

Dispute resolution in the telecommunications sector

CURRENT PRACTICES
AND FUTURE DIRECTIONS



Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions

Discussion Paper

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PREFACE

The International Telecommunication Union (ITU) Telecommunication Development Bureau (BDT) and the World Bank commissioned two law firms, Debevoise & Plimpton and McCarthy Tétrault, to undertake a study on dispute resolution in the telecommunications sector as a contribution to the Global Symposium for Regulators (GSR) and the World Summit on the Information Society (WSIS), both of which took place in December 2003.

This Working Paper is the result of that study. It does not pretend to exhaust the range of issues and experiences that are relevant to dispute resolution in the telecommunications sector. This Working Paper does, however, describe how many disputes have been settled and explores many key issues facing policy-makers and regulators. It is hoped that this Working Paper will contribute to the understanding of telecommunications dispute resolution and to the dialogue on how to improve it.

In communicating with regulators and representatives of the telecommunications sector around the world, a remarkable range and depth of experience and expertise was discovered that is available to help resolve telecommunications disputes. Yet the art of telecommunications dispute resolution is still in its very early stages of development. Much can be done in most countries to improve the speed, efficiency and effectiveness of dispute resolution. Too often, telecommunications disputes have caused unnecessary disruptions and delays in the development of telecommunications markets. Improvement is clearly required.

The team was composed of Robert R. Bruce, a partner in the London office of Debevoise & Plimpton; Rory Macmillan, a mediator and lawyer at Debevoise & Plimpton; Timothy St. J. Ellam, a partner in the Calgary office of McCarthy Tétrault LLP; Hank Intven, a partner in the Toronto office of McCarthy Tétrault; and Theresa Miedema, a consulting lawyer with McCarthy Tétrault LLP.

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Finally, we wish to acknowledge the invaluable assistance of regulators and other officials, in a wide range of countries, who provided input to the study. We benefited enormously from their insights, although we were constrained by time and resources to do full justice to the wealth of information and experience made available to us.

All information contained in this report is current as of December 31, 2003.

This Working Paper is not legal advice, nor should this report in any way be construed to be legal advice or a substitute for legal advice from competent legal counsel.

This Working Paper is a co-publication of the International Telecommunication Union and the World Bank. The findings, interpretations, and conclusions expressed in it are those of the author(s) and do not necessarily reflect the views of the International Telecommunication Union, the Board of Executive Directors of the World Bank, or the governments they represent.

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EXECUTIVE SUMMARY

The global telecommunications sector is in the midst of a transformation caused by privatization, liberalization, and technological change. These trends have dramatically changed the way the sector functions. The number of service providers has increased substantially, as has the range of services they offer. Old business models and commercial arrangements are being abandoned or bypassed while new ones emerge. An era characterized by regional telephone monopolies that provided “plain old telephone service” is yielding to an era characterized by multiple providers of information and communications technology (ICT) services using Internet protocol (IP), wireless, and broadband technologies.

Some disputes are inevitable by-products of these changes, as new interests clash with traditional ones. Policy-makers and regulators are recognizing that effective dispute resolution is an increasingly important objective of telecommunications policy and regulation. Failure to resolve disputes quickly and effectively can:

- Delay the introduction of new services and infrastructure;
- Block or reduce the flow of capital from investors;
- Limit competition, leading to higher pricing and lower service quality; and
- Retard liberalization – and with it, general economic, social and technical development.

Ultimately, the test of successful dispute resolution – as with regulation generally – is its impact on investment, growth, and development in the sector. Successful dispute resolution is important for all countries that seek to facilitate the rapid diffusion of new communications infrastructure and ICT services. It is particularly crucial for countries that have historically experienced a lack of investment and growth. Rapid and effective resolution of disputes is a key component in bridging the “digital divide”.

The experience documented in this report indicates that existing regulatory and legal institutions are not always well equipped to resolve disputes efficiently and effectively. The lack of resources, expertise, and time often lead to delays or suboptimal results in resolving disputes. Policy-makers, regulators and courts, therefore, are adopting a range of alternative approaches to dispute resolution.

This report documents a wide range of global experience with dispute resolution in telecommunications. It describes and analyses the major traditional and alternative approaches to dispute resolution, with a view to providing policy-makers and regulators with a better base of understanding to make decisions on resolving different types of disputes.

While recognizing that alternative dispute resolution is not the sole provenance of telecommunications (indeed some of the more innovative techniques for consensus-oriented dispute resolution can be found in the Internet and related spaces), the scope of this report is necessarily limited to developments in the telecommunications sector. Useful lessons can surely be drawn from experiences in other sectors that will undoubtedly have application in the sphere of telecommunications.

1 AN OVERVIEW OF DISPUTE RESOLUTION TECHNIQUES

There are various, common ways of resolving disputes, as discussed in this section.

Regulatory adjudication: Most regulatory bodies adjudicate disputes. They decide between the positions of disputing parties, typically after a formal process that involves the presentation of arguments by those parties. Adjudicated decisions are often subject to review within a regulatory agency and eventually by the courts or government officials. Regulatory adjudication can have the following advantages:

- There are well-structured channels for decision-making,
- It provides accountability on the part of official decision-makers,
- There are established mechanisms for coordinating decisions among agencies with related responsibilities, and
- It makes available the full force of the government's enforcement mechanisms.

On the other hand, regulatory adjudication can bring the disadvantages of delays, abuse by competitors, and lack of necessary economic, legal and financial expertise to resolve disputes efficiently and finally.

Court adjudication: While this report focuses on regulatory and alternative dispute resolution methods, court adjudication remains an important final recourse for many types of disputes, particularly those that are less policy-related. It has the advantage of bringing finality and official enforcement mechanisms to bear upon a dispute. But there also are a number of disadvantages: high costs and delays in some jurisdictions and a perceived lack of telecommunications-specific expertise to deal with many complex industry disputes.

Alternative dispute resolution: Alternative dispute resolution (ADR) involves less formal or official means of dispute resolution, such as negotiation, mediation and arbitration. Parties have traditionally pursued ADR processes voluntarily, sometimes by contractual commitment. Regulators are now increasingly turning to ADR approaches to help them deal with excessive pressures and demands on their limited resources available for resolving industry disputes.

Negotiation and mediation: Negotiation and mediation are flexible, consensual approaches that have the advantage of encouraging parties to identify common interests and "win-win" solutions. Negotiation and mediation processes can, however, be subject to abuse by disputing parties who seek to delay adverse resolution of disputes or to obtain information about the other party's case.

Regulators often require parties to try negotiation or mediation before bringing their disputes before the regulator. Some regulators or their staffs perform the role of mediator. Some parties prefer to use independent mediators instead. The involvement of regulators can induce parties to behave more reasonably. But it can also reduce parties' incentives to negotiate in a candid, constructive manner, because parties may see the presence of regulators as a precursor to a formal regulatory proceeding. This may then lead them to take a more adversarial, strategic approach.

Arbitration: Arbitration is an adjudication process in which the disputing parties appoint arbitrators but retain control over the design of the process. Arbitration awards usually are enforceable in courts, where they tend to be subject to limited review on procedural grounds, such as the scope of the arbitrators' authority. The advantages of arbitration include:

- Confidentiality;
- The parties' control over the design of the process;
- Speed, compared with most regulatory or judicial procedures; and
- In international arbitration, the neutrality of the forum (compared with the national courts of either of the parties).

Telecommunications regulators are increasingly encouraging parties to use arbitration as a way to resolve disputes. There are numerous, well-established arbitration institutions around the world that have developed their own procedures and trained arbitrators. Where individual countries lack such resources, they are often able to find them somewhere in their region.

2 COMMON TYPES OF DISPUTES IN TELECOMMUNICATIONS

Disputes arise in various circumstances. Those that have the greatest impact on telecommunications sector investment and growth include:

Disputes related to liberalization: Introducing competition often undermines the established financial and business interests of incumbent network operators. Many disputes arise from the incumbent's desire to protect its dominant position in the market. Reduction or termination of exclusive rights frequently has led to legal and regulatory disputes.

Investment and trade disputes: Disputes often arise where regulatory reforms diminish the value of private-sector interests. These include complaints by investors, operators, and service providers about early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licenses. Other claims are contractual or based on alleged breaches of legal or policy commitments.

Interconnection disputes: These are the most common type of dispute between service providers. New technologies have bred many different, alternative networks for providing services, including fixed, mobile, wireless local loop, limited mobility variations and fixed wireless Internet access, e.g., Wi-Fi and Wi-Max systems. Preventing and resolving technical, operational and pricing disputes are key to the development of competitive markets. Dominant operators often have greater market power than new competitors, making regulatory intervention necessary. Regulators are increasingly providing advance guidelines for the negotiation of interconnection arrangements. They are also developing specialized adjudication procedures to resolve interconnection disputes. Where regulators lack information and expertise, they are turning to international benchmarking and outside expert consultants for assistance.

Consumer disputes: Disputes between service providers and consumers are common, particularly in basic telephone service markets. Consumers often face problems stemming from their lack of bargaining power or the absence of competitive options to the incumbent operator. Regulators are using a variety of mechanisms to ensure effective resolution of consumer disputes. Many require the service providers themselves to resolve disputes initially. Appropriate supervision and appeal provisions are supplied, and informal mechanisms are sometimes used, such as ombudsmen schemes. Consumer protection agencies, as well as regulators, often address consumer disputes.

Radio frequency disputes: Radio frequency allocation and assignment disputes are dealt with internationally through mechanisms available through the ITU. Domestically, disputes may arise from interference, license conditions, and pricing.

3 KEY PERSPECTIVES ON DISPUTE RESOLUTION

Dispute resolution in the telecommunications sector is at a relatively early stage. While there are many complex issues and perspectives, some key ones are most relevant in designing dispute resolution processes.

Changing patterns and assumptions: With rapid technological development and convergence, the dispute resolution field is also changing by introducing alternative methods for resolving disputes. These trends allow telecommunications regulators to try new dispute resolution methods. This suggests that regulators should re-evaluate assumptions about the roles of regulators and market participants in resolving disputes.

Economics of dispute resolution: In evaluating the success of dispute resolution processes, it is important to consider economic costs to the sector as a whole. Costs may result from delays and lack of transparency and predictability. At a more “micro” level, the emergence of a “market” for dispute resolution techniques and professional services is likely to improve the quality of those techniques and services. Some regulators are giving parties a choice of alternative dispute resolution procedures. It is important to design appropriate economic incentives for the parties to resolve disputes. The allocation of responsibility for the costs of disputes, for example, can affect the manner in which parties behave.

Market power asymmetries: The appropriate choice of a dispute resolution technique in any situation depends partly on the comparative levels of parties’ market power. Some regulators believe they can encourage the employment of ADR techniques when opposing parties have similar levels of market power and when parties are more likely to negotiate solutions that meet their mutual commercial interests. Regulatory intervention may be more necessary when one party needs protection from another party with greater market power.

Confidentiality and transparency: It is important to balance the competing priorities of protecting confidential business information and publishing well-reasoned decisions.

Dealing with complexity: Many disputes involve complex webs of interrelated issues that defy simple categorization. Pricing, technical, operational, licensing, and policy issues all must be considered when regulatory regimes are in transition. Jurisdictional overlaps among telecommunications sector, competition and consumer authorities, as well as between national, regional and international authorities, make disputes even more complicated. Authorities need to coordinate their actions to prevent delays and fragmented resolution of disputes. Consensus-building measures work particularly well in bridging jurisdictional boundaries.

4 THE ROLE OF OFFICIAL AND NON-OFFICIAL SECTORS IN DISPUTE RESOLUTION¹

A well-resourced “official” sector, utilizing regulatory adjudication and the courts, is crucial to a successful dispute resolution environment. However, alternative approaches are often useful to deal with the lack of available regulatory or judicial resources, or where less formal techniques offer particular advantages.

Drawing on “non-official” resources: The commercial world’s extensive experience with arbitration and other ADR techniques can help policy-makers and regulators encourage the use of non-official dispute resolution approaches in a regulated industry. Commercial arbitration illustrates how regulators can keep control over important policy issues and also ensure the usefulness of their dispute resolution systems – while easing their workload burdens.

Quality control over official and non-official processes: The type of dispute resolution process that is chosen influences what role regulators and courts will play in dispute resolution. Regulatory adjudication and arbitration require court oversight of procedures, because the parties have relinquished control over the outcome to the adjudicator or arbitrator. Regulatory adjudication may also appropriately be subject to various levels of “internal” agency and “external” court review for substantive appeal. It is important, however, not to undermine the credibility or timeliness of regulatory adjudication through over-use of review procedures.

Voluntary negotiated processes, including mediation, depend for their success on freedom from official review. Even where there are doubts about the efficacy of voluntary negotiations, regulators may be able to provide incentives for good faith engagement in negotiations instead of imposing substantive decisions.

¹ See, Chapter 5.

Confidence factors in relying on non-official approaches: There are several important factors in gauging whether non-official dispute resolution approaches are as mature and suitable as regulatory adjudication or court action in any given setting. These factors include how professional the arbitration and mediation boards are, how well developed the arbitration and mediation institutions are, and how effective the oversight procedures are.

5 IMPROVING TELECOMMUNICATIONS DISPUTE RESOLUTION

At this early stage of development in global telecommunications-sector dispute resolution, it is not appropriate to provide uniform recommendations on how to design and conduct dispute resolution procedures. Countries vary in their stage of market development, regulatory approaches, dispute resolution and general business cultures, as well as in the types of disputes that commonly arise. These factors will result in different experiences with regulatory adjudication, arbitration, mediation, negotiation, ombudsmen schemes and other approaches described in the report.

Policy-makers and regulators can, however, take the following steps to improve approaches to dispute resolution:

- Publish adjudicated decisions and facilitate access to them through the Internet and other means, in order to provide resources for regulators, other adjudicators, disputing parties, and their advisors. Creation of a well-organized international database would be invaluable to promote adoption of best practices in resolving disputes.
- Publish examples of innovative dispute resolution procedures, including less formal approaches, in order to promote their adoption.
- Strengthen non-official ADR approaches by endorsing their usage, improving understanding of the legal frameworks in which they operate, and supporting them with official enforcement of their results.
- Tap into the human resources available for dispute resolution by establishing panels of arbitrators and mediators and collaborating with existing arbitration and mediation institutions.
- Improve networking among regulators internationally to exchange dispute resolution experience.
- Increase cross-pollination of ideas and collegial sharing of experiences between the telecommunications sector and the dispute resolution communities, in order to promote better application of effective techniques in resolving disputes.
- Harness new online resources and services to help policy-makers and regulators to improve dispute resolution techniques. Several are already being used to garner experience and perspectives in dispute resolution, such as the ITU's online Global Regulators Exchange (G-REX) and live virtual conferencing facilities. Collaboration with educational and other institutions and the "e-business" community offers further opportunities to build consultative networks.
- Recognize that dispute prevention is as important as dispute resolution. Reducing the contentiousness of the sector and reliance on destructive dispute processes would enhance its prospects for investment and growth. Use of consensus-building measures by policy-makers and regulators can engage parties in the sector and identify converging interests and mutual commercial opportunities.

6 CONCLUSION

Successful dispute resolution is increasingly important for attracting investment, competition, and development. Dispute resolution mechanisms in the telecommunications sector need to be as speedy as the networks and technologies they serve. Official dispute resolution mechanisms are important as a basic guarantee that sector policy will be implemented.

This report examines the current state of dispute resolution as of the beginning of 2004, explores key issues and offers suggestions to assist policy-makers and regulators as they evaluate, design, and manage dispute prevention and resolution processes.

Policy-makers and regulators should use minimal but well-focused regulatory intervention to create an environment where industry players have incentives to resolve disputes constructively. This can often involve the use of alternative dispute resolution mechanisms. Disputes can be enormously destructive to the sector, and effective dispute resolution is increasingly central to successful deployment of modern information infrastructure. This is particularly so where it is necessary to encourage investment and to foster competition. This is the best way to reach the under-served billions of people on the wrong side of the digital divide.

1 INTRODUCTION TO DISPUTE RESOLUTION

1.1 Dispute Resolution: A Pressing Priority for Policy-Makers and Regulators

The global telecommunications sector has been transformed over the past decade by privatization, liberalization, technological change, and growth in demand. These trends have contributed to economic growth and improved sector governance, but they also have produced an increasing number and variety of disputes that call for faster, more cost-effective and better resolution.

Competitive markets inevitably produce disputes, and competitive telecommunications markets are no exception. As new companies enter markets, with new and competing services, new relationships arise among service providers, network operators, and end users. In the rapid formation of these new relationships and deployment of new technologies, it is inevitable that some relationships and technologies will fail. The creation and evolution of competitive markets naturally increases the number and type of disputes among all players in those markets. These disputes may involve failures to fulfill contractual obligations, non-compliance with regulatory requirements, and a wide range of other issues.

Moreover, recent history in the sector has featured turbulent changes resulting not only from liberalization and competition, but also from a cycle of rapid market growth, followed by sudden, nearly catastrophic, financial collapse. This has also brought on disputes. Pressures inherent in a market undergoing liberalization produce incentives to use all available resources – including strategic use of dispute-resolving mechanisms – to gain business advantages. Extraordinary financial pressure on the sector – the high cost of financing and lack of cash reserves – raises the temperature further.

Some telecommunications disputes involve relatively inconsequential differences among customers, service providers, and infrastructure providers, while others raise fundamental regulatory issues. Disputes become particularly relevant for regulators where service providers have enough power in the market to resist liberalization and even abuse their market power, particularly in areas that distort the functioning of competitive markets. Interconnection provides many examples of this type of dispute. An obvious example is when a service provider with exclusive control over essential infrastructure facilities fails to reach a reasonable agreement to interconnect with its competitors or provide access to its network or facilities.

Recently developed or amended regulatory regimes give telecommunications regulators some role in dispute resolution. In some circumstances, this role can be awkward. Regulators are often accused of siding with either the incumbent or its competitors. Some regulators have extensive roles in proposing, issuing, and enforcing legislation and regulations, even as they are tasked with promoting overall development of the sector. Conflicts of interest may result, and they can be intense where there is little separation of governmental, shareholder, and regulatory interests. Often, governments have financial interests in operators through ownership of corporate shares or because the operators represent large sources of revenue, through license fees or revenue-sharing arrangements.

Because of the technical nature of some types of disputes, regulators may not have the necessary expertise to resolve them optimally. Strapped for resources and realizing limitations on their expertise, regulators often encourage the players to solve these disputes themselves, if possible, before involving the regulators. In some cases, regulators simply refuse to intervene, preferring to redirect disputants to alternative ways of resolving their disputes.

Recognizing the importance of efficient dispute resolution in developing a fully competitive market, regulators are increasingly focusing on these issues. For example, the European Union's (EU's) new Framework Directive introduced new rules for dispute resolution in the regulation of electronic

services and the use of radio frequency spectrum.² This is an example of a wider phenomenon, in which regulators and international institutions such as the World Bank and the International Telecommunication Union (ITU), are devoting resources to improve dispute resolution in the telecommunications sector. There is increasing emphasis on techniques often known as “alternative dispute resolution” (ADR). These techniques include arbitration, mediation and other mechanisms that are less formal than traditional forms of regulatory adjudication.

1.2 An Approach to Dispute Resolution

Ultimately, the test of successful dispute resolution – like regulation generally – is its impact on investment, growth and competition in the sector. This report focuses on mechanisms that harness underlying incentives for investment, growth and competition.

Prolonged, unresolved disputes can paralyze sector development, restrict investment in infrastructure and slow the development of services. This is particularly harmful for countries that have historically experienced a lack of investment and growth in their telecommunications sectors. Healthy resolution of disputes is therefore a key component in bridging the “digital divide”. It is key to economic development. With that in mind, this report is concerned with both:

- Key regulatory issues that have faced policy-makers in recent years in the process of opening telecommunications markets around the world; and
- Emerging challenges and policy issues likely to face the sector in the next few years.

Whether policy-makers and regulators can address these challenges expeditiously and effectively will be crucial in narrowing the divide between populations that have access to advanced digital services and those that do not. Emerging challenges are arising, for example, as a consequence of:

- Increased convergence and substitution of mobile services for fixed services,
- The potential growth of unlicensed wireless networking, and
- The impact of IP technology on competition in the industry.

These challenges are also opportunities, since in many cases they offer unparalleled scope for increasing penetration of services to previously unserved populations.

Dispute resolution is a central theme in dealing with both new and existing challenges and opportunities facing the sector. This report focuses, therefore, on the critical resources required to make dispute resolution easier and less costly.

The report discusses ways that regulators and policy-makers can reduce delays in reaching “finality” of decisions. It suggests various procedural innovations and improvements in reviewing dispute resolution processes and regulatory decisions. It explores ways of sharing precedents, case histories, benchmarking data, and other relevant information among regulators and policy-makers around the world. The report also identifies ways that Internet-based consultation can be further developed, not only to exchange data and other information but also for real-time, face-to-face dialogue among regulators.

² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive). The extension of the directive to cover radio frequency use in addition to interconnection marks an important development. Article 20 requires national regulatory authorities to issue binding resolutions of disputes arising under the regulatory regime “in the shortest possible time frame and in any case within four months except in exceptional circumstances”. Given the unsustainable pressure this may impose on regulatory authorities, the Framework Directive contains a release valve, allowing national regulatory authorities to “decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to a timely resolution of the dispute”. Mediation is similarly encouraged for cross-border disputes in Article 21 of the Directive.
http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/comgreen/index_en.htm

The concerns of telecommunications and media regulators and competition authorities are increasingly seamless. Consequently, procedural innovation cannot be confined to the traditional telecommunications regulatory realm alone. Many of the most difficult and complex issues that have the greatest potential to delay or impede sector development defy traditional classification. This report explores how techniques often used to resolve commercial and private-sector disputes can apply to disputes involving regulatory and public sector concerns, as well. In some cases, this report questions whether legal institutions and processes designed in the last century – or even the 19th century in the case of certain important U.S. regulatory institutions – are best suited to facilitate the growth and expansion of new infrastructure for the 21st century. The report explores how innovation, flexibility, and imagination may be required to develop new legal, regulatory, and institutional structures to deal with disputes and handle the challenges of a rapidly changing telecommunications sector.

This does not mean the role of the judiciary should be restricted. Courts can continue to play an important role in resolving disputes. In fact, in many jurisdictions the courts themselves encourage ADR to supplement the judicial process.

This report explores the diversity of disputes facing regulators and policy-makers today and discusses various formal and informal approaches to deal with the different types of disputes. The report emphasizes the value of sharing experience across international jurisdictions, across economic sectors, and across disciplinary divides. Such sharing can provide guidance and insight for public officials and private-sector executives around the world. This is particularly valuable in countries that currently lack expertise and experience.

1.3 Defining “Disputes”

At the outset it is helpful to establish a working definition of the terms *dispute* and *dispute process*.

Traditional definitions of *dispute* can be narrow. For example:

“A dispute may be viewed as a class or kind of conflict which manifests itself in distinct, justiciable issues. It involves disagreement over issues capable of resolution by negotiation, mediation or third-party adjudication. The differences inherent in a dispute can usually be examined objectively, and a third party can take a view on the issues to assess the correctness of one side or the other.”³

Another example states that:

“An ‘actual’ dispute will not exist until a claim is asserted by one party which is ‘disputed’ by the other...”⁴

This report relies on a broader notion of disputes that permits insights specific to a regulated industry. In such an industry, the relations and interests among private parties often affect other parties, with implications for public policy. Consequently, this report does not limit its exploration to disputes occurring only where one party has filed a formal claim against another. It goes further, exploring situations where conflicting interests among parties are blocking sector development, even though no formal dispute process is under way.

