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From a Developing Country's Perspective: Is Net Neutrality a Non-Issue for South Africa?

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From a Developing Country’s Perspective: Is Net Neutrality a Non-Issue for South Africa?

Nisha K. De Lany*

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I. INTRODUCTION

In 2012, high school students from the South African township of Joe Slovo Park petitioned the South African telecom providers to allow free access to Wikipedia on their mobile phones for homework and research because the data

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charges were too expensive.¹ After waiting for over a year, a telecom provider partnered with the Wikimedia Foundation and created Wikipedia Zero, which is a mobile version of Wikipedia.² The service provider made this app free of charge for its South African subscribers.³

The situation above may not strike too many as a major issue. It appears to simply be a great gesture from Wikipedia to provide a basic mobile version of its website to South Africans free of charge.⁴ However, this situation is a problem. While many unable to use the Internet would be able to gain access free of charge, this access would be severely limited to free sites such as Facebook, Twitter, or Wikipedia.⁵ Zero-rating is generally when service providers enter into an arrangement with mobile network operators to offer subscribers low-data usage versions of their online services with free access to subscribers.⁶ “Companies like Facebook say that zero-rating allows users to access basic web services . . . but critics argue that zero-rating allows tech and telecom companies to pick and choose what mobile users can access, a serious violation of net neutrality.”⁷ The story in South Africa stirs concern over an issue that has generally been seen as a U.S. domestic problem because it exemplifies that net neutrality is truly a global issue—especially in developing nations.⁸ The above-mentioned story exemplifies that net neutrality is truly a global issue.

As the story in the beginning of this Comment reflects, the lack of access to all websites can be felt by Internet users around the world.⁹ The net neutrality issue has recently gained much popularity within mainstream media as the United States attempts to tackle the issue domestically.¹⁰ International observers

1. Mike Ludwig, *When Facebook is the Internet: Zero-Rating and the Global Net Neutrality Debate*, TRUTHOUT (Nov. 19, 2014), <http://www.truth-out.org/news/item/27518-when-facebook-is-the-internet-zero-rating-and-the-global-net-neutrality-debate#> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. Jeremy Malcolm, *Net Neutrality and the Global Digital Divide*, ELECTRONIC FRONTIER FOUNDATION (Jul. 24, 2014), <https://www.eff.org/deeplinks/2014/07/net-neutrality-and-global-digital-divide> (on file with *The University of the Pacific Law Review*).

5. See generally *id.* (stating services typically zero-rated in developing countries by providers include Google, Facebook and Twitter).

6. Matthew Shears, No. 208 Net Neutrality, Zero-Rating & Development: What’s the Data? CTR. FOR DEMOCRACY AND TECH., available at http://www.intgovforum.org/cms/wks2014/index.php/proposal/view_public/208 (on file with *The University of the Pacific Law Review*).

7. Ludwig, *supra* note 1.

8. See also *id.* (stating net neutrality will have “huge implications for the future of the Internet, both at home and abroad” and that zero rating is a “growing trend across the world, especially in developing countries”).

9. See *id.* (discussing the story of South African high school students struggling to gain access to affordable Internet sites to complete their homework and research).

10. Shawn McCoy, *International Consequences Worry Observers of the Domestic Net Neutrality Debate*, INSIDE SOURCES (Aug. 25, 2014), <http://www.insidesources.com/international-consequences-worry-observers-of-the-domestic-net-neutrality-debate/> (on file with *The University of the Pacific Law Review*).

are following the United States' debate.¹¹ One such observer is the Internet Service Providers Association of South Africa (ISPA), recognized as an industry representative body within South Africa.¹² ISPA recently "issued a press release indicating that network neutrality is a non-issue" for the country of South Africa.¹³ ISPA has influenced and shaped telecommunications policy in South Africa since its formation in 1996.¹⁴ Its recent take on the net neutrality debate is likely to influence how and if South Africa will choose to implement any net neutrality regulations.¹⁵ ISPA's stance is based on net neutrality being primarily a U.S. domestic issue, not affecting South Africa, as South Africa has existing competition laws which can be used to deal with anti-competitive practices, should any arise.¹⁶

This Comment asserts that South Africa should not take ISPA's stance on net neutrality because it is not just a U.S. domestic issue, but a global one that has a great impact on South African citizens, especially as the Internet becomes potentially more and more accessible. Instead of focusing on the United States, South Africa should shift its attention to other developing nations that have already begun to address net neutrality.¹⁷ Chile and Brazil are two such developing countries which South Africa should look to and thereby conclude that, as a developing country, it must implement its own regulations to address net neutrality.¹⁸ Part II gives a background on how the Internet works and briefly describes the concept of net neutrality from a U.S. perspective.¹⁹ Part III examines Chile and Brazil, briefly discusses their social and political histories, and analyzes how each country respectively has implemented net neutrality laws based on their views and experiences of the issue—which are very different

11. See generally McCoy, *supra* note 10 ("Dozens of governments around the world censor Internet content, just as they restrict traditional media. While a U.S. policy decision may give them a talking point, they are driven above all by their own interests in silencing the critics.")

12. See INTERNET SERV. PROVIDERS ASS'N, <http://ispa.org.za/> [hereinafter ISPA] (on file with *The University of the Pacific Law Review*) (ISPA "facilitate[s] exchange between the different independent Internet service provers, the Department of Communications, ICASA, operators and other service providers in South Africa.").

13. Davis Onsakia, *Network Neutrality, Why Africa's Disinterest?*, DIPLO INTERNET GOVERNANCE CMTY. BLOG (Sept. 29, 2014, 2:33 PM), <http://www.diplointernetgovernance.org/profiles/blogs/network-neutrality-why-africa-s-disinterest> (on file with *The University of the Pacific Law Review*).

14. ISPA, *supra* note 12.

15. See generally *id.* (inferring ISPA will influence future regulation given its status as a preeminent Internet industry body).

16. *Net Neutrality-Related Excerpts from Industry Submissions in Response to ICASA's Notice of Public Inquiry into the State of Competition in the Information and Communications Technology Sector*, ELLIPSIS REGULATORY SOLUTIONS, available at <http://www.ellipsis.co.za/wp-content/uploads/2014/07/Net-neutrality-extracts-submissions-ICASA-competition-inquiry.pdf> [hereinafter Responses to ICASA] (on file with *The University of the Pacific Law Review*).

17. *Infra* Parts II–III.

18. *Id.*

19. *Infra* Part II.

compared to the U.S.—but relate closer to South Africa’s position as a country.²⁰ Part IV examines South Africa’s social and political past and compares its similar experiences to Chile and Brazil.²¹ Part V provides recommendations as to how South Africa should implement such policy.²² Part VI concludes that South Africa should implement net neutrality policy within its own country, just as Chile and Brazil have.²³ On a broader level, this Comment may cause other developing countries to re-examine their views on the net neutrality issue as it affects them now, or how it could affect them in the future.²⁴

II. BACKGROUND

In 1962, computer scientist J.C.R. Licklider “proposed that if the whole world could be interconnect[ed] through an ‘intergalactic network,’ ideas could be shared easily and rapidly.”²⁵ The United States Department of Defense Advanced Research Projects Agency developed this concept of a global network, soon to be known as the Internet, in the 1960s as a way for government and university researchers to share information and the network was strictly for official use only.²⁶ By the 1980s, technological advancements made the Internet more accessible, open to public and commercial use, and realistic as a global network.²⁷

A. *The Internet*

Figure 1 on the following page reflects the most simplified model of the components required to have an Internet connection today.²⁸ The personal computer connects to a modem and an Internet service provider (ISP), which then connects the device to the Internet.²⁹

20. *Infra* Part III.

21. *Infra* Part IV.

22. *Infra* Part V.

23. *Infra* Part VI.

