

REFLECTIONS ON REGULATION AND DISPUTE RESOLUTION IN THE INDIAN TELECOMMUNICATION SECTOR

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I Introduction

INDIA INITIATED an interesting and innovative experiment in telecom regulation in 2000, when it institutionally separated the function of regulating the market from the function of resolving its disputes. The sector regulator, the Telecommunication Regulatory Authority of India (TRAI), was previously responsible for hearing disputes in the sector. Legislative amendments created the Telecommunication Disputes Settlement and Appellate Tribunal (TDSAT), giving it the power to hear disputes directly from disputing parties, as well as to review decisions of the TRAI.¹

Dispute resolution is now recognised as a strategic issue for regulators and policy makers: it is crucial for the successful implementation of a liberalisation policy agenda.² This article, prompted by a recent seminar on telecom dispute resolution hosted by TDSAT in Delhi, looks at the role of the TDSAT in the context of the sector and offers some observations on its powers and first years of service, as well as the challenges it will likely face in the future. The article follows a mini-case study International Telecommunication Union (ITU) in 2003.³

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1. The Telecom Regulatory Authority of India (Amendment) Act, 2000 amended the Telecommunication Regulatory Authority of India Act, 1997.

2. For an extensive study on dispute resolution in the telecom sector and its importance to regulatory policy, see Robert Bruce, Rory Macmillan, Hank Intven *et al.*, "Dispute Resolution in the Telecommunications Sector: Current Practice and Future Directions", prepared for the World Bank and International Telecommunications Union (ITU), published on the ITU's regulatory site at http://www.itu.int/ITU-D/treg/Case Studies/ Disp-Resolution/ITU_WB_Dispute_Res-E.pdf

3. See Robert Bruce and Rory Macmillan, "India: Dealing with Interconnection and Access Deficit Contributions in a Multi-carrier Environment" (2003), available at http://www.itu.int/ITU-D/treg/Case_Studies/index.html.

Why dispute resolution matters

Many countries opening their telecom markets and privatizing incumbent operators have established independent regulatory authorities and made them responsible for regulating the sector. Thus was TRAI established in 1997 under the Telecommunication Regulatory Authority of India Act, 1997, (referred to herein as the Act).

Much telecom regulation comprises measures designed to open the market to competition or deal with an entrenched lack of competition. In a capital-intensive network industry such as the telecom sector, the historic investment and established customer relationships of the incumbent operator often give it a tremendous advantage over new entrants. While the telecom sector is no longer viewed as a "natural monopoly", the cost of telecommunication infrastructure investment is nevertheless high.

The early stages of competition often involve permitting new entrants to offer services using the infrastructure of the dominant operator by leasing its lines and other facilities. As new entrants build their own networks (e.g., when mobile operators set up business, or when new entrant fixed line operators build their own networks), they need to connect to the dominant operator's infrastructure to deliver traffic and services between their own and its customers. To ensure that they can have such access to the dominant operator's network on economically viable terms, critical areas of regulation address leased lines, interconnection and other types of access agreements.

Resistance to such measures is an obvious way for dominant operators to hold back the tide of open market competition. There is a broad range of other disputes that may arise too, of course. These include disputes between operators and consumers, disputes over the use or abuse of frequency spectrum, disputes between regulators and operators, as well as disputes under international trade and investment agreements.⁴

In many cases, the way disputes are resolved is central to the success or failure of sector regulation.⁵ This close relationship between regulated matters and disputes arising over the provision of telecom services and infrastructure has led legislatures in many countries to confer a dispute resolution power on the body established to regulate the sector.

India was no exception, so TRAI was originally given the power to "settle disputes between service providers".⁶ Disputes were to be

4. See the World Bank/ITU study, *supra* note 2.

5. See Rory Macmillan, "Effective Dispute Resolution: A Pressing Priority for Policy-makers and Regulators", ITU news, October 2004 at 26.

6. Telecommunication Regulatory Authority of India Act, 1997 (TRAI Act) S. 11(1)(n).

adjudicated by a two-person bench constituted by the chairperson.⁷ The bench had the powers and authority of a civil court on the specific matters which were most likely to give rise to disputes relating to regulatory policy.⁸ Individual consumer complaints and antitrust matters were excluded since these were already subject to applicable laws and relevant commissions.⁹

The creation of TDSAT

It may be questioned whether the combination in one body of the regulator's rule-making function (quasi-legislative), its monitoring and enforcement functions (quasi-executive) and its dispute resolution function (quasi-judicial) is at odds with the principle of separation of powers—a principle which has been an important feature of the liberal democratic tradition of government at least since Montesquieu.¹⁰ This factor is one among others which led the government of India to introduce amending legislation which created TDSAT in 2000. TDSAT started hearing cases in 2001.¹¹

The establishment of TDSAT, and particularly the separation of the dispute resolution function from the regulatory functions of TRAI, has been welcomed as a positive sign for investors. The commitment to resolve disputes in a manner fitting Indian judicial traditions—without the trappings of the overwhelmed civil court judiciary—was viewed as signalling a broader intention to provide a transparent regulatory regime governed by the rule of law.

TDSAT has a dual dispute resolution function. It covers both disputes between parties as well as appeals against TRAI directions, decisions or orders.¹² Under its purview, disputes between parties may involve those between licensor (*i.e.*, the government) and licensee,

7. *Id.*, s. 14(1). A third member could resolve points of disagreement between the two.

8. These were technical compatibility and inter-connections between service providers, revenue sharing arrangements between different service providers, and quality of telecommunication services and interest of consumers.

9. TRAI Act, s. 14(2).

10. See Montesquieu, "L'Esprit des Lois". This issue has arisen in several countries where the author has advised on the design of the new regulatory regime and the regulator's powers. It has always proved difficult to resolve this question satisfactorily. Some have suggested that the regulator's dispute resolution powers are merely the exercise of its regulatory powers and its judgments on disputes are merely regulatory decisions, subject to administrative review just as any of its other decisions.

11. "How," it was asked, "can a regulator sit in judgment on its own regulations and decisions?"