Moreover, in addition to examining how disputes play out among operators, this report also considers the “vertical” elements of dispute resolution. These are the levels of the decision-making and review that start with “self-regulatory” or informal dispute-resolution efforts, then build up to regulatory agency decisions, then internal reviews of such decisions, and finally, judicial review by administrative courts and by other government authorities.

³ Brown and Marriot, *ADR Principles & Practice*, 2nd Edition, Nov. 1999, Sweet & Maxwell, page 2.

⁴ D. Foskett Q.C. in *The Law and Practice of Compromise*, quoted in Brown and Marriot, page 2.

The broad approach that this report takes to dispute resolution views dispute processes as a central part of overall regulatory policy, rather than focusing purely on legal procedures for isolated, specific arguments between pairs of disputants. Instead of the scope of the dispute and remedies being limited to the parties' complaints, related policy and market issues can be considered.

This report also suggests ways that policy-makers can narrow the circumstances in which they must intervene to resolve disputes and how they can create an environment in which industry players have incentives to act in ways that obviate the need for overt regulatory intervention. The report explores various techniques to increase consensus, decrease the scope of the dispute resolution process, and encourage more negotiation-driven and cooperative conduct in the sector. These techniques are an essential part of the overall discipline of dispute resolution.

1.4 Scope of this Report

This report is limited to dispute resolution in the telecommunications sector. The authors and the institutions supporting this report recognize that some of the innovations in ADR techniques for dispute prevention and consensus-oriented dispute resolution are found in other, sometimes related sectors, such as in the Internet and related spaces. Indeed, in its early years, the ethos behind resolving disputes related to the Internet, including domain name disputes, was based on informal procedures and building a community consensus. Even in the Internet world, however, these informal procedures have evolved into more formal (if still alternative) processes, including domain dispute resolution and related intellectual property rights issues through the World Intellectual Property Organization (WIPO)⁵, new domain name dispute resolution rules and procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN)⁶, and the like.

As discussed in Chapters 6 and 7, the Internet itself has spawned new technological approaches to resolving disputes, including so-called online dispute resolution (ODR), for use both in the “on-line” world and the actual world. Indeed, as argued in this report, simultaneous developments are affecting the mechanisms for resolving disputes in the telecommunications sector. These include convergence in the sector, as well as the rapid evolution of techniques for resolving disputes. Useful lessons can surely be drawn from experiences in other sectors that will undoubtedly have application in the sphere of telecommunications.

⁵ See, e.g., procedures carried out under the WIPO Arbitration and Mediation Center, available at: <http://arbiter.wipo.int/center/index.html>

⁶ Available at: <http://www.icann.org/udrp/#udrp>

2 AN OVERVIEW OF DISPUTE RESOLUTION TECHNIQUES

This section of the report discusses the various types of techniques available to resolve disputes in the telecommunications sector. It identifies features of the various dispute resolution techniques that are relevant for the sector and spotlights organizations that deal with dispute resolution.

2.1 Regulatory Adjudication

In this report, we use the term *regulatory adjudication* to refer to methods regulatory authorities use, exercising their legal powers, to make decisions resolving disputes brought before them. There are many approaches to regulatory adjudication, especially in countries with long-developed administrative traditions, such as the United States and Canada.

Many countries with newer regulatory agencies also have given these agencies power to consider and adjudicate disputes among players in the telecommunications sector. A good example is Morocco, where the regulator has been given broad power over interconnection dispute resolution (see Box 2-1).

Box 2-1 – Morocco’s Approach to Interconnection Dispute Resolution

In 1997, Morocco implemented a sweeping restructuring of its telecommunications sector. The National Post Office and Telecommunication Agency (ONPT) was split into two separate entities for telecommunications and postal services. Additionally, an independent regulatory body, the National Telecommunication Regulatory Agency (in French, the Agence Nationale de Réglementation des Télécommunications or ANRT) was established. Under legislation enacted in the late 1990s (Law 24-96 and Decree 2-97-1025), ANRT was given broad responsibility for technical regulation of interconnection terms, including:

- Approving operator technical and tariff quotations, particularly those offered by Maroc Télécom;
- Revising interconnection agreements, if considered necessary by ANRT; and
- Establishing the procedures for submission of interconnection disputes and for settling those disputes if negotiations between operators have failed and one of the parties has requested ANRT’s intervention.

Several disputes have been referred to ANRT concerning interconnection and abuse of dominant market position. In an early dispute between Médi Télécom and Maroc Télécom regarding interconnection tariffs, ANRT established a procedure that will be followed in later disputes. After an initial consultation period, the parties were still in disagreement. During a 30-day period set aside to hear the dispute and issue its decision, ANRT:

- Set up an internal interconnection committee;
- Consulted with two international experts, as well as its own internal experts – all of whom presented reports that arrived at the same conclusions; and
- Submitted a report containing a study of international benchmarks, a financial model and copies of the expert reports to ANRT’s Management Committee.

With certain amendments, the report was approved and published by the Management Committee. Sensitive information pertaining to the dispute was not released. Overall, the decision was regarded as being fair to both parties.⁷

Regulatory agencies often have considerable flexibility in their procedures, which can range from formal, court-like hearings with oral or written evidence to much more informal or “legislative”

⁷ ITU Effective Regulation Case Study: Morocco 2001. A. Gentzoglani, N. Sundberg and S. Schorr. <http://www.itu.int/ITU-D/treg>

approaches to fact finding and determination. Telecommunications laws sometime dictate the choice of procedures, or in other cases, there are general laws that mandate administrative procedures. It is not unusual, however, for the regulator to be empowered to decide what procedures are most appropriate in the context of a particular dispute.

2.1.1 Who Decides?

In some cases, a regulatory agency will sit publicly as a court to consider a dispute (this is sometimes referred to as acting *en banc*). In other cases, the decisions are made out of the public view, but in any case, all agency members (i.e., commissioners) may participate in, or vote on, the decision.

However, for reasons of administrative efficiency, many regulatory agencies delegate the handling of specific disputes (or other matters) to a member of the agency (i.e., a commissioner), a staff employee, or another person. In the United States, some regulatory agencies refer issues to “administrative law judges” who make legal and factual determinations, which are then subject to agency review.

Such administrative law judges (“ALJs”) or other delegated persons can sometimes assist a regulatory body in developing a “record” for agency action based on written and oral comments. A factual record can be developed through more formal procedures, similar to judicial proceedings, involving submission of written or oral testimony subject to cross-examination.

Alternatively and more typically, officials can evaluate the factual, legal, and policy-related issues through successive rounds of written comments or oral presentations. At a very minimum level, agencies often call for the public filing of submissions in written form, with increasing reliance on making this documentation available through the Internet. Some agencies – the New Zealand Commerce Commission is a good example – will rely on submissions by its staff members or contractors of the Commission as a basis for sharpening public comment from outside parties.

2.1.2 Inter-Agency Submissions

One issue typically facing regulatory bodies concerns the role of other governmental agencies in the regulatory process. In some regulatory frameworks, other governmental entities are treated strictly as third parties – with rights only equivalent to private parties. For example, in the United States, the Department of Justice’s Antitrust Division might submit comments on Federal Communications Commission (FCC) proceedings like other private parties. The Department of State and the Department of Defense can participate similarly in FCC proceedings, as though they were private parties. In Canada, the Commissioner of Competition typically submits comments or expert’s reports to the Canadian Radio-television and Telecommunications Commission (CRTC) in proceedings run by that regulator.

The United States has unique procedures arising from the fact that it has both federal and state regulatory authorities. For example, these procedures give state regulatory bodies representation on a federal-state “joint board” that addresses all interconnection-related issues that potentially involve conflicts between the jurisdictional responsibilities of the FCC and state regulators. The role of the joint board is merely advisory, and jurisdictional clashes between federal and state regulators are often resolved in the courts or through legislative intervention.

2.1.3 Internal Reviews Prior to Decisions

The process of agency decision-making is often complex and time-consuming. This is a source of both strengths and weaknesses of agency adjudication. Specialized divisions or bureaus within a regulatory body may be established to deal with different sectors of the industry that are under the jurisdiction of the agency. These bodies may take the initial responsibility for preparing a recommended decision for the regulatory agency as a whole. Advice and input are often provided through a consultation procedure involving other affected internal divisions within the agency.

In many regulatory bodies, a separate, specialized legal branch may conduct intensive reviews of recommended agency decisions. The scope of such “external” legal reviews may be focused only on whether a proposed agency decision meets expected legal requirements for reasoned decision-making

and is defensible in court. In other circumstances, such reviews may be more general in scope, allowing legal, technical, or policy advisors to exercise policy-driven analyses.

2.1.4 Internal Reviews After Decisions

In many cases, formal procedures exist that allow parties to ask a regulatory agency to reconsider a decision or order. Frequently a party to a dispute will seek to overturn an adverse decision by requesting such reconsideration. In order to provide some finality to their dispute-resolution or other decision-making processes, some agencies have established criteria to determine whether they will reconsider a decision. For example, the Canadian regulator has established the criteria set out in Box 2-2.

Box 2-2 – CRTC Guidelines to Review Decisions

In Telecom Public Notice CRTC 98-6, the CRTC announced guidelines for filing an application to request that the CRTC “review and vary” one of its decisions. Such applications are submitted under section 62 of the *Telecommunications Act*. The guidelines restated the test the Commission will use to determine whether to exercise its review power and identified five factors that will assist in assessing whether a decision should be reviewed for correctness:

- (i) Whether the application raises an error of law, jurisdiction or fact;
- (ii) The extent to which the issues raised in the application were central to the original decision;
- (iii) The extent to which the facts or circumstances relied upon in the application were relied upon in the original decision;
- (iv) The length of time since the original decision; and
- (v) Whether the resulting decision would supersede the original decision in a prospective manner, as opposed to curing an error on a retrospective basis.

The weight to be given to each of these factors will depend on the circumstances of each case.⁸

2.1.5 Judicial Review

In many cases, the courts may review the decisions of regulatory agencies, through a process known as “judicial review”. Such a process reduces the likelihood that some critical or new issue will go unaddressed. Exhausting the administrative process may tend to limit the potential issues addressed in judicial review, but it also can extend the overall timetable for decision-making. Many governments have carefully demarcated standards for judicial review.

Typically, judicial review is not intended to provide an opportunity for *de novo* review of the issues before the regulatory agency. Rather, the existence of established legal precedents in many countries, such as the United States, allows courts to give substantial deference to agency decision-making – provided that the agency’s decisions are not shown to be “arbitrary and capricious”. Typically, agency actions can be overturned when there is not a reasoned explanation for a departure from a past policy or decision of the agency. Or, a reviewing court can conclude that the agency’s failure to address the factual predicates of a policy could constitute a basis for reversal of action. Seldom, however, will a reviewing body overturn an agency action and direct a different outcome. Instead, courts may “remand” or refer a decision back to the agency for further review and assessment, sometimes with instructions relating to the scope of the further review.

2.1.6 Political Review

In some countries, regulatory decisions are subject to review at the political level – for example by a minister or the national cabinet. Such review procedures can be highly problematic in cases where the minister or government also holds an ownership stake in one of the parties to a dispute (most often, an

⁸ CRTC Public Notice 98-6, www.crtc.gc.ca/archive/eng/Notices/1998/PT98-6.htm

incumbent telecommunications service provider). In such cases, there is usually an appearance – if not the reality – of a conflict of interest. Similarly such review procedures can lead to political favoritism or governance problems. ADR techniques are often useful techniques to avoid having ministers or other politicians caught in a conflict-of-interest position.

2.1.7 Interim measures

The subject of interim measures is closely related to matters of appeal and review. Interim measures involve the temporary suspension of regulatory decisions while courts or other review bodies are examining them. The use of interim measures raises two competing priorities:

- It is important to ensure that while the case is being decided on review, one or both parties will not be prejudiced in a way that, even if they win the case, they will have suffered irreparable harm.
- It is also important to ensure that no party abuses interim measures by simply prolonging a proceeding in order to avoid the implementation of policy.

In Germany, numerous decisions of the regulatory agency (the Regulierungsbehörde für Telekommunikation und Post or RegTP) have been suspended in the national courts pending review. As illustrated in Box 4-4, Germany's procedures have brought considerable delays in implementation of the regulator's decisions. Similarly, in the Netherlands, a majority of pleas seeking interim suspension of the regulator's (Onafhankelike Post en Telecom Autariteit's or OPTA's) decisions have been granted.

In Spain, as in France, the filing of a claim with a national court contesting a decision of the Telecommunications Market Commission (CMT) is less likely to result in interim suspension of the CMT's ruling. The claiming party must specifically request such a suspension, and the courts will only grant it after considering:

- The likelihood that the party will succeed on the merits of the case when it is ultimately decided;
- An assessment of the different interests in the dispute; and
- The risk of irreparable harm to the party requesting the interim measure.

In practice, the Spanish courts have not accepted suspension requests. As a result, the CMT's resolutions – and therefore regulatory policy – have been implemented despite ongoing, lengthy court cases.

The German and Spanish examples illustrate two different approaches. There are arguments for and against each one. Regulators need to weigh the importance of implementing sector policy efficiently against the importance of protecting parties from the repercussions of the proceedings before they are finally determined.

2.1.8 Advantages of Regulatory Adjudication

There are a number of clear advantages to the traditional model of regulatory adjudication, at least when it is effectively and efficiently applied in appropriate situations. But it can have significant drawbacks. Both the advantages and disadvantages are discussed here and in the following sections.

An important advantage of regulatory adjudication is that it can draw upon the legitimacy of the official sector, as well as the benefit of its enforcement mechanisms. Another significant advantage of regulatory adjudication is that a well-staffed regulatory agency can access staff resources with different expertise – technical, economic, and legal – to provide input into decisions.

In cases where a regulator does not have the internal expertise to adequately analyze the technical, economic, legal, or other issues, it may retain consultants or other experts on a short-term basis to supplement its analytical capabilities. Box 2-3 sets out an example of a relatively new regulator that retained consultants to provide international experience in resolving a contentious interconnection dispute.

Box 2-3 – Botswana: Regulatory Adjudication of Interconnection Disputes

The Botswana Telecommunications Authority (BTA) was one of the first countries in Africa to establish an independent regulatory agency. In 1999, the agency resolved its first interconnection dispute, establishing an interconnection agreement between the incumbent Botswana Telecommunications Corporation (BTC) and the two major cellular operators in Botswana, Mascom Wireless and Vista Cellular (BTA Ruling No. 1 of 1999).

During the following years, disputes arose regarding the original level of interconnection termination charges. As in many countries, traffic patterns shifted dramatically as mobile telecommunications penetration levels surpassed fixed-line penetration, thereby undermining the assumptions of the original interconnection rates.

The regulator took action to resolve the dispute only after the parties were unable to agree on modifications to the earlier interconnection agreement. Given the technical nature of interconnection and related tariff issues, the BTA decided to supplement its staff resources by retaining an international consulting firm that had worked on interconnection rates in other countries.

The international consulting firm assisted BTA members and staff in dealing with economic and legal matters related to the interconnection dispute. But the dispute resolution process was essentially run as a normal regulatory adjudication. Parties to the dispute filed pleadings and replies supporting their position on issues underlying the dispute. The BTA, its staff, and the consultants reviewed the pleadings, met with the parties and undertook additional research relevant to international interconnection rates to support BTA's ultimate resolution of the dispute.

BTA Ruling No. 1 of 2003 set forth in substantial detail BTA's rationale for setting new interconnection charges through reliance on international benchmarks. The ruling set a precedent for resolving more general disputes that may arise in interconnection agreements.

The Ruling:

- Considered the legal basis and framework for dealing with interconnection disputes in Botswana. Under the *Telecommunications Act* of 1996, BTA can decide interconnection disputes and has wide latitude in setting “fair and reasonable” terms and conditions.
- Considered three major models for dealing with interconnection: revenue sharing, sender-keeps-all, and interconnection usage charges. The conclusion was that interconnection usage charges should be the basis for a new interconnection arrangement centering on termination charges independent of charges to consumers.
- Focused on various costing methodologies and benchmarking as two broad approaches to setting interconnection charges and reviewed the EU approach to developing benchmarks for interconnection charges at various tiers of the network, i.e., local, single tandem and national levels of interconnection. BTA carefully considered the use of benchmark data and the countries to be used in the benchmark study, concluding that the EU countries were viewed as representing a “good sample of countries that have reached or are in the process for reaching efficient cost-oriented termination charges for fixed networks ...” (Ruling at 37).
- Concluded that Botswana should use the “national” level of interconnection – as opposed to local or single tandem interconnection charges – as the basis for termination charges. For determining fixed network termination charges, it was found that an average or mid-range of all fifteen EU countries would be fair and reasonable.
- Adopted a transition period, given that the proposed charge levels were significantly below current charges. It explicitly recognized that there is a trade-off between regulatory and financial objectives.

Box 2-3 – Botswana: Regulatory Adjudication of Interconnection Disputes (*cont'd*)

The ruling demonstrated a classic case of traditional regulatory adjudication. However, it was conducted by a fairly new regulatory agency that recognized the need to supplement staff resources with international consulting expertise to establish a good precedent based on international experience on complex interconnection issues.⁹

A traditional adjudication process can also give the public a channel to provide input into the decision-making process. Agencies are familiar with the use of public notice procedures and are exploiting the potential of the Internet to disseminate information, seek input, and encourage public dialogue. Agencies can often structure their procedures to address disputes on a generic rather than an *ad hoc* basis. Agencies can then act in a more legislative, rule-setting capacity, dealing with specific disputes in a narrower enforcement context. There is also tension when an agency seeks to evolve an overall regulatory framework in the midst of dealing with individual cases. This approach is often precedent-setting and flexible.

Some governments have established mechanisms to solicit advice and participation from specialized consumer protection and competition law agencies. One drawback to this is that regulatory agencies may not properly coordinate their activities with these specialized entities, resulting in problems or delays in the dispute resolution process. The same observation could be made, of course, about coordinating with governmental authorities on a vertical basis. Moreover, jurisdiction issues among federal, provincial/state, municipal, and even international officials often undermine efforts to frame comprehensive policy initiatives.

Finally, the very structured and hierarchical nature of the dispute resolution process can contribute to its legitimacy and accountability. For example, regulatory agencies can be made accountable through different avenues. There are varying mechanisms – i.e., appointment procedures, budgetary controls, review procedures, sharing of responsibilities – for oversight to be exercised at an executive level.

2.1.9 Disadvantages of Regulatory Adjudication

The potential drawbacks of regulatory adjudication can be significant and may justify paying close attention to alternative approaches to dispute resolution.

The overall process can become extraordinarily lengthy – consuming significant time to obtain input from parties, prepare recommended actions by staff, deliberate on decisions, reconsider decisions, and ultimately have those decisions reviewed by the courts. Often the complexity and volume of inputs by the parties is disproportionate to the practical needs of the decision-making process. This especially can be the case where agencies rely on more traditional evidentiary or fact-finding procedures.

One significant disadvantage of regulatory adjudication arises from the ever-present temptation for competitors to “game” the process, using it as part of an overall strategic response to the emergence of competitive market conditions. If the process is available and if regulators are ready to intervene, then a regulatory dispute resolution process is likely to become a permanent feature of liberalized markets. The critical question is how to encourage effective competition with well-focused regulatory intervention.

In addition, there may be too few resources, in terms of economic and technical advice or international best-practice information, to produce an optimal outcome. Some regulators also may be constrained by their legislative mandates to deal with the issues of sector development, such as the convergence of traditional telecommunications, media, and information. These prescribed policy mandates may limit agencies’ abilities to be flexible in confronting significant disputes and sector issues. In a similar way,

⁹ ITU Botswana Mini-Case Study 2003, Recent Experience in Interconnection Disputes. This is one of five mini case studies on interconnection dispute resolution undertaken by ITU. Further information can be found on the web site at <http://www.itu.int/ITU-D/treg>.

traditional institutional structures may be less open than more informal consultative and dispute resolution mechanisms to new information about the impact of regulatory initiatives on investment in the sector.

In addition, regulatory adjudication may, like judicial adjudication, have limitations in that it may be the response of a single regulatory body, based on a narrow jurisdictional mandate and limited enforcement powers, to individual claims defined by parties on specific legal grounds. A significant risk of the regulatory process, then, is the tendency of regulatory bodies to fragment or compartmentalize decisions into separate proceedings. One of the potential advantages of more informal procedures may be their ability to address a wider range of related issues concurrently for resolution. We discuss below in further detail potential approaches and mechanisms for dealing with these important challenges. But we first turn to a discussion of arbitration and mediation techniques used to resolve telecommunications sector disputes.

2.2 Introducing Alternative Dispute Resolution

Alternative dispute resolution (ADR) encompasses several different techniques. Policy-makers and regulators are increasingly turning to these methods to resolve disputes. The European Union (EU) Framework Directive, for example, requires national regulatory authorities to resolve disputes within a certain time period and suggests that regulators use ADR methods. For an example of how such methods are being developed, see Box 2-4.

Box 2-4 – The United Kingdom’s Approach to Applying the EU’s ADR Directive

In November 2002 the United Kingdom’s Office of Telecommunications (Oftel), now the Office of Communications (Ofcom), issued a consultation document, followed three months later by a statement, on “Dispute Resolution under the new EU Directives”. This established how U.K. regulators would meet the EU’s deadline for establishing dispute resolution mechanisms, in compliance with Articles 20 and 21 of the Framework Directive.

In its guidelines, Ofcom requires the parties in any dispute to demonstrate that they have attempted to resolve that dispute through commercial negotiations. Requiring such evidence is a clear signal from Ofcom to parties, encouraging them to resort first to available dispute resolution mechanisms.

Ofcom has gone even further, indicating that when it believes alternative dispute resolution methods would be more appropriate than regulatory intervention, Ofcom will decline to intervene. Ofcom identified suitable dispute resolution organizations, including the International Chamber of Commerce’s International Court of Arbitration, the London Court of International Arbitration and, with respect to mediation and other informal dispute resolution techniques, the Centre for Effective Dispute Resolution, a leading European mediation organization.

We will first consider what ADR is and then review the legal, institutional, and jurisdictional frameworks in which ADR techniques are used.

ADR consists of a number of processes and procedures that are an alternative to litigation and other official procedures. In essence, ADR involves procedures for settling disputes by means other than litigation or administrative adjudication. ADR methods include arbitration and mediation, as well as numerous other hybrids and variations.¹⁰

The general philosophy underpinning ADR is that, where possible, it is more beneficial for parties to resolve their disputes by private processes and negotiated agreements than through contentious litigation or regulatory adjudication. A major benefit of ADR methods is that they can preserve and even enhance business relationships that might otherwise be damaged by the adversarial process. This

¹⁰ In some jurisdictions, arbitration would be excluded from a strict definition of ADR as it is seen as a system of adjudication under a defined process.

does not mean ADR procedures are never contentious. But they do offer parties greater control over the procedures that will apply, and over the choice of adjudicators.