24. *Infra* Part V.

25. Victor Grech, *Publishing on the WWW. Part 5 – A Brief History of the Internet and the World Wide Web*, NAT’L CTR. FOR BIOTECH. INFO., <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3232505/#> (on file with *The University of the Pacific Law Review*).

26. *Id.*

27. *Id.*

28. Alan Simpson, *What is the Internet?*, COOLNERDS, <http://www.coolnerds.com/Newbies/whatIsNet/whatIsNet.htm> (on file with *The University of the Pacific Law Review*).

29. *Id.*

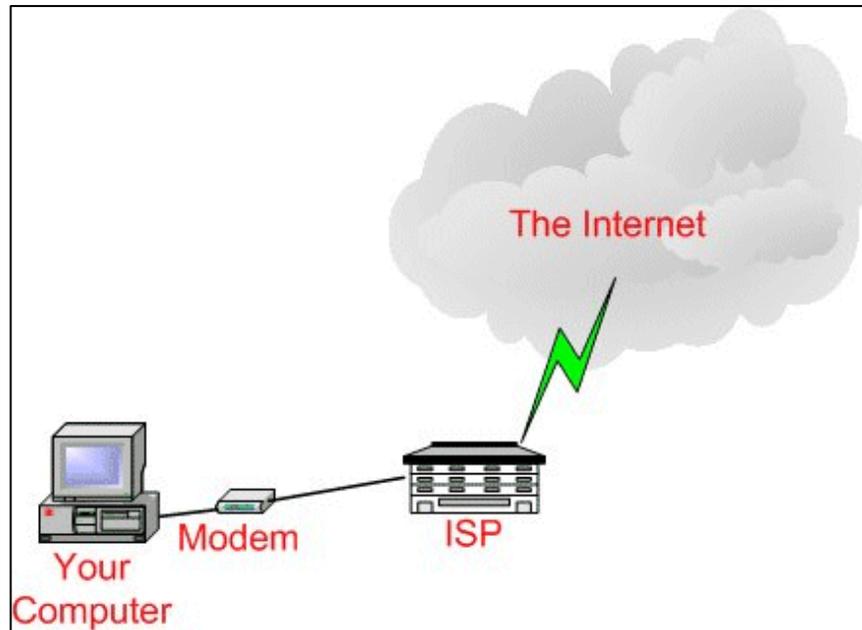


FIGURE 1³⁰

The ISP can connect the end user to the global network through fixed telephony such as dial up, mobile-cellular telephony, fixed fiber optic, or broadband service.³¹ Columbia University media law professor Tim Wu originally created the term “network neutrality” (net neutrality) as a concept where ISPs, as well as governments, should treat all data on the Internet equally and not charge differently or discriminate by user, content, site, platform, application, type of attached equipment, or mode of communication.³² However, since the phrase has been coined, the term “net neutrality” has been intermingled with various conceptual interpretations.³³ Currently, three different, popular

30. *Id.*

31. Melissa E. Hathaway & John E. Savage, *Stewardship of Cyberspace: Duties for Internet Service Providers*, CYBERDIALOGUE2012 (Mar. 2012), available at http://belfercenter.ksg.harvard.edu/files/cyberdialogue2012_hathaway-savage.pdf (on file with *The University of the Pacific Law Review*).

32. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. OF TELECOMM. & HIGH TECH. L., 141, 145 (2003).

33. MILTON MUELLER ET AL., NET NEUTRALITY AS GLOBAL PRINCIPLE FOR INTERNET GOVERNANCE (2007), available at <http://www.internetgovernance.org/wordpress/wp-content/uploads/NetNeutralityGlobalPrinciple.pdf> (on file with *The University of the Pacific Law Review*).

concepts provided a basis for this term.³⁴ The first concept sees net neutrality as an engineering principle, parallel to the end-to-end principle, which views the network's primary function as carrying traffic; with this concept, the network is paid to carry such traffic and any decision about priorities or protocols are made by endpoint systems.³⁵ The second concept views net neutrality as an economic principle in that network providers should conduct non-exclusionary business practices and "not offer deals to one content provider unless they offer the same deal to" all other content providers.³⁶ The third concept of net neutrality is a free speech principle, where network providers should not discriminate based on content.³⁷

Net neutrality has commonly been viewed as a domestic debate relevant specifically to the United States.³⁸ However, for the purposes of this Comment, the concept of net neutrality will not be based on the popular notion of net neutrality being an exclusive U.S. issue. Instead, this Comment addresses net neutrality as a global principle that encompasses both the rights of the Internet user and the rights of the network operators.³⁹ The Internet user holds the right to access services, content, and applications on the Internet without interference from network operators or overbearing governments, while the network operators hold the right to transmit applications and content reasonably free of liability from third parties.⁴⁰ The Internet Governance Forum describes the concept of net neutrality as unrestricted and nondiscriminatory user access to content, applications, and services "consistent with the full enjoyment of human-rights."⁴¹

34. Ed Felten, *Three Flavors of Net Neutrality*, FREEDOM TO TINKER (Dec. 18, 2008), <https://freedom-to-tinker.com/blog/felten/three-flavors-net-neutrality/> (on file with *The University of the Pacific Law Review*).

35. *Id.*

36. *Id.*

37. *Id.*

38. MUELLER ET AL., *supra* note 33.

39. *Id.*

40. *Id.*

41. *Dynamic Coalition on Network Neutrality*, INTERNET GOVERNANCE FORUM, <http://www.intgovforum.org/cms/dynamic-coalitions/1330-dc-on-network-neutrality> (on file with *The University of the Pacific Law Review*); see also *What Is the Internet Governance Forum*, INTERNET GOVERNANCE FORUM (Sept. 30, 2011), <http://www.intgovforum.org/cms/aboutigf> (on file with *The University of the Pacific Law Review*) (showing The Internet Governance Forum was established in 2006 by the World Summit on the Information Society, and is "the leading global multi-stakeholder forum on public policy issues related to Internet governance." The forum is based on the UN General Assembly adoption of the Universal Declaration of Human Rights in which Article 19 states, [e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

B. Viewing Net Neutrality from a U.S. Perspective Instead of a Global Perspective

It is imperative to briefly recognize how and why net neutrality is generally viewed as a U.S. issue.⁴² Although specific details on the debate in the U.S. are beyond the scope of this Comment, acknowledging the debate helps explain why an organization such as ISPA has taken a certain stance on the issue.⁴³ This Comment will rely on Wu's description of network neutrality for the United States.⁴⁴

Wu describes the net neutrality issue as a principle where open access and broad discrimination are different means and net neutrality is the end to those means.⁴⁵ In the U.S., the net neutrality debate is predominately viewed as an industrial concern, where it is important to maintain a healthy, competitive environment.⁴⁶ The Internet is a platform for application developers, such as email, the web, and streaming application, and they are all competing for the end-users' interests.⁴⁷ Therefore, the U.S. net neutrality debate is centered around the Internet platform remaining neutral to the various applications.⁴⁸

The U.S. discussion of net neutrality focuses on competition and protection of the already-established open Internet access that the U.S. population currently enjoys.⁴⁹ For the U.S., this focus is sound.⁵⁰ The United States has a strong, established market of Internet based companies, and in comparison to developing countries, the U.S. population has greater access to the Internet.⁵¹ The United States has an entire generation known as digital natives, the Millennials, which means this is the only generation in the United States that has grown up with the Internet.⁵² U.S. consumers who access the Internet from their smartphones or computers retain access to the Internet and are not limited to applications such as

42. See generally Wu, *supra* note 32, at 143 (describing network neutrality in the United States).

43. See generally Part II (discussing ISPA's stance on net neutrality).

44. *Supra* text accompanying note 32.