12. TRAI Act, s. 14, as amended.

between service providers themselves, or between service providers and groups of consumers. The mandate is broad, though TDSAT may not adjudicate individual consumer disputes handled by various consumer commissions, or competition law disputes handled by the Monopolies and Restrictive Trade Practices Commission. TDSAT's jurisdiction to hear appeals against the TRAI amounts to a form of judicial review of administrative action. As discussed further in section IV, the breadth of TDSAT's mandate is interesting because it is exclusive: no civil court may entertain any suit or proceeding or grant any injunction where TDSAT has jurisdiction.¹³

In order to ensure that it has sufficient powers to examine evidence and establish facts, TDSAT has powers akin to a civil court. This includes summoning and enforcing examination under oath, ordering discovery and production of documents, regulating use of affidavits, requisitioning public records, commissioning examination of witnesses of documents and others.¹⁴ These powers are robust and valuable to its ability to do the job.

At an enforcement level, TDSAT's orders are executable as civil decrees and are to be executed by civil courts as if they had made them.¹⁵ Penalties for wilful non-compliance may amount to two lakh rupees (less than US\$ 5,000) every day a default continues. It is open to question whether such amounts are sufficient given the size of the country which, although it suffers from extensive poverty, boasts of a vast population and large telecom sector revenues.

Effective dispute resolution

Most countries with independent telecom regulators combine the dispute resolution function within the sector regulatory body. It may be that investors' positive perceptions of India's new approach to dispute resolution concerned less the institutional separation of regulatory and dispute resolution functions and more the broad signal that the government was committing resources to resolving disputes well. Investors tend to care about the predictability and quality of results, and only become concerned with the nuances of institutional structure to the extent the results are at stake.

The question in the Indian telecom sector, then, is the extent to which the regime optimize disputes resolution. The following are some of the themes this article explores:

13. *Id.* s. 15, as amended.

14. *Id.* s. 16 (2), as amended.

15. *Id.* s.19, as amended.

In a highly regulated sector such as the telecom sector, how do adjudication and regulation relate, and how do the respective institutions responsible for each interact? How does adjudication work where important public policy matters are at stake?

How can the importance of procedural flexibility be balanced against the need for transparency, predictability and due process?

What safety valves exist if TDSAT becomes overwhelmed with an increasing case-load? What scope is there for turning to non-official resources in dispute resolution, such as mediation, arbitration and other alternative dispute resolution approaches?

II Where Public Policy and Regulation Meet

As explained in section I of this article, dispute resolution in a highly regulated field such as the telecom sector involves an intertwining mix of policy, regulatory and legal issues that are hard to separate. This is no less true in India than in any other country, as has already been discovered in the course of TDSAT's judgments. Before exploring TDSAT's experience, it is worth reviewing the relationship between policy and regulation generally, and then more particularly in the Indian telecom sector.

Separation of telecom policy and regulation in India

A theme idea underlying the creation of independent regulators and privatisation of state-held operators in many countries is that operation, regulation and policy should somehow be separated. By privatising state-owned operators, the operation of telecom infrastructure and services is separated from policy-making and regulation. The responsibilities for making financial, investment, operational and marketing decisions and bearing the related risks are thereby more rationally matched. They suffer fewer distortions from political whim and unstable regulatory conditions. The theory is that this makes for more efficient investment and operations focused on customer market demand, merely framed by the regulatory environment.

In turn, separation policy from regulation by creating a regulator independent of the government's more political organs renders the regulatory environment less vulnerable to political change; a stable, predictable and hopefully healthy regulatory environment is more assured. It is common, therefore, in many countries for sector legislation to entrust regulation to the independent regulator and to reserve matters of policy to government ministries. The legislation will establish specific issues for which the regulator is responsible and specific goals which the

regulator is to pursue, and enforcement of regulations and licenses, as well as range of investigatory, penalty and other powers necessary to regulate effectively.

Meanwhile, the government ministry responsible for the telecom sector may be explicitly mandated in the legislation to set sector policy. Policy-making is usually understood to involve setting broader aspirations for the sector and its role in the socio-economic development of the country. Regulation on the other hand is about implementing those policy aims.

Naturally, the demarcation between policy and regulation (and the powers of policy makers as opposed to regulators) is rarely perfectly clear. Disagreements sometimes arise over the relationship between policy-makers and the regulator. Working out this relationship balance is common in most countries, and again India is no exception.

One of the TRAI's important powers is to make recommendations to the government on various matters, including licensing, competition, technology, equipment and spectrum management.¹⁶ This recommendation role is at the nub of the separation of policy and regulation in India since central government reserved the actual decision-making over these issues to itself. Such a reservation is not necessarily always a matter for concern where sufficient separation exists between the policy makers and regulatory agency. So long as the regulator has the resources to, does and is assured of continuing to exercise its recommendation powers objectively and independently, investors may have confidence.¹⁷

Concerns have been expressed in India about the TRAI's independence and the relationship between its recommendation role and central government decision-making. They arose in connection with a major dispute between the Indian cellular operators and the fixed line operators.¹⁸ The relationship between policy makers and regulators was criticised on the basis that recommendations of the TRAI to central government in 2001 were accepted and guidelines adopted on their basis so quickly that in effect a "command" relationship existed between the two institutions.¹⁹ How such concerns are addressed and how the

16. *Id.*, s. 11 (1), as amended.

17. The Danish National IT and Telecom Agency (NITA) in Denmark, for example, was established in April 2002 through a merger of the State Information Services and the former National Telecom Agency (NTA). NITA is part of the Danish Ministry of Science, Technology and Innovation.

18. See *infra*.

19. See the judgment of D.P. Wadhwa J. in *Cellular Operators of India & Others v. Union of India & Others*, (2003) 3 SCC 186: "It was because recommendation of TRAI was a foregone conclusion as the record of the DOT and the TRAI would show. Clause 18 was already forming part of the guidelines, even

separation of policy-making and regulating functions develop in India will be an important factor for the prospects for investment and growth in the sector.

A second concern about the TRAI's regulatory independence relates to how and by whom policy is defined and how it may be imposed on the TRAI. Under most countries' constitutional frameworks, government policy-making must be consistent with the regime established by national legislation—since even government ministries are subject to the law. Where such legislation has established an independent regulator, government policy should not clash with the mandate and powers reserved to the regulator.²⁰

The defining point of a regulator's independence is found where politicians or civil servants in a government ministry exert pressure upon the regulator. A regulator would ordinarily be justified in protecting its turf from policy-makers if the principles applying to a matter have been set out in law, the matter is within its mandate and it has powers under the law to handle it. Should there be disagreement over this defining point, the resolution of the question ought to be a matter of interpreting the legislation. This would ordinarily be a matter of judicial interpretation in constitutional or administrative courts.