ADR can produce settlements and save costs, resulting in solutions that benefit all parties. ADR procedures can take the place of formal adjudication, or they can complement adjudication or litigation by producing settlements within those systems. Above all, the advantage of ADR is flexibility. Different kinds of disputes often require different kinds of procedures and approaches, and ADR usually makes this possible.

ADR procedures can be divided into three primary categories: negotiation, mediation and arbitration. However, it is important is to view dispute resolution processes as a continuum. At one end is negotiation, and at the other end is litigation or regulatory adjudication.

2.3 Negotiation

The fundamental key to all consensual ADR activity is negotiation. The key characteristic of negotiation is that it is a consensual process that may allow the parties to arrive at a mutually agreeable solution. Negotiations generally are held on a confidential basis, and they are usually “without prejudice” to any legal recourse the parties may have. Unlike mediation, there is usually no third-party facilitator involved in traditional negotiations.

As there is no third party involved, the parties can usually schedule the progress of the negotiations on their own. Negotiation permits dispute resolution at the lowest level of conflict and avoids adversarial procedures.

Before undertaking negotiations, parties must consider whether the dispute is suitable for negotiation. That is, is it possible for the parties themselves to resolve the dispute? Secondly, some consideration should be given to a reasonable time limit for the negotiations, given the particular circumstances of the case. Negotiations are often a prerequisite for starting formal dispute resolution procedures, so it is common for parties to agree to try good-faith negotiations for a certain period of time before taking the next step in the dispute resolution process. This may delay the start of official proceedings while the parties negotiate.

The main advantage of negotiation is that it may result in a solution that is favourable to each party, which may be very valuable to an ongoing business relationship. Reaching agreement by negotiation avoids the more adversarial processes found in other types of ADR.

Negotiation also has been used as an alternative to litigation in restructuring contracts, concessions and licenses of telecommunications operators. In this case, the negotiations are often held between the government or regulatory authorities and the operator. A recent example of such negotiations involved an agreement between the Organization of Eastern Caribbean States (OECS) and the dominant local operator, Cable and Wireless plc, to shorten the term of the original monopoly rights granted to the operator (see Box 2-5).

Box 2-5 – Agreement between Cable & Wireless (C&W) and OECS States

In April 2001, the member states of the OECS reached a negotiated settlement to end the monopoly that previously had been granted in licenses issued to the dominant regional telecommunications operator, C&W. This agreement followed, but differed from, an agreement to end C&W's monopoly in Jamaica. Key features of the OECS agreement are set out below.

Liberalization of the Telecommunications Sector – Competition was to be introduced on a phased basis, with transition to full competition and liberalization between 12 and 18 months from the date of the agreement. During the first phase, new licenses were only to be issued to competitors for limited types of networks and services. For example, a mobile cellular operator would have to pass international traffic over a point of interconnection to the international gateway switch of C&W.

Box 2-5 – Agreement between Cable & Wireless (C&W) and OECS States (*cont'd*)

During the transition phase, three working groups were set up to resolve lingering issues. These working groups were to reach consensus on recommendations for issues such as tariffs and rebalancing, cable TV, and wireless communications.

The OECS contracting states and C&W were to keep in mind and implement certain regulatory principles, such as:

- Promotion of competition,
- Consistency with the Telecommunications Acts,
- Clear and concise drafting,
- Protection of confidential information,
- Decisions made in accordance with the rules of natural justice and provision for a fair appeals process,
- Fees were to cover the cost of regulation,
- Regulation of access to submarine cables should be designed to protect competition and prevent anti-competitive practice, and
- Where possible, preservation of existing numbering, spectrum and domain-name allocations.

C&W and the contracting states were to make their best efforts to ensure that C&W's network was not bypassed. All parties agreed to ensure that any necessary rebalancing would be achieved substantially during phase one.

New C&W Operating Licenses – Each contracting state agreed to grant C&W a new, non-exclusive operating license or licenses to provide at least the same networks and services it provided before the expiry of the existing licenses under the Telecommunications Acts.

Settlement of Claims – C&W agreed to waive all claims against each contracting state arising as a result of the introduction of the Telecommunications Acts and the consequent termination of its exclusive operating licenses. The contracting states relinquished all claims against C&W for all breaches of those exclusive operating licenses.

Dispute Resolution – All disputes were to be referred to a Joint Committee comprised of the Eastern Caribbean Telecommunications Authority (ECTEL) and C&W representatives. The Committee was to resolve the matter within 15 days, and if unable to do so, the matter would be referred to arbitration in the state where the dispute arose.

Termination – If any of the parties failed to observe the terms of the agreement, and the breach was incapable of remedy, the agreement between C&W and the individual state would be terminated. The agreement between C&W and the states not involved in the breach would remain unaffected.

Note: This Agreement was scheduled to terminate on 7 April 2003, two years after it was signed.

2.4 Mediation and Conciliation

Mediation is a consensual process that involves a neutral third party in facilitating dispute resolution. Regulators frequently employ mediation to provide informal resolutions of important controversies facing key sector participants. Mediators also may be private individuals who are not involved in the regulatory process. Using regulatory intervention as a fall-back alternative, a regulator often may persuade parties that it is preferable to arrive at a mutually acceptable solution through mediation rather than through the potentially unpredictable alternative.

The core roles of a mediator can be summarized simply. The mediator will solicit the views of the parties on the nature of the dispute and its key issues. He or she will seek potential convergence of parties' interests and propose constructive win-win solutions. In striving to improve communication between parties and potentially develop a direct negotiation, one of the central activities of a mediator

is often to convey views of the dispute from one party to the other in a neutral way. At an appropriate moment in the mediation process, the mediator may be able to suggest potential solutions or views of the underlying issues to both sides.

Closely related to mediation is conciliation, which involves more formal procedures than mediation. The United Nations (UN) has long encouraged conciliation and mediation to resolve disputes among states. Recently, the United Nations recognized that mediation and other dispute resolution techniques are becoming common in commercial practice (see Box 2-6).

Box 2-6 – UNCITRAL Model Law on International Commercial Conciliation

On 19 November, 2002, the United Nations General Assembly adopted a resolution encouraging all member states to give due consideration to enacting the Model Law on International Commercial Conciliation, which had been completed and adopted by the United Nations Commission on International Trade Law (UNCITRAL). In adopting the resolution, the General Assembly:

- Recognized the value for international trade of having methods for settling commercial disputes where a third person is requested to assist the parties to settle the dispute amicably;
- Noted that conciliation and mediation are increasingly used in commercial practice as an alternative to litigation;
- Considered that the use of such dispute settlement methods results in significant benefits; and
- Stated its belief that the Model Law will assist states in enhancing current legislation governing conciliation or mediation techniques and in formulating such legislation where none exists.

The Law applies to international commercial conciliation, but it does not apply to cases where a judge or arbitrator attempts to facilitate a settlement. Articles 1 and 2 of the Model Law establish definitions and rules of interpretation, while Article 3 allows parties to agree to exclude or vary part of the law. The substantive articles are as follows:

Article 4: Commencement is on the day on which the parties agree to engage in conciliation proceedings, and if the party that issued an invitation to conciliate does not receive a reply within a specified time (usually 30 days), it can consider the invitation rejected.

Article 5: Unless the parties agree that there shall be two or more, there shall be one conciliator. The parties should agree on the conciliator, who should be independent and impartial and of a nationality other than the parties.

Article 6: The parties can agree on the conduct of the conciliation, and if they cannot, the conciliator can conduct the proceedings in such a manner as he or she considers appropriate. The conciliator may propose settlement terms at any stage of the proceedings.

Article 7: The conciliator may meet or communicate with the parties together or separately.

Article 8: Unless information is given to the conciliator subject to a condition of confidentiality, all information concerning the dispute shall be disclosed to both parties.

Article 9: Unless required by law or consented to by the parties, all information relating to the proceedings shall be kept confidential.

Article 10: Generally, *no information* from the conciliation process is admissible in any other proceeding.

Article 11: The conciliation proceedings are terminated by a settlement agreement, a declaration by the conciliator that further efforts are no longer justified, or a declaration of termination by a party.

Article 12: Unless agreed to by the parties, the conciliator shall not act as arbitrator in any related disputes between the parties.

Article 13: Generally, the parties shall not resort to arbitral or judicial proceedings during conciliation.

Article 14: If a settlement agreement is reached, it is binding and enforceable.¹¹

¹¹ General Assembly Resolution 57/18 – Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law. <http://www.uncitral.org/en-index.htm>

2.4.1 Advantages of Mediation

A good mediator will proceed with an “interest-based” rather than a “position-based” view of the issues in dispute. In other words, he or she will seek to explore the underlying incentives and financial, institutional, or personal grounds that might be the basis for reaching an agreement among the parties. Often, a solution may suggest itself that is broader or different than that identified by the parties as the immediate subject of a dispute. The mediator will explore with the parties whether the benefits of reaching an agreement exceed the costs of continuing a dispute.

Several aspects of the mediation process make it an effective tool for dispute resolution. The role of the mediator can be structured flexibly. For example, there are often advantages to co-mediation, in which two mediators rely on complementary skills and experience to try to bring the parties to agreement. The confidentiality of the mediation process is important to its success. Parties need assurance that efforts to narrow their differences will not be used to their disadvantage – that is, that no evidence of compromise proposals will be introduced into the record of a pending proceeding before a court or a regulatory body. Mediation, then, can create space within which parties may contemplate and reconsider their interests and priorities without fear of prejudicing their positions.

There are a number of additional benefits of mediation, including the following:

- It may preserve the long-term relationships upon which the telecommunications industry is based;
- Mediation costs are usually lower than adjudication or litigation;
- Parties can select a compatible mediator, usually without regulatory intervention;
- Mediation processes are more structured than negotiation (specific rules and procedures are available);
- Professional organizations are available to assist;
- Advancements in technology usually outpace the ability of the regulators to control it. There is a benefit in having a dispute mediated by parties who have more technical experience;
- Mediation facilitates resolution without public adversarial processes; and
- In addition to regulatory support, the benefits of mediation have led to judicial support for established mediation services and institutions.¹²

2.4.2 Disadvantages of Mediation

Whatever the benefits of mediation, there are also significant potential concerns about its use in a regulatory context. Views and experiences differ regarding the success of mediation, depending on whether it is consensual or mandated. The success of the process depends on the willingness of the parties to work together in good faith. The consensual nature can therefore be a weakness. Most regulatory agencies appear to refuse requests for mediation unless both parties have agreed to take part. On the other hand, providing a “window” for mediation before formal dispute resolution steps are initiated can create pressure on a dominant service provider to engage in a negotiated solution.

Article 20 of the EU Framework Directive¹³ provides that Member States may allow a national regulatory agency to decline to resolve a dispute “where other mechanisms, including mediation, exist

¹² For example, see *IBM v Cable & Wireless*, where Colman J. said that “[CEDR] is one of the best known and most experienced dispute resolution service providers in this country. It has over the last 12 years made a major contribution to the development of mediation services available to parties to disputes who need advice on both a choice of mediator and on appropriate procedures for mediation”. [2002] All ER (D) 277 (Oct.).

¹³ Article 20 of the Framework Directive of the European Union provides:
In the event of a dispute arising in connection with the obligations arising under this Directive between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned, shall, at the request of either party, issue a binding decision to resolve the dispute in the shortest possible timeframe and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/comgreen/index_en.htm

and would better contribute to resolution of the dispute in a timely manner". Within the EU, as in other jurisdictions, reliance on mediation varies. The Swedish regulator often uses mediation, and the Danish regulator, the National Telecommunications and IT Authority (NITA), has demonstrated skill and creativity in relying on informal dispute resolution mechanisms.¹⁴

Other EU regulators, including Ofcom and the Dutch regulator OPTA, have been more skeptical about the potential advantages of mediation. The key issue, however, is to identify situations where mediation may be a useful technique and where it will not. Ofcom, for example, has sought to establish a clear demarcation between the types of matters in which it will become engaged and those that it expects parties to resolve through private dispute resolution (see Box 2-7).

Box 2-7 – Ofcom Guidelines and Dispute Resolution Procedures

Ofcom has issued guidelines on the dispute resolution procedures that must be implemented by public communication providers in the United Kingdom.

The dispute resolution procedures follow the introduction of the 2003 *Communication Act* and the establishment of the Office of Telecommunications Ombudsman (OTELO), pursuant to EU directives.¹⁵

OTELO is a voluntary member organization with a preference for an ombudsman-type negotiation process rather than arbitration or mediation. However, the guidelines are not restricted to an ombudsman-type relationship. In order to be approved, an alternative dispute resolution process between communications operators and consumers must be:

- (a) Independent and impartial;
- (b) User-friendly and easily accessible by all consumers, including those with disabilities or language difficulties;
- (c) Transparent, providing regular feedback to consumers through the process of the dispute;
- (d) Effective (which Ofcom has stated will mean that most disputes are resolved within six weeks of the initial complaint);
- (e) Free of charge to the customer, which also extends to costs not being awarded against an unsuccessful complainant; and
- (f) Able to properly investigate disputes and make awards of appropriate compensation.

In addition to OTELO, other private dispute resolution organizations are expected to submit their ADR processes to Ofcom for approval.

The mediation process is subject to abuse by parties seeking to prolong a dispute. Some parties may use it to fish for information that might be relevant at another stage of a dispute resolution process and that might improve their position. Regulators can, however, create expectations – even on the part of reluctant and dominant service providers – about engaging in good faith negotiations. They can use their powers to hold parties to such expectations. They can establish indicators of good faith attempts

¹⁴ In Denmark, Section 65 of the Telecom Act allows regulators to intervene on a “reasonable request” and NITA must act within 1 month of availability of information and not later than two months from a request. In the absence of information, NITA can act on an interim basis. NITA manages mediation procedures that can last three to six months (and not be less than one month). Mediation is considered very successful by NITA and has been used in 10 cases. NITA can make an interim decision in mediation after two months if an [significant market power]SMP operator had not provided information two weeks before a decision.

¹⁵ See http://www.ofcom.org.uk/consultations/past/draft_guid_ccd/comp_disputes/complaints/?a=87101

to negotiate and can swiftly intervene to end the mediation process if it appears that no progress is being made.¹⁶

Since mediation is basically a voluntary exploration of interests in order to find a negotiated solution, it is often beneficial to both parties, unless it is found by one or both to have cost valuable time and money.

2.4.3 Factors for Success

A number of factors can contribute to the success of mediation. First, mediators and the parties must be able to establish a successful rapport. Second, while the parties have ultimate control over their participation in the overall process, the mediators' management of the discussions makes it more structured than negotiation. Parties normally agree to specific mediation rules and procedures available to them. Third, by diplomatic "reality checking" on the positions and assumptions of the parties, the mediator can enable parties to ease back from rigid, embedded, and unrealistic positions. Fourth, the mediator plays a critical role by focusing the parties on their underlying interests rather than the abstract merits of their positions. Fifth, good mediators demonstrate patience, insight, and psychological finesse to convince the parties to modify their entrenched positions.

Finally, successful mediation in the regulatory context can depend on the role of regulatory officials. Involving regulatory staff themselves as mediators, or having a neutral mediator report to the regulator, can discourage disputing parties from taking unreasonable positions during the mediation process. In some cases, however, involvement of regulatory staff may compromise the confidentiality of the dispute resolution process. Such confidentiality is a key element in the success of mediation because parties may wish to avoid potentially self-damaging consequences of changing their positions on important regulatory issues. In these cases, it can be preferable to use an outside neutral mediator, who can be trusted by both parties to maintain the confidentiality of the mediation process.

2.5 Arbitration

Arbitration is a method of dispute resolution (sometimes preceded by mediation) that takes the place of conventional litigation. It is a consensual process in which disputing parties agree to refer a dispute to a neutral third party arbitrator or panel of arbitrators for resolution. A commitment to arbitrate disputes is often included at the outset of commercial agreements, binding the parties to seek arbitration of any future disputes that may arise. The parties also may choose arbitration when the dispute arises, as an alternative to litigation or regulatory adjudication.

2.5.1 Advantages of Arbitration

Arbitration has several benefits. First, since it is generally a private, or "non-official" procedure offering more in the way of privacy and secrecy, it can offer better protection against disclosure and the use of the party's confidential business and strategic information. Parties can expressly agree that all information and documentation disclosed during arbitration will be held in confidence. ADR mechanisms are private by nature. As such, the common fear of a negative "precedent", may be diminished.¹⁷ There is less need to maintain a rigid position out of fear that the outcome may harm a party in future cases. Moreover, with a desire to maintain existing commercial relationships, there often comes an increased willingness to reach a mutually acceptable compromise. The ability to resolve disputes privately and keep their existence confidential helps parties avoid a negative reputation as litigious or confrontational, which can be an impediment in the telecommunications community.

¹⁶ For example, it is common to impose timelines on the mediation process. In the United Kingdom, Ofcom provides four months for the parties to try and resolve disputes under ADR, failing which, the matter is referred back to Ofcom. http://www.ofcom.org.uk/consultations/past/draft_guid_ccd/comp_disputes/comp_comp.pdf?a=87101

¹⁷ However, arbitration, by its nature, is a process in which a body of precedent is not built up that can be relied on, necessarily, in future cases. The feature of arbitration should be a factor taken into account in designing any ADR regime. See, e.g., discussion at Chapter 6, Section A.(a).

Furthermore, parties may combine arbitration with informal negotiations or mediation, thus resolving their dispute in a manner similar to an assisted negotiation. This fosters a better continuing working relationship and is a particularly valuable approach if the parties' dealings require ongoing interaction.

Arbitrations can sometimes take less time than conventional litigation or regulatory adjudication. This is due to several factors, including:

- The ability to design and schedule the steps needed at an early stage of the proceedings,
- The ability to reduce steps that are otherwise mandatory in conventional litigation, and
- The increased availability and flexibility of arbitrators.

From the industry's perspective, the potential compressed timing is a benefit because it offers commercial advantages, including reduced interference with business objectives. In the case of international arbitration, there is a considerable advantage in the availability of more neutral forums for adjudicators than parties would find in either party's national courts.

2.5.2 A Well-Established Means of Dispute Resolution

In some jurisdictions (for example in Western Europe), arbitration is important in the operation of the civil justice system. It has a very long history, and for centuries has been widely used for the settlement of a variety of disputes between states, between state entities and private parties, and between private parties. Since the *New York Convention of 1958 on the Recognition and Enforcement of Arbitral Agreements and Awards*,¹⁸ there has been an unprecedented growth in the use of arbitration for the settlement of disputes in international trade and investment.

The sources of the law of arbitration in international commercial disputes are international conventions such as the New York Convention of 1958 and the European Convention of 1961.¹⁹ There are international model laws and model rules²⁰, national and municipal legislation in each country, and institutional rules such as those of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). Some jurisdictions, such as France, have separate rules or statutes for international and domestic disputes.

To those formal sources of arbitration law must be added an increasing body of academic writing, including reports of awards to which practitioners look for guidance, though not for precedence.²¹

One development of particular importance is the use of arbitration in bilateral investment treaties. The number of these treaties has risen from about 500 to 2,000 in the past decade. These treaties usually provide for arbitration, sometimes by reference to recognized institutions such as the International Chamber of Commerce (ICC) or the International Centre for the Settlement of Investment Disputes (ICSID). The ICC, ICSID and other organizations that assist with ADR are discussed in further detail in Annex C.

In many jurisdictions and internationally, arbitration is regarded as the primary means of dispute resolution for international trade, business, and investment disputes. For example, arbitration has assumed an important role in dispute resolution in North America under Chapter 11 of the North American Free Trade Agreement (NAFTA).

¹⁸ New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
<http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>

¹⁹ See <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/>

²⁰ See <http://www.eurolegal.org/arbitration/arblaws.htm> for a selection of links to multiple national arbitration laws and rules.

²¹ For example, academic journals, though too numerous to name, include Arbitration (The Chartered Institute of Arbitrators); Arbitration International (LCIA), American Review of International Arbitration (Center of International Arbitration and Litigation Law); Bulletin of the International Court of Arbitration (ICC); ICSID Review/Foreign Investment Law Journal (ICSID); International Arbitration Law Review (Street & Maxwell); and World Trade and Arbitration Materials (Kluwer); to name a few.

2.5.3 Using Arbitration in Telecommunications Disputes

The use of arbitration as a dispute resolution tool normally depends upon agreement by or among the parties in a contractual arrangement. However, there are circumstances in which the use of arbitration may be encouraged or mandated either by regulatory policy or through legislation. Arbitration can be used for various types of disputes, such as interconnection disputes. In the United States, the *Telecommunications Act* of 1996 allows state regulatory commissions to use arbitration to resolve interconnection-related disputes. Likewise, Jordan has also turned to arbitration as a means of interconnection dispute resolution. Box 2-8 discusses the new Jordanian procedure.

Box 2-8 – Arbitrating Interconnection Disputes in Jordan

In July 2003, Jordan's Telecommunications Regulatory Commission (TRC) adopted an interconnection dispute process. Several features of the process were intended to produce higher-quality decision-making, more efficient processes, and a dispute resolution regime that gave substantial responsibility to the parties themselves.

The Jordanian process was applied to any dispute among licensees relating to, or arising out of, an interconnection agreement. The process was used more to interpret the execution of interconnection agreements once they were negotiated, rather than as a resource to support new entrants struggling to negotiate a fair agreement.

The process amplified the Jordanian telecommunications law's emphasis on negotiation and mediation. The law directed the TRC commissioner to draw up “guidelines for negotiations between the parties or disputants in the dispute, and ...[to] propose a solution himself or by means of a mediator or persons appointed for this purpose..” (Law, Article 60) Thus, the interconnection dispute process included a requirement that the parties attempt to negotiate a good faith solution before bringing the dispute to the TRC. Moreover, it indicated that the TRC would first confirm that there was a genuine dispute and that the parties had sought to resolve the matter commercially (Articles 1.1 and 5.2).

The process imposed a timetable requiring the disputants to meet for negotiations within 10 working days of written notice of the dispute, allowing at least 20 working days for such negotiations. Such measures were designed to assist in resolving disputes before the parties became caught up in a more time- and resource-consuming tangle of formal proceedings.

The Jordanian approach gave responsibility for the dispute to the parties in several key ways. The parties could choose to utilize an arbitration process instead of referring the dispute to the TRC. This enabled parties to engage experts familiar with the sector rather than the TRC, which may not have the same speed of response or confidentiality, or judges in the courts, who may be less familiar with technical and other sector-specific issues. The process, moreover, did not prevent the licensees from eventually pursuing remedies in court. There was likely to be scope for clarifying potential conflicts between outcomes arising out of arbitration or judicial proceedings and the prerogatives and policies of the TRC.

While parties disputing a commercial agreement generally would have the right to go to arbitration, the TRC's emphasis on arbitration as an alternative mechanism raised interesting questions about the relationship of an arbitrator's jurisdiction and the TRC's regulatory jurisdiction. The arbitration legislation in Jordan made make arbitrators' decisions enforceable in Jordanian courts and, where parties adopt the arbitration route, it remained to be seen how TRC regulatory policy would be treated by arbitrators in reaching awards and by courts in reviewing such arbitration awards. The option of arbitration, and a consequent demand for arbitrators with expertise in the telecommunications sector, could lead to developing resources – i.e., panels of experts – that could become more widely available on a regional basis.