45. Wu, *supra* note 32, at 145.

46. See generally *id.* (referring to net neutrality as a "system of belief about innovation" that is premised upon a "survival-of-the-fittest" attitude).

47. *Id.* at 146.

48. *Id.*

49. See generally *id.* at 145 (describing the focus of the U.S. discussion regarding net neutrality); see also Daniel A. Sepulveda, *The World Is Watching Our Net Neutrality Debate, So Let's Get It Right*, WIRED (Jan. 21, 2015, 7:00 AM), <http://www.wired.com/2015/01/on-net-neutrality-internet-freedom/> (on file with *The University of the Pacific Law Review*) (describing the U.S.'s commitment to net neutrality).

50. See generally Wu, *supra* note 32, at 145 (describing the focus of the U.S. discussion regarding net neutrality).

51. *Id.*; Sepulveda, *supra* note 49.

52. PEW RESEARCH CENTER, MILLENNIALS IN ADULTHOOD: DETACHED FROM INSTITUTIONS, NETWORKED WITH FRIENDS, 5 (2014), available at http://www.pewsocialtrends.org/files/2014/03/2014-03-07_generations-report-version-for-web.pdf (on file with *The University of the Pacific Law Review*).

Facebook.⁵³ In contrast, people in developing countries may be restricted to only those applications that offer free access or what is known as zero-rating.⁵⁴ Zero-rating only provides “a myopic view of the Internet,” and in developing countries, such a service will impact local economies because locally developed apps cannot compete with free services.⁵⁵ Arguably, the Internet has also become essential in many U.S. industries in terms of providing communication and efficiency.⁵⁶ According to Wu, the U.S. should regulate net neutrality because evidence suggests that operators pay less attention to their long-term goals and instead favor short-term results.⁵⁷ Such practices reflect discrimination, and operators banning classes of applications or equipment retards healthy competition.⁵⁸

ISPA’s stance that net neutrality is a non-issue for South Africa is similar to several other South African domestic industry responses regarding net neutrality,⁵⁹ which generally focus on the U.S. net neutrality debate.⁶⁰ ISPA states:

[N]et neutrality has become a major issue in the United States because of the effective monopoly (duopoly in some areas) in the provision of cable access services and the dominance of cable providers in the Internet access market as a whole. ISPA does not believe that the manner in which the issue is being addressed in the US is particularly helpful in the local market, which is at a different stage of development and which has a different set of fair competition issues.⁶¹

ISPA’s stance is understandable if one looks at net neutrality solely as a U.S. domestic issue, as ISPA has.⁶² In that respect, ISPA is correct to state that South Africa’s development is quite different compared to the U.S.’s development, and therefore, the concern of net neutrality as presented in the U.S.

53. See Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RES. CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> (on file with *The University of the Pacific Law Review*) (stating cell phone users also use the Internet on their phones to conduct banking, get information about health conditions, and get educational material and take classes).

54. Malcolm, *supra* note 4 (stating that services typically zero-rated in developing countries include Google, Facebook, and Twitter).

55. Roslyn Layton, *IGF Highlights How Developing Countries Use Zero Rating Programs to Drive Internet Adoption*, TECH POLICY DAILY (Sept. 4, 2014), <http://www.techpolicydaily.com/communications/igf-zero-rating-programs/> (on file with *The University of the Pacific Law Review*).

56. See generally Wu, *supra* note 32, at 145 (“[N]et neutrality must be understood as a concrete expression of a system of belief about innovation”).

57. *Id.* at 143.

58. *Id.*

59. Responses to ICASA, *supra* note 16.

60. See generally *id.* (summarizing responses focused on the U.S. net neutrality debate).

61. *Id.*

62. See generally *id.* (framing the net neutrality debate as a “major” United States issue).

does not apply to South Africa.⁶³ However, ISPA should instead examine other developing countries' approaches to net neutrality.

III. COMPARISON OF SOCIAL AND POLITICAL CLIMATE OF OTHER DEVELOPING COUNTRIES

This Comment suggests Chile and Brazil are better examples for ISPA and South Africa to consider with regard to net neutrality.⁶⁴ Specifically, both countries' focus is on how to tackle the net neutrality issue at a fundamental level as a young democracy rather than an industry regulation issue.⁶⁵

A. *Chile*

Chile's net neutrality policy is viewed not as a technical issue, but one that transcends to a political issue and beckons protection as a fundamental right.⁶⁶ The success of Chilean citizens' efforts is exemplified in their success at passing legislation that made Chile the first country with a net neutrality policy.⁶⁷ This is starkly different from how net neutrality is viewed in the United States.⁶⁸

1. *Social & Political History*

Chile has had a rocky political history.⁶⁹ The human rights violations under General Pinochet's military government eventually led to mass public protests.⁷⁰ Despite unfair campaign conditions, a plebiscite election in 1988 replaced the military government with a democratic government.⁷¹ In April 1990, the government established the Chilean National Commission on Truth and Reconciliation to address the serious human rights violation committed under the Chilean government and officially recognize victims and their families.⁷² Chile is

63. *Id.*

64. *Infra* Parts III–IV.

65. *Infra* Parts III–IV.

66. See generally Patricia Adriana Vargas-Leon, *Monitoring in the First Nation-State that Achieved a Network Neutrality Law, a Case-Study in Chile* (Apr. 30, 2013), <http://ssrn.com/abstract=2278301> (on file with *The University of the Pacific Law Review*) (explaining the true nature of the net neutrality issue in Chile as a crucial part of the political process).

67. *Id.* at 2.

68. Compare Wu, *supra* note 31, with Vargas-Leon, *supra* note 64.

69. Vargas-Leon, *supra* note 66.

70. *Authoritarianism Defeated by Its Own Rules*, U.S. LIB. OF CONG., available at <http://country.studies.us/chile/88.htm> (on file with *The University of the Pacific Law Review*).

71. *Id.*

72. *Chilean National Commission on Truth and Reconciliation*, TRIAL, <http://www.trial-ch.org/en/resources/truth-commissions/america/chile.html> (last visited Aug. 4, 2015) (on file with *The University of the Pacific Law Review*).

now a strong democracy, yet the human rights atrocities are still a vivid, recent past for many Chileans.⁷³

The Chilean constitution assures every person “[f]reedom to express opinion and to report, uncensored, by any form or by any means, without provisions to respond to the crimes and abuses committed in the exercise of these freedoms, according to law, which shall be of qualified quorum.”⁷⁴ This view is based on Chile’s recent history prior to being a democracy where the people faced not only censorship, but also brutal punishment for such expression.⁷⁵ Hence, the Chilean government has implemented policies based on the populations’ demand for the preservation and protection of such right as freedom of expression.⁷⁶ Upon experiencing extreme oppression, Chileans view the Internet, and specifically social networks, as a place of power where political activism can take place to express concerns similarly to physical protests outside a government building.⁷⁷

2. Net Neutrality Policy

The current Piñera Administration enacted the first net neutrality law between 2010 and 2011 as part of the country’s digital development.⁷⁸ Chile now has one of the highest per capita Internet usages in South America.⁷⁹

The Internet, as a massive media communications tool, has become a space to communicate ideas at a worldwide level.⁸⁰ “From this point of view, the Internet represents a new opportunity that serves political rights in situations where there are democratic and anti-democratic regulators who attempt to control any mean of telecommunication.”⁸¹

Neutralidad Si!, a Chilean civil society citizen group, began to discuss the issue of net neutrality in 2006.⁸² The organization was concerned about the lack of government supervision in the Internet Access Service business, which led to abuse against content providers and users, and pushed for net neutrality

73. See generally *id.* (describing the current state of mind of many Chileans).

74. Vargas-Leon, *supra* note 66, at 6.

75. See *supra* text accompanying notes 64–68.

76. See also Vargas-Leon, *supra* note 66, at 2 (stating Chile has been in a political state of unrest as people turned to social networks as a mechanism for protests).