The reverse of the TRAI's recommendation role is central government's power "from time to time [to] issue directions to the [TRAI] as it may think necessary..."²¹ The TRAI is bound by such directions, although it is to have an opportunity to express its views before such a direction is given.²² Thus, it appears, the central government has retained the right to impose policy on the TRAI. Although, the types of policy should involve "the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality", such terms could be broadly construed.

before the recommendations were received by the DOT from TRAI. Recommendations of TRAI appeared to be a mere formality for guidelines dated 25.01.2002 to be put in operation." Opinion of Wadhwa J. robustly criticised both the Department of Telecommunications and the TRAI: "...we cannot brush aside the argument of the petitioners that TRAI fell in line with what DOT required. DOT suppressed its earlier decisions which prohibited mobility in any form or use of handset and then overturned the same without any reason. How can a well considered decision of the Government could be ignored or overturned, we are unable to comprehend."

20. Of course, government policy could involve a proposal to change the regime as a whole, including introducing new legislation changing the mandate and powers of the regulator. But until such legislation is passed, policy would have to be consistent with existing legislation.

21. TRAI Act, s. 25 (1).

22. *Id.*, s. 25(2), as amended.

Also important to observe is that “the decision of the Central Government whether a question is one of policy or not shall be final.”²³ Thus, the central government is effectively able to rule on its own powers. It will be interesting to see how the central government uses its power to impose policy and this interpretative power. It will also be interesting to follow how TDSAT and the Indian Supreme Court review the exercise of these central government powers. Investors will want to assess whether the central government might use its power (and be permitted by the Supreme Court) to issue directions to the TRAI in a manner that undermines the independence of the TRAI and the stability and predictability of the regulatory regime.

Public policy and TDSAT’s powers: the WLL (M) dispute example

TDSAT had occasion to deal with the grey zone between regulation and public policy in one of the most important disputes to occur in the Indian telecom sector since the 1997 Act was passed. The dispute arose between the Indian cellular operators on the one hand and the government and the country’s fixed line operators, or basic service operators (BSOs), on the other. It concerned, among related issues, the “level playing field” between the cellular operators and those BSOs which were offering limited mobility services using wireless technology.

The case was complex, raising issues of licensing service definitions, technological neutrality, license fees for different but arguably substitutable services, types of terminal equipment, service pricing and market structure, definition of the local loop, and underlying universal service policies.²⁴ The purpose here is neither to review the case in detail nor to evaluate whether the decision was correct on the merits. Rather, what is of interest for our purposes is to understand the public policy elements at its core, TDSAT’s role in addressing these and the overall process.

In short, the cellular operators had been licensed under a specific cellular service licensing process separate but concurrent with the BSO’s licensing process. The cellular operators had paid hefty fees for their licenses whereas the BSOs had not. A policy debate arose—and continued for several years—in the sector about whether the BSOs should be permitted to use wireless local loop technology on their fixed network to offer a service that in fact had an element of mobility [WLL (M) services].

The cellular operators argued that WLL (M) services were effectively a competitive substitute for their cellular services. The result, they argued, was a distortion of the “level playing field” essential to the licensing

23. *Id.*, s. 25(3), as amended.

and regulatory regime under which the cellular operators had entered the market. They had paid for licenses without knowing that the BSOs would later be permitted to offer WLL (M) services. Indeed, the cellular operators argued, it went against earlier policy of the Department of Telecommunications pursuant to which the cellular licenses had been tendered and issued.

The central government and the TRAI had been involved in developing policy towards the BSO's WLL(M) services. It appeared that the prevailing view in 1999 was that WLL(M) was not within the scope of the BSO's licenses. This position began to shift, however. Consultation papers were published and open discussion meetings were held, and so controversial were the issues that "pandemonium" reportedly prevailed at one meeting.²⁵

By 2001, the TRAI was of the view that the cost of cellular services kept such services out of reach of much of the population. It also took the view that the costs of using fixed infrastructure for the BSO's last mile connectivity was restraining rollout of the BSO's traditional fixed services. The WLL(M) services seemed to offer a cost-efficient alternative that would accelerate rollout of services to the population. The TRAI answered the "level playing field" concern by arguing that the limited mobility of the BSO's WLL(M) services prevented them from being true substitutes for regular cellular services, and that anyway the cellular operators no longer had a right to a protected market.

On the recommendation of the TRAI, the Department of Telecommunications issued guidelines in 2001 pursuant to which the licenses of the BSOs were amended. The amendments allowed the BSOs to offer WLL(M) services provided their mobility was limited.²⁶ And so the dispute caught fire, with the cellular operators claiming that they were unfairly treated and that proper licensing procedures in the law had not been followed.

TDSAT initially dismissed the case on the grounds that it concerned matters of central government policy and it could not go into these. On appeal by the cellular operators, however, the Supreme Court of India decided that TDSAT did have the power to adjudicate the matter. Since TDSAT was explicitly mandated with jurisdiction over telecom disputes,

24. For an extensive discussion on the importance of the relationship among licensing structures, licensing fees and substitutability of services, see "Telecommunications in Crisis: Perspectives of the Financial Sector on Regulatory Impediments to Sustainable Investment", Robert Bruce and Rory Macmillan, 2002, published on the ITU's regulatory site at [http://www.itu.int/ITU-D/treg/Events / Seminars/2002/GSR/Documents/11-Investor_casestudy.pdf](http://www.itu.int/ITU-D/treg/Events/Seminars/2002/GSR/Documents/11-Investor_casestudy.pdf).

25. *Cellular Operators of India*, see *supra* note 19.

26. Mobility was permitted within the Short Distance Charging Areas (SDCA) where customers were registered.

it should not shrink from judging them. It appears, then, that TDSAT is expected to have a fairly vigorous role to play in adjudication disputes notwithstanding that they may involve important policy issues. Still, since the case involved decisions of the government and recommendations of the TRAI, “due weight” should be given to those.²⁷

The public policy dimension of the case was all the more important because of the rapid growth of the BSO’s WLL(M) services. With the competitive impact of the WLL(M) offerings, prices of services “crashed dramatically”, representing a “bonanza” to the consumer²⁸ and resulting in extremely high growth in service penetration. There were reports of two million subscribers being added each month.