Where the parties chose to have the TRC adjudicate the dispute, the TRC could hire experts and charge the costs to the parties. With the costs covered by the parties, the TRC was able to engage the level of expertise necessary to ensure high-quality decision-making, further improving its overall level of regulation. The ability to engage and rely on experts, together with an efficient (15 working days) internal review process, was likely to reduce the scope of judicial review should the TRC's final decision be challenged in court.

Box 2-8 - Arbitrating Interconnection Disputes in Jordan (*cont'd*)

Since the parties could cover TRC's expenses, dispute resolution was not a "free public good". The charging regime thus reduced operators' incentives to make frivolous use of regulatory dispute resolution as a strategic tool. Although the interconnection dispute process did not establish how such costs would be allocated among disputants, the TRC could follow the approach of courts in allocating costs to the losing party, or otherwise reflecting the TRC's view of the merits.

With the disputants free to choose their process and bear the costs, the TRC effectively created the conditions for a market in dispute resolution. This would create enough flexibility to suit various conditions, giving parties control over optimal processes while ensuring that enforceable regulatory adjudication would remain available.

Source: ITU Jordan Mini Case Study 2003: Dispute Resolution and Consensus Building in Interconnection at http://www.itu.int/ITU-D/treg/Case_Studies/Disp-Resolution/Jordan.pdf

In addition, some private ADR bodies have developed specific arbitration programs for the wireless industry (see Box 2-9).

Box 2-9 – The AAA's Wireless Industry Arbitration Rules

The American Arbitration Association (AAA) has developed an arbitration program in conjunction with the U.S. Cellular Telecommunications and Internet Association (CTIA) for the wireless industry and its customers. AAA includes, as members of its Telecommunications Panel, individuals that are competent to hear and adjudicate disputes administered under the Wireless Industry Arbitration Rules. These individuals are neutral parties, and many have direct experience in the telecommunications industry.

The rules contain three tracks: Regular Track Procedures; Fast Track Procedures for cases involving claims of less than USD 2,000; and Large/Complex Case Track Procedures for cases involving claims of at least USD 500,000.

Regular Track: The Regular Track Procedures apply to cases involving claims between USD 2,000 and 500,000. They also apply in Fast Track and Large/Complex cases where they do not conflict with any portion of the Fast Track Procedures or the Large/Complex Case Procedures. Features of the Regular Track Procedures include:

- Optional pre-arbitration mediation and/or early neutral evaluation;
- Express arbitrator authority to control the discovery process;
- Broad arbitrator authority to control the hearing; and
- Written breakdowns of the award and, if requested in a timely manner by all parties or at the discretion of the arbitrator, a written explanation of the award.

Fast Track: The Fast Track Procedures apply to cases involving claims of less than USD 2,000. Features of these procedures include:

- A 45-day "time standard" for case completion;
- An expedited arbitrator appointment process, with a single arbitrator appointed directly by the AAA from the Telecommunications Panel; and
- A presumption that cases involving less than USD 2,000 will be heard based on documents only, with an option of an oral hearing for an additional fee.

Large/Complex Case Track: Large/Complex Case Procedures, which supplement Regular Track Procedures, are for use in cases involving claims of at least USD 500,000. Key features of the Large/Complex Case Track Procedures include:

- Mandatory pre-arbitration mediation and/or early neutral evaluation;

Box 2-9 – The AAA's Wireless Industry Arbitration Rules (*cont'd*)

- A presumption of multiple arbitrators;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by telephone;
- Broad arbitrator authority to order discovery, including depositions; and
- A presumption that there will be multiple hearing days scheduled consecutively or in blocks of hearing days.²²

A number of issues arise with respect to the role and relationship of a telecommunications regulatory agency in the arbitration process. One is the question of whether the arbitrator(s) will actually be regulatory officials or independent persons approved or appointed by the agency. In some cases, regulatory officials have functioned as arbitrators but more frequently the regulatory agency has only overseen the process of appointing independent arbitrators.

In the United States, state regulatory agencies have had considerable experience with arbitration. Some tend to rely on rather formal, evidentiary proceedings and see arbitration as a way to streamline agency deliberations. Evidentiary records are developed on a more informal basis, and the scope for discovery is limited. Factual issues are developed on the basis of a written record without cross-examination. Some regulatory agencies limit the arbitrator's role to choosing between the rival parties' negotiating positions in order to encourage the parties to narrow their views as they "bid" for the arbitrator's decision.

Among the issues facing U.S. state regulators is whether to permit the consolidation of related proceedings before a single arbitrator or to deal with each dispute on an *ad hoc* basis. More importantly, many regulators have taken the position that the results of any arbitration should be subject to public comment and ultimately approved by the regulatory agency. In this respect, the arbitration process is often approached as an extension, on a more informal basis, of current regulatory deliberative procedures rather than a free-standing dispute resolution process. To this extent, it involves a wider definition or scope of dispute than the definition offered by the disputants, enabling related issues and parties to be considered.

Arbitration can enhance the independence of the regulatory decision-making process from political pressures. On the other hand, a private alternative to regulatory adjudication can change the dynamics of handling disputes even in countries whose traditions of regulatory independence appear strong. New approaches to dispute resolution must become an important element of future policies designed to break with the past and result in a more cooperative approach to handling commercial and competitive relationships in the telecommunications sector.

The use of arbitration techniques and tools in the telecommunications sector will require addressing several important public policy concerns:

- Potential limitations in the scope of proceedings, i.e., dealing with the precedent-related aspects of a dispute or with implications for related issues;
- Potential concerns about the enforceability of proceedings and about initiatives of the regulator to protect the integrity of its own jurisdiction at the expense of the credibility of the arbitration process;
- Concerns about the expertise and experience of the arbitrator(s);
- Concerns about the potential for conducting protracted proceedings in a quasi-judicial context without taking full advantage of opportunities for procedural streamlining;

²² Wireless Industry Arbitration Rules, American Arbitration Association, effective July 1, 2003. A summary of the Wireless Industry Arbitration Rules can be found at: <http://www.adr.org>

- Concerns about confidentiality-related considerations versus the interest in transparency that is usually characteristic of public decision-making;
- Concerns about the legitimacy of a private dispute resolution process as a venue for resolution of issues affecting public policy and government interests;
- Concerns about costs (which can be similar to concerns about litigation); and
- Concerns with respect to a party's limited rights of appeal.

Chapter 5 explores in more detail how these issues can be addressed and balanced in appropriate ways for suitable situations. Where they are successfully addressed, it may well be possible to structure credible, efficient, and effective alternatives to regulatory agency adjudication, through arbitration, that improve the overall quality of dispute resolution in the telecommunications sector.

2.6 Dispute Resolution Bodies

There are a number of international public and private entities that provide ADR services to various parties. The most widely known public and private ADR entities are outlined in Annex C.

2.7 Other Methods of Dispute Resolution

There are numerous classifications of dispute resolution methods, and this chapter has only outlined a few of them. Most other approaches to dispute resolution are merely variations or hybrids of regulatory adjudication, arbitration, mediation or negotiation.

Evaluative mediation, for example, is a combination of adjudication and mediation. The mediator will perform the mediation role by assisting negotiations, but if they fail then the mediator will provide his or her view on the case. This view may be required at the request of one party, or it may require both parties to request it. The evaluation may merely show the parties how a neutral third party views the dispute. In such a case, the evaluation is not binding but provides a reality check to parties holding unrealistic positions. In other cases, the parties may agree in advance to accept the mediator's proposed decision, in which case, like arbitration, it becomes binding.

Mediation by regulators can become a form of evaluative mediation. Regulators may be responsible for issuing a binding decision if negotiations fail and the case goes to regulatory adjudication. The involvement of regulators in the mediation can result in one or both parties' using the process as a preliminary part of an adjudication process rather than a true exploration of potential settlement.

Ombudsmen schemes are another example of a hybrid technique that is increasingly used in the telecommunications sector, particularly for consumer disputes. In a typical ombudsmen scheme, policy-makers, regulators, or even industry bodies will nominate an individual to investigate and resolve disputes. Ombudsmen may have a variety of powers, ranging from the ability to issue binding decisions (an adjudicatory role) to assisting in clarifying facts, assisting in negotiations, and recommending solutions (a mediation or evaluative mediation role). Their available resources depend on the extent of their mandate and powers.

Some other methods of dispute resolution are mentioned in examples discussed in Chapter 3. There are still other methods that are not discussed in this report, which focuses more on underlying issues and challenges facing policy-makers and regulators in dealing with dispute resolution.

3 CURRENT DISPUTES AND RESOLUTION APPROACHES

This chapter describes some of the main types of disputes currently seen in the telecommunications sector, as well as the dispute resolution techniques applied to attempt to resolve them. The purpose of this chapter is largely illustrative. It describes a wide range of current disputes and resolution techniques to provide an empirical basis for the analyses provided in subsequent chapters.

The description of current disputes in this chapter also provides some illustrations of how disputes have been resolved in some countries. These may be useful in other countries, as well. More importantly, this chapter provides a good basis for considering the alternative approaches outlined in Chapter 2 and discussed in subsequent chapters.

3.1 Disputes Related to Liberalization

The process of opening a country's telecommunications markets to competition frequently gives rise to disputes, which commonly involve stakeholders that have significant and conflicting economic interests at risk. For example, incumbent service providers often have incentives to protect their dominance in as many markets as possible, for as long as possible. The government may share an interest in protecting the incumbent's monopoly, or at least its dominance, particularly where the incumbent is wholly or partially state-owned.

On the other hand, governments and regulators also have a strong interest in promoting healthy competition in telecommunications markets. This interest stems not only from a desire to promote economic growth and social development, but also from imperatives of the government's international trade obligations, such as those under the World Trade Organization (WTO) General Agreement on Trade in Services (GATS). Finally, potential competitors have an interest in profitably entering various telecommunications markets, particularly the more lucrative ones.

In some cases, the incumbent has legal rights that pose an obstacle to liberalization. For example, some incumbents have been granted licenses or concessions to operate as monopolies for a lengthy period of time, rights that are inconsistent with national and global trends toward liberalization. In such cases, policy-makers and regulators may decide not to wait for such exclusive rights to expire before introducing market reforms.

The process of terminating monopoly rights early can be very challenging, particularly where the incumbent has private-sector investors. In theory, a government could issue a law or regulation that simply terminates the incumbent's monopoly rights. In reality, such a course of action could signal a fundamental disregard for the legal rights of telecommunications operators and service providers. This course of action might actually discourage investment in the sector by creating uncertainty about the legal rights of service providers and raising concerns about the predictability of government regulation and policy.

Regulators are sometimes left with the challenge of either finding a legal means of terminating the incumbent's monopoly rights or reaching a compromise with the incumbent to end the monopoly. In most cases, it is preferable for the government or regulators to resolve disputes about early termination of exclusive rights in a mutually agreeable manner.

This is not always possible, of course. In some cases, governments, regulators, new entrants, and incumbents have taken their disputes over exclusive rights to the courts. In other cases, supporters of expeditious liberalization have tried to terminate the incumbent's monopoly rights by initiating court proceedings to invalidate the original grant of those rights. In some countries this case can be made on the grounds that the original grant of monopoly rights violated a law, a legal or constitutional requirement that has precedence over the telecommunications legislation or the exclusive rights in the license.

In a case arising in Dominica, and ultimately appealed to the Privy Council of the United Kingdom, it was argued that the grant of a monopoly over local services constituted a violation of the

constitutionally-protected right to freedom of expression and, for that reason, the monopoly itself was invalid (see Box 3-1).

Box 3-1 – Dominica: Was Granting Monopoly Rights Unconstitutional?

Cable & Wireless West Indies (CWWI) began to provide international telecommunications services to Dominica on a monopoly basis in about 1929, and it added domestic service there in 1967. In September 1985, CWWI won an exclusive, 20-year license to provide both national and international services. The government of Dominica held no interest in CWWI. A new company, Cable & Wireless Dominica (CWD), was formed in 1995 to take over the provision of services. This time the Dominican government held 20 percent of the shares in CWD. The government was also entitled to royalties, and the capital invested for its shares was in the form of a cash advance to be paid out of future royalties. CWD was granted an exclusive 25-year license to provide national and international telecommunications services, pursuant to the *Telecommunications Act 1995* (the Act).

Marpin Telecoms and Broadcasting Limited (Marpin), a new market entrant, sought to compete with CWD in the provision of public telecommunications services, particularly in the areas of mobile telephony and e-mail and Internet services. Marpin had entered into an ISP agreement with CWD in 1996, using toll-free access numbers allotted by CWD. In 1997 Marpin cancelled the ISP agreement and attempted to bypass the CWD system by using VSAT technology. CWD responded by withdrawing Marpin's 1-800 numbers, so Marpin clients could no longer connect to Marpin's network.

Marpin sought relief in the courts, citing Section 16 of the Dominican Constitution and challenging the validity of the Act for authorizing the exclusive license. Marpin also challenged the validity of the license itself for granting exclusivity to CWD. The case was heard in the High Court of Justice of Dominica, which held that the CWD monopoly did violate freedom of expression and was therefore unconstitutional. The Dominican Court of Appeal upheld the decision. The case was appealed to the United Kingdom Privy Council, the highest court of appeal for Dominica.

In October 2000, the Privy Council held that Marpin's freedom to communicate ideas and information through telecommunications under Section 10(1) of the Constitution was hindered by CWD's monopoly. In their Lordships' view, "some significant hindrance to freedom of communication is normal and in this instance inevitable if there exists a statutory monopoly to control means of communication as important in the world of today as the telephone".²³

Subsection 10(2)(b) of the Dominican Constitution limits freedom of expression if it is in the public interest. Here, the issue was whether, in authorizing and granting exclusivity, exclusivity provisions in the Act and the license were reasonably required for the purpose of protecting the freedoms and rights of other persons. An important question in making this determination was whether, on balance, allowing Marpin to compete with CWD would or would not be conducive to providing Dominica with telecommunications services giving best effect to the rights of users to freedom of communications.

The Court did raise the possibility that a developing country with a small population might be able to justify a monopoly on the grounds that the cross-subsidization of telecommunications services would be reasonably required for the purpose of protecting the rights and freedoms of the people to communicate freely. In this case, the Judicial Council held that a resolution of these issues required a balancing of interests and a local evaluation of the evidence. The Court therefore remitted the case back to the trial judge for further factual determinations.

It should be noted that the Constitution of Dominica had rather unique provisions governing the freedom of expression, making it possible to argue that the grant of monopoly rights was

²³ *Cable and Wireless (Dominica) Ltd. v. Marpin Telecoms and Broadcasting Co. Ltd.*, [2001] 1 W.L.R. 1123.

unconstitutional.²⁴ Constitutional challenges to the grant of monopoly rights would be more difficult to sustain in countries with a more conservative approach to the concept of freedom.

Dominica also serves as an example of a country in which the dispute over the early termination of an incumbent's monopoly ultimately was resolved through negotiated agreement. Dominica is a member of the OECS, which has established the Eastern Caribbean Telecommunications Authority (ECTEL) as a regional telecommunications authority. In April 2001, ECTEL concluded negotiations with Cable & Wireless (C&W) for the early termination of C&W's monopoly in Dominica, St. Lucia, St. Vincent and the Grenadines, Grenada, and St. Kitts and Nevis. Some of the key terms of the agreement between C&W and the ECTEL members are highlighted in Box 3-1.

The transition to competitive markets in these Caribbean countries has also given rise to disputes concerning the imposition of an interconnection agreement on C&W and the timetable for the implementation of a price cap regime – including the process of rate rebalancing. The latter issue was the subject of a second agreement between Dominica, St. Lucia, St. Vincent and the Grenadines, Grenada, St. Kitts and Nevis and C&W in May 2002. These two successful agreements have not, however, enabled the parties to avoid litigation on a range of related issues.²⁵

The early termination of a grant of exclusivity in Jamaica was also reached through negotiated compromise. In 1999, Cable & Wireless Jamaica (CWJ) successfully negotiated an agreement with the Jamaican government that called for phasing out, over a three-year period, CWJ's monopoly on provision of a wide range of telecommunications services. The Jamaican government also introduced new telecommunications legislation in 2000 that reflected its incremental move to a liberalized sector and introduced other regulatory reforms. Both the agreement to phase in competition and the new telecommunications legislation were then challenged in the Jamaican Constitutional Court as being unconstitutional violations of the freedom of expression. An Internet Service Provider (ISP), Infochannel, filed the court challenge to the agreement and the legislation (see Box 3-2).

²⁴ The Constitution of the Commonwealth of Dominica of 1978, section 10 Protection of Freedom of Expression:

10 (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision: (a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or (c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

²⁵ C&W has taken a number of unresolved and contentious issues to court in a number of the five OECS contracting states. C&W has, for example, applied to the High Court of St. Vincent and the Grenadines for a judicial review of a decision by the National Telecommunications Regulatory Commission of St. Vincent and the Grenadines to impose, among other things, an interim interconnection agreement on C&W and Digicel. C&W also sought a stay in St. Lucia, Grenada, and St. Kitts and Nevis of decisions taken by the telecom regulators of those countries to impose price cap regimes in those countries. C&W argued that, pursuant to the terms of the May 2002 agreement, it was entitled to one month's time to rebalance its rates prior to the implementation of the price cap regime. The courts in St. Lucia granted the stay.

Box 3-2 – The Infochannel Challenge

Infochannel, a Jamaican telecommunications service provider, had been providing long distance telecommunications services over the Internet, using Voice over Internet Protocol (VoIP) technology, since approximately 1995. It received a VSAT license from the Government of Jamaica in 1998 that allowed it to directly access the Internet via satellite to provide a full range of Internet services. This was part of the government's attempt to liberalize the telecommunications sector.

At that time, Cable & Wireless Jamaica (CWJ) still enjoyed exclusivity over international calling, pursuant to the terms of its own license. In 1999, CWJ brought a legal action to have Infochannel's license invalidated, arguing that the Infochannel license breached CWJ's monopoly rights. The action initiated by CWJ was discontinued after the Jamaican Minister of Industry, Commerce and Technology reached a settlement with CWJ and Infochannel.

After the Jamaican *Telecommunications Act* was enacted in 2000, the government refused to grant Infochannel a new license to provide VoIP services. Infochannel brought another legal action to challenge the constitutionality of the agreement reached between CWJ and the Government of Jamaica, and of the 2000 *Telecommunications Act* – both of which prohibited Infochannel from providing VoIP services. Infochannel argued that the agreement and the Act violated its right to protection under the law, its right to property, its right to fair treatment, and its right to freedom of expression.

In December 2002, the Court of Appeal in Jamaica ruled that the freedom of expression of both Infochannel and of one of its private customers (who had joined in the litigation) had been violated. The Court also quashed the provisions of the *Telecommunications Act* that provided for the phased transition to liberalization on the grounds that these provisions violated the freedom of expression.

The process of liberalization in the OECS contracting states and in Jamaica illustrates several disputes concerning the termination of the incumbent's monopoly. The Caribbean cases also illustrate different approaches to dispute resolution used to protect stakeholders' interests, including negotiations and court actions. The litigation initiated through the courts included constitutional challenges and petitions for judicial review of a regulator's decision.

Resorting to the courts to address disputes that arise in the process of liberalization represents a challenge for regulators, who may find that their regulatory authority is compromised by legal challenges and unfavourable judicial decisions. This may be particularly troublesome for a newly established regulator, since ongoing legal battles over liberalization may impair the regulator's ability to establish its authority at an early stage. This is not a challenge that can be easily remedied.

Creating a liberalized and investment-friendly telecommunications sector generally requires that the regulator's decisions endure some form of review. How regulatory decisions may be appealed is an important component of regulatory reform and liberalization. We will return to the issue of reviewing and appealing decisions of regulators and other dispute adjudicators later in this report.

Another source of dispute in the process of liberalization arises as new technologies offer competitive alternatives to traditional services. A key example can be found in mobile telephony. As mobile technology has improved, mobile phone services are increasingly being viewed as a substitute for fixed line services.

The dispute between the Jamaican regulator, Infochannel, and CWJ provides another example of how technological change can spark disputes as a country moves toward liberalization. As described above, the regulator issued Infochannel a license to provide Internet services using VSAT technology. This allowed Infochannel to take advantage of a new technology to bypass CWJ's network, undermining CWJ's exclusivity rights. Infochannel was able to use this new technology to offer VoIP, a substitute for the traditional international telecommunications services offered by CWJ on an exclusive basis. The constitutional challenge to C&W's monopoly in Dominica also began as a dispute about whether the provision of innovative new services violated the C&W monopoly.

Disputes also have arisen over whether new market entrants must use the facilities of the incumbent when the incumbent continues to enjoy a monopoly over some telecommunications services. For example, there have been disputes over whether a license to provide mobile services includes the right of the licensee to use its own international gateway or that of a competitor, rather than the incumbent international service provider's gateway. In some cases, these disputes result from ambiguity in the governing telecommunications legislation or the license.

Policy-makers and regulators can take a proactive approach to these disputes by seeking to avoid ambiguity in the licensing regime. Legislation and licenses that are clearly drafted and specifically avoid any ambiguity in what is being licensed are an example of a proactive approach. Nevertheless, even the clearest language may not be able to prevent disputes arising from unforeseen technological developments that change which services are available and how services are delivered.

3.2 Investment Disputes

The process of liberalization may give rise to disputes between the investors in telecommunications operating companies and the regulatory agency or ministry that has introduced regulatory reform. Disputes typically arise when the regulatory reform diminishes the value of the investor's stake in the sector. The early termination of the incumbent's monopoly, rate rebalancing, mandatory interconnection, the introduction of a new rate-setting structure, and changes to the terms and conditions of licenses are all examples of regulatory changes that could diminish investor value.

For example, Spanish-based Telefonica, an investor in Telefonica de Argentina SA, sued the Government of Argentina over a freeze in service tariffs that, along with the 70 percent currency devaluation, cost the company € 3.3 billion (USD 3.8 billion). The legal basis on which investors may initiate a claim against the government varies from jurisdiction to jurisdiction. In some countries it may be possible to argue that the government's actions constitute an unlawful seizure of property or a diminishment of the property rights of the investor.

An investor also may build a claim on the grounds that the government has not complied with existing legislation or its statutory obligations. For example, in a rate-setting case, an investor may take the position that the regulator's decision did not properly take into account certain statutorily required criteria. In some cases, there may be a contract between the investor and the government that provides the investor with certain "regulatory guarantees" – contractual commitments that the government will regulate the telecommunications sector in a particular way. The failure to abide by those commitments can then serve as the basis for a compensation claim for breach of contract.

The existence of an agreement between an investor and the government is not uncommon in countries where a publicly-owned telecommunications company has been privatized. The contract governing the sale of the government's stake in the company may contain, for example, provisions guaranteeing that the company will enjoy an exclusive license for certain services. Or, it may guarantee a minimum rate of return or an increase in service rates for a certain period.

In such a case, the government's subsequent attempts to introduce regulatory reform, such as competition or rate rebalancing, may spark a breach-of-contract action. The resolution of this type of dispute is challenging for the regulator, who is caught between the objective of introducing regulatory reform and honoring contractual commitments to telecommunications investors. The challenges of resolving such an investment dispute are illustrated by developments in Guyana (see Box 3-3).

Box 3-3 – GOG and the Reluctant Investor

In 1990, Atlantic Tele-Network Inc. (ATN) purchased an 80 percent share of the state-owned incumbent telecommunications service provider in Guyana, Guyana Telephone and Telegraph (GT&T). The Government of Guyana (GOG) retained the remaining 20 percent stake in the company. The privatization contract or “purchase agreement” between ATN and the government stipulated that GT&T would be granted a 20-year monopoly in domestic and international telecommunications markets in Guyana, renewable for an additional 20 years.

