvious decrease in the cost of phone calls around 10%.

Therefore, from this point of view, the privatization of CRT brought good results for the State, in terms of amounts of revenue collected directly from the sale, as well as in terms of tax revenue related to the company's investments.

Also it is possible to say that with the privatization of CRT, investments in the company have increased. This is good for the State and for the society, because it will probably result in better services and lower costs for the service, as it is expected.

2. Olívio Dutra Government –Workers' Party – 1999 up to now

In 1999 a change occurred in the State government, when the left-wing Workers' Party came to power. Thereby, we had a significant change in the policies of administration of the State, as the previous party in the government (PMDB) has other philosophies with more right-wing tendencies.

This change happened during the procedures of CRT's privatization. It is important to mention that the Workers' Party does not believe that privatizations are priorities in the administration of the State.

In their Government Plan, the Workers' Party shows to be totally against what they call "neoliberal" (liberal) politics of the Federal Government and President Fernando Henrique Cardoso. The Workers' Party claims that these politics were faithfully followed in the State of Rio Grande do Sul, by the PMDB Party.

In their opinion, this liberal politics have provided disorder in the structure of Brazilian productive sector built during the past several years. The combination of a surcharge in the monetary exchange fees, high interest rates, wage squeeze and a removal of restraints on businesses, especially in sectors such as textile, footwears, agriculture and car spare among others have caused enormous damages to the national productivity, to Brazilian economy.

In addition, they say that the unemployment has increased at the same time as the benefits of social policies are being reduced. On the other hand, private capital, mainly international, takes possession of important Brazilian public resources and receives large

fortunes through instruments such as PROER, which has consumed US\$ 25 billion in public resources.

According to the Workers' Party, contrary to the objectives set by Brazilian National Development Bank (Banco Nacional de Desenvolvimento Econômico e Social – BNDES) for National Privatization Program (Programa Nacional de Desestatização - PND), its results are catastrophic for employment and production outputs.

In the specific situation of the State of Rio Grande do Sul (RS), State government has built, throughout the years, a different structure, in relation to the other States in the Country, in which there are public enterprises or companies able to provide the population needs in each sector, including electric power (CEEE), technological infrastructure (CIEN TEC, FAPERGS, PROCERGS), transportation infrastructure (DAER, CINTEA, DEPREC, DAE) and telecommunications (CRT). So, the infrastructure in the state could allow the government to provide economic development.

In their opinion, despite this good situation, conservative governments ideology and compromises for the private gains of a few people have avoided using of those instruments to develop the economy of the State. Worst of all, Antônio Brito's

government, with its development project for the state allowed formerly profitable public enterprises to become private, “giving” them to the private sector.

Finally, they believe that even with the privatization of CRT, State and municipal government will have to release money to guarantee good and qualified services in the telecommunications field.

3. Some brief comments on the judicial and administrative processes related to CRT's privatization

During the procedures of CRT's privatization, some judicial and administrative processes were affected by the different ideas of the two parties that have been already mentioned (the PMDB and the Workers' Party) about that subject.

These processes have involved discussions about irregularities, costs of the transaction and workers' participation in the company's acquisition, among other topics.

The Public Prosecution Office of Rio Grande do Sul, through its “Promotoria de Justiça de Defesa do Patrimônio Público”,

located in Porto Alegre, the capital of the State, has instituted one civil investigation (“Peças de informação n. 188/98”). It was started by a claim of State Deputy Flávio Koutzi, from the Workers’ Party, and Mr. Olívio Dutra (who is from the Workers’ Party and after that became the Governor of the State). They have enumerated several irregularities about the privatization process of CRT, which have been analyzed by the Prosecutors in charge of “Promotoria de Justiça de Defesa do Patrimônio Público”.

The subject of that investigation was the second stage of the privatization process of CRT, that occurred in 1998, when the State of Rio Grande do Sul sold in an auction the majority of its shares in the company. At that time the State intended to seek private sector partnership in the field of telecommunications and lost its status as the major shareholder.

The main irregularities that were appointed were, basically, formal and material flaws in the public announcement for the auction. In the viewpoint of the claimants these irregularities affected the whole procedure of privatization. Therefore, they think that the privatization should be reversed.

One of the allegations was that the public announcement for the auction did not have a provision about the

principle of universal service. In their opinion, it should be ensure that the public would have access to basic telecommunication services at a reasonable cost and that the system would provide equitable treatment through non-discriminatory access to the service, according to what is established by the decree n. 2.592, of 1998, May 15. It had to be clear that the winner of the auction would have this obligation.