The scale and speed of such change in the market gives a sense of the magnitude of what was at stake among operators competing in the sector. In any terms, its extraordinary growth represented a boon for policy makers. Ensuring that the population receives access to services is a central policy aim of most administrations, not least India. Taking any step that might restrain such growth would seem to run contrary to such policy and the public interest. This factor was evidently in the minds of the TDSAT members who decided the case by majority, concluding that “WLL service with limited mobility will go a long way in increasing teledensity of the country and making available cheaper and affordable service and benefits accruing from evolving technology.”²⁹

Remarkably, TDSAT was split and the case was decided by a majority of two outvoting its chairperson. The majority held that WLL technology had always been permitted as part of the BSO’s fixed licenses,

27. See opinion of Pattanaik, CJI in *supra* note 19.

28. See the majority opinion of R.U.S. Prasad and P.R. Dasgupta, JJ., in *ibid*.

29. See the majority opinion of R.U.S. Prasad and P.R. Dasgupta JJ: ‘Viewing the concept of WLL(M) from a developmental approach rather than a restrictive regulatory approach can play a positive and promotive role in meeting the needs of the market. The phenomenal rise in the number of subscribers, both fixed as well as mobile services in the wake of availability of additional and supplemental value-added services is a case in point.’ The majority opinion concluded. “We hold that WLL service with limited mobility will go a long way in increasing teledensity of the country and making available cheaper and affordable service and benefits accruing from evolving technology which are in conformity with the objectives of NTP-1999. Therefore, allowing WLL service with limited mobility would be in best interest of the telecom sector and consumers at large in the country. As long as WLL(M) service is provided as a value-added service under a [fixed service provider] license, the existing distinctions between fully mobile Cellular Mobile Service and Limited Mobile Service being provided by WLL(M) service-providers would have to be maintained. We are conscious of the fact that allowing WLL service with limited mobility will cause disturbance in the level playing field. Hence, we have suggested a number of steps which should be considered and taken for ensuring level playing field.”

and that the mobility element was merely a supplementary or value added service. The majority was not troubled by the fact that WLL(M) services, permitted without requiring a separate license for mobile services, may impinge on regular cellular services. They compared this to the fact that permitting cellular operators to provide SMS messaging without separate licensing had wiped out the radio-paging industry.³⁰ The majority decision did, however, require the government to address concerns about the “level playing field” by imposing appropriate license fees on the BSOs so that they could not be said to have an advantage over the cellular service providers which had previously paid fees themselves.

The WLL (M) case illustrates the challenges facing regulatory adjudication when weighing a range of inter-related legal, licensing and procedural issues against the sector’s underlying policy aims of access to services, low pricing and competition. Some may continue to pose questions about how the government and TRAI decided to permit BSOs to offer WLL (M) services, and TDSAT’s concurrence with such policy. As in any dispute, some will continue to be frustrated with the outcome. Regardless of the result, what is impressive about TDSAT’s handling of the case is how the process drew out and weighed the facts and applicable principles.

Once the Supreme Court overruled TDSAT’s initial hesitation over hearing the dispute because it concerned matters of policy, TDSAT seems to have embraced its responsibilities with vigour. It’s chairman’s minority judgment expressed robust and blunt criticism of government and regulator, the language of which was only tempered by “judicial discipline”.³¹ Whether or not one agrees with the majority or the minority opinions, the process itself offers investors valuable insight into how disputes over important telecom policy matters are decided in India.

III Transparency, Flexibility and the Rule of Law

Adjudicating in a highly regulated sector such as the telecom sector

30. *Ibid.*

31. Such frustration is reflected in the language of the minority decision of D.P. Wadhwa J: ‘A well considered decision of the Government was overturned without even bat of eyelid and the speed with which the impugned decision was taken cannot be explained otherwise than that it was because of extraneous considerations. The decision and the implementation thereof stand vitiated. The decision to grant limited mobility etc. was taken in September, 2000 itself as reported in the Hindustan Times (Delhi edition) and going to TRAI was only a ritual which was in contravention of 5th proviso to Section 11 of TRAI Act. Judicial discipline restrains us from using strong language but the whole thing proceeded on specious pleas to grant benefit to FSPs.’ See *ibid.*

is a delicate and nuanced business. This section discusses features of regulatory adjudication and their implications for dispute resolution in the Indian telecom sector. Regulatory adjudication would in many countries refer to the sector regulator's dispute resolution role, such as TRAI's before the creation of TDSAT. Here, TDSAT is adjudicating in a highly regulated environment and so although characterized as a "tribunal" and not as a regulator, its decision-making has both regulatory and adjudicatory implications. Understanding telecom dispute resolution, then, requires understanding and perhaps contrasting the combination of both regulatory and adjudicatory functions—two functions which traditionally have different ways of gathering information, weighing argument and reaching decisions. This raises important issues for flexibility, transparency and predictability.

The "regulatory" in regulatory adjudication

Given the contextual background of regulatory policy to the disputes regulatory adjudicators face, the features of regulatory process itself are relevant to the design of regulatory adjudication processes. Regulatory regimes are usually set up in the context of privatisation and liberalisation because it is acknowledged that the structure of market will not suffice to achieve important policy aims—effective competition, universal service, orderly numbering and frequency spectrum allocation, for example. Regulation may be described as the visible hand where the "invisible hand" of the market is expected, or has been proven, to fail in furthering the public good.

Making official decisions in a regulated field such as the telecom sector, then, requires an intimate understanding of the market, including emerging technologies, rapidly changing business models, and the impact on investment and financing realities. The rapidity of change in the telecom market accentuates the importance of this and necessitates a regulatory culture of consultation and consensus building which is increasingly common in many countries.³²

This is as true for the regulatory adjudicator as it is for regulators generally.³³ Combining the centrality of regulatory policy, the ever-

32. For a discussion of the importance of consultation and consensus building right across the industry, see Robert Bruce and Rory Macmillan, "Telecommunications in Crisis: Perspectives of the Financial Sector on Regulatory Impediments to Sustainable Investment", (2002), published on the ITU's regulatory site at http://www.itu.int/ITU-D/treg/Events/Seminars/2002/GSR/Documents/11-Investor_casestudy.pdf.