77. *Id.*

78. *Id.*

79. PEW RES. CTR., EMERGING NATIONS EMBRACE INTERNET, MOBILE TECHNOLOGY (2014), available at <http://www.pewglobal.org/2014/02/13/emerging-nations-embrace-internet-mobile-technology/> [hereinafter EMERGING NATIONS] (on file with *The University of the Pacific Law Review*).

80. See Manuel Castells, *The Impact of the Internet on Society*, MIT TECH. REV. (Sept. 8, 2014), <http://www.technologyreview.com/view/530566/the-impact-of-the-internet-on-society-a-global-perspective/> (on file with *The University of the Pacific Law Review*) (“humankind is not almost entirely connected” via the Internet).

81. Vargas-Leon, *supra* note 66, at 2.

82. *History of the Project*, NEUTRALIDAD SI!, <http://www.neutralidadsi.org/history-of-the-project/> (last visited on Dec. 19, 2014) (on file with *The University of the Pacific Law Review*).

legislation.⁸³ Some of the group's common issues concerned "port blocking, service blocking, [and] traffic shaping or different types of bandwidth throttling."⁸⁴ An example of the abuse, which Chile now can address with its new net neutrality law, is Chile's telecommunications regulator, Subtel.⁸⁵ Zero-rated data usage in which Internet companies such as Facebook, Wikipedia, and Twitter can make deals with mobile carriers to offer their services for free may put consumers in a filtered bubble created by those companies because local content producers cannot compete against such exclusive agreements between mobile network operators and the major content providers.⁸⁶ Thus, these consumers really would not have true access to everything the Internet has to offer.⁸⁷ Claudio Ruiz, Executive Director of Derechos Digitales, a Chilean, non-governmental organization (NGO) that focuses on the public interest of defense, promotion, and development of human rights in the digital environment,⁸⁸ said:

[Net neutrality is] not just a consumers issue but a substantive one. Chile . . . ha[s] groundbreaking net neutrality law provisions and the Inter-American system of human rights sees net neutrality as a human rights issue. Its presence can guarantee fundamental rights such as freedom of expression and privacy for citizens worldwide, and therefore its defense has to be global.⁸⁹

The push towards net neutrality is much more than just industry regulation.⁹⁰ Chile's stance on net neutrality is based on the Internet being a space for communication.⁹¹ Chileans view the Internet as a medium where such freedom of expression needs to be protected.⁹²

83. *Id.*

84. *Id.*

85. *See id.* (stating Neutralidad Si! Filed a complaint against telecom regulator Subtel).

86. *See generally* Shears, *supra* note 6 (stating such deals may give certain web services an advantage by offering "skewed incentives" for subscribers to those services).

87. *See* Jessica McKenzie, *Face Off in Chile: Net Neutrality v. Human Right to Facebook & Wikipedia*, TECHPRESIDENT (June 2, 2014), <http://techpresident.com/news/wegov/25090/face-chile-net-neutrality-v-human-right-facebook-wikipedia> (on file with *The University of the Pacific Law Review*) (showing Chilean net neutrality law makes some free Internet services illegal).

88. DERECHOS DIGITALES, <https://www.derechosdigitales.org/&prev=search> (last visited Dec. 19, 2014) (on file with *The University of the Pacific Law Review*).

89. Deji Olukotun, *More than 35 Organizations from 19 Countries Launch Global Net Neutrality Coalition*, ACCESS BLOG (Nov. 24, 2014, 3:36 PM), <https://www.accessnow.org/blog/2014/11/24/global-coalition-launch-thisisnetneutrality-net-neutrality> (on file with *The University of the Pacific Law Review*).

90. *See supra* Part III.A.

91. *History of the Project*, *supra* note 82.

92. *See* Vargas-Leon, *supra* note 66, at 2 (stating Chile has been in a political state of unrest as people turned to social networks as a mechanism for protests).

B. Brazil

Brazil's view on net neutrality is much broader than the United States' view on the matter.⁹³ The law in Brazil is targeted to look forward and asserts "freedom of expression, interoperability, the use of open standards and technology, protection of personal data, accessibility, multistakeholder governance, [and] open government data."⁹⁴

1. Social & Political History

Brazil also has had a rocky history with military governments, dictatorships, brutality, and censorship of the press.⁹⁵ It too is a democracy now, with past oppression still recent and vivid amongst its citizens.⁹⁶ As recent as 2010, during the presidential election, a human rights report determined that, state-level security forces committed several human rights abuses including: "unlawful killings; excessive force, beatings, abuse, and torture of detainees and inmates by police and prison security forces; inability to protect witnesses involved in criminal cases... inefficiency in prosecuting government officials for corruption; violence and discrimination against women; violence against children... discrimination against indigenous persons and minorities; [and a] failure to enforce labor laws."⁹⁷ In 2011, in an effort to recognize the victims and victims' families who experienced this torture and abuse, the government established the National Truth Commission to help Brazilians heal.⁹⁸ Given Brazil's history, it should be no surprise that the Brazilian constitution now guarantees several rights in promoting human rights.⁹⁹ The Brazilian government has become committed to human rights issues and has implemented policies to further the promotion of those rights.¹⁰⁰

93. See *supra* Part II.B (discussing the United States approach toward net neutrality).

94. Glyn Moody, *Brazil's 'Marco Civil' Internet Civil Rights Law Finally Passes, With Key Protections Largely Intact*, TECHDIRT (Mar. 27, 2014, 12:07 AM), <https://www.techdirt.com/articles/20140326/09012226690/brazils-marco-civil-internet-civil-rights-law-finally-passes-with-key-protections-largely-intact.shtml> (on file with *The University of the Pacific Law Review*).

95. See *supra* Part III.

96. Astrid Prange, *Brazil Remembers Its Struggle for Democracy*, DEUTSCHE WELLE (Oct. 4, 2014), <http://www.dw.com/en/brazil-remembers-its-struggle-for-democracy/a-17554707> (on file with *The University of the Pacific Law Review*) (discussing Brazil's political history leading to democracy).

97. U.S. DEP'T OF THE STATE, 2010 HUMAN RIGHTS REPORT: BRAZIL (Apr. 8, 2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154496.htm>. (on file with *The University of the Pacific Law Review*).

98. *Brazil: Truth Commission Bill Important Step Against Impunity*, INT'L CTR. FOR TRANSITIONAL JUST. (Oct. 27, 2011), <http://www.ictj.org/news/brazil-truth-commission-bill-important-step-against-impunity> (on file with *The University of the Pacific Law Review*).

99. *Evolution of Human Rights in Brazil*, UNITED NATIONS EDUC. SCI. AND CULTURAL ORG., <http://www.unesco.org/new/en/brasilia/social-and-human-sciences/human-rights/human-rights-evolution/> (last visited Mar. 25, 2016) (on file with *The University of the Pacific Law Review*).

100. *Id.*

2. Net Neutrality Policy

Following Chile, Brazil also took major steps towards preserving net neutrality when it passed the Marco Civil da Internet, also known as the Internet Bill of Rights, which established “that net neutrality should be guaranteed, and further regulated by a presidential decree, with inputs from both the Brazilian Internet Steering Committee and ANATEL, the national telecommunications agency.”¹⁰¹

“The Internet Bill of Rights” is the net neutrality policy implemented by the Brazilian legislature.¹⁰² This policy takes on the fundamental principles of “freedom of speech, freedom of information, and the right to privacy.”¹⁰³ The Brazilian Internet Bill of Rights exemplifies such principles “by instituting certain guarantees for the protection of private information and the secrecy of information exchanged or stored online, and by restricting the liability of ISPs and Internet application providers (IAPs), such as social media websites and search engines for third-party content.”¹⁰⁴

Two leading situations in Brazil also led to the push for the new net neutrality policy.¹⁰⁵ In 2004, Skype users reported that Brazil Telecom blocked the service, which drew much media attention.¹⁰⁶ Brazil Telecom initially denied the blockade, but then admitted there was a block to the service’s use.¹⁰⁷ A similar situation occurred with Oi, formally known as Telemar, Brazil’s largest telecommunications company.¹⁰⁸

Brazilian law professor, Ronaldo Lemo stated:

Without neutrality, the Internet looks more like cable TV, where providers can offer different service packages . . . Basic service would include email and the social networks. ‘Premium’ would let you watch videos and listen to music. ‘Super Premium’ would let you download.