However, the Public Prosecution Office has concluded that the goal of universal service should not be included as a rule in the public announcement for the auction, because it is already established by the law, as an obligation of all the concessionaires of the telecommunications services, held in public regime.

The law n. 9.472, of 1997, the Brazilian general telecommunication law, clearly prescribes in its article n. 79, first paragraph, the goal of universal service as an obligation to all the concessionaires in this field. This way, any concessionaire should promote the goal of universal service, providing non-discriminatory access to the service, equitable treatment and accessible cost. Also, the Regulatory Body has to monitor the implementation of this rule. The decree n. 2.592, of 1998, establishes goals to the progressive universal service in the telecommunications field, in the public regime.

Therefore, this rule should not be specified in the public announcement for the auction, because it is an obligation resulting from a legal imposition. It is extensive to all the concessionaires of this kind of service and it is to be monitored by the Regulatory Body (in Brazil, ANATEL). Besides it is established in the legislation, this obligation is detailed in each concession contract.

So, this is one subject that should not be in the auction rules. It is an inappropriate demand to require these rules to be inserted in the public announcement for the auction, because they do not result from the business of selling the shares of the company, but the law previously establishes them. This way, the appointed situation could not turn the privatization process irregular.

Other claim was the absence in the public announcement for the auction of a clause about protection to the national technology. It was concluded by the Prosecutors that this kind of requirement should not be included in that regulation, for similar reasons as the subject above mentioned. Rules that should be included in the public announcement, according to the law, are concerned with the qualification of the participants, the minimum price for the sale and the procedures for the auction. These rules ensure the equality of conditions among all the participants in the auction as well as the transparency of the transaction.

In the sequence, the claim describes several arguments about the invalidity of the public announcement for the auction, which has included in its content the shareholders agreement, established with the holding that acquired thirty-five percentage of the ordinary shares of the company, in the first stage of the privatization, in 1996. In that agreement are defined some reciprocal obligations among the State and the auction winner, including administrative aspects of the company.

The conclusion of the Public Prosecution Office was that it was not practicable to examine or institute a judicial action regarding those aspects, because the Judiciary Power, through many other processes, has already analyzed them. Technically it was impracticable to start another judicial process. They have pointed out that in those judicial processes, concerning the validity of the clauses of that agreement, the Judiciary and the Public Minister have concluded there were no severe irregularities that could affect the privatization process of the State telecommunications company.

Another aspect, appointed as irregular in the claim, was the allegation of the invalidity of the auction because of the low price fixed for the shares of the company, in relation to the market price. However, the claimants did not show enough evidence about that

situation. There was only one study from a consortium of specialized enterprises that, because of technical problems could not be reexamined. The Public Prosecution Office has asked the Executive Branch to provide a new evaluation about the price of the company's shares, but they have answered they did not have a specialized team for that job and they could not afford that kind of evaluation by private enterprises. Another expert asked to do the evaluation has told it would require a specialized team and he was not able to do that alone. Then, the allegation has remained empty, with no proof, no sufficient demonstration to justify the proposal of a judicial process.

It is interesting to mention that the Public Prosecution Office has concluded, also, that it was not convenient or useful, at this moment, to take any step in the way to reverse the transfer of the State telecommunication company from the public sector to the private one, because it would cause a strong burden to the public funds and the damage would be worse than the benefits. The CRT's privatization is fait accompli, with deep consequences for the State and the society. The conclusion was to file the investigation and not to set up any judicial process.

There were also some injunctions that were petitioned to argue about some irregularities in the privatization process

of the State telecommunications company. One of those was petitioned by Mr. Renato Bastos Ribeiro, who, it is interesting to mention, is from Caldas Junior Journalism Enterprise (“Empresa Jornalística Caldas Júnior”), which prints the newspaper “Correio do Povo” and whose rival is “Zero Hora”, another newspaper in Rio Grande do Sul (“Zero Hora” is published by RBS, a private company that has participated in the consortium of companies that bought 35% of the State participation in CRT, in the first stage of the privatization process). In that injunction they discuss all the clauses of the shareholders agreement, calling them illegal. They ask for declaration of invalidity about that agreement and several clauses of the public announcement for the auction.

In another injunction, numbered as 597007053 in the State Court, also petitioned by Mr. Renato Ribeiro Bastos, the discussion was about the inclusion of that shareholders agreement in the public announcement for the auction. In his opinion, that situation caused the invalidity of the public announcement for the auction. The conclusion of the State Court was that there were no serious irregularities and that agreement clauses were legal. The State Court decision clearly says they are not discussing the inconvenience of the privatization of CRT or the selling of its company’s shares by the state government. That is because the privatization was a political decision that resulted from the will of Legislative power and it is presumed as a public interest. The State government, as the majority shareholder in the

company, sends to the Legislative a bill that became the law n. 10.682, of 1996, January 2nd, where the selling of the company's shares was authorized and a modernization program was planned for the company. Then, the Judiciary concluded that the right place to discuss the convenience of the privatization of the company should be the Legislative house. If the Judiciary would at some point decide about that convenience, it would interfere in the competence of the Legislative branch.