Approximately 10 years after entering into the purchase agreement, GOG announced its intention to liberalize the telecommunications sector and invited ATN to negotiate contract changes consistent with GOG’s program of regulatory reform. In addition, GOG publicly called upon GT&T and ATN to enter into negotiations for ending the GT&T monopoly. GT&T and ATN, however, refused to negotiate until the Public Utilities Commission (PUC) granted an interim increase in GT&T’s rates, thereby increasing rates to a level ATN alleged was required by the 1990 purchase agreement. ATN argued that some increases in local rates (i.e., rate rebalancing) were required for it to earn returns prescribed by the agreement.

Tensions between the parties grew when ATN lobbied the Inter-American Development Bank (IDB) to withhold approval of a USD 18 million loan for an ICT project in Guyana. ATN argued that the ICT project would infringe on its monopoly rights, since these rights extended to transmission of information over the Internet. The GOG countered by arguing that GT&T’s monopoly rights did not extend to the Internet since the Internet had not even been commercialized when GT&T received its license.

According to published newspaper reports, ATN and the GOG met in Trinidad in the spring of 2002 to try to negotiate a resolution of the ongoing dispute. ATN publicly stated that it was willing to agree to the early termination of its monopoly rights. The negotiating teams reportedly reached a tentative agreement on key issues, and this tentative agreement was referred to the principals of both parties, which apparently declined to endorse it.

ATN then initiated court action in the United States, seeking a court order to block the IDB loan to Guyana pursuant to the U.S. *Foreign Assistance Act* of 1961 and the *Helms Amendment* to that Act. ATN also sought a *writ of mandamus* directing Jose Fourquet, the Executive Director of IDB, to veto the loan approval process. Although ATN’s legal action was dismissed, the parties have since then failed to negotiate an agreement on how to proceed with liberalization of the sector, rate rebalancing, and other outstanding issues.

Under the terms of the purchase agreement, disputes between the GOG and ATN could be referred to the International Centre for Settlement of Investment Disputes (ICSID) for arbitration, with the written consent of the GOG. However, the dispute has not been referred to ICSID for arbitration.

As can be seen in the ATN-Guyana case, investment disputes can become intertwined with disputes over economic regulation of the operator. As the Guyanese government and ATN negotiated the early termination of GT&T’s monopoly, their negotiations expanded to include talks about a number of other issues, some of which were related to disputes between GT&T and the government that transcended the narrower issues between the GOG and ATN.

The Guyana dispute also illustrates an important dimension of some investment disputes: issues related to foreign direct investment in the telecommunications sector. An increasing number of countries have dropped foreign investment restrictions, sometimes in conjunction with commitments to open market access under the WTO GATS. Consequently, it is increasingly common for local operators, including incumbents, to be owned in whole or in part by foreign investors. Investment disputes become more complicated in this context because they often raise issues of international law, the application of bilateral and multilateral treaties, conflicts between laws in different jurisdictions, and whether the laws of the parent company’s home jurisdiction apply to the dispute. These gnarly issues may complicate the already contentious telecommunications issues that kicked off the dispute.

Investment disputes between nationals of different countries may be referred to the International Centre for Settlement of Investment Disputes (ICSID) for resolution by one of two routes. The first is

through provisions in contracts between governments of member countries and investors from other member countries. The second is through the operation of local investment laws and bilateral investment treaties (“BITs”). Some investment laws, and many BITs, contain requirements for advance consent by governments to submit investment disputes to the ICSID for arbitration. ICSID was established in 1966 under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. As described in Annex C, ICSID is an autonomous international organization, part of the World Bank Group.²⁶

Such investment disputes may also be referred to the UN Commission on International Trade Law (UNCITRAL) and eventually spill over into the courts of different jurisdictions. such as The 1974 U.S. *Trade Act* and the U.S. *Foreign Assistance Act* of 1961 (including the *Helms Amendment*) contain provisions with important implications in investment disputes that involve American investors. Many other countries have similar kinds of legislation.

To date, only one telecommunications investment dispute has been referred to ICSID for resolution. In July 2002, the dispute between Telefonica and the Argentine government was referred to ICSID. As noted above, Telefonica claimed € 3.3 billion (USD 3.8 billion) in damages from the Argentine government for compensation for a freeze in service tariffs and a massive currency devaluation. As of 1 January 2004, no decision had been issued in this dispute.

3.3 Interconnection Disputes

Interconnection-related disputes are the most common type of dispute between service providers. New technology has given rise to a myriad of alternatives through which consumers can obtain basic telecommunications services. Consumers in the same service area may use fixed or mobile networks – wireline or wireless – to reach the public switched telephone network (PSTN). Mobile services, in particular, are increasingly becoming a viable substitute for fixed local access services. Operators of all different access networks must be able to interconnect with one another’s networks.

Interconnection is particularly important in newly liberalized markets that were previously dominated by a single incumbent operator. In such cases, new entrants require interconnection to the incumbent’s network in order to provide services that are both affordable and of a sufficient quality to be a competitive alternative to the services of the incumbent. The incumbent, however, has an economic incentive to make interconnection more difficult and costly in order to maintain its competitive advantage over new market entrants. A dominant incumbent operator also can generally exercise significant bargaining power and, therefore, can frustrate the efforts of competitors to secure interconnection on favorable terms. This inequality in bargaining power has been a key factor in many interconnection disputes.

3.3.1 Issues Arising in Interconnection Disputes

Disputes over interconnection may involve a wide variety of technical, operational, and financial issues. Some of the main types of interconnection disputes have involved:

²⁶ ICSID website at www.worldbank.org/icsid/about/main.htm. The web site indicates that ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID contracting states, whether or not parties to the dispute, are required by the Convention to recognise and enforce ICSID arbitral awards.

Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute, provided it relates to a transaction which has “features that distinguishes it from an ordinary commercial transaction”. The Additional Facility Rules further allow ICSID to administer certain proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry “to examine and report on facts”.

- Failure by a dominant operator to develop a Reference Interconnection Offer (RIO) or standard interconnection arrangements;
- Failure to conclude negotiations on a timely basis;
- Disagreement on interconnection charges;
- Disputes over quality of interconnection services;
- Failure to comply with the terms of a negotiated interconnection agreement;
- Poaching of customers by new entrants through improper customer transfers (“slamming”);
- Improper use of competitively sensitive customer information by incumbent operators.

Interconnection disputes may develop during the negotiation phase or during the implementation and life of interconnection agreements. Many service providers, particularly new entrants, often wield little weight in disputes with incumbents. Third-party intervention is necessary to ensure that a fair and pro-competitive resolution is attained in such disputes.

Many aspects of the interconnection relationship engage important policy considerations that are vital to the general health of the telecommunications sector as a whole. Most regulators consider it important to maintain some form of regulatory oversight of the negotiation and implementation of interconnection arrangements. But regulators must balance the need for continued oversight with the need to reach agreements and resolve disputes quickly and efficiently. Most regulators also recognize that operators generally have a better understanding of their networks and the operational requirements for interconnection than regulators do. Moreover, operators have the technical information necessary to implement efficient interconnection arrangements. There is also a general sense that, at least in a competitive market where parties have equal bargaining power, the negotiation of commercial arrangements should be left to the parties themselves.

The challenge for the regulator is to provide room for the operators to work out their own arrangements while maintaining sufficient control over the process to keep negotiations moving in the right direction and in a pro-competitive way.

It should be noted that the *Reference Paper* of the *WTO Agreement on Basic Telecommunications Services* commits adherents to establish an independent dispute resolution mechanism. More specifically, it requires that parties to an interconnection dispute have recourse to an independent, domestic body that can resolve the dispute within a reasonable period of time.

Regulators have taken different approaches to fostering an interconnection environment that protects the interests of new entrants while also leaving room for parties to negotiate agreements on their own. These approaches include prescribing interconnection arrangements on an *ex ante* basis, establishing interconnection guidelines, approving reference interconnection offers (RIOs) or model interconnection agreements, policing operators with significant market power, and generally overseeing the interconnection process. Often, this involves assisting dispute resolution, either through mediation or arbitration. We will discuss these approaches in more detail below.

3.3.2 Preventing or Narrowing the Scope of Interconnection Disputes

3.3.2.1 Interconnection Guidelines and Default Interconnection Arrangements

There is growing consensus that it is necessary to have *ex ante* interconnection rules and guidelines for negotiating interconnection agreements and resolving disputes. Many regulators have adopted principles to govern the basic framework for interconnection in their country without stipulating the specific terms and conditions for agreements. These principles may be set out as regulatory prescriptions or general guidelines, and they may be contained in licenses, regulatory decisions, orders, or policy statements. Operators are then free to take the lead in negotiating specific interconnection agreements, but they must do so within the prescribed framework. The adoption of interconnection principles or guidelines may pre-empt many interconnection disputes. For example, stating that interconnection should occur at any technically feasible point, or that the requesting

operator should pay any additional costs of non-standard interconnection, makes clear that network operators cannot arbitrarily dictate the Point(s) of Interconnection (POI).

Adherence to the interconnection guidelines may be a license condition or it may be set out as a general requirement in telecommunications legislation – or even in the order setting the interconnection guidelines themselves. Refusing to comply with such guidelines could attract sanctions, an approach that acts as a deterrent. Although regulatory guidelines establish the framework for interconnection agreements, they tend to be fairly general in nature. Thus, disputes sometimes arise over how the general principles should be applied in particular interconnection arrangements.

Some regulators have opted to prescribe detailed interconnection conditions in order to head off potentially controversial issues. Examples of this approach are interconnection orders for local network operators, enacted in 1996 in the United States and in 1997 in Canada. In both countries, regulators held lengthy regulatory proceedings before the rulings were issued. Incumbents, new entrants, and other interested members of the public provided input. Detailed regulatory decisions emerged from these processes, specifying the approaches and many of the specific terms, rates and conditions for interconnection.

Nevertheless, these decisions did not resolve all issues, and there have been lengthy follow-up proceedings. In Canada, an industry committee was established to help resolve these ongoing issues (see Box 4-1). Moreover, the interconnection rules were revisited as technology evolved and the competitive telecommunications sector developed.

In Jordan, the regulator has taken an innovative step to provide greater clarity and transparency on interconnection requirements. The Telecommunications Regulatory Commission issued an “explanatory memorandum” explaining and supporting its June 2003 decisions on interconnection rate charges and related retail charges. This explanation provides insight on how the regulator is likely to approach other interconnection issues should disputes arise in the future. Another approach that several regulators have employed is to publish default interconnection arrangements, together with the guidelines for their implementation. If negotiations fail, the default arrangements will apply. The U.S. Federal Communications Commission used such an approach for certain interconnection issues when issuing the landmark 1996 interconnection order. Similarly, the Nepal Telecommunications Authority has issued default interconnection arrangements and interconnection prices.

Regulators have frequently addressed the difficulty of establishing interconnection arrangements with the incumbent by requiring incumbent operators to publish standard interconnection agreements or reference interconnection offers (RIOs). RIOs generally serve the same purpose as default arrangements prescribed by a regulator, but they typically provide a much greater level of detail for interconnection arrangements with the incumbent. Since RIOs are often prepared by the incumbent, they can provide more company-specific information on points of interconnection, types of equipment, and other technical specifications. RIOs are generally implemented only after regulatory approval. Once an RIO has been approved by the regulator, the incumbent is generally required to provide interconnection to any competitor on the terms and conditions specified in the RIO. In some countries, competitors have a choice between negotiating their own arrangements or relying on the RIO. In other countries, there is a general rule that interconnection with the incumbent will occur on the basis of the terms and conditions set out in the RIO.

The existence of an RIO significantly reduces the range of issues that may be disputed since many of the terms and conditions of interconnection are standardized in the RIO. In the past, incumbent operators sometimes criticized as unfair the requirement to establish an RIO. They argued that this approach amounted to regulatory “handicapping” and construction of “non-level playing fields”. Some argued that mandating the same interconnection obligations on all operators would provide more interconnection opportunities.

This is, however, the minority view. There is a general consensus that the universal imposition of interconnection obligations on all operators, large and small, would amount to over-regulation. Only dominant operators are considered to have sufficient market power to impose unfair and anti-competitive interconnection terms. Thus, there is a general trend to require RIOs in the case of dominant operators, but to allow non-dominant operators to negotiate their own arrangements in the

context of a set of general regulatory interconnection principles (and sometimes default interconnection arrangements).

This “asymmetrical regulation” of dominant operators is consistent with the *WTO Reference Paper on Regulatory Principles for Basic Telecommunications*, which imposes interconnection obligations only on telecommunications “major suppliers”.

Several resources are available to regulators in developing such interconnection guidelines and approving RIOs. Many countries have published interconnection agreements and established interconnection charges that can serve as “benchmarks” or models for others. Benchmarking has been used extensively within the EU and at the international level, such as in the United States-Japan bilateral telecommunications negotiations.

3.3.2.2 Publication of Interconnection Agreements

Most regulators require interconnection agreements to be published. This allows the regulator to maintain a general oversight of interconnection arrangements between operators. It also plays a role in preventing future interconnection disputes by providing all parties with information about existing interconnection arrangements. A registry of interconnection agreements is a valuable regulatory resource for the industry.²⁷ Some countries, such as Nigeria, have adopted “partial publication” approaches that are aimed at balancing the need for public access to information about interconnection arrangements with the need to protect commercially sensitive information.²⁸

3.3.2.3 Industry Technical Committees

Operators are often best placed to determine the specific conditions of interconnection arrangements since they have the necessary technical, operational, and financial information. A common way to take advantage of this knowledge is to establish industry committees to work out the details of interconnection arrangements. If interconnection negotiations are proceeding smoothly, incumbents and new entrants may choose to delegate the resolution of technical details of interconnection arrangements to such panels or working groups. In some cases, though, the regulator may need to take the initiative to ensure that appropriate technical committees are established. In either case, it is generally a good practice to set deadlines for reports.

Depending on the degree of cooperation between operators, representatives of the regulator may be able to play a useful role on such committees, facilitating agreement on interconnection arrangements, suggesting alternative approaches when there is an impasse, and otherwise mediating the discussions. Some regulators have appointed expert consultants to act as facilitators or mediators, and sometimes experts have been used to assess the merits of conflicting positions and to assist the regulator in resolving the dispute.²⁹

²⁷ In Bolivia, for example, the Superintendent of Telecommunications maintains a registry of interconnection agreements between licensees that provide services on the public switched network. In El Salvador, interconnecting operators must file interconnection agreements and all modifications to such agreements with the telecommunications regulators. Similarly, in Chile, all carriers are required to file their interconnection agreements with the regulator, SUBTEL. Although the entirety of the agreements are not available to the public, the technical conditions, time tables, procedures, and maximum tariffs allowed generally are available. This arrangement allows for the protection of commercially sensitive information.

²⁸ Pursuant to the Nigerian Interconnection Regulations, the regulator must ensure that up-to-date information about interconnection arrangements between operators in the country is published from time to time in a way that facilitates easy access for the users of this information. In order to ensure that the regulator has access to the information necessary to meet this obligation, operators are required to file with the regulator all technical, operational and accounting information that the regulator deems necessary. All interconnection agreements must be filed with the regulator within 30 days of the execution of the agreement. The regulator has a duty to maintain the confidentiality of information filed with it. By using the regulator as the conduit for information, the Regulations control the access to commercially sensitive information without compromising the general availability of information about interconnection arrangements.

²⁹ This approach has been taken, for example, in Sri Lanka and Botswana.

The industry technical committees established by the regulator in Canada are generally regarded as successful models to resolve and avoid interconnection disputes.³⁰ The CRTC Industry Steering Committee (CISC) includes participation from interested companies in the industry, as well as regulators. It took about two years for the CISC to reach an agreement on major issues relating to interconnection, and regulatory intervention has been necessary from time to time. However, CISC managed to achieve industry consensus on many important interconnection issues. CISC subcommittees continue to deal with ongoing issues that arise, such as those relating to the interconnection of networks incorporating new technologies.

Jordan has recently established a consultative body similar to the Canadian CISC. After issuing interconnection guidelines, the Jordanian regulator established an Interconnection Steering Committee (ISC) to oversee the implementation of the guidelines. The chairperson and CEO of the Jordanian regulatory commission chairs the ISC, which includes participants from the Jordanian incumbent service provider, mobile service licensees, and other licensed operators, in addition to staff members of the commission. The ISC has established a number of working groups to address key interconnection issues.

There are also less formal approaches to establishing industry technical committees. In Nigeria, for example, the regulator hosted a consultative forum for operators on interconnection pricing. Negotiations between operators on interconnection costs had been stalled for some time, and the regulator saw the forum as a way to obtain input from operators on acceptable ways of determining those costs. Participants in the forum included the two national carriers, the digital mobile licensees and the fixed wireless operators.

3.3.2.4 Incentives to Conclude Interconnection Arrangements

Some regulators have offered incentives for operators to work toward successful conclusion of interconnection agreements. The Canadian regulator used such incentives in 1984 when it first licensed mobile cellular operators. Licenses were issued simultaneously to the incumbent wireline operators and to a competitive national cellular operator. The licensing conditions prohibited the incumbents from starting up their cellular services until they had completed interconnection agreements with the new entrant on the same terms and conditions as those that would apply to their own cellular operations. The incentives proved to be effective: incumbent operators did not want to delay introduction of their own cellular services, so they quickly concluded mutually acceptable agreements.

3.3.3 Regulatory Intervention in Interconnection Disputes

3.3.3.1 Forms of Regulatory Intervention

Interconnection disputes are probably the most common and difficult types of disputes in the telecommunications sector. Interconnection negotiations between operators are frequently derailed by disputes, and disputes often arise even after initial interconnection arrangements have been concluded. It's no surprise, therefore, that most telecommunications legislation and regulations authorize regulatory intervention to resolve disputes.

In some cases, there may be an obligation under international trade law to provide access to an independent dispute resolution mechanism. As previously noted, the *WTO Regulation Reference Paper* requires countries to ensure access to an independent domestic body to resolve interconnection disputes within a reasonable period of time.

3.3.3.2 The Timing of Regulatory Intervention

One challenge facing regulators is to know when to intervene in interconnection disputes and when to leave the parties to negotiate a solution by themselves. Some laws, regulations, and guidelines call for regulators to get involved in an interconnection dispute after the passage of a prescribed amount of

³⁰ The CRTC Industry Steering Committee (CISC) and its subcommittees are described in Box 4-1.

time. Some countries have established timetables for the process of negotiating interconnection arrangements. Deadlines for the completion of various steps or deliverables may be set at the outset of negotiations, although sometimes these deadlines take effect only when it appears that negotiations are being delayed. The consequences of failing to meet the deadlines can include regulatory intervention, regulatory adjudication, or referral to mediation or arbitration.

The timelines and procedures for regulatory intervention in interconnection disputes in a range of different countries are described in Annexes A and B.

3.3.3.3 Asymmetrical Regulatory Intervention

In many cases, the decision on whether a regulator will intervene in an interconnection dispute during the negotiation phase depends on whether one of the parties to the dispute is a dominant operator in the market. In Nigeria, for example, when the regulator receives an appeal from an operator involved in interconnection negotiations, the regulator must intervene in the negotiations if no agreement has been reached within 90 days of the commencement of negotiations. This requirement only applies, however, when at least one of the negotiating parties is a dominant operator. Where none of the parties are dominant operators, the regulator may decline to intervene, even if a party requests it.

Nevertheless, some regulators will intervene in interconnection negotiation disputes between non-dominant suppliers. In Peru, for example, any dispute over an interconnection contract – or the interpretation of the contract – can be submitted (by either party) to the regulator, the Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL), for arbitration. Similarly, in Bolivia, either party in an interconnection negotiation may submit a dispute to the regulator. The parties are then required to execute an agreement within 15 days' of the issuance of a resolution by the regulator.

Sometimes whether regulators will intervene in disputes involving only non-dominant operators depends on the consent of both parties. In Singapore, for example, the Info-communications Development Authority (IDA) will “conciliate” between non-dominant operators in interconnection negotiation disputes only if both parties seek IDA’s assistance. IDA normally does not become involved in such disputes.

3.3.3.4 Procedures for Regulator-Sponsored Mediation or Arbitration

The procedures governing the intervention of regulators in interconnection disputes vary from country to country. In Brazil, disputes pertaining to the application and interpretation of the regulations during interconnection contract negotiations must be resolved by the Agência Nacional de Telecomunicações (ANATEL) through arbitration, which is conducted by an Arbitration Council composed of three members appointed by the President of ANATEL. The arbitration process begins when a party submits a petition to the President of the Council. The petitioning party then must submit all relevant information and documentation within the next 10 days. The Council is required to arbitrate the interconnection conditions within 15 days.

The Guatemalan Superintendencia de Telecomunicaciones hires an expert to advise the regulator on resolving the dispute. Although the regulator ultimately makes the final call on how the dispute ought to be handled, it is expected to decide based on the expert’s analysis.

The Nigerian interconnection regulations provide for a two-stage inquiry into interconnection disputes. During a preliminary inquiry stage, the Nigerian Communications Commission (NCC) gathers information in order to determine whether there is cause for a full investigation – the second stage – during which more detailed information and analysis can be gathered.

All parties have the right to state their case when an appeal for intervention has been made. The NCC must make a decision on the appeal within six months, but an interim decision may be issued, depending on the urgency of the case. The determination of the NCC may be made retroactive to the date when the dispute was brought to the regulator. The NCC’s decision on interconnection disputes may be appealed to the Federal High Court, although the decision of the regulator is binding until the final determination is made on the appeal. The provisions of the Nigerian interconnection regulations that outline the dispute resolution process are set out in Box 3-4.

Box 3-4 – Nigeria’s Interconnection Dispute Resolution Provisions

TELECOMMUNICATIONS NETWORKS INTERCONNECTION REGULATIONS

(Nigeria, SI 2003)

PART V – INTERCONNECTION DISPUTES RESOLUTION

17. (1) Where in interconnection negotiations no agreement is reached between the negotiating telecommunications operators within 90 days of the commencement of the negotiations, either party may appeal to the Commission and the Commission shall decide on the case, taking into due consideration the interests of both parties.
- (2) An appeal shall be made in writing, setting out the reasons on which it is based, in particular the areas of agreement and dispute, including but not limited to when interconnection was requested, what telecommunications network or service offerings were requested and on what issues agreement failed to be reached.
- (3) An appeal may be withdrawn.
- (4) The Commission may refuse to resolve the dispute in a case where none of the telecommunications operators involved is dominant in the relevant market.
- (5) Upon any of the interconnecting parties filing an appeal:
- (a) The Commission shall give the parties concerned the opportunity to state their case;
 - (b) A preliminary enquiry phase shall be introduced when initial consideration is given, so that the Commission can decide if there is a case to answer or to proceed to a detailed investigation;
 - (c) The Commission shall inform the complainant of the outcome of the preliminary enquiry phase within four weeks;
 - (d) The preliminary enquiry phase shall be followed by an investigation phase involving the gathering of analysis and assessment of more detailed information;
 - (e) The Commission may require written argument with supporting facts and research, if necessary, to assist in clarifying the issues in dispute;
 - (f) Where appropriate, the Commission may give representatives of business circles affected by the dispute the opportunity to state their case; and
 - (g) The Commission may also consider inviting other interested parties to comment on the issues.
- (6) The Commission shall decide on the dispute based on oral or written submissions and public proceedings and subject to the agreement of the parties concerned, a decision can be reached without oral submission.
- (7) When the presence of the public may pose a threat to public order, specifically to national security or to an important business or operating secret, the public may, at the request of one of the parties concerned or by a determination of the Commission, be excluded from the proceedings or from any part thereof.
- (8) The Commission shall take into due consideration the interests of the users and the entrepreneurial freedom of each telecommunications operator in its decision.
- (9) The Commission:
- (a) May, given the urgency of the case, issue an interim order before arriving at a decision;
 - (b) Shall decide the case within six months, beginning from the date of the appeal.