101. Moody, *supra* note 94.

102. See generally Pinsent Masons, *Brazil Guarantees Net Neutrality and Allows ISPs to Store User Data Outside Brazil*, OUT-LAW.COM (Apr. 25, 2014), <http://www.out-law.com/en/articles/2014/april/brazilian-guarantees-net-neutrality-and-allows-isps-to-store-user-data-outside-brazil/> (on file with *The University of the Pacific Law Review*) (stating the new Internet Bill of Rights includes net neutrality provisions).

103. Hogan Lovells et al., *Marco Civil da Internet: Brazil’s New Internet Law Could Broadly Impact Online Companies’ Privacy and Data Handling Practices*, LEXOLOGY (May 7, 2014), <http://www.lexology.com/library/detail.aspx?g=2b5808f2-a0a6-469f-ba05-4b2335dfb36f> (on file with *The University of the Pacific Law Review*).

104. *Id.*

105. Pedro Henrique Soares Ramos, *Neutralidade Da Rede e o Marco Civil da Internet: um guia para Interpretacao (Net Neutrality in Brazil: A Guide to Understanding Marco Civil)*, SÃO PAULO LAW SCHOOL OF FUNDAÇÃO GETULIO VARGAS FGV DIREITO SP (2014), <http://ssrn.com/abstract=2496076> or <http://dx.doi.org/10.2139/ssrn.2496076> (on file with *The University of the Pacific Law Review*).

106. *Id.*

107. *Id.*

108. *Id.*

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Today that sounds like an aberration, but without Net neutrality, it's a possibility.¹⁰⁹

As Professor Lemo describes the issue, developing countries, unlike the U.S., are challenged to assure citizens access to basic Internet and not just services such as email and social networks that are offered under the zero-rating service.¹¹⁰ This is the crux of the developing world's issue as it creates a tier in access to information, which should be readily available to everyone.¹¹¹

However, many telecommunication companies did not wholeheartedly accept the legislation that passed.¹¹² The government faced many pressures and objections from industry lobbyists against the net neutrality provision.¹¹³ Telecom companies strongly opposed net neutrality because it specifically "bar[red] them from charging higher rates for access to content that use[d] more bandwidth."¹¹⁴ The government however did not succumb to such strong objections and passed the law that barred telecom companies "from charging higher rates for access to content that uses more bandwidth, such as video streaming and voice services like Skype. World Wide Web inventor Tim Berners-Lee has described the Brazilian legislation [as] a 'fantastic example of how governments can play a positive role in advancing web rights and keeping the web open.'"¹¹⁵ Brazil's regulation has gone as far as to articulate that any disputes involving companies such as Google or Facebook and disputes involving information on Brazilians will be subject to Brazilian law and courts.¹¹⁶ By taking into consideration the concerns of its citizens, Brazil's net neutrality policy ensures its citizens' rights are the utmost priority over private Internet companies.¹¹⁷

109. Eraldo Peres, *Net Neutrality Wins in Brazil's Internet Constitution*, ALJAZEERA AMERICA (Mar. 26, 2014), <http://america.aljazeera.com/articles/2014/3/26/brazil-internet-constitution.html> (on file with *The University of the Pacific Law Review*).

110. *Id.*

111. Romina Bocache et al., *The Network Neutrality Debate and Development*, DIPLO (Mar. 2007), <http://archive1.diplomacy.edu/pool/fileInline.php?IDPool=453> (on file with *The University of the Pacific Law Review*).

112. See generally Masons, *supra* note 102 (describing the reaction of telecommunication companies to the Brazilian legislation).

113. *Id.* at 2

114. Anthony Boadle, *Brazilian Congress Passes Internet Bill of Rights*, REUTERS (Apr. 22, 2014), <http://www.reuters.com/article/2014/04/23/us-internet-brazil-idUSBREA3M00Y20140423> (on file with *The University of the Pacific Law Review*).

115. Masons, *supra* note 102, at 2.

116. *Id.*

117. See *id.* (describing how the gathering of metadata on Brazilian internet users will be limited).

IV. SOUTH AFRICA: SOCIETY AND POLITICS: PAST AND PRESENT

Similar to Chile and Brazil, South Africa's political and social history has also been full of turmoil.¹¹⁸ Under the apartheid regime, the non-white majority population, faced harsh oppression.¹¹⁹ Violence became common where anti-apartheid resistance led to civil rights violations.¹²⁰ Finally, in the 1990s, South Africa repealed apartheid, and in 1994, the country held its first universal election, which included the non-white majority.¹²¹ To help heal the country from the brutalities many South Africans faced under the apartheid regime, the government established the Truth and Reconciliation Commission in 1995.¹²²

The post-apartheid country has a constitution that arguably has one of the most enumerated positive rights amongst all constitutions in the world.¹²³ These rights include education, health services, water, and housing.¹²⁴ The intention of the framers was not to entitle such positive rights to an individual, but focus the post-apartheid country on progressively providing such rights as the country is financially able.¹²⁵ The South African constitution's prioritization of social infrastructure reflects the nation's newly focused public policy.¹²⁶ Consistent with this policy, on May 25, 2014, President Jacob Zuma established a Ministry of Telecommunications Postal Services.¹²⁷ The president recognized the country has a fast growing telecommunications sector; the goal of the newly established ministry is to "derive more value out of the booming information communications and technology industry."¹²⁸ One of the constitutional mandates of the Ministry is to oversee and strengthen the Independent Communications Authority of South Africa (ICASA).¹²⁹ As such, ICASA has numerous responsibilities:

118. NICOLAS COOK, SOUTH AFRICA: POLITICS, ECONOMY, AND U.S. RELATIONS (2013), available at <http://fas.org/sfp/crs/tow/R43130.pdf> (on file with *The University of the Pacific Law Review*).

119. *Id.*

120. *Id.*

121. *Id.*

122. TRUTH AND RECONCILIATION COMM'N, SOUTH AFRICA (TRC) 1 (Encyclopaedia Britannica ed., 2014), available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (on file with *The University of the Pacific Law Review*).

123. See generally *Our Constitution*, PARLIAMENT OF THE REP. OF S. AFR., http://www.parliament.gov.za/live/content.php?Category_ID=11 (last visited Mar. 25, 2016) (on file with *The University of the Pacific Law Review*) (stating several positive rights within the Constitution).

124. *Id.*

125. Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4, 1 (2006).

126. *Our Constitution*, *supra* note 123.

127. See *President Jacob Zuma Announces Members of the National Executive*, PRESIDENCY REPUBLIC OF SOUTH AFRICA (May 25, 2014), <http://www.thepresidency.gov.za/pebble.asp?relid=17453> (on file with *The University of the Pacific Law Review*) (announcing that the executive branch has created the Ministry of Telecommunications Postal Services).

128. *Id.*

129. *Our Constitution*, *supra* note 123.