Another interesting approach in that decision was about the participation of foreign partners in the winning consortium. They concluded that it was not a problem because every shareholder, old or new, strategic partner or not, foreign or national, are under the country's laws and should obey them. Then, the provision insert in the Brazilian Constitution (article 5, XII, as others related to this subject) should be respected and followed by everyone. As well as, the Constitutional Amendment n. 8, of 1995, allows for foreign partners.

Although the State Court decision was unanimous, it is interesting to highlight the position of one of the Justices, "Desembargador" Osvaldo Stefanello, who said clearly that he was against what he called "the wave of privatization that is devastating the country", because of his ideology. In his opinion this wave of

privatization is collapsing the Civil Service, as it was the only resistance to what the neoliberal system calls “economics globalization”.

There was a lawsuit (denominated “Ação Popular”), petitioned by Mr. Carlos Alberto Bastos Ribeiro, also from Caldas Junior Journalism Enterprise (“Empresa Jornalística Caldas Júnior”). The petitioner says that there are many irregularities in the procedures for the auction for the selling of the CRT’s shares, almost all of them regarding legal and formal aspects. This lawsuit does not yet have a final judicial decision, but there was an appeal (“Agravo de Instrumento”) presented by the petitioner concerning the rejection of the preliminary verdict where there are some interesting viewpoints. In this decision the State Court concluded that there was not any severe irregularity: they considered the procedures for the auction were well done and within the realm of the law. The public announcement for the auction was considered correct and not invalid. The required publicity and legality were properly observed.

Ribeiro’s allegation that Brazilian enterprises were excluded from the auction was not accepted because there were more than 25 companies that have qualified to participate in the auction, among foreign and national companies. So that there was a national group – RBS Participações S/A – that participated in the winning consortium. The State Court said that the rigid requirements included in

the public announcement for the auction were due to the demand that is required in the telecommunications field, where it is necessary to use high and advanced technology.

4. CRT and Brazilian regulation – ANATEL

As already mentioned, Law n. 9.472/97, the General Telecommunications Law, brought several important provisions concerning the National Regulatory Agency, ANATEL (Agência Nacional de Telecomunicações).

The most relevant one is article 18, a single paragraph, granting to the Executive Branch power to set up limits to foreigner participation in the capital of telecommunication service providers.

With regard to the role of the Legislature in the telecommunications sector, principally concerning regulation, it should be pointed that it must take account of the main objectives to be carried by the Regulatory Body and to ensure that it can carry out its functions with impartiality, independence and sufficient power. Administrative procedures will ensure justice and transparency safeguarding the interest of the public. It is also a duty of the Legislature to correct any

defects that experience may reveal in the everyday application of the telecommunication legislation.

Before making comments about the performance of ANATEL during the procedures for the privatization of CRT, it is important to mention its characteristics and principles.

Administrative independence of ANATEL, is the basic important point assured by the law, and it is necessary against pressure from economic and political groups. It is possible to enumerate some basic principles in the Regulatory Body activities:

1. Managers' political independence: Senior Officials are appointed for a fixed term and are removable prior to expiration of the term only for grave fault or serious crimes. There are rules of eligibility and conduct for them and key staff. These rules emphasize financial and political independence from entities under the body's jurisdiction and encourage selection of individuals with relevant expertise;

2. Technical independence on decisions: it is related to the principle mentioned above and it is important to assure that the Senior Officials and the staff will not suffer political pressure and will not

develop political activity. The decisions must be predominantly technical and allowing negotiation, instead of political solutions;

3. Budgetary autonomy and sufficiency: managerial and financial independence, to guarantee internal conditions to act, to do their job with autonomy to use its own tools.

Concerning these ideas, there is a lesson from “The Blue Book”, which demonstrates the correct way adopted by the Brazilian legislation about the subject:

“REGULATORY BODY – A critical aspect of telecommunications legislation will be the provisions establishing, authorizing and enabling the Regulatory Body to implement the general law. Three aspects require discussion in more substantial detail: the independence of the Regulatory Body; the extent authority delegated to it by the legislation; and the procedures it will follow in decision making.