33. Some hold that regulatory adjudication is actually no more than the exercise of regulatory decision-making in specific situations and should not be differentiated from the other activities of regulating, for example, when subject to appeal or review by administrative or other courts.

transforming **market and importance** of access to and understanding of current **market information** makes it important for regulatory adjudicators to **have flexibility** in the way they hear and decide disputes. **Flexibility** is valuable to allow them to move nimbly to obtain and **assess relevant** information, seek input from parties other than the immediate disputants, and reach decisions quickly enough to be relevant for the market before it moves on. Legislation in several countries explicitly enshrines this flexibility of procedures.³⁴

Likewise in India, TDSAT is not bound by the Indian civil procedure code “but shall be guided by the principles of natural justice and... shall have powers to regulate its own procedure.”³⁵ This room to manoeuvre is likely to be helpful as TDSAT develops its understanding of the market and the types of information it requires, as well as the relative urgency of different kinds of disputes. As seen in the following section, however, flexibility needs to be weighed against the considerations of the adjudicatory function.

The “adjudication” in regulatory adjudication

Adjudicatory processes are usually by their nature dialectic, posing parties and their arguments against one another before third party decision-making who are asked to choose between a binary offer of conclusions. Whereas regulatory activities tend to be more consultative and on-going, adjudication tends to be more circumscribed. Adjudication processes often follow more strictly set and applied procedures, limit contributions to the disputants and their representatives, limit information to the specific case at hand, and strive to limit the time period of the dispute.

These features of adjudicatory processes protect opposing parties from the arbitrariness and error of the neutral third party, providing predictability and specific guarantees to the parties. These guarantees provide assurance that their arguments will be heard, that they may respond to the other party’s arguments, that they may present evidence, that such evidence as is presented will be reliable, and that the decision-maker will follow particular lines of reasoning to reach his or her conclusions about the evidence and the arguments.

Since regulatory adjudication is not only a regulatory function but also an adjudicatory function, the flexibility that is valuable for the

34. E.g., the Australian Competition and Consumer Commission “is not bound by technicalities, legal forms or rules of evidence.” Section 152DB of Trade Practices Act 1974. Some countries, such as Ireland’s ComReg and the UK’s OfCom, even publish their draft adjudicatory decisions for public comment before issuing them.

35. TRAI Act, s. 15, as amended.

regulatory function needs to be weighed against the protection necessary for the adjudicatory function. An example of such protection is the existence and application of clear procedures. Legislators or telecom regulators in many countries have published guidelines or procedures to explain what cases the regulator will hear, what they require parties to show and how the process will work.

A basic set of rules for petitions and appeals has been issued in India for TDSAT's cases, but these are limited in scope to the initiation of complaints. Where procedural guidelines or rules for a body charged with adjudicating disputes are not available, at least three issues become more important in assessing its predictability and transparency. These are:

- The composition of such body;
- Its actual practices and explanations for them; and
- The appeal of its decisions.

Regarding the composition of the body, it is valuable that TDSAT's chairperson must be or have been a judge of the Supreme Court or chief justice of a high court. This provides some assurance as to how the notoriously vague notion of "natural justice" shall be applied. The credibility of TDSAT, at least in part depends upon the integrity of this individual and how he or she controls procedures to ensure that evidence and argument are weighed fully and fairly without bogging down the process.

TDSAT's other members must either have held a senior government position or be well versed in the sector.³⁶ This may be helpful, but there may be needs for checks and balances. Members coming from closely related jobs, either within government or the private sector, may have legacy links with the parties or issues at stake. Such links may raise potential conflicts of interest or questions of bias that are better addressed head on through disclosure requirements and, if necessary, the recusal of the relevant TDSAT member.

The practice of the institution in conducting its processes and in explaining its decision is also important. Cases before TDSAT are gradually showing some of the approaches it takes to procedural matters. The cases generally suggest a tendency to approach procedure in a manner comparable to a civil court, for example, weighing prayers for

36. *Id.*, s. 14C, as amended, provides "[A person shall not be qualified...unless he...] in the case of a Member, has held the post of Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a period of not less than two years or a person who is well versed in the field of technology, telecommunication, industry, commerce or administration."

orders, prayers for adjournments, submissions of affidavits and expert evidence,³⁷ wrongful statements,³⁸ requests for interim measures, opposition to jurisdiction and the like all in the "interests of justice".³⁹

With respect to explaining its decisions, TDSAT publishes written opinions, including dissenting opinions, in the style of a common law court. This supplies a useful bank of reasoned precedent to which market participants, investors and TRAI officials will be able to refer in the future. The respect for precedent in the Indian jurisprudential tradition suggests that such publication is a valuable feature of the regime.

TDSAT's decisions may be appealed to the Supreme Court on the same grounds usually applicable to appeals of appellate decrees, *i.e.*, on a "substantial question of law".⁴⁰ What a "substantial question of law" is in such a situation is of course undefined. An example arose in the WLL(M) dispute discussed above in section II. TDSAT's refusal to adjudicate matters of policy was appealed to the Supreme Court. The Supreme Court remanded the case to TDSAT on the basis that it had not addressed matters of law for which it was responsible.

Such back-and-forth reflects the natural process of unfolding the jurisdiction of a new institution such as TDSAT. The Supreme Court has not yet, however, had an occasion to review in detail the appropriateness of TDSAT's procedures. If and when it does, it will have to take into account the law's explicitly wide discretion provided to TDSAT to determine its procedures itself. Since it will not ordinarily be possible to appeal TDSAT's findings of fact, its procedures for establishing facts will be all the more important.

37. See, *e.g.*, *BPL Cellular Ltd. v. Union of India & Ors*, Civil Appeal No. 5468 of 2004, pending (Petition No. 6 of 2001). In this case, TDSAT considered the weight of reports and affidavits of Booz-Allen & Hamilton, an international consulting firm, submitted by the petitioner. TDSAT considered the expertise of these reports and concluded by reference to the Evidence Act that without evidence of the professional qualifications of Boozz-Allen, the tribunal could not admit the reports as evidence.

38. See *e.g.*, *Cellular Operators Association of India*, *supra* note 19. In this case, TDSAT addressed the consequences of one of the parties which had made a wrongfull statement by affidavit, ordering a contribution to the costs of the tribunal in the Prime Minister's Relief Fund. Although the amount of the contribution was low, this illustrated the type of approach TDSAT intended to take, establishing potentially useful precedent.