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[ICASA is] responsible for regulating the telecommunications, broadcasting and postal industries in the public interest and ensure affordable services of a high quality for all South Africans. The Authority also issues licenses to telecommunications and broadcasting service providers', enforces compliance with rules and regulations, protects consumers from unfair business practices and poor quality services, hears and decides on disputes and complaints brought against licensees and controls and manages the effective use of radio frequency spectrum.¹³⁰

With this mandate in mind, in March 2014, ICASA formally addressed net neutrality through an “[i]nquiry into the State of Competition in the Information and Communications Technology Center.”¹³¹ ICASA’s mandate addresses “the impact of convergence, net neutrality and disruptive technologies on the competitive landscape.”¹³² Many industry members responded to the notice; in reaction, ICASA announced it would conduct public hearings in connection with the submissions.¹³³ ISPA, which the Ministry of Communications has formally recognized as an industry representative body, recently took a stance against implementing any net neutrality laws in South Africa based on the current U.S. domestic debate and how the United States Federal Communications Commission is addressing it.¹³⁴

In addition to looking at net neutrality from a developing country’s standpoint, ISPA should also consider South Africa’s repressive history and that South Africa has a strong interest in protections the freedom of expression from censorship.¹³⁵ South Africa’s population has a heightened concern of protecting such freedoms because of the country’s recent oppression.¹³⁶ The Internet is an emerging communication that will undoubtedly rapidly grow throughout the

130. *Id.*

131. *ICASA Launches Inquiry Into State of Competition in the ICT Sector*, INDEP. COMM’NS AUTH. OF S. AFR. (Mar. 12, 2014), https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/Inquiry_Into_State_Of-Competition_In_The_ICT/Default.aspx (on file with *The University of the Pacific Law Review*).

132. *Id.*

133. Duncan McLeod, *ICASA to Hold Competition Hearings*, TECH CENT. (Sept. 12, 2014), <http://www.techcentral.co.za/icasa-to-hold-competition-hearings/50949/> (on file with *The University of the Pacific Law Review*).

134. See Marc McIlhone, “*Net Neutrality*” a Non-issue in South Africa for the Present, Says ISPA, INNOVATION AFR. 2014 (Aug. 11, 2014), <http://ispa.org.za/press-release/net-neutrality-a-non-issue-in-south-africa-for-the-present-says-ispa/> (on file *The University of the Pacific Law Review*) (showing that ISPA strongly recommends ICASA stay away from regulation relating to net neutrality because it considers it a particular problem in the U.S. and not a helpful debate in South Africa).

135. See *infra* Part IV (illustrating that South Africa’s interests with fundamental rights are consistent with regulation of net neutrality).

136. See *supra* Part III (reflecting that the repeal of apartheid government, where freedoms were restricted, happened recently in 1994).

country in time.¹³⁷ According to one report, ninety-one percent of South Africans own a cell phone and sixty-two percent of Internet users in South Africa use social networking sites once they are online.¹³⁸ The Internet is used not only as a social network to keep in touch with family and friends, but it is also a place where people share and obtain views on topics such as religion and politics.¹³⁹ The report also found that Internet use correlates with national income and education.¹⁴⁰ For example, twenty-nine percent of mobile phone owners in South Africa use their phones for monetary transactions.¹⁴¹

ISPA's stance is based on the lack of growth and Internet infrastructure in South Africa in comparison to the U.S.; however, reports strongly suggest more people will have access to the Internet over time.¹⁴² Wireless access via cell phones will be increasing in developing countries as 3G mobile spreads, giving many more people access to the Internet, despite these countries still lacking computers and fixed broadband service.¹⁴³ The International Telecommunications Union reported that the number of Internet users worldwide has grown from 400 million to two billion between 2000 and 2010.¹⁴⁴ "There are also an estimated 5.3 billion mobile subscriptions, [seventeen percent] of which are 3G connections. Developing countries are also estimated to have an astounding [seventy-six percent] of the world's mobile phones."¹⁴⁵

A. *South Africa Compared to Chile*

South Africa, like Chile, considers political participation a fundamental component of its democratic government, and media outlets, including the Internet, are a platform for political participation.¹⁴⁶ Both Chile and South

137. See Oliver Fortuin, *Is Communication Technology the Key to Unlocking Africa's Potential?*, WORLD ECON. FORUM (June 2, 2015), <https://agenda.weforum.org/2015/06/is-communication-technology-the-key-to-unlocking-africas-potential/> (on file with *The University of the Pacific Law Review*) (noting that mobile phones are common in South Africa and innovations in smart phone tech are reducing the costs that are adding to South Africa's potential for communication).

138. EMERGING NATIONS, *supra* note 79, at 2–8.

139. *Id.* at 3.

140. *Id.*

141. *Id.* at 6.

142. *Id.* at 1.

143. *The Importance of Net Neutrality in the Emerging and Developing World*, ACCESS 7 (Sept. 2011), available at https://s3.amazonaws.com/access.3cdn.net/6d698a85cebaff26c1_szm6ibxc7.pdf [hereinafter *The Importance of Net Neutrality*] (on file with *The University of the Pacific Law Review*). 3G is the third generation of mobile telecommunications technology as a result of work carried out by the International Telecommunication Union, which is based on the International Mobile Telecommunications-2000 specifications. See *What Really Is a Third Generation (3G) Mobile Technology?*, INT'L TELECOMM. UNION, https://www.itu.int/ITU-D/tech/FORMER_PAGE_IMT2000/Documents/IMT2000/What_really_3G.pdf (last visited Mar. 25, 2016) (on file with *The University of the Pacific Law Review*).

144. *The Importance of Net Neutrality*, *supra* note 143, at 7.

145. *Id.*

146. Vargas-Leon, *supra* note 66, at 4.

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Africa's transitions to democracy were similar in that both countries' transitions were negotiated.¹⁴⁷ Just as Chile's government has had an infamous past with human rights violations that led the government to establish the Truth and Reconciliation Commission,¹⁴⁸ the South African government has also implemented a Truth and Reconciliation Commission to reconcile past human rights abuses by the government.¹⁴⁹ However, unlike Chile—which established its truth commission by a presidential decree—South Africa's implementation was based on input from civil society and hundreds of hours of hearings.¹⁵⁰ The significance of such turmoil to this Comment is the fact that the Internet, as it has been recognized by the Harvard Institute of Politics, is “part responsible for the ‘civic reawakening of a new generation’ mainly through the use of social media (Facebook, Twitter and MySpace) to pursue political changes.”¹⁵¹

Chile also parallels South Africa in its citizens' Internet usage via cell phone.¹⁵² According to the same report mentioned above for South Africa, ninety-one percent of Chileans own a cell phone, of which sixty-six percent use the Internet occasionally or own a smartphone; seventy-six percent of Internet users in Chile use social networking sites once they are online.¹⁵³ Chile and South Africa are also both very similar in terms of the quality of infrastructure within each country.¹⁵⁴ Given these similarities, ISPA's stance on net neutrality in South Africa should consider how similarly situated countries like Chile, have tackled the matter.¹⁵⁵

B. South Africa Compared to Brazil

On a broader level, both South Africa and Brazil share many similarities.¹⁵⁶ Both countries suffer from poverty and post-colonial inequality, and in response

147. Muneer Abduroaf, Truth Commissions: Did the South African Truth and Reconciliation Commission Serve the Purpose for Which it was Established? (October 24, 2010) (unpublished research paper, Faculty of Law at the University of the Western Cape), available at http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/1650/Abduraaf_LLM_2010.pdf?sequence=1 (on file with *The University of the Pacific Law Review*).

148. *Supra* Part III.

149. *Infra* Part IV.

150. Abduroaf, *supra* note 147, at 8–9.

151. Vargas-Leon, *supra* note 66, at 4.

152. See EMERGING NATIONS, *supra* note 79, at 4 (illustrating that Chile and South Africa both have the cellphone ownership percentage of ninety-one percent).

153. *Id.* at 2–8.