“It is widely accepted that a government’s regulatory functions should be separated from its functions as operator of the country’s telecommunications infrastructure and provider of telecommunications services. The reason for separation is to ensure that the regulator can act impartially in deciding the interests of the public, other operators and users, and the government. The Regulatory Body’s independence from outside financial interests and partisan politics also affects its

ability to act effectively and to inspire public confidence.”⁶

About the role of the Judiciary upon the Regulatory Body activity, the most suitable conception would be to be just to verify compliance with the law, correcting errors of law and referring matters back to the Regulatory Agency, which would be bound to act upon correction. In this way, the Regulatory Body's actions should be presumed to be valid and enforceable in the absence of substantial evidence in the contrary. However, this does not mean that the Judiciary should simply confine itself to endorsement of any decision taken; on the contrary, it should be vigilant and circumspect. It means that the level of review should not be perfunctory, but narrow and focus on ensuring that the Regulatory Body's decisions are lawful, rational and not arbitrary and based on relevant factors and case evidence.

Again, it is interesting to quote ideas from “The Blue Book”:

“Presuming that its actions do not go against the law, the Regulatory Body must have latitude not only to establish the relevant facts and formulate judgements, but also to select those policies which, in its view, are most in line with the public/social interest. Once the court has determined that the Regulatory Body

⁶ “Telecommunication Policies for the Americas (The blue Book)” - Telecommunication Development Bureau (BDT), International Telecommunication Union (ITU), March 1996, p. 06

action falls within a wide range of legally permissible regulatory options, the task of the Judiciary should end here. (...)

“(...) the combined work of the Regulatory Body and courts is of benefit to the public/social interest and is a useful instrument for cooperation in the application of the law.

“It is only logical that it should be the Regulatory Body, not the courts, that must be satisfied that the public interest will be served by a given decision. The fact that the court might not have made the same determination based on the same facts does not warrant a substitution of judicial for administrative discretion.”⁷

There was a judicial process about the role of ANATEL during the procedures of the privatization of CRT, where ANATEL was charged with inappropriate conduct. It was petitioned by the State of Rio Grande do Sul versus ANATEL and in its content it is said that ANATEL did not perform its function as a regulatory body in the privatization process of CRT and has incurred in detour of its aim and purposes. There was a judicial decision in an appeal regarding the rejection of a preliminary verdict (Agravo de Instrumento n.2000.04.01.098103-2/RS, Tribunal Regional Federal da 4a. Região) where the Justice concluded that the allegation was serious and it was necessary to deepen the investigation. Nevertheless, the Court has not yet reached a final decision.

⁷ “Telecommunication Policies for the Americas (The blue Book)” - Telecommunication Development Bureau (BDT), International Telecommunication Union (ITU), March 1996, p. 33.

V – CONCLUDING REMARKS

The situation of the world economy in the last two decades has produced a re-evaluation of the strategic needs and practical benefits related to the privatization process of State-owned enterprises (SOEs). The intense competition in the international market has pressured enterprises and countries to improve their productivity.

The growing of public or State-owned enterprises was phenomenal until the 1980's. Unfortunately, the actions of these enterprises became subordinated to political pressure or influence. Increasing patronage, not having good products or good administrative management and the lack of control about spending money too freely have produced a significant downfall in the productivity. These factors led to the privatization process of public enterprises.

As it is said in an article from IMF⁸, “perhaps the most important lesson after a decade of transition in the centrally planned economies to market-oriented systems is that private sector development can surely be rated as a success. Despite a handful of reversals as well as slowdown in 1998, most transition countries are

now recording positive growth in output – the bottom line indicator of trends in efficiency”.

In the telecommunications sector is possible to say that the globalization of world markets, technological advances and new developments in the area of services integration, satellite communications and radiocommunications tend to overcome the tradition that binds telecommunication to natural monopolies, even in the local telephony field. Cellular and personal telecommunications, the existence of cable networks for other services, and the future global satellite systems provide new elements to be considered by policy-makers. Likewise, compression techniques might radically change the concepts of video distribution, affecting cable TV too.

The end of monopolies in the telecommunication area and the trends on competition bring many benefits to the consumers. A competitive environment creates strong incentives for service providers to be efficient by offering good products at attractive prices in order to win business over rivals. Meeting customers' needs should be regarded as a commercial encouragement and not, as it tends to occur under monopoly conditions, as a problem. Competition tends to ensure that new services be offered quickly in the interest of the customer. There is less incentive for a monopolist to innovate; the

⁸ Privatization in Transition Countries – Economic Issues n. 18 – IMF/Washington DC,

monopolist is not pressed to do things in a different way since the customer has no alternative. On the other hand, a competitive telecommunications operator cannot delay the introduction of a new technology if it will enhance performance.