Box 3-4 – Nigeria’s Interconnection Dispute Resolution Provisions (*cont’d*)

- (10) The parties to the dispute shall be:
 - (a) Notified of the Commission’s decision and the decision shall be published;
 - (b) Given the statement of the reasons on which the decision is based.
- (11) The Commission shall have the power to set the effective date of any determination retroactively to the date at which the dispute was referred to the Commission.
- (12) The Commission is without prejudice to the rights of the parties to appeal to the Federal High Court, provided that the Commission’s decision shall remain binding until the final determination of the appeal.
- (13) A copy of the notice of appeal shall be lodged with the Commission within 30 days from the date of the decision.

In some countries, the regulatory framework allows disputants to select the type of dispute resolution method. For example, in Jordan, after a dispute has continued for 20 working days after the parties have begun negotiating a solution, the parties may ask the regulator to intervene or seek the assistance of an arbitrator. The consent of both parties is necessary to send a dispute to arbitration, while a dispute may be referred to the regulator for resolution on the request of only one party. The Jordanian interconnection dispute resolution process also explicitly provides that referring a dispute to arbitration, or to the regulator for resolution, does not prejudice the rights of the parties to seek remedies through the courts.

As illustrated in Annexes A and B, procedures governing regulatory intervention often specify a time frame for the issuance of the regulator’s decision in the dispute.

3.3.3.5 Appealing Regulatory Decisions on Interconnection Disputes

Dispute resolution procedures sometimes provide specific direction on appealing regulatory decisions on interconnection disputes. Although the legislation and regulations of many countries contain general provisions for reviewing regulatory decisions, there appears to be a trend toward establishing special provisions for the appeal of interconnection dispute decisions.

Appeal provisions often deal with the status of the regulatory decision pending resolution of an appeal. In most cases, the decision is deemed to be binding until the appeal is addressed.

Appeals may be made to different types of bodies. In Nigeria, the regulator’s decision in an interconnection dispute may be appealed to the Federal High Court. In Jordan, “objections” to the regulator’s decision in an interconnection dispute may be made to the Board of Commissioners of the regulator. If no objections are received within 30 days, the decision of the regulator is considered final. However, if an objection is received, the Board must issue a decision on the objection within 15 days of receiving the objection. The Board may take more time to issue its decision if it provides notice to the parties. The parties also can appeal the decision of the Board of Commissioners to a court of competent jurisdiction.

3.3.3.6 Paying for the Costs of Dispute Resolution

There are different approaches to the question of who should pay the costs involved in regulatory dispute resolution. Only a few countries provide directions in their legislation or regulations as to who should pay. The process adopted by the Jordanian regulator specifically states that the regulator will charge the disputants for the costs of actual resources consumed, in terms of both costs per person hour and per class of professional involved in resolving the dispute.

In Guatemala, the disputants are not required to pay for the regulator’s costs of resolving disputes. But they are made to pay for the cost of retaining the required interconnection expert, and the dispute resolution process will not proceed until the disputants have arranged the payments.

3.3.4 Interconnection Pricing

Interconnection charges are a common source of dispute. Disagreements may involve important policy considerations, particularly where the incumbent operators are involved. So regulators and policy-makers often take proactive roles in setting interconnection rates.

The *WTO Reference Paper* requires countries to develop cost-oriented interconnection rates. This requires the development of cost information, particularly for incumbent wireline operators. In many countries, however, operators and regulators have not developed reliable cost information. The most common approach to dealing with the absence of cost data is to use comparative rates or “benchmarks” from other countries. For example, Botswana recently used benchmarking to resolve a major interconnection dispute (see Box 2-3).

3.3.5 Enforcement of Compliance with Interconnection Agreements

The potential for interconnection-related disputes does not end once an interconnection agreement has been reached. Disputes over implementation or compliance are common.

As with all legal agreements, interconnection agreements may sometimes be referred to the courts for adjudication. But there are often significant public policy issues at stake in interconnection-related disputes, and these issues may be best handled by, or under the supervision of, the telecommunications regulatory authorities. Many countries give regulators the power to adjudicate disputes about compliance with interconnection agreements and to enforce such compliance. Regulators in some, but not all, countries also have the power to directly sanction operators that are non-compliant.

In Brazil, for example, the regulator ANATEL has authority to impose sanctions on providers that do not comply with the obligations they have undertaken in interconnection agreements. Once ANATEL has approved an interconnection agreement, the parties are required to implement it within 90 days.

The regulatory frameworks of many countries – including Peru, Bolivia, Guatemala, Chile, the United States, and El Salvador – grant regulators the authority to fine operators that do not comply with their interconnection obligations. In Peru, OSIPTEL has the authority to revoke a carrier’s license for repeated infractions.

Some interconnection disputes arise when an operator illegally interconnects with the network of another operator. In such cases, the regulator may have authority to issue sanctions against the party that has illegally interconnected. In Bolivia, for example, the sanctions for illegal interconnection include fines, the confiscation of equipment and materials, or a prohibition on providing services for one year.

3.4 Other Disputes between Service Providers

Although interconnection is a primary source of disputes between service providers, there are many other types of disputes, as well. As with interconnection disputes, regulators tend to focus their attention on other disputes that involve dominant operators. Because of the incentives for dominant operators to engage in anti-competitive practices, such operators are frequently subject to regulatory constraints and obligations that are not imposed on their non-dominant competitors.

Many types of competition-related disputes are brought to the attention of regulators. For example, disputes have frequently arisen over service packages or “bundles” that dominant operators offer to customers. In some cases, competitors have complained that incumbents do not offer such service packages to current subscribers, but only to potential new customers. They allege that this kind of bundling is a strategy to target customers of competitors, using preferential and even predatory pricing and terms. In other cases, competitors have complained that dominant wireline operators have bundled highly competitive services with near-monopoly services, precluding competitors from matching such service offerings.

Where there are no significant policy implications, regulators generally avoid involvement in disputes between service providers. The disputants often rely on the courts and alternative dispute resolution organizations (see discussion of these organizations in Annex C). While the courts in many countries

provide the most final and enforceable form of dispute resolution, it is often a costly alternative. Indeed, the cost of lawyers' fees and court costs can be more than the amount at stake in the dispute. New Zealand recently has amended legislation to provide certain cost sanctions to the parties (see Box 3-5).

Box 3-5 – “Formal” Consensus (With a Twist) in New Zealand

In December 2001, New Zealand adopted a new Telecommunications Law that created the position of telecommunications commissioner as a member of its Commerce Commission. This new legislation provided incentives for parties in a dispute to amicably resolve issues.

The new law also enabled the telecommunications commissioner to make final and binding decisions, which are enforceable and subject to appeal only to a superior court – making the position of the telecommunications commissioner in New Zealand unique.

The commissioner also has the power to consult widely on any given issue, inviting persons who have an interest in the dispute (other than the parties) to give opinions on the issues.

As distinct from the other members of the Commerce Commission, the telecommunications commissioner acts alone with regard to his telecommunications-related duties. The commissioner does, however, participate in the general work of the Commerce Commission.

If a dispute is brought before the commissioner, the law provides that the parties to the dispute must pay the Commission's full costs. The commissioner also may require that one party pay another party's costs if that party materially has contributed to those costs or to unreasonable delay. This provides another incentive for the parties to resolve their differences amicably and rapidly.

Most importantly, and perhaps most interestingly, the commissioner can meet informally with parties to a dispute to help resolve it without resorting to a hearing. However, given the weight and seriousness of the commissioner's decisions (they carry the sanction of a court judgment), parties to such informal meetings have sometimes asked the commissioner to “codify” any negotiated agreement by issuing a “decision” on the matter, thereby giving it additional legal force and creating valuable precedent at the same time.

3.5 Disputes between Regulators and Service Providers

Regulators do not participate in disputes solely as intermediaries. In some cases, the regulator itself is one of the disputants. A case brought by IsTim, Telecom Italia's Turkish mobile operator, against the Turkish regulator illustrates an action brought against the regulator itself for an alleged failure to exercise its regulatory duties (see Box 3-6).

The IsTim case illustrates the benefits of alternative dispute resolution mechanisms in dealing with complaints against regulators. Mediation, for example, can offer parties an opportunity to resolve a dispute in a timely manner without the risk of receiving an unpredictable ruling and running up extensive legal fees. It was not in the interests of either IsTim or the regulator to pursue a lengthy, complex case.

It may be that a mediated resolution would have enabled a package of measures designed to provide IsTim with a result closer to its original expectations without undermining the reputation of the regulator or exposing it to the risk of liability for a substantial monetary award. Indeed, because mediation focuses on identifying parties' genuine interests and finding a mutually acceptable solution that meets those interests it is precisely the sort of process that can help avoid confrontations that benefit neither party.

Examples of less dramatic disputes include claims that regulators have exceeded their powers, challenges to new regulations or terms of competitive licenses, and disputes over due process in enforcement. Such disputes are most commonly dealt with in the courts. But as the IsTim case reveals, alternative dispute resolution mechanisms may have significant advantages in terms of speed, costs and preservation of the long-term regulator-service provider relationship.

Box 3-6 – The IsTim Dispute in Turkey

The Turkish competitive mobile operator, IsTim, alleged that the Turkish Telecommunications Authority failed to enforce IsTim's roaming rights against Turkey's dominant operators and failed to control pricing for interconnection with Turk Telecom's fixed network. IsTim claimed USD 2.5 billion in damages as a result of the alleged failings of the regulator, arguing that had the Authority fulfilled its duties, IsTim would have rolled out its network sooner, offered wider market coverage, and enjoyed higher market share.

The IsTim case was addressed through arbitration rules of International Chamber of Commerce (ICC) in Paris. While the case was brought on the narrow and highly technical issues of roaming agreements and interconnection pricing, the real issues in dispute were broader. IsTim made a large investment in its license in boom economic times (the largest single foreign direct investment made in Turkey up to that time) and this investment produced disappointing results. The claim against the regulator appeared to be part of a wider strategy to deal with these commercial problems. Resolution of this claim has involved a variety of intertwined issues related to roaming, pricing and sector consolidation.

Since the parties reached an amicable settlement through negotiations, IsTim irrevocably waived finally and conclusively all of its claims and rights which it alleged in the Arbitration proceedings. This waiver covered all facts, claims, rights, entitlements and legal grounds upon which the arbitration was based. This waiver was accepted by the respondent as well. Thus the Arbitral Tribunal rendered an award that the judicial process with respect to the dispute was finally settled within the framework of the settlement agreement and the proceedings finalized.

Turkcell and Telsim, two competitive mobile operators, alleged that the treasury share that they have paid from their interconnection revenues were illegal and they would not pay that money. They brought the case before arbitration in accordance with arbitration rules of International Chamber of Commerce (ICC) in Paris. The Arbitral Tribunals finalized all the relevant arbitral proceedings and rendered the award that the payment of the above said treasury shares were not illegal. Thus those operators are still obliged to pay the relevant payment.

Turkcell and Telsim, two competitive mobile operators, claimed that the decisions of the Telecommunications Board enforcing Turkcell and Telsim to engage in roaming agreements with IsTim were unfair. They brought the case before arbitration in accordance with arbitration rules of International Chamber of Commerce (ICC) in Paris. The Arbitral Tribunal finalized all the relevant arbitral proceedings and rendered the award that the disputes were not arising out of the license contracts, so the Arbitral Tribunals were not authorized to resolve those disputes.

As with interconnection, disputes with regulators often involve pricing issues, and they sometimes involve parties other than service providers. For example, in June 2003 local consumer rights groups appealed an ANATEL decision in Brazil allowing fixed-line operators to raise their rates. Courts in the states of Rio de Janeiro, Santa Catarina, Rio Grande do Sul, Parana and Minas Gerais issued injunctions prohibiting the rate increases. Meanwhile, a federal court judge also issued an injunction in the case.

The rate-increase case in Brazil was greatly complicated by the number of courts that apparently had jurisdiction to hear the injunction requests. This complexity was heightened by the decisions of a number of judges to substitute their rate increases for those given by ANATEL. The applications filed in various state courts eventually were consolidated and appealed through at least three levels of the court system in Brazil. The development of the multiple challenges to ANATEL's rate decision illustrates the complexities that may arise in the course of appealing a regulator's decision. Another concern in this particular dispute was the impact of the court decisions on ANATEL's regulatory authority and its ability to supervise the telecommunications sector in an effective manner.

Issues related to reviewing the decisions of the regulator and the implications of such reviews are discussed in subsequent chapters of the report.

3.6 Consumer Disputes

Disputes between telecommunications consumers and service providers occur in every jurisdiction. Issues frequently disputed between consumers and service providers include:

- **Service Charges:** Disputes may arise over the types and amounts of charges that are levied on consumers for services.
- **Billing:** Disputes may arise over the charges billed to a consumer for various services or for calls that have been made. Consumers may dispute the fact that they made the calls at all. In other cases, a consumer may be billed for services that he or she did not request. The practice of billing a consumer for services that the consumer has not requested is sometimes called “cramming”, and several jurisdictions specifically prohibit service providers from engaging in it. Billing disputes also may involve failure to provide adequate information about charges billed to the consumer. Many jurisdictions recognize the consumer’s right to an accurate reporting of billed charges, including a written itemization of them, but disputes may still occur.
- **Payment of Charges:** The terms of payment for telecommunications services – and the time frame for disconnection after the non-payment – frequently result in disputes. Many telecommunications regulators have set standards to govern the terms of payment and disconnection, but these may not cover all potential areas of dispute.
- **Slamming:** Slamming is the practice of changing a consumer’s service provider without the consumer’s authorization. In other words, slamming is when one service provider “steals” a customer from another service provider, without asking the customer. This is a common source of disputes between consumers and service providers. Many jurisdictions have specifically banned slamming and have implemented measures to protect consumers from this practice, thereby reducing disputes.
- **Quality and Terms of Service:** Poor quality of service is a frequent cause of disputes, as are terms for connection and disconnection of service. Many jurisdictions have set quality of service standards and mandate certain terms of service in their regulatory frameworks, particularly for services provided by dominant operators.
- **Privacy:** Disputes over privacy frequently involve issues of use of personal consumer information, such as home addresses, credit information and calling patterns. Many countries have recognized consumers’ right to privacy, including, for example, the right to have one’s name removed from the telephone directory. However, disputes over application of these rights are common.
- **Advertising:** Disputes may arise over misleading advertising. Many jurisdictions protect consumers from misleading information through competition laws or consumer-protection legislation. Questions about the application of such legislation are a frequent cause of disputes.

Regulatory approaches to dealing with disputes between consumers and service providers may be proactive or reactive. Most countries have adopted a combination of the two. Proactive approaches include setting guidelines for consumer-service provider relations, establishing the obligations of each party. Such guidelines remove or reduce uncertainty in the relationship between consumers and service providers that would otherwise engender conflict. An example of this is the creation of guidelines to specify when a customer’s services may be discontinued.

Different types of regulatory or legislative instruments governing relationships, and disputes, between consumers and telecommunications service providers have been applied. Some jurisdictions, such as Australia, have enacted consumer-protection legislation specifically for the telecommunications sector. In many jurisdictions, regulators are required to protect consumers, particularly when there are monopoly or near-monopoly services. Other government agencies often have supplementary or overlapping responsibility for consumer protection; these may include consumer protection bureaus or competition authorities.

Some regulators have enacted a “consumers’ bills of rights”. Issues that may be addressed in such a document include, for example, prohibitions on slamming and cramming, guidelines on the publication of directory information, and requirements about what information must be provided on customers’ bills. Whether as part of a “consumer bill of rights” or otherwise, major service providers – particularly local telephone service providers – are often required to publish their procedures for addressing consumer complaints.

In some countries, the telecommunications regulator will become involved with a dispute as soon as it receives a complaint. For example, in the United States, the FCC has established an “informal complaint” process designed to head off the escalation of disputes when they first surface. When a person initiates an informal complaint with the FCC, the agency notifies the company named in the complaint and the company is given an opportunity to respond. The FCC then reviews both the complaint and the response to determine if any infringement of the law has occurred and determines what actions, if any, are necessary to resolve the complaint.

This FCC practice illustrates a common approach taken by regulators, which is to put the onus on the consumer and the service provider to resolve their disputes before turning to the regulator for assistance. In this regard, many regulators require service providers to establish procedures to address consumer complaints and to prepare reports on the resolution of such complaints.

In South Africa, for example, the licenses issued to Vodacom Group (Pty) Ltd and Mobile Telephone Networks (Pty) include a requirement for the companies to publish and enforce guidelines for their personnel to handle consumer complaints. The licensees must make these guidelines available to consumers at the commencement of service. In addition, the licensees also must file statistics on consumer complaints with the Postmaster General every six months.

While service providers are generally free to establish their own procedures for addressing consumer complaints, the regulator may prescribe certain minimum requirements. These may include: allowing consumers to file a complaint in person or by telephone; providing consumers with a tracking number so that they can follow the progress of their complaint; or setting a maximum time limit for processing and responding to complaints.

In cases where a dispute between a consumer and a service provider remains unresolved, consumers often can ask the regulator to intervene. Many regulators, however, require that parties first exhaust all avenues of pressing their complaint with the service provider. For example, in Botswana, when the incumbent operator installed billing software in 2000 that generated large numbers of erroneous bills, Botswana’s regulator required consumers to seek all possible remedies from the incumbent before the regulator agreed to intervene.

Regulators often have specific powers or procedures to investigate consumer complaints, particularly since many consumer – service provider disputes stem from actions that are either mandated, restricted, or prohibited by regulation. Regulators often can seek written submissions about the dispute or conduct a full hearing on the matter. Some regulators also have the power to issue binding decisions concerning the dispute and to levy sanctions, such as ordering compensation by the service provider.

Non-government agencies also are involved in consumer dispute resolution services. Such agencies may act as conciliators between the parties or provide arbitration services in consumer disputes. This provides consumers with cheaper and timelier alternatives to the court actions. Other examples include the use of the broadcast or print media. Nigeria’s televised “consumer Parliament”, described in Box 3-7, provides an interesting example of such an approach.

Certain disputes may trigger the intervention of government agencies other than the telecommunications regulator. When a dispute pertains to a matter that is regulated under competition or consumer protection legislation, the agency responsible for the enforcement of such legislation may become directly involved at an early stage in the dispute. For example, the Canadian competition authority recently initiated an investigation into the marketing practices of prepaid long distance phone card providers after it received complaints that consumers had been misled by the information included with the phone cards.

Box 3-7 – Nigeria’s Televised Consumer Parliament

The Nigerian Communications Commission (NCC) has introduced an interesting initiative to deal with consumer disputes. The NCC has collaborated with the television broadcast media to establish a televised “consumer Parliament”. Unsatisfied consumers gather in the old Parliament building in Lagos with representatives from Nigerian service providers. One of the consumers is appointed speaker. Consumers are then invited to ask questions and make complaints to the service providers.

The Parliament process is broadcast on the Nigerian national television channel. As “reality TV” with real relevance to ordinary Nigerians, the show has high viewing ratings. National TV exposure brings pressure to bear on the service providers to reduce the causes for consumer complaints. The broadcasts also have an educational function. The regulator, who is present during sessions of the “consumer Parliament”, can take the opportunity to explain to viewers the role of regulation in relation to the consumers’ complaints.

Similarly, the federal Privacy Commissioner of Canada held a number of hearings in 2002 on complaints he received about the misuse of personal information by telecommunications service providers. In a number of cases, the Privacy Commissioner held that consumer complaints were well-founded, and he recommended measures that service providers should take to come into compliance with the Canadian *Personal Information Protection and Electronic Disclosure Act* (“PIPEDA”).³¹

3.7 Disputes Related to International Trade

International trade law sometimes applies to disputes within a country’s telecommunications sector. The WTO’s GATS is the most important multilateral trade agreement affecting the provision of telecommunications services. Specific commitments relating to the opening and regulation of telecommunications markets are set out in related documents, including particularly the *Fourth Protocol to the GATS Agreement*, which came into effect on 1 January 1998, the *Schedules of Specific Commitments* of individual GATS signatories, and the *WTO Reference Paper*, which was included in the commitments of most signatories.

Some of the obligations set out in the *WTO Reference Paper* relate to:

- Prevention of anti-competitive practices in telecommunications;
- Requirements governing the interconnection to major suppliers;
- Requirements related to interconnection dispute resolution mechanisms;
- Universal service obligations;
- Public availability of licensing criteria; and
- The establishment of independent regulators.

Many of these obligations are applicable to telecommunications disputes in the telecommunications sector in GATS signatory countries. If a GATS signatory does not comply with its obligations, a dispute may arise between it and another signatory whose citizens or nationals are affected by a breach of obligation. Such disputes may be addressed through the GATS dispute resolution procedures.

Individual service providers do not have “standing” to seek remedies through the GATS dispute resolution procedures. However, the home country of the service provider may put pressure on another country’s government to comply with its GATS obligations. Thus, a domestic dispute about licensing or interconnection, for example, can develop into an international trade law dispute. An ongoing dispute in Mexico between service providers with U.S. investors and the Mexican regulator took this course after the U.S. government sought recourse for alleged trade violations. Box 3-8 describes the development of this dispute.

³¹ The Privacy Commissioner, however, does not have the authority to impose a sanction on companies that violate PIPEDA. Rather, the Privacy Commissioner must make an application to the Federal Court to enforce the law or the consumer can bring an action in court for damages.

Box 3-8 – United States vs. Mexico

The United States was the first country to use the Dispute Settlement Body (DSB) of the WTO in the area of telecommunications. On 17 August 2000, the U.S. government requested consultations with the government of Mexico pursuant to Article 4 of the Dispute Settlement Understanding (DSU) and Article XXIII of the General Agreement on Trade in Services (GATS).

This U.S. government action followed years of complaints and pressure by American operators AT&T and MCI WorldCom, Inc., who had invested in Mexican affiliates and sought to improve the conditions for competition in Mexico's USD 12 billion telecommunications market. Both companies claimed that the Mexican government's refusal to force the dominant telecommunications carrier, Teléfonos de México, S.A. de C.V. (Telmex), to reduce its rates for long-distance competitors to interconnect with its local network undermined their efforts to compete in the Mexican market.

The consultations provided clarifications but did not resolve the dispute. On 10 November 2000, the United States requested the establishment of a panel pursuant to Article 6 of the DSU and also requested additional consultations with the Government of Mexico. The United States alleged that Mexico had failed to: (1) ensure timely and non-discriminatory local, long-distance and international connection with Telmex and had failed to resolve interconnection disputes within a reasonable period of time; (2) ensure cost-oriented interconnection for all calls to and within Mexico; (3) permit the cross-border supply of basic telecommunications services over leased lines; and (4) permit the provision of long-distance services through cross-border arrangements. Finally, the United States alleged that Mexico had discriminated against U.S. service suppliers over concessions related to the installation and operation of interstate public telecommunication networks. Mexico objected to the establishment of a panel, but consultations were held on 16 January 2001. Again, the consultations did not resolve the dispute.