154. *Quality of Overall Infrastructure—Country Rankings 2011*, WORLD ECON. FORUM (2011), available at http://www.photius.com/rankings/infrastructure_quality_country_rankings_2011.html (last visited July 16, 2015) (on file with *The University of the Pacific Law Review*) According to the World Economic Forum, Chile scores 5.7 and South Africa scores 4.6, which does not put them too far apart with regards to the quality of overall infrastructure within the country. *Id.*

155. See *supra* Part IV (showing how net neutrality relates to a fundamental right).

156. See *South Africa: The Brazil of Africa*, AFRICA RES. INST. (Dec. 2007), <http://africaresearchinstitute.org/newsite/wp-content/uploads/2007/12/BN-0704-South-Africa-Brazil.pdf> (on file with *The University*

to such issues, both countries now have recently established industrialized and multi-racial democracies.¹⁵⁷ Additionally, the international community has recognized both countries as leaders within their respective regions.¹⁵⁸

Similar to lobbyists in Brazil, ISPA has also taken a strong stance against net neutrality.¹⁵⁹ Brazil implemented its Internet Bill of Rights through a public consultation process and not as a result of industry demand.¹⁶⁰ Just like ISPA's strong public stance, "Eduardo Cunha, a former telecom executive and lobbyist for Brazil's major telecom companies, led the effort to gut the net neutrality provisions from the bill, which prevents them from charging higher rates for access to bandwidth-heavy content."¹⁶¹ Fortunately, the Brazilian legislature retained its stance on net neutrality, "siding with advocates of a free and open Internet even in the face of fierce lobbying from incumbent service providers."¹⁶²

V. RECOMMENDATIONS

Based on the facts provided above, this Comment recommends that South Africa implement net neutrality regulation similar to regulation employed in Chile and Brazil.¹⁶³ The regulation should be comprehensive and transparent, based on the principle that net neutrality is a human right to asserting freedom of communication and expression, and subject to regulation by a national telecommunications agency.¹⁶⁴

South Africa should use Brazil's Internet Bill of Rights as an example of legislation while developing its own net neutrality legislation.¹⁶⁵ South Africa has one of the most comprehensive constitutions in the world; therefore, drafting and enacting an Internet Bill of Rights would be consistent with its founding principles. Similar to Brazil's legislation, South Africa should adopt legislation

of the Pacific Law Review) (showing that South Africa and Brazil have similarities such as being multi-racial, industrialized, and democratic with problems of poverty, post-colonial inequality, and new political institutions).

157. *Id.*

158. *Id.*

159. See Summary of Responses made with regard to ICASA's Notice of Public Inquiry into the State of Competition in the Information and Communications Technology Sector (Aug. 11, 2014), available at <http://www.ellipsis.co.za/wp-content/uploads/2014/07/Net-neutrality-extracts-submissions-ICASA-competition-inquiry.pdf> [hereinafter *Summary*] (on file with *The University of the Pacific Law Review*) (showing ISPA's strong stance on net neutrality, which includes their view on putting a priority on fair and open competition of internet access and informed choice of customers).

160. Danielle Kehl, *US Should Look to Brazil and the EU for Strong Net Neutrality Rules*, HILL (May 14, 2014, 5:00 PM), <http://thehill.com/blogs/congress-blog/technology/206137-net-neutrality-eu-brazil-and-us> (on file with *The University of the Pacific Law Review*).

161. *Id.*

162. *Id.*

163. See *supra* Parts I–III (showing that South Africa is similar to Chile and Brazil in a number of ways and, therefore, should have the same net neutrality regulations).

164. See *supra* Parts II–III (illustrating the many areas of that net neutrality regulations should consider).

165. See *supra* Part III (showing how Brazil's Internet Bill of Rights address many issues that are similar to South Africa's internet issues).

based on the idea that net neutrality is a fundamental human right to freedom of expression and communication.¹⁶⁶ Because South Africa is witnessing its population “leapfrog” onto the Internet, there is a strong need for legislation to protect net neutrality.¹⁶⁷ Although South Africa is a developing country, it already has an established governmental body that can implement net neutrality legislation.¹⁶⁸ The country currently has new regulatory agencies that oversee the telecommunications and broadcast industries.¹⁶⁹ Further, South Africa also already implemented regulatory policy within the telecommunications industry, suggesting the country may not be completely against comprehensive regulations needed to provide net neutrality.¹⁷⁰

South Africa can also take many lessons from Chile’s net neutrality regulation when implementing its own public policy, especially in regards to the need for transparency.¹⁷¹ The Chilean government recently faced harsh criticism from its public when citizens discovered that the Chilean government implemented an Internet surveillance policy that identified opposing political leaders and social protests leaders.¹⁷² Similarly, South Africa should be mindful to the heightened public suspicion and public doubt concerning government “oversight” of the Internet.¹⁷³ Thus, this Comment also recommends that South Africa create a monitoring policy when implementing a net neutrality regulation to deflect any accusations of “spying.”¹⁷⁴ Specifically, such a policy should include legal limits to the actions of the Executive branch, evaluation of public

166. *See id.* (showing that South Africa focuses on many fundamental principles in their constitution that also encompass protection of rights related to internet and communication).

167. Ludwig, *supra* note 1, at 4.

168. *About Us*, ICASA, <https://www.icasa.org.za/AboutUs/tabid/55/Default.aspx> (last visited Mar. 26, 2016) [hereinafter ICASA] (on file with *The University of the Pacific Law Review*).

169. *See* Siddharta Menon, *Policy Impediments to Media Convergence: An Exploration of Case Studies From South Africa and India*, 12 INT’L J. COMM. L. & POL’Y 313, 322 (2008) (listing the regulatory agencies in South Africa for telecommunications and broadcast industries).

170. *See* ICASA, *supra* note 168 (listing The Broadcasting Act of 2002 and The Independent Communications Authority of South Africa Act of 2006 as legislation enacted in South Africa); *see also* The South African Telecommunications Act of 1996, REP. OF S. AFR. (1996), available at http://www.gov.za/sites/www.gov.za/files/26584_0.pdf (on file with *The University of the Pacific Law Review*). Chapter 5, Article 36B (1) of the Act states:

“A ‘public switched telecommunication networks’ shall be the telecommunication systems which are installed or otherwise provided, maintained and operated by a public switched telecommunication service licensee for the purpose of providing public switched telecommunication services and fixed-mobile services such as - (a) a local access network; (b) a national long-distance network; and (c) an international network; by whatever means such as copper cables, wireless loops, microwave links, optic fibre cables, satellite earth stations, space segments and satellite systems.”

(The South African Telecommunications Act of 1996 is an example of such a policy.).

171. *See generally* Vargas-Leon, *supra* note 66, at 1 (discussing how Chile has transparency issues from government monitoring of internet that serves as a lesson for other policies).

172. *Id.* at 7.

173. *See id.* at 2 (illustrating how South Africa’s monitoring policy that would monitor the Internet and social networks was done during the President’s lowest level of popularity and harshly criticized).