39. See, for example, *BPL Mobile Cellular Ltd v. Union of India*, Petition No. 18 of 2001 (8.8.2001).

40. TRAI Act, s. 18(1), as amended, permits appeal on the grounds in section 100 of the Code of Civil Procedure, which provides that an appeal may lie to the high court if the high court is satisfied that it "involves a substantial question of law".

There may, then, be advantages in TDSAT increasing the transparency of its procedures by publishing some basic guidelines or principles it plans to follow. These might address, just to give a few examples, how and when the issues at stake are to be defined, how arguments may be exchanged, some basic rules of evidence and expert witnesses the award of costs and the use of interim measures. Of course, the point made above in section (a) about the importance of flexibility would need to be weighed carefully against the benefits of introducing too much detail. Paradoxically, introducing such guidelines might free TDSAT somewhat from any over-formalism resulting from referring by default to civil court procedures.

Probably the most reassuring aspect of TDSAT's approach has been its adherence to the tradition of writing common law-style judgments, including dissenting opinions, giving reasons for its decisions. One challenge facing TDSAT in the future will likely concern how to maintain this level of rigour in face of an ever-increasing case load, on issue discussed in the next section.

IV Using Resources in Dispute Resolution

Dispute resolution consumes resources. It is expensive, takes time and requires the expertise of highly qualified lawyers, economists, engineers and policy advisors among others. The resources of many countries' dispute resolution institutions (whether civil courts or sector-specific regulatory authorities) are constrained and cannot manage the full burden of resolving all disputes well. How the official sector organizes itself, including the scope it allows for using non-official alternative means of resolving disputes, can have a major impact on the effectiveness and efficiency of dispute resolution in the telecom sector.

International trends in exploiting dispute resolution resources

The question of how best to prioritize resources is not only of concern for less developed countries. It is a very real concern in countries, which usually have greater resources available. For example, the high volume of cases jamming regulators and appeal courts in Germany and the Netherlands illustrates the challenge to the regulatory adjudication system by regulatory gaming of market participants (strategic use of regulatory adjudication and appeal processes to impede regulatory policy).

India may also be vulnerable to this use of regulatory adjudication. The large scale of the market at stake and the number of highly qualified lawyers in India and their incentive arrangements may encourage increased use of regulatory adjudication. Should TDSAT's volumes of cases increase, existing resources may be inadequate to resolve them

quickly and effectively.

This subject has caught the attention of regulators and policy makers in many countries.⁴¹ Regulators are increasingly prioritizing their resources in dispute resolution, and are turning to alternative resources where available. While regulatory adjudication remains the cornerstone of dispute resolution, such alternative resources include non-official mechanism such as arbitration and mediation. In Europe, for example, the EU Framework Directive explicitly contemplates national regulatory authorities encouraging alternative means of dispute resolution such as mediation where they are available and efficient.⁴²

Private arbitration has been successful in many countries in reducing the burden on the court system of many types of disputes. It has been acclaimed internationally to have surpassed expectations as to its reliability and efficacy. Thus, arbitration is also increasingly viewed as a potentially effective resource in telecoms dispute resolution. Jordan's Interconnection Dispute Procedures, for example, permit parties to use arbitration to resolve disputes.⁴³

A wide variety of innovative dispute resolution techniques are increasingly being employed to lighten the burden on official institutions. These range from more official techniques (like variations of regulatory adjudication) to those having almost no official involvement (such as private mediation). They range from the more adjudicatory types of dispute resolution (such as use of independent experts and arbitrators) to those techniques that are more voluntary in nature (such as conciliation).

This variety of techniques and mechanisms is producing an interesting panoply of hybrid approaches to dispute resolution. To take some examples, Hungary's Board of National Communications Authority has set up a Permanent Court of Arbitration for Communications, an independent body comprised of a large bank of arbitrators to resolve disputes in the sector. Arbitrators from the Permanent Court of Arbitration, which is a member of the International Chamber of Commerce (ICC) in Hungary, will arbitrate disputes where the parties have chosen to submit them to arbitration. It resembles private

41. For a wide-ranging discussion of these trends, see the World Bank/ITU study "Dispute Resolution in the Telecommunications Sector: Current Practice and Future Directions" *supra* note 2.

42. Art 20(2) of the EU Framework Directive provides that "Member States may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner..."

43. See Robert Bruce and Rory Macmillan "Jordan: Dispute Resolution and Consensus Building in Interconnection" (2003), available at http://www.itu.int/ITU-D/treg/Case_Studies/index.html.

arbitration, then, except that a key part of arbitration process is reserved for the official sector: the regulatory authority proposes the membership of the Permanent Court of Arbitration.

In the UK, a Local Loop Unbundling Adjudicator Scheme has been established. As in private arbitration, it is based upon a contractual commitment by operators who sign up to the scheme. It is in this sense voluntary. The creation of the scheme has in fact, however, been very much led by the regulator Ofcom, which also appoints the scheme's independent telecommunication adjudicator.⁴⁴ It is, then, also semi-official. In addition, both voluntary facilitation and mandatory adjudication are available.

These trends evidence a recognition at a high level of policy-making of the importance of effective and efficient dispute resolution to the sector. They also acknowledge a growing need to relieve the burden on the official mechanism of regulatory adjudication and the opportunity for innovatively employing a variety of alternative resources for this purpose. It enables the official sector to tap into already developed methods and use the expertise of experienced professionals.

As India's market becomes more competitive, it is likely to face the same trends as other markets- an ever more complex and numerous case load, some of which will have important regulatory policy implications and some of which will concern purely commercial disputes.

Existing ADR traditions in India

As suggested by the EU Framework Directive, it is only appropriate for official dispute resolution institutions to decline to hear disputes where other alternatives are genuinely available. Only when the UK's LLU Adjudicator Scheme was becoming available in the UK, for example, could Ofcom suggest that disputing parties use it instead of Ofcom's standard dispute resolution procedure. Should TDSAT need to focus only on strategic regulatory disputes and wish to encourage disputing parties to use alternative mechanisms for more purely commercial disputes, what alternatives are available in India?