If the United States had chosen to renew its request to establish a panel at the DSB meeting on 1 February 2001, it would have been accepted automatically. The United States chose not to do so, but it retained the right to request establishment of a panel at a future date. The U.S. decision not to renew its request appears to have been influenced by an agreement reached in January 2001 among Telmex, Alestra, and Avantel (the Mexican affiliates of AT&T and MCI WorldCom, respectively). Telmex agreed to reduce interconnection rates and the companies agreed to resolve all remaining issues, including resale, local interconnection, usage of certain assets, quality standards and international traffic.

The arrangements between carriers did not resolve all issues. On 18 February 2002, the United States requested that a panel be established to examine allegations that some of the measures taken by Mexico as a result of consultations did not fulfill its commitments and obligations under GATS. Specifically, the United States was concerned that Mexico's measures failed to: (1) ensure that Telmex provides interconnection to U.S. cross-border basic telecommunications suppliers on reasonable rates, terms and conditions; (2) ensure reasonable and non-discriminatory access to, and use of, public telecommunications networks and services for U.S. basic telecommunications suppliers; and (3) provide national treatment to U.S.-owned commercial agencies.

The DSB established a panel on 17 April 2002, and the panel was composed on 16 August 2002. Due to the time needed to translate all relevant documents into Spanish and English and the complexity of the issues, the DSB panel issued a notice on 17 March 2003, stating that it would not be possible for the panel to complete its work within six months. The panel expected to complete its work by August 2003. However, the panel issued another notice on 8 August 2003, further postponing completion of its work.

On 1 June 2004, the WTO Dispute Settlement Body adopted the panel report on "Mexico – Measures Affecting Telecommunications Services". Following adoption of the report, the United States and Mexico notified the WTO Dispute Settlement Body that they had arrived at a mutually agreed solution regarding compliance with the panel recommendations.

Box 3-8 – United States vs. Mexico (*cont'd*)

The Parties agreed that 13 months constitutes a reasonable period of time to comply with the recommendations of the Report, as set forth in the following paragraphs:

1. Within two months of adoption of the Report, Mexico shall have in force revised International Long Distance Rules (the “ILD Rules”). Mexico shall completely eliminate those aspects of the current ILD Rules that implement the “uniform settlement rate” system, the “proportional return” system, and the requirement that the carrier with the greatest proportion of outgoing traffic to a country negotiate the settlement rate on behalf of all Mexican carriers for that country. Thus, the new ILD Rules shall allow the competitive commercial negotiation of international settlement rates.
2. Within thirteen (13) months of adoption of the report, Mexico shall have in force regulations (Reglamentos) authorizing the issuance of permits (permisos) for the resale of international long distance public switched telecommunications services. Such Reglamentos will regulate commercial agencies (comercializadoras) established in Mexico and permit them to purchase and resell these telecommunications services through the use of capacity of concessionaires, within the limits established in Articles 52 and 61 of Mexico’s Federal Telecommunications Law.
3. The Parties anticipate that the competitive commercial negotiation of international settlement rates resulting from the revisions of the ILD Rules will result in reasonable and cost-oriented rates.
4. The United States recognizes that Mexico will continue to prohibit International Simple Resale.
5. Once Mexico has complied with the obligations set out in the previous paragraphs, and provided that international settlement rates offered do not increase above the rates established by commercial negotiations concluded in May 2004 between United States carriers and the Mexican carrier authorized under the current ILD Rules, the Parties will file a notice with the Dispute Settlement Body stating that a mutually agreed solution to this dispute has been achieved. Provided that Mexico has complied with this agreement, the United States shall not seek recourse to Article 21.5 of the DSU, concerning any finding or recommendation of the panel report.

3.8 Radio Frequency Disputes

Disputes over frequency allocations and assignments may, in some cases, be settled through the ITU, and particularly the Radiocommunication Bureau (ITU-R).

The mission of ITU-R is found within Article 1 of the ITU Constitution, which states that the ITU is to “maintain and extend international cooperation among all of the member states of the union for the improvement and rational use of telecommunications of all kinds”. ITU-R’s primary purpose is to allocate bands of the radio frequency spectrum, register satellite orbital locations and generally provide a means to coordinate the use of the radio frequencies.

ITU-R coordinates the work of the sector. It also provides advice to member states on the equitable, effective, and economic use of spectrum, as well as investigating and assisting in resolving cases of harmful interference.

In order to address frequency allocation matters, ITU-R organizes World Radiocommunication Conferences (WRCs), which are held every two to three years. WRCs review and revise the Radio Regulations, which form the international treaty governing the use of the radio frequency spectrum. Member states of the ITU attend the WRC in order to vote on and approve the proposed changes to the Radio Regulations, but in practice, any actual changes to the Radio Regulations are made through negotiation and consensus building. The agenda for a WRC is set years in advance and takes into account recommendations made by previous WRCs and input from various ITU Study Groups (SGs) and Working Groups (WGs). The Radiocommunication Advisory Group (RAG) is given the task of reviewing the priorities and strategies of ITU-R and monitoring the progress and work of the SGs.

The Radiocommunication Assembly (RA) is normally convened at the same time as a WRC. The RA assigns conference preparatory work and other questions to the SGs and approves and issues ITU-R recommendations developed by the SGs. One or more Conference Preparatory Meetings (CPMs) are held to develop the regulatory, technical, operational, and procedural issues that will be considered at the next WRC. The CPM prepares a consolidated report to be used in support of the work of the WRCs. It is this report that consists of the recommendations by the various SGs.

The SGs are composed of more than 1500 specialists from telecommunications organizations and administrations throughout the world. These SGs are responsible for drafting the technical bases for radio communication conferences, developing draft recommendations, and compiling handbooks.³² Within each SG there may be several WGs reviewing specific issues. The WGs develop positions, which are then considered by the relevant SGs. The SGs prepare various recommendations for ITU-R.

The SGs attempt to arrive at the recommendations on a conciliatory basis. The entire process used by ITU-R in arriving at agreements for the use of the radio frequency spectrum is an example of compromise through negotiation. While there is no formal dispute resolution body within the ITU, the work of the SGs, the WGs, and the RAG are instrumental in determining how disputes and disagreements will be settled. Negotiations often continue throughout each WRC with the parties holding lengthy sessions on particular issues.

The ITU does not take any steps in the field of dispute resolution unless its Members vote for such an action. This is rarely, if ever, done. The ITU seeks to create consensus rather than act as a dispute resolution body.

³² SG1 (Spectrum Management), SG3 (Radio Wave Propagation), SG4 (Fixed Satellite Service), SG6 (Broadcasting Services), SG7 (Science Services), SG8 (Mobile, Radio Determination, Amateur and Related Satellite Services), SG9 (Fixed Service), CCV (Coordination Committee for Vocabulary), CPM (Conference Preparatory Meeting) and SC (Special Committee on Regulatory/Procedural Matters).

4 KEY PERSPECTIVES ON DISPUTE RESOLUTION

This chapter discusses some of the underlying issues to be considered in constructing and assessing different regulatory models and dispute resolution strategies. It offers five perspectives that are relevant in designing dispute resolution systems and approaches for specific disputes.

4.1 Changing Patterns and Assumptions

Unlike the electricity and water utility sectors, the telecommunications sector is characterized by fast-changing technologies and business models. Globally, there is a transition from a single utility-oriented model for the industry to a model featuring multiple information service and technology providers.

The convergence of different technologies and industries is resulting in entirely novel combinations of business models and value chains. This also means that the definition of relevant markets, the structure of those markets, the location of competitive pressures in the value chain, and the distribution of market power increasingly are shifting.

An example of this shift is visible in emerging VoIP markets, and the resulting impacts on traditional telecommunications pricing models. The advent of competition in long distance service markets is undermining historic cross-subsidies between international and local services. The speed of this transition has been accelerated by VoIP-based international services. In markets where broadband services are beginning to gain a significant market foothold, the traditional model for telephone service provision and pricing may be eroded by reliance on broadband connections, which are increasingly used to provide a full range of voice, data and video services. These changes are quite dramatic in the Japanese market, where major ISPs such as Yahoo have begun to challenge the traditional pricing and service packages of the dominant market player, NTT.

The crisis in the Indian telecommunications sector over the use of roaming for limited mobility CDMA (see Box 4-6) is an example of how markets that are changing rapidly in unforeseen ways give rise to a need for robust dispute resolution systems.

Given the rapid technological change in the telecommunications sector, the regulatory approaches traditionally used may warrant re-examination. Regulators' agendas are increasingly complex, requiring them to better understand sector dynamics – including the new business practices and economics of an Internet-driven telecommunications market. Regulators need to be agile in their regulatory approaches, and to be constantly prepared to rethink assumptions about the market they are regulating.

Some U.S. commentators on emerging Internet trends have contrasted the styles of “East Coast” and “West Coast” regulation, speaking narrowly in the language of the American market. This distinction in styles is also relevant to other countries. East Coast regulation is a caricature of the more traditional forms of regulatory control exercised by the FCC and state regulatory bodies, under the oversight of the U.S. Congress, state legislators, and federal and state courts. This type of regulation is influenced by politics and the give-and-take of established interests, mediated through administrative, legislative, and judicial processes. In its caricature, East Coast regulation tends to rely more upon institutional and hierarchical authority structures.

Supposedly, the West Coast style of regulation is embedded in the drafting of codes and protocols for Internet-related services. These decisions are often highly complex from a technical standpoint, and are made, often consensually, in technical and industry forums.

These two models have traditionally been segmented, with each viewed as appropriate in its respective domain. East Coast approaches are thought to be for large-scale infrastructure regulation, with West Coast regulation more appropriate for “high-tech” information technologies. But there may be some convergence of the two approaches. Innovations in some countries, such as Australia and Malaysia for example, suggest that some regulators are increasingly interested in the benefits of involving sector participants more in regulatory activities.

4.1.1 Industry Leadership in Regulatory Initiatives

Regulators are often not in the best position to keep current with industry innovations in new technologies. Regulators are not expected or intended to be technicians or business pioneers – if they were, they would be working for the new enterprises that develop technologies and new business models. In many instances, it may be more appropriate for regulators to allow these entrepreneurs and market players to have input in determining how to solve complex sector problems.

Telecommunications regulators are responding to the rapidly changing technological environment by relying more on industry input and on industry-based dispute resolution. This approach can reduce or eliminate future disputes.

The Canadian telecommunications regulator has recognized the advantages of industry-led standards and procedures in relation to interconnection. The CRTC's CISC process has been widely recognized as a model of industry-cooperation in the development of regulatory rules (see Box 4-1).³³

Box 4-1 – The CRTC Interconnection Steering Committee (CISC)

In 1987, the Canadian regulator established the CRTC Interconnection Steering Committee (CISC) to develop technical, legal, and administrative methods for implementing the CRTC's interconnection decisions.

The mandate of CISC is to undertake tasks related to technological, administrative, and operational issues on matters assigned by the CRTC or arising from the industry. The CISC is composed of a Steering Committee (SC), Working Groups (WG) and *ad hoc* committees. The SC provides oversight while the WGs prioritize and handle specific issues, with the objective of reaching consensus.

The difference between the CISC process and many regulatory decision-making processes is that industry experts do the bulk of the work, albeit under the guidance of CRTC staff. At its height, CISC included 20 working committees totalling about 200 people, initially dealing with 165 issues. The overwhelming majority of these issues were resolved within the committees.

Issues that could not be resolved by the committees were sent to the Steering Committee, and if not settled at that level, would be submitted for regulatory adjudication by the CRTC. As of 2002, CISC had forwarded over 173 consensus items to the Commission for approval.

Through CISC, industry players have had a hands-on role in developing regulatory instruments to implement Commission policy, enabling competition in local telephone services to unfold in a more seamless fashion than would have been possible under traditional methods. By using industry experts, guided by government policy experts, the time and expense of implementing policy has been cut and the level of cooperation among industry players has improved.

Other issues that call for industry-led solutions include those relating to Internet peering. These issues have a significant impact on telecommunications markets in many countries. It is not clear, however, that these issues should be subject to regulatory intervention at the national level. As is the case with many issues arising in the Internet sector, the best forum for resolution of peering policies and disputes may well be industry forums in the largely self-regulatory Internet domain.

³³ 30 August 2000. CRTC won the Institute of Public Administration's gold award for its forward thinking and innovation in regulation. The Institute of Public Administration of Canada (IPAC), presented the CRTC with the IPAC Award for Innovation Management. <http://www.crtc.gc.ca/ENG/NEWS/RELEASES/2000/R000830.HTM>

4.1.2 Changes in Dispute Resolution

Not only is the telecommunications sector undergoing rapid change, but the field of dispute resolution is also changing in many significant ways.³⁴ Generally speaking, the use of mediation is increasing in civil and commercial disputes. This has led to an increasing number of dispute resolution institutions offering mediation and other forms of ADR as part of their services, both domestically and internationally. In the more developed legal jurisdictions, both civil and common law, there is no shortage of experienced ADR institutions and practitioners.

Some governments, such as those in the United States and Australia, have expressly incorporated ADR procedures as part of public administration. The United States enacted the *Alternative Dispute Resolution Act of 1998*, which requires each federal district court to authorize the use of ADR in all civil cases and to establish its own ADR program. Similar rules are in place in several Canadian provinces. In India, Australia, Hong Kong (China) and Singapore, arbitration legislation also calls for the use of conciliation. It has long been standard practice in the courts of many civil law countries – Germany and Switzerland, for example – for judges to take an active role in trying to bring the parties to settlement, often by proposing terms that the judge considers appropriate. Similarly, there is a long tradition in China of combining litigation (or arbitration) with the mediation of a settlement.

In commercial dispute resolution generally, practitioners must be prepared to embrace new ideas of procedure and practice in order to satisfy the proper objectives of the commercial community, both domestically and internationally.

4.1.3 Regulatory Adjudication and ADR

Two trends are at work: the rapid changes in both the telecommunications sector and in the realm of dispute resolution. The expansion of the global telecommunications market with its emphasis on innovative and fast-changing technology may need to be accompanied by dispute resolution procedures which are fast and flexible – and suited to the types of disputes which the global telecommunications industry will produce. In turn, the dispute resolution field is increasingly offering new models that may be useful to the telecommunications sector's new needs.

The telecommunications sector offers an opportunity to re-evaluate the relationship of traditional regulatory adjudication, on the one hand, and arbitration and mediation, on the other. Arbitration normally depends on contractual commitments or other agreements by parties to arbitrate. It has focused traditionally on *ad hoc*, specific disputes. Regulatory adjudication has tended to address strands of ongoing and inter-related controversies, generally where there is a perceived public interest in ensuring consistent outcomes.

These different domains of dispute resolution generally have been separate and compartmentalized. Conventional wisdom has held that arbitration and mediation are best for private and commercial disputes and that regulatory adjudication is best suited for public policy issues. This compartmentalization (and the public/private distinction) between the disciplines of regulatory adjudication, on the one hand, and arbitration/mediation, on the other, may be too strict. For example, regulators increasingly are using the tools of arbitration, either informally or formally. The U.S. Telecommunications Act of 1996 authorized the use of ADR procedures in resolving interconnection-related controversies, as did the new Jordanian interconnection dispute procedures and the Saudi Arabian Telecommunications Bylaws. Mediation also is being used increasingly and incorporated into regulatory regimes.

³⁴ The commercial pressures which have promoted international commercial arbitration are as powerful now as at any time since the New York Convention in 1958; indeed, perhaps more so. The growth of trade in the single unified market of the European Union already outstrips the capacity of the court systems within the European Union to cope with commercial disputes, both domestic and international, and serves to emphasize the weakness of those jurisdictions which lack efficient and experienced commercial court arbitration systems. The developments in Eastern Europe, as countries seek to transfer from planned economies to market economies, also increase the need for efficient resolution of domestic and international commercial disputes. Investment in emerging markets and the growth of bilateral investment treaties and trading blocs such as the North American Free Trade Agreement, are making it imperative to devise efficient and inexpensive dispute resolution systems for commercial disputes.

Given the rapid pace of change in the contemporary telecommunications sector, the challenge for regulators is to keep an open mind about the choice of process in particular situations. It is necessary continually to re-examine the assumptions behind regulatory approaches and choices of dispute resolution techniques. As illustrated throughout this report, regulators can choose in advance the kinds of dispute processes they wish to use for specific types of problems. However, it is important for regulators also to institute flexibility so that they can adapt initial structures for new situations that arise. This could involve regulators providing a role in the selection of mechanisms in consultation with parties, for example, as contemplated in Saudi Arabia's Telecommunications Law (see Box 4-2.)

Box 4-2 – Flexibility in Choosing DR Mechanisms in Saudi Arabia

Chapter 6 of the Saudi Telecommunications Bylaws sets forth a flexible dispute resolution mechanism compared with other national models. The procedures for resolving disputes are clear and straightforward. A period of negotiation is required between the parties before bringing a case. This reduces the burden on the Saudi Communications and Information Technology Commission (Bylaw, Article 45.1). The Commission is not constrained to follow an inappropriate dispute resolution procedure but has discretion to determine the best mechanism to adopt for each dispute. It may choose from a selection of mechanisms that include mediation, final offer arbitration, and regulatory adjudication (Bylaw, Article 44).

In deciding whether to accept a request for consensual resolution or to proceed by way of a rule-making proceeding, the Commission must take into account:

- Whether the dispute will have regulatory or precedent-setting value, and whether a consensual proceeding likely will be accepted as an adequately authoritative precedent;
- Whether the dispute raises policy issues that extend beyond the interests of the parties involved and that may require additional comment from other concerned parties before a final resolution may be made; and
- Whether the dispute might have a material effect on persons who are not parties (Bylaw, Article 45.8).

This is significant from a regulatory point of view since resolution by the parties themselves – by mediation or by an independent arbitrator – can preclude the Commission from implementing regulatory policy through dispute rulings. This is frequently a sensitive issue in constructing dispute resolution mechanisms in a regulatory context. For example, where the dispute concerns interconnection, policy is upheld by requiring the Commission's resolution of disputes to be in accordance with its Interconnection Guidelines (Bylaw, Article, 46.1).

The Commission retains considerable influence over the process to be followed in a consensual proceeding. It may override the parties' chosen dispute resolution approach and timetable and appoint an inquiry officer to propose an approach and timetable in consultation with the parties. If there is disagreement, the Commission may resort to a rule-making proceeding (Bylaw, Article 45.9).

4.2 The Economics of Dispute Resolution

The utility of dispute resolution procedures should be assessed in economic terms. An economic assessment should include identifying overt and hidden costs, as well as who bears them. By making costs transparent, the costs can be “priced in” and key players can make economically rational decisions that best meet their mutual needs and improve efficiency. Those responsible for establishing dispute resolution systems can design them in a way that allocates such costs efficiently among the players.

Where the design of the dispute resolution system does not allocate costs efficiently, the transaction costs of resolving disputes may be unnecessarily high. Higher transaction costs can reduce the likelihood of effective resolution. This can act as a drag on investment and hinder growth – a wider social cost to the sector and economy as a whole.

An economic analysis of dispute resolution should assess:

- The underlying incentives and behavior of the various players; and
- The overall costs to the sector in terms of market performance – that is, the level of competition, pricing, and quality of services.

This section provides some economic perspectives that may offer important clues to improving dispute resolution methods.

4.3 The “Market” in Dispute Resolution

The general commercial dispute resolution industry continues to develop according to the laws of supply, demand, and competition. The various services are continually revised and improved to accommodate their market. Disputing parties are able to choose the most effective means, given their type of dispute, power disparities between the parties, timing issues, cost restraints, and the need for certainty.

Promotion of a more developed market specifically aimed at telecommunications sector dispute resolution could improve the fairness of cost-allocation in dispute resolution and reduce transaction costs to parties and to the sector as a whole. By encouraging alternative means of resolving disputes, some regulators and policy-makers are essentially promoting the development of a commercial market for specialized telecommunications dispute resolution services.

The Jordanian TRC’s new interconnection dispute procedure allows parties to choose between a regulatory determination by the TRC or arbitration. That potential litigants will have choices of process, especially between public and private procedural mechanisms, will set these procedures off against one another. Control of the process, level of policy input, enforcement, timing and cost will all be factors disputants can weigh in choosing between them. The parties will be able to choose processes that meet their mutual interests.

In some cases, the parties’ needs may not be “mutual” enough to allow efficient outcomes without regulatory intervention. Disputes may revolve around structural inequalities that are so entrenched that they undermine the process itself. This can often happen in interconnection disputes involving an incumbent and a new entrant. Such cases may call for swift and effective regulatory intervention. This means that the market for the supply of dispute resolution services cannot be entirely free and left solely to parties’ voluntary agreed choices. But it is not necessary to resort to regulatory intervention in all cases.

A range of incentives and penalties are available to policy-makers and regulators that are interested in properly structuring the “market” for dispute resolution. Seeking efficiency does not mean undermining the commitment to core precepts of justice, the rule of law, and due process. The challenge facing regulators is to employ approaches to encourage the development of an efficient market in dispute resolution services while ensuring that basic access to effective dispute resolution is also available.

4.4 Efficient Allocation of Direct Costs

The development of a dispute resolution market may help to increase efficiency, reduce companies’ transaction costs, and make the market more attractive to investment and growth. One aspect of this is the proper allocation of transaction costs. Some costs are more obvious than others, and a key question is who bears them. Direct costs include:

- The time and resources of the regulator;
- The cost of technical, legal, or economic advice or other out-sourced expertise; and
- The fees of arbitrators and mediators.

The impact of how such costs are allocated among players has significant effects on access to dispute resolution and the incentives of disputants. There are advantages and disadvantages of the regulator or

parties bearing the costs of dispute resolution proceedings. The advantages of *regulators'* bearing costs include:

- Reduction in the cost to market participants of obtaining justice; and
- Greater justification for the regulator having more influence over the dispute.

The advantages of *parties* bearing costs include:

- The parties may be better placed to choose the best use of resources to resolve a dispute;
- If dispute resolution is not considered a “free good”, it will reduce the likelihood that parties will unreasonably initiate disputes, complicate the process or delay resolution; and
- Relief of the financial burden on the regulator may free resources for more pressing needs.

Regulators are taking various approaches to allocation of the direct costs of dispute resolution. Some examples are listed in Box 4-3.

Box 4-3 – Allocating Direct Costs

Ireland – ComReg	ComReg pays the expenses of mediation but passes those costs on to the market through the levy. ³⁵
Jordan – TRC	The TRC’s new interconnection dispute procedure permits it to require that parties pay for expenses of the TRC (i.e., the cost of engaging technical experts). ³⁶
Botswana – BTA	In its decision in the 2003 interconnection dispute, the BTA bore the costs of hiring consultants to conduct a benchmarking study on interconnection rates, considering this to be part of its responsibility financed by license fees. ³⁷
U.K. – Ofcom	The new Communications Act permits Ofcom to seek to recover its costs from operators who abuse the right to bring a dispute by making frivolous or vexatious references. ³⁸ Since radio spectrum disputes are likely to be costly (they may involve monitoring and technical compatibility tests), Ofcom may charge a fee for the resources consumed and work done resolving such disputes. ³⁹

4.5 Uncovering Hidden Costs

Taking an economic approach to dispute resolution does not mean focusing on efficiency at the expense of undermining the commitment to core precepts of justice, the rule of law, and due process. Indeed, undermining such principles may in itself result in costs that are not as obvious as the expenses of experts and decision-makers. Individual parties and the market as a whole may suffer costs resulting from delay, uncertainty, and abuse of procedures. Delay and uncertainty resulting from ineffective dispute resolution can have a paralyzing impact on a sector restructuring process and basic economic development as a whole.