174. *See id.* (discussing how the Chilean government wanted to deflect concerns about spying).

policies, protection of civil liberties, and overseeing data collection.¹⁷⁵ By doing so, South Africa's net neutrality policy would be better prepared to address any transparency issues should they arise in the future.¹⁷⁶

There are several opposing views to neutrality regulation.¹⁷⁷ One prevalent school of thought that criticizes net neutrality regulation is based on the free market principle.¹⁷⁸ Under this principle, critics claim that in countries where bandwidth capacity does not grow fast enough to "ensure quality of service without prioritizing any traffic," net neutrality will lead to poor quality Internet because innovative services will not receive priority over other kinds of Internet traffic such as email or web pages, resulting in those services being unable to fully develop and gain market share.¹⁷⁹ Such critics believe that regulation retards growth and innovation because regulation will obstruct the free flow of the open market.¹⁸⁰ However, most critics base their argument against net neutrality on an economic principle.¹⁸¹ Such criticism also comes from opponents with commercial interests, including significant market power "telecommunications companies, such as Verizon, Comcast, AT&T, cable companies[,] . . . [and] their associations."¹⁸² These critics include free-market scholars such as Christopher Yoo and Adam Thierer.¹⁸³ However, South Africa should realize that the economic bases by such opponents are not a concern for a developing country like South Africa.¹⁸⁴

From a developing country's standpoint, net neutrality regulation is critical to address for the following reasons: priority for improving access for all citizens; threat of limited access to objective information; and establishing applications such as Voice over Internet Protocol (VoIP), which will decrease the digital divide by improving communications.¹⁸⁵ Tim Berner-Lee, founder of the world wide web, is also an advocate for net neutrality, stating the Internet as a platform

175. *Id.* at 7.

176. *See id.* (showing that South Africa shares the same concerns in transparency as Chile and should be a consideration in public policy).

177. *See generally* Bocache et al., *supra* note 111 (addressing net neutrality opposition arguments, including the effect on profitability of companies concerning innovation, investment and development).

178. *See generally id.* at 6 (explaining that there are many questions regarding net neutrality, including whether the informal free market can be trusted).

179. *Id.* at 13.

180. *Id.*

181. *See generally id.* (explaining that the main arguments against net neutrality principles include technical and economic grounds).

182. *Id.* at 12.

183. *Id.*

184. *See generally id.* at 19 (showing developing countries prioritize economic threats when it comes to net neutrality issues).

185. *Id.* at 6; see also Vangie Beal, *VoIP – Voice Over Internet Protocol*, WEBOPEDIA, <http://www.webopedia.com/TERM/V/VoIP.html> (last visited Mar. 25, 2016) (on file with *The University of the Pacific Law Review*) (explaining VoIP enables the use of the Internet as the medium for transmission, instead of traditional circuits normally used for telephone calls).

should remain neutral and protected from discrimination against any specific “hardware, software, underlying network, language, culture, disability, or against particular types of data.”¹⁸⁶ Notably, “worldwide regulatory history supports control of monopolies.”¹⁸⁷ “Lack of competition, particularly in developing countries, can be devastating if costs are not controlled by the need to compete fairly. Behind the scenes, control of delivery systems amounts to an invisible monopoly.”¹⁸⁸ Brazil and Chile are examples of developing countries that have successfully sought a political solution to net neutrality by implementing regulation.¹⁸⁹

VI. CONCLUSION

ISPA narrowly views net neutrality as an industry issue specific to the U.S. and fails to see net neutrality like Chile or Brazil—as a mode of communication fundamental to the right of freedom of expression, thus warranting protection.¹⁹⁰ South Africa reflects similar progressive views with regards to implementing positive rights of its citizens especially given its recent history of oppression.¹⁹¹

On a larger scale, other developing countries that also view net neutrality just as a U.S. domestic debate are similarly disregarding the issue, as it likely exists within its own country.¹⁹² A typical U.S. user has learned to navigate the Internet from a personal computer, a school computer, or a library computer.¹⁹³ However, a typical user in a developing country is likely to “leapfrog” to first learn to navigate the Internet from a mobile device because it is more affordable and accessible than a computer.¹⁹⁴ The news story first mentioned in this Comment exemplifies this concept.¹⁹⁵ Profit companies such as Facebook are acutely aware of the “leapfrogging” that is occurring in developing countries and that many of these consumers have prepaid plans with limited or no web data.¹⁹⁶

186. *Berners-Lee on Net Neutrality*, WIRED, http://www.wired.com/2006/05/berners-lee_on_net_neutrality/ (last visited July 16, 2015) (on file with *The University of the Pacific Law Review*).

187. Bocache et al., *supra* note 111, at 17.

188. *Id.*

189. *See supra* Part III (illustrating how Brazil and Chile have enacted net neutrality regulations).

190. *See generally* Summary, *supra* note 159 (showing ISPA considers the U.S.’s approach to net neutrality issues helpful even though there are different competition issues).

191. *See supra* Part III (demonstrating that Chile, Brazil, and South Africa have similar histories with similar problems, such a non-white majority populations oppressed by violence).

192. *See supra* Part I (illustrating how South Africa views net neutrality as a non-issue).

193. Ludwig, *supra* note 1, at 4.

194. *Id.*

195. *See supra* Part I (retelling a story of high school student using mobile phone Internet and learning how to use the Internet through leapfrogging).

196. Ludwig, *supra* note 1, at 4.

Where access is available in developing countries, individuals have been able to utilize the Internet in ways not possible in the recent past, helping accelerate development in certain areas; such an increase in transparency and accountability of governments sheds light on human rights abuses.¹⁹⁷ Chile and Brazil have exemplified this.¹⁹⁸ Without net neutrality regulation, it will be easier for oppressive governments to control the Internet by manipulating content.¹⁹⁹ Other examples of how a lack of neutral access may concern citizens in developing countries, especially those with young democracies such as South Africa, include the possibility of news controlled and influenced by corporations and the government replacing citizen journalism and news from civil society through blogs, video, and audio.²⁰⁰ Moreover, governments are becoming increasingly aware of the power of Internet access.²⁰¹ A study found that governments in forty countries filter the Internet to control the flow of online content deemed socially or politically disagreeable.²⁰² South Africa can address these issues through this Comment's recommendations by implementing net neutrality legislation that provides transparency.²⁰³ The Internet has also aided improvements in science and technology, demonstrating another socio-economic benefit of implementing net neutrality regulation as it ensures free access to academics and researchers.²⁰⁴ Open data initiatives by institutions around the world are enabling researchers in developing countries to exchange information and advice with those in the developed world.²⁰⁵

The consequences of not recognizing and addressing net neutrality as an issue within South Africa will have a significant impact on South Africans.²⁰⁶ The high school students from the news story mentioned initially in this Comment are an example of how net neutrality is in fact an issue, right now, in South Africa

197. *The Importance of Net Neutrality*, *supra* note 143, at 9.

198. *See supra* Parts II–III (discussing the concept that Internet access in Chile is partially responsible for a civic reawakening for new generations to pursue political change and illustrating how more access provides freedom of speech and freedom of information).

199. *The Importance of Net Neutrality*, *supra* note 143, at 9.

200. *Id.*

201. H. NOMAN & C.J. YORK, WEST CENSORING EAST: THE USE OF WESTERN TECHNOLOGIES BY MIDDLE EAST CENSORS 2, (2010–2011), available at http://opennet.net/sites/opennet.net/files/ONI_WestCensoringEast.pdf (on file with *The University of the Pacific Law Review*) (documenting that over 40 national governments notice potential of internet access and have used method to control flow of objectionable online content).

202. *Id.* at 1.

203. *See supra* Part V (recommending that enacting net neutrality will help accelerate development in transparency and accountability of governments).

204. NOMAN & YORK, *supra* note 201, at 1.

205. *Research Project: Exploring the Emerging Impacts of Open Data in Developing Countries*, OPEN DATA RES. NETWORK, <http://www.opendataresearch.org/project/2013/oddc> (last visited July 18, 2015) (on file with *The University of the Pacific Law Review*).

206. *See* Ludwig, *supra* note 1, at 4 (showing that the lack of net neutrality in developing countries is dangerous as it may lead to exploitation with fees to access certain sites on a zero-rate service).

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not just a U.S. domestic issue.²⁰⁷ By implementing net neutrality regulation as recommended by this Comment, South Africa will successfully address the issue facing its country in a manner consistent with its status as a developing country.²⁰⁸

207. *Id.* at 1.

208. *See generally supra* Parts I–V (showing that not recognizing net neutrality could lead to exploitation of fees or restriction on fundamental rights).