India does have alternative dispute resolution mechanisms. One example is the *Lok Adalat*, which evolved from an informal local dispute resolution process to become recognized in national legislation.⁴⁵ The *Lok Adalat* resembles a combination of conciliation and adjudication by

44. See the Office of the Telecommunications Adjudicator website at <http://www.offta.org.uk/>

45. Traditionally, the results of *Lok Adalats* did not have the force of law in the sense of official courts. Nevertheless, the local element did provide some effectiveness in terms of implementation. The *Lok Adalat* has become adopted by the official

local senior or retired judicial officers. "Permanent *Lok Adalats*" were established for utility sectors including, interestingly, for telephone services.⁴⁶ An award of a permanent *Lok Adalat* is "final and binding" on the parties and is "deemed to be a decree of a civil court."⁴⁷

Permanent *Lok Adalats* lack the telecom sector expertise required for large disputes, however, and furthermore their jurisdiction is limited to cases involving up to ten lakh rupees (about US\$ 20,000).⁴⁸ Nevertheless, the model is an interesting precedent for the Indian telecom sector, and it may be worth exploring whether some of its elements could be a rough basis for developing ways to deal with larger telecom disputes.

Arbitration and TDSAT's exclusive jurisdiction

Are other resources, such as conventional private arbitration, available? TDSAT's exclusive jurisdiction may be a significant limiting factor in developing and using arbitration for resolving telecom disputes in India. As mentioned in section I, no civil court may entertain any suit or proceeding or grant any injunction where TDSAT has jurisdiction. Although arbitration panels and processes are not civil courts or civil court processes, this exclusive jurisdiction is also generally understood to exclude arbitration. The basis is a landmark case in the insurance industry, which established that where a tribunal has exclusive jurisdiction, this also applies to exclude arbitration.⁴⁹

It is not clear whether TDSAT's exclusive jurisdiction means that every single dispute between licensed operators must be heard by TDSAT – including disputes over simple commercial matters that do not raise regulatory issues. It may be that instead of blanket exclusivity for TDSAT, allowing a more nuanced approach to cases involving important public policy matters would be helpful.

Some of the logic that has gone into developing the legal notion of "arbitrability" could be useful in developing TDSAT's (and the Supreme

sector, with the Legal Services Authorities Act, 1987 setting forth qualifications required for the *Lok Adalat* members, and an explicit encouragement to courts to refer cases to it where the matter is an appropriate one to be taken cognizance of by the *Lok Adalat*". Legal Services Authorities Act, 1987, ss. 19 and 20.

46. *Id.*, s. 22A. It is unclear how TDSAT's and the permanent *Lok Adalat*'s respective jurisdictions relate to one another. That TDSAT may not deal with individual consumer disputes probably removes some of the potential overlap given the ten lakh rupee limit on permanent *Lok Adalat* cases.

47. *Id.*, s. 22E.

48. *Id.*, s. 22C.

49. See *Life Insurance Company of India v. D.J. Bahadur*, (1981) 1 SCC 315. *Vulcan Insurance Co. Ltd. v. Maharaj Singh*, (1976) 1 SCC 943.

Court's) thinking in this area. "Arbitrability" is employed in many countries to delineate those areas of sensitive public policy which should be reserved to custodians of the official sector the courts. Courts in the US, for example, have developed a rich jurisprudence of cases where judges have wrestled with the question of whether private parties should be permitted to submit disputes involving important public policy issues to the hands of privately selected arbitrators. Areas where the courts have insisted that only they can guard the public interest at stake have included antitrust, securities laws and bankruptcy.⁵⁰ More straightforward commercial disputes can be handled by arbitrators if the parties so choose.

As mentioned above, regulators in Europe and many other countries are taking the view that not all disputes in the sector need the attention of the regulatory authorities. Indeed, they are increasingly prioritizing those disputes which by their nature require the attention of the official sector while allowing (even encouraging) others to be resolved through privately arranged processes including arbitration.

TDSAT's exclusive jurisdiction may not prevent the official sector from developing alternative routes and safety valves if and when it becomes over-encumbered with disputes. It may also restrict private parties themselves from taking creative initiatives to improve handling of their disputes. For example, in the UK, private companies such as British Telecom and Vodafone have established their own private dispute resolution schemes for dealing with other companies. To take another example, the United Kingdom Competitive Telecommunication Association (UKCTA) — an association of the UK's new entrants — has established its own dispute resolution scheme which is intended to apply amongst its members. These initiatives have been set up with the help of the UK's Chartered Institute of Arbitrators, include dispute resolution procedures closely related to arbitration and have the benefit of the long experience of its members.

The standardization in the sector of such schemes can make them usable for many cases and represents a valuable industry initiative that relieves Ofcom, the industry regulator, of the burden of dealing with their disputes. They increase the likelihood of disputes being resolved efficiently and allow the official sector the room to focus on disputes that matter most to the structure of the sector. Such initiatives may be difficult or even impossible to implement in India given TDSAT's exclusive jurisdiction.

It may be worth reconsidering whether TDSAT's exclusive jurisdiction is in the best interest of the sector. The rational underlying exclusive jurisdiction of a court or tribunal is primarily to ensure that

50. E.g. see *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

matters of public policy are not left in the hands of private arbitrators under privately selected procedures. Thus TDSAT's exclusive jurisdiction would be justifiable to the extent that TDSAT, having been designed and mandated for the job, is not only the best qualified but the only reliable guardian of the public interest in disputes among telecom companies. This may be so in disputes where there is a significant public interest at stake, such as key access issues and major licensing disputes.

Exploring ways to "liberalise" dispute resolution itself could enable TDSAT to prioritise the most important disputes in the country and focus its resources on these.⁵¹ Such an exploration might include legislative change or more creative ways in which arbitration resources could be characterized lawfully as within TDSAT's operations.⁵²

Developing mediation and other alternative techniques in the Indian telecom sector

Mediation, conciliation, facilitated negotiation, consensus building fora and similar techniques are all useful to telecom sector dispute resolution. They are rarely complete substitutes for regulatory adjudication, which remains the cornerstone of effective dispute resolution. Nevertheless, such techniques do often provide avenues of effective communication between parties and frequently help to resolve disputes. Where they do not result directly in resolution, these techniques often help parties to agree on facts and clarify the core disputed issues, thus allowing later adjudication processes to focus on the key points that are disputed.