In Brazil the catastrophic performance of the State-owned enterprises in the last twenty years left no doubt that we were facing a failing system. Privatization was, therefore, urgent and inevitable. In this way we have to recognize that this process had its beginning with the controversial economic team of the Fernando Collor de Mello administration.

In the telecommunications field, as we have seen, in many countries it was historically explored as a State monopoly. For instance, in Brazil, only now we are allowing the use of private capital in this sector through the selling of the State governments' shares in the telephone companies, as well as through the direct exploration of some services by private initiative.

Fernando Henrique Cardoso's government has drawn up a political liberalization of the telecommunications sector, but not a broad privatization, as it has happened in the iron and steel or petrochemical sector. The State is no longer responsible for the

management of the system, but it has assumed the role of a Regulatory Body and makes the policies related to the sector of telecommunications. This strategy allows the State to keep exploring those segments less profitable (infrastructure and local telephone services) and the private initiative to explore those segments that are more competitive and require more and greater investments (international and inter-state services and cell phones).

If we observe the sectors today controlled by SOEs the diversification reached by those companies is clear. That diversification has been very expensive for the taxpayer. From the telecommunication to the petrochemical industry, through electric power to public services and mining, not any economic group is able to be efficient and competitive in all those fields. The importance, as Professor Lawrence W. Reed teaches, is not the privatization but the effects that come from the clients' satisfaction and from the reached results.

Considering the difficulties for the State to obtain resources to finance the necessary investments in sectors that are very important and significant to international investors, as telecommunication and electric power, it is interesting to think about the privatization alternative.

In the case of the State of Rio Grande do Sul, especially about the state telecommunication company, it seems that the privatization was a good choice. This has been clearly understood and realized by the Judiciary Power, which has not allowed the reverse of the privatization process of CRT, considering that it would cause severe damages for the public funds and the taxpayers. Fortuitous irregularities that could be detected in the procedures for that privatization were nothing compared to the enormous losses that would happen in case of a reversion in the current situation. It is possible to say, without fear of being wrong, that the public or social interest has prevailed. It could not be different, considering all the pros and cons in this delicate case.

It is clear that the efforts of the new State government, under the Workers' Party, on trying to reverse the privatization process of CRT were guided by ideological positions. We could not expect something different, cause we have seen, over the last few years that the Workers' Party has demonstrated its coherence concerning its proposals and ideas. We do not think it was a bad choice, considering that the majority of the State population elected them because of these proposals. Also the Workers' Party has always made clear that they were against privatization of SOEs. Thereby, it is not untrue to say that the population expected this step.

Otherwise, it is also not untrue that it was expected that the Judiciary Power, through the analysis of the facts brought to its appreciation, should find the best solution, considering the relevant public and social interest, which is above any ideological position.

Although a significant piece of the Brazilian population still offers resistance to the privatization process of SOEs, it is interesting to highlight that there are concepts and economic principles related to privatization that are recognized and assumed in the most developed societies in the world.

The concept that has to be understood by everybody before anything else is that privatization, in a broad sense, is the goods' or services' transferred from the public sector, politicized and supported by taxes paid by the society, to the private initiative, exposed to an open and competitive market. Through this idea the superiority of private initiative is revealed. Thereby, we can realize the competition element among enterprises to the purchase and sale of public goods or services.

A SOE is an enterprise that carries out services and will survive while there are taxes to finance it, not depending on the results that are reached or the satisfaction level of its clients. There is no compromise with the results and the incentives are practically non-

existent when we consider variables such as job stability and monopoly.

The constant search for the satisfaction of its clients' needs is a reality in all private sector enterprises; otherwise, the final user is free to choose a rival that is more convenient in respect of the market price. This is impossible in a non-competitive environment impregnated with nationalized protectionism and over-exerted interest in clients to the detriment of business.

Technocrats still take a long time to realize that if some services rendered were privatized, they would have more power to contract services or to substitute services, without being tied to the rigid structure of the civil service. The price and the quality of the goods and services would be significant factors in the negotiation; further, technocrats and users could give their opinion about the services .

From these ideas, we can conclude the importance of spreading the benefits of privatization without ideological or political links. This is particularly because, mostly in Brazil's case, the State has to worry about important and relevant aspects to the population such as **health, elementary education** and **justice**. These issues have to be the priority of a government, and we cannot say the same about other sectors like telecommunication, electric power, banks and so on.

Of course, these activities are also important to the people, but we have to have priorities, especially in a country with so many problems to solve as in Brazil. We have to take care about the activities we can or cannot transfer to the private initiative.

“What you own, you take care of; what nobody or ‘everybody’ owns falls into disrepair.”
(Margaret Thatcher)



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