It does not appear to be beyond the powers of TDSAT to encourage parties to enter into a mediation process. Indeed, there are signs that TDSAT is willing to compel parties to engage with one another to refine disputed issues and narrow down the claims. For example, on one occasion TDSAT directed the parties "to sit together and compute the amount allegedly overcharged by DoT. After few sittings petitioner scaled

51. For a discussion of developing a "market" in dispute resolution techniques, see section 4.3 of the World Bank/ITU study "Dispute Resolution in the Telecommunications Sector", *supra* note 2.

52. One possibility to consider might be along the lines of the Hungarian initiative. Can TDSAT establish and monitor a register of qualified arbitrators under its umbrella, allocate cases to them and review only cases where manifest errors, jurisdictional issues or matters of public policy are at stake? If such an arrangement were possible or desirable, interaction between TDSAT's powers and mandate under the TRAI Act, 1997 would have to be carefully considered in relation to the Arbitration and Conciliation Act, 1996.

down its claim..."⁵³ this kind of practice may be useful from time to time when used strategically by TDSAT to weed out excessive or unrealistic claims of law, fact or remedy. But can TDSAT actually compel parties to turn to mediation instead of the tribunal's adjudicatory procedures?

It may be difficult, if not impossible, for TDSAT to decline to hear a dispute in the sense proposed for European national regulatory authorities – even where alternative means of dispute resolution are available. To do so would require, as mentioned above in connection with the EU Framework Directive, the availability of a reliable institutional and skill base for such mediation. It is not apparent whether such a base has yet developed in India to the point where, as in the case of the UK Centre for Effective Dispute Resolution (CEDR) for example, judges and regulators refer to its availability to justify declining or at least postponing hearing disputes.⁵⁴

Developing India's commercial mediation base would be a major contribution to address this concern. The "professionalisation" of a mediator community can raise training standards, create credibility for mediation as a means of resolving disputes and generate a flow of professionals strong in other areas (e.g., law, economics, finance, engineering, public policy) into the dispute resolution field. Dispute resolution in the telecom sector is not and should not be the exclusive domain of lawyers. Other expertise and experience are important and can even be more constructive in finding deals where disputing parties' interests converge.

The types of steps that could be taken in this direction might include TDSAT signalling its intention to encourage parties in appropriate cases to use mediation before coming to TDSAT, and perhaps even sometimes requiring parties to show that they have completed a good faith mediation process. It would be worth exploring the range of TDSAT's discretion to award (or refuse to award) costs based on whether a party had unreasonably refused to enter into mediation – an approach that is used increasingly in several countries.⁵⁵ It might also involve the allocation

53. See *Reliance Telecom Ltd. v. UOI*, petition No. 19 of 2002 (14.11.2003).

54. Thus, for example, Ofcom in the UK (Ofcom's predecessor regulatory authority) referred to the existence of CEDR, the International Chamber of Commerce and the London Court of International Arbitration as important factors in its confidence in encouraging more disputes towards the direction of alternative dispute resolution mechanisms. See Ofcom, "Dispute resolution under the new EU Directives", 28.2 2003 at para 3.15.

55. This approach is used increasingly in UK courts to encourage parties to use mediation. Thus, the losing party may not have to pay the winning party's costs if the case could and should have been settled easily by mediation and the winning party refused to enter into mediation or another ADR process. See, For example,

of human and financial resources to train well-qualified individuals (selected or self-selected) in mediation skills. Lastly, it might involve the establishment of a collection of qualified mediators under a common banner. All of this would increase the likelihood of disputing parties trying mediation to resolve disputes.

Under the present legislative framework, TDSAT's flexibility of procedures may be a valuable tool when it comes to employing alternative dispute resolution techniques. TDSAT may be able to appoint individuals to investigate the facts in disputes and reach conclusions that feed into the judgments of TDSAT itself. Such individuals could perhaps also be mandated to act in mediation role. Innovative use by TDSAT of this room to manoeuvre will be useful in allowing it to prioritize key sector cases for its own consideration while allowing others to be resolved at a less grand level.

V Some Conclusions

India's experiment with separating regulatory and adjudication functions is an exciting development in telecom dispute resolution. What may matter more, however, is the underlying transparency and predictability of the process and its results. Also important is the scope in the regime for employing or allowing resources where they are likely to become increasingly needed, as disputes increase in volume and complexity. Some conclusions about the Indian telecom dispute resolution regime include:

- TDSAT has demonstrated a capacity to handle cases with major implications for the Indian telecom sector. With the Supreme Court's encouragement, it has embraced its jurisdictional powers in dealing with complex matters involving important public policy concerns.
- TDSAT's method of publishing reasoned opinions in the style of the common law tradition is a helpful indication of transparency and the intellectual resources committed to resolving disputes.
- TDSAT's procedural flexibility is valuable to enable it to be an agile dispute resolution institution with the capacity to identify relevant facts more quickly. It may nevertheless be

Dunnett v. Railtrack, [2002] 2 All ER 850. In Cowl v. Plymouth City Council, (The Times 8.1. 2002), Lord Woolf LJC said, "Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible."

valuable to publish guidelines or procedures to enhance the predictability and transparency of the process.

- To the extent that there may be any risk of close relations between the central government and the TRAI, TDSAT's independent adjudication procedure and institutional status may be a helpful counter-balance, although it is yet to assert itself strongly on this issue.
- The institutional separation of adjudication and regulation may not in itself be as important as the clear devotion of resources to deal with dispute resolution in a transparent manner. Ensuring that sufficient resources are allocated to TDSAT, or are exploited from areas beyond the official sector, is likely to be ever more important as TDSAT's case load expands.
- The tightness of TDSAT's exclusive jurisdiction may impede the exploration of useful alternative resources for resolving disputes, including private arbitration and a variety of innovative hybrid approaches being employed in other countries. It is worth examining the limits of this exclusivity further, but this is unlikely to be led by private parties since they will hesitate to initiate steps (*e.g.*, submitting disputes to arbitration) which risk being declared legally ineffective. It will also be valuable – and may become imperative – to explore ways of “liberalizing” TDSAT's exclusivity to allow the sector to benefit from such approaches.
- Various steps might usefully complement TDSAT's role of regulatory adjudicator. It may be able to encourage parties to use mediation and other more voluntary arrangements, including through publishing guidelines and awarding or refusing to award costs depending on the use of mediation. Various other steps might also help, including mediator training and setting up a credible panel or institution of mediators, as well as appointing TDSAT mediators.