³⁵ See Commission for Communications Regulation, Consultation Study on Dispute Resolution Procedures, Document 03/69, 20 June 2003, at 4.4. http://www.comreg.ie/_fileupload/publications/comreg0369.pdf

³⁶ TRC Dispute Resolution Procedure, section 4. http://www.trc.jo/static_english/new%20stuff/interconnection%20disputes%20process.pdf

³⁷ Discussion with officials from the Botswana Telecommunication Authority, November 2003.

³⁸ *Communications Act*, section 190. <http://www.legislation.hmsagov.uk/acts/acts2003/20030021.htm>

³⁹ U.K. *Communications Act*, section 190. <http://www.legislation.hmsagov.uk/acts/acts2003/20030021.htm>

The misuse of regulatory adjudication processes also can distort the functioning of competitive telecommunications markets in significant ways. The ability of operators to abuse dispute procedures is highly relevant to countries whose markets are in the process of liberalization.

Each dispute resolution mechanism has advantages and disadvantages relating to delay, uncertainty, and vulnerability to abuse. In a successful mediation, compromising parties “buy” certainty sooner than they might receive it in other types of proceedings, and the parties may have control over the outcome. On the other hand, if abused, it may simply delay a fair result. Regulatory adjudication can provide greater certainty because it has the backing of the official sector, although it may have costs in terms of delays and appeals. Parties in regulatory adjudication and arbitration proceedings also can experience considerable uncertainty. They may be unable to predict how the decision-makers will interpret the evidence and the rules, and how they will apply regulatory policy.

One way for regulators to improve dispute resolution procedures is to employ control systems, such as appeals and oversight procedures. These are discussed in Chapter 5, but they merit mention here in relation to the economics of dispute resolution.

Control systems involve costs. While employing more hierarchical layers of review may have the effect of refining the decision-making process to get it right, this brings considerable costs, not only financially but also in terms of time and human capital. Such costs may or may not be well spent, but certainly it is incumbent on those responsible for the system to ensure they are justified.

Raising the costs of justice can undermine the ability of the system to provide meaningful justice at all. As the old adage has it, “Justice delayed is justice denied”. This would certainly apply to overpriced justice, as well. This can paralyze an otherwise dynamic sector and hinder investment and growth. There are plenty of experiences of disputants using, or even abusing, dispute resolution systems with repeated challenges to decisions and awards, appealing against them and claiming nullity.

An economic assessment of dispute resolution seeks to uncover the indirect and hidden costs imposed by such factors in order to identify the underlying dynamics, causes, and incentives that raise such costs. It is not easy, for example, to identify the cost to a mobile company of a delay in a spectrum dispute proceeding, or to a country’s economy of a delay caused by a dispute with a foreign investor. Nevertheless, there are ways of accounting for such costs on individual companies and assessing their impact on the economy.

In ordinary commercial disputes, for example, companies regularly claim loss of profit resulting from an inability to provide a service because of a breach of contract. Similarly, interconnection disputes may perpetuate high interconnection rates, which are passed on to customers in the form of high retail prices. Such prices may be benchmarked against other countries, so that the cost to service providers and customers is more transparent.

As discussed in Box 4-4, the extensive use of appeals procedures in the German telecommunications market has resulted in considerable delays in the development of a competitive market in leased lines.

Box 4-4 – Procedural Delays in the German Leased Line Market

The leased line market in Germany illustrates the potential for delays, resulting from extensive review procedures and use of interim measures to suspend regulatory decisions.

In 2000 it became apparent that Deutsche Telekom was discriminating materially against new entrants in the provision of leased lines. For example, the waiting period for new entrants to obtain service was greater than the waiting period for Deutsche Telekom’s own retail service.

The first complaint by a new entrant was brought to the regulator, the Regulatory Authority for Telecommunications and Posts (RegTP), in October 2000, and British Telecom, another new entrant, followed with its own complaint in September 2001. British Telecom’s complaint was forwarded to Deutsche Telekom in November of that year. In February 2002, the regulator opened an investigation. At the end of May, RegTP issued a decision, finding that Deutsche Telekom was discriminating against new entrants, and requiring DT to stop the practice.

Box 4-4 – Procedural Delays in the German Leased Line Market (*cont'd*)

Deutsche Telekom sought judicial review of RegTP's decision in the administrative courts. The lower courts suspended RegTP's decision in October 2002. On appeal to the higher administrative court, the suspension was upheld in February 2003. A final decision by the federal administrative court is not expected until 2005.

Germany currently faces about 2500 appeals from RegTP decisions to the administrative courts and 150 appeals from the lower administrative courts to the higher administrative courts.⁴⁰ Germany's draft Telecommunications Act is expected to amend these procedures to increase the use of mediation and streamline judicial review.

As a result of concerns over delays and uncertainties, several European countries are in the process of streamlining their dispute resolution processes to reflect the imperatives of the market. The proposed Telecommunications Act in the Netherlands, for example, will exclude the procedure for objections to decisions by the Independent Posts and Telecommunications Authority (OPTA) if required by time pressure. Under the proposed legislation, appeals to the courts also will be bypassed in such cases, with appeals going directly to the highest judicial authority, the Court of Appeal (the CBB). The President of the CBB will have the power to impose interim measures pending the appeal (see Box 4-5).

Box 4-5 – Appeals in the Netherlands

OPTA's experience with review and appeal processes illustrates the use of legal remedies by interested operators, particularly KPN, the Dutch incumbent operator:

- Of the 43 OPTA decisions appealed to the court of first instance (the Court of Rotterdam), 13 have been annulled.
- Of 20 cases seeking interim measures, 11 of OPTA's decisions have been suspended.
- Of seven cases brought to the higher appeal court (the CBB), four decisions have found in favour of OPTA.

Once hidden costs are made transparent, regulators can assess the economic impact of the problems in the dispute resolution system and seek ways to improve it. Regulators and policy-makers should always consider the economic impacts of disputes and dispute resolution, understanding how the various resolution structures may impact incentives, decisions, and ultimately the costs to market participants and the sector as a whole.

4.6 Market Power Asymmetries

The new EU Framework Directive, which entered into force in April 2002, set more rigid timeframes for dispute resolution and encouraged national regulatory authorities to use arbitration, mediation, and other ADR techniques. In implementing the directives, Oftel (later merged into Ofcom) engaged in a consultation process on the use of ADR techniques. In a February 2003 statement on dispute resolution, Oftel considered how to use ADR mechanisms and when it would be appropriate to reduce or even eliminate its role in resolving disputes.

Market dominance traditionally has been the prime motivator for regulators to oversee markets and to crack down on abusive behavior. Oftel noted, however, that where both parties to a dispute are

⁴⁰ Presentation of RegTP official at British Institute for Comparative and International Law, October 30, 2003.

dominant in the market involving the dispute, their positions may be sufficiently balanced in terms of market power to voluntarily negotiate a solution. In such cases, there would be less need – or possibly no need at all – for the regulator to take an active role. Mediation or another form of ADR might suffice. Oftel went so far as to signal that it will likely decline to resolve these types of disputes.

Oftel also noted that where there is equal market power, the disputants are more likely to negotiate their way to a mutually acceptable agreement. These cases, Oftel suggested, would be more suitable for ADR mechanisms. Where there are inequalities of power, however, there may be a greater need for regulatory involvement in order to prevent abuse of process. Such cases would, Oftel suggested, be less suitable for ADR and should be left for Oftel to resolve. Other types of disputes in which Oftel signalled it would not interfere included those where:

- Neither party is dominant in its market;
- Similar disputes are resolved in other industries without the intervention of the regulator; and
- There is insufficient evidence that attempts have been made to enter into commercial negotiation.

In explaining its approach to disparities between operators with or without significant market power (SMP) Oftel summarized its thinking by use of the following simple diagram:

COMPLAINANT		
TARGET	SMP ⁴¹	No SMP
SMP	Likely to be suitable for resolution by ADR	Likely to be suitable for resolution by Oftel
No SMP	Likely to be suitable for resolution by Oftel	Likely to be suitable for resolution by ADR

In essence, there is greater need for regulatory involvement in the dispute resolution process where there is an imbalance of market power. The picture may be more complex than this, however. The concern may be less about *whether* regulators are involved, and more about *how* regulators are involved.

It is often assumed that where there is an unequal situation, the regulatory body will have to hear the parties, manage the process, and issue the decision on the basis of policy – i.e., imposing reasonable interconnection terms on an operator. Not all of these elements need to be performed by the regulators. In some situations it is sufficient to ensure that there is a procedure for reaching resolution, and to focus regulatory resources on policing that procedure to ensure that it is carried out. Regulators do not have to hear the parties and issue the decisions themselves. It may be sufficient for arbitrators to perform that role, or for mediators to assist the parties in negotiating within a framework of principles and procedures set by the regulator. Nevertheless, as discussed in Chapter 5, it may still be appropriate for the official sector to be involved in establishing the dispute resolution mechanisms and supervising their use.

Under the new EU Framework Directive, all service providers – regardless of their market power – must provide residential and small business customers with access to an ADR mechanism. The procedure must be independent, transparent, simple, inexpensive, fair, and prompt, but the actual types of dispute procedures are not specified. Oftel has concluded that there may be advantages of ombudsmen schemes (rather than arbitration and mediation) in disputes with residential and small

⁴¹ SMP stands for “significant market power”, which denotes dominance.

business customers (see Box 2-7).⁴² The telecommunications ombudsman scheme that was established in June 2002 currently has nine major service providers as members. Their customers may refer complaints to the ombudsman, who investigates and reaches a decision.

4.7 Confidentiality versus Transparency

Designing consensus-building mechanisms requires addressing the competing priorities of confidentiality and transparency. Significant matters in dispute frequently involve confidential strategic, technical, and marketing information of concern only to the immediate parties to a dispute. In this respect, confidentiality concerns must be fully respected to ensure credibility for the dispute resolution forum. At the same time, many issues in dispute, or of concern to a number of key industry players or an industry sector, will be subjects of intense public interest. Transparency of process is crucial to building confidence in the dispute resolution processes.

The tension between these priorities is not new. Many governments have developed confidentiality rules and exceptions for public interest cases as part of their adjudications, as well as arbitration laws and practice. In mediation, on the other hand, it is generally accepted that the process must be confidential in order to be successful.

The transparency of a national regulatory framework often can have a significant bearing on the ability of telecommunications operators and service providers to access domestic and international capital markets. For example, how quickly interconnection disputes can be resolved is likely to be very important to investors. They want to see whether new entrants can gain a market foothold and not be hurt by an incumbent's abuse of dominant market position.

Regulators' procedural rules often capture the tension between the competing priorities of confidentiality and transparency by requiring regulators' decisions to be published but permitting parties to request confidentiality for specific market-sensitive information. Transparency is essentially a means of holding the regulatory agency accountable so that its behavior is visible to market participants and potential investors. Informal proceedings such as mediation and arbitration offer an advantage with respect to the parties' confidentiality because the regulator is not reaching a decision that it must publish and for which it must be accountable.

Regulators are taking different approaches to confidentiality and transparency. Botswana's 2003 interconnection ruling, for example, was relatively transparent in setting out the parties' arguments and its decision. The Jordanian TRC, on the other hand, has been much more discreet about discussing even the existence of a dispute between the incumbent operator and the leading mobile operator. The challenge facing regulators is to find a suitable balance in each given situation.

4.8 Dealing with Complexity

As noted at the outset, this report has approached dispute resolution and the very notion of disputes in a broad fashion. Disputes may be viewed as complex situations or problems involving two or more parties with differing interests, with a focus on issues that concern regulatory policy. In addition to straightforward disputes between two parties, there are some systemically complex issues that create a situation or climate of disagreement and potential stagnation. This can threaten the development of the sector. This section explores some disputes that reflect such complex problems.

4.8.1 Inter-Related Issues in Transition

In many countries undergoing regulatory transition, incumbent telecom operators have enjoyed exclusive rights conferred by longstanding concessions or laws. There have been, however, increasing pressures to open markets, in keeping with international obligations stemming from WTO membership or, in the case of some European countries, relating to EU membership.

⁴² See also Review of dispute procedure schemes, Draft Guidelines issued by the Director General of Telecommunications, 4 April 2003. Available at www.ofcom.org.uk

A decision to shorten the duration of exclusive rights can have a wide range of regulatory repercussions. Liberalization can lead to rate rebalancing or rules permitting more flexibility with respect to the regulation of local exchange prices.

An incumbent operator, which may be required to face competition more quickly than anticipated, also may seek relief from other existing regulatory obligations and arrangements. These might include, for example, clarification of the government's rights and obligations as a shareholder and its interests in the revenues of the company. Such arrangements are not easy to resolve. Saudi Telecom, although partly privatized, is still required to pay a very large revenue-sharing amount to the government. Yet two thirds of the company's revenue base – its revenues from mobile services – will soon be exposed to competition.

Many aspects of necessary changes in an overall legal and regulatory framework have a very politically sensitive dimension. Problems requiring an integrated approach to dispute resolution are often made more difficult because of bureaucratic or jurisdictional divisions of responsibilities within a government.

4.8.1.1 Disputes Over Market Structure and Licensing

As discussed in Box 4-6, India's dispute over licensing and roaming terms of its limited mobility wireless local loop (WLL(M)) service illustrates how complex disputes can arise from a combination of:

- Disparities in licensing fees;
- Innovative use of technology;
- Rapid sector transformation;
- The involvement of state interests;
- Substitutability of comparable services; and
- Regulatory policy on roaming.

Box 4-6 – India's Limited Mobility Wireless Dispute

India has been liberalizing its market over the last decade, licensing a series of new entrants and privatizing fixed-line services. In the GSM cellular market segment, there are four operators in most of the 25 licensing areas. As the fourth GSM cellular license was being finalized, the government announced a new policy allowing open competition in the fixed-line market. It allowed fixed operators to provide wireless local loop (WLL(M)) services using the 800 megahertz (MHz) band. In addition, the policy allowed a limited form of mobility, although such mobility would be restricted to an average radial coverage of 25 kilometers. Using CDMA2000 technology, however, the WLL(M) operators offer their customers roaming across different coverage areas.

India's mobile sector is growing exponentially. By the end of September 2003, the number of mobile subscribers had nearly tripled over the previous year, to more than 23 million. Of these, 18.3 million were GSM subscribers. The number of WLL(M) customers has reached 4.8 million and is continuing to grow extremely quickly.

The GSM cellular operators have argued that such roaming has permitted the fixed-line operators to enter the mobile market through the back door without having to pay the high license fees that GSM operators paid for their 900 MHz frequencies. The GSM cellular operators fought a series of protracted regulatory and court battles aimed at declaring WLL(M) operators illegal – a war they appeared to have lost in August 2003.

The Telecommunications Regulatory Authority of India (TRAI) has been asked to address various issues relating to entry fees and spectrum charges, and its consultation paper on the subject was open for public debate.⁴³ One solution has been to propose a unified licensing regime for both fixed and mobile services.

⁴³ For more information on the Indian situation, see <http://www.itu.int/osg/spu/ni/fmi/casestudies/index.html>

Box 4-6 – India’s Limited Mobility Wireless Dispute (*cont’d*)

Now, the GSM operators appear to have shifted their strategy. Rather than challenging the decision to permit WLL(M) services, it appears that they are seeking compensation to provide them with a “sustainable business operation”.

Thus, the WLL(M) case illustrates the complex web of licensing, technological, and financial issues that can arise in disputes where sectors are in rapid transition and defy simple categorization.

Developing markets are not the only ones to experience disparities in terms of licensing. The Connect Austria case, described in Box 4-7, is a specific example in Europe of an interesting parallel to the Indian situation.

Box 4-7 – Licensing Anomalies in Austria

Having licensed GSM 900 operators, Austria’s Telekom-Control-Kommission (the TKK) allocated additional spectrum to the country’s DCS 1800 operators, including Mobilkom Austria, the incumbent operator’s mobile network operation. The TKK did not impose a separate, additional licensing fee on the DCS 1800 operators. As a result, they paid less for their frequencies than did the GSM 900 operators. The case has yet to be finally determined, despite winding its way through the Austrian Constitutional Court, the European Court of Justice and the Austrian Federal Administrative Court.

More generally, the disparities across Europe in the licensing of 3G spectrum have, some argue, created two sorts of anomalies and distortions in the European market:

- European countries followed different approaches, generating extraordinarily different levels of license fees. Most notable were the United Kingdom and Germany, which raised over €100 billion in 3G license auctions between them. Other countries merely sought to recover administrative costs of the licensing process. The distortions across the European market have yet to be tested as illegal barriers to trade under EU law.
- Operators paying large sums for spectrum may find that their services will compete to some extent with other services that do not require licensing, such as Wi-Fi services using 802.11(b) and 802.11(g) technologies in airports, hotels, and other “hotspots”.

The anomalies and distortions arising in India, Austria, and the EU all have occurred where the markets were developing rapidly and new technologies were being introduced and used in unanticipated ways. These cases underline the need, as a matter of dispute prevention, for careful attention in the licensing process to the possibility of unfair treatment that could give rise to claims at a later stage.

4.8.1.2 Transformation of Licensing Regimes

Regulatory reform often involves introducing a new licensing regime. Existing operators typically have to migrate from the previous regime to the new one. Where private companies were permitted to operate under the previous regime, they often have done so under Build-Operate-Transfer (BOT) contracts and similar concession-type agreements.

Transition from BOT and similar contracts into new licensing regimes can be a thorny process. This is particularly difficult when complex revenue-sharing and interconnection relationships among operators and with governments add complexity. Governments frequently have revenue-sharing interests in such contracts, which indeed can generate considerable revenue for the national treasury, not least the ministry responsible for sector reform.

Government interests in operators can introduce a complicating factor, making it harder to find an appropriate venue for dispute resolution that can address all of the inter-related issues. In Lebanon, for

example, a lengthy dispute between the Ministry of Telecommunications and the two mobile operators threatened to affect investment, competition, and growth in the mobile sector (see Box 4-8). The range of inter-related policy issues included the conversion of BOT concession contracts to licenses, the pricing of assets reverting to the state, the terms of revenue-sharing with the state, and the use of microwave frequencies. These issues were compartmentalized into various different arbitration proceedings as well as an entirely separate regulatory reform process.

Box 4-8 – Lebanon’s Mobile Disputes

The Republic of Lebanon’s mobile sector has undergone regulatory uncertainty since 1999. A long, complicated transition from a BOT concessions regime to a licensing regime has resulted in numerous disputes involving its two mobile operators, Libancell and FTM, in a complex web of issues. These included:

- Claims by the government for fees for use of microwave frequencies;
- Claims by the government that offerings to the mobile companies’ customers exceeded the contractual limits;
- Claims by the operators relating to the early termination of their BOT contracts; and
- The valuation of the assets on termination of the BOT contracts to be paid for by the government.

The disputes represent a cluster of closely related issues, all fundamentally linked with the status of sector reform in transition. The issues included the government’s revenue-sharing interest in the mobile operators and difficult negotiations over conversion of the BOT contracts into licenses under a new regulatory regime. The disputes have been dealt with in a relatively compartmentalized fashion:

- Each of the two operators has been dealt with separately, although their issues are similar if not identical.
- Arbitration processes under the ICC forum have been used for the microwave frequency and customer numbers dispute.
- Arbitration processes under ICSID have been used for foreign investment claims.
- Consulting services have been used for asset value determinations.
- Meanwhile, the regulatory reform process has been conducted in parallel, resulting in long-term management contracts to manage the mobile businesses upon transfer of the assets to government ownership.

This compartmentalization of the issues into different dispute forums has made it more difficult to address the entire problem as a whole. This kind of complex dispute involving inter-related issues offers an example of disputes that might benefit from a mediation and consensus-building process, as discussed in Chapter 6.

Dispute prevention is as important as dispute resolution. Transitions involving complex structures can make stability more precarious and disputes more likely. Thailand’s concession structures raise particularly challenging issues for transition to a licensing regime (see Box 4-9).⁴⁴ While not reaching the level of dispute proceedings experienced in Lebanon, the issues are so complex that sector-wide consensus-building measures might also be particularly useful as a dispute prevention measure.

⁴⁴ *Telecommunications in Crisis: Perspectives of the Financial Sector on Regulatory Impediments to Sustainable Investment*, Robert Bruce and Rory Macmillan, presented to the International Telecommunication Union (ITU) Global Symposium for Regulators in Hong Kong, China, December, 2002, and published in the ITU’s regulatory site at http://www.itu.int/ITU-D/treg/Events/Seminars/2002/GSR/Documents/11-Investor_casestudy.pdf

Box 4-9 – From Concessions to Licenses in Thailand

Thailand's concession case illustrates the complexities in transitioning from a system of interrelated concession agreements, established at different stages in the sector's development, to a licensing regime. Following the Telecom Law of 2001, holders of concessions granted by state-owned telecommunications operators, the Telephone Organization of Thailand (TOT), the domestic telecommunications operator, and the Communications Authority of Thailand (CAT) – the international operator – were to be converted into licensed private operators.

Previously, only government-owned entities were permitted to own telecommunications networks. Instead, TOT granted revenue-sharing concessions to fixed-line companies and CAT granted revenue-sharing concessions to mobile companies. TOT and CAT received differing percentages of the concession holders' revenues. Mobile concessionaires also paid TOT an access fee. All concession-holders were required to transfer the assets they installed to the concession-granting entity, TOT or CAT.

Several inter-related issues made the introduction of a licensing regime particularly difficult:

- The new telecommunications law limited foreign investment in licensed operators to 25 percent. The foreign investment in most of the concession holders exceeded this amount.
- There were few guidelines for valuing the conversion of concessions to licenses, especially concerning the valuation of assets acquired by concession holders and transferred to either TOT or CAT.
- Revenue-sharing and access-fee agreements had to be replaced by conventional interconnection agreements. This included revising arrangements between the mobile and fixed-line operators. These agreements employed a sender-keeps-all/caller pays arrangement, resulting in mobile concession holders not being compensated for calls terminating on their networks.

Given the historically complex arrangements, an integrated approach was required to deal with the inter-related issues of pricing of new licenses, valuation of assets and the economics of the new interconnection agreements. Such an integrated approach would be an important dispute prevention measure.

4.8.2 The Cost of Complex Disputes

Most countries lack a strong tradition of identifying, assembling, and expeditiously resolving clusters of issues that are central to a major sector transition process. Regulatory uncertainty can, however, impose a particularly heavy penalty on efforts to raise significant amounts of capital that may be required to implement a restructuring process successfully.

How disputes are defined – and who has responsibility for resolving them – determines the effectiveness of their resolution. Compartmentalizing issues rather than viewing them as inter-related can raise the costs for parties and the sector as a whole. For example, interconnection issues are often not considered directly in relation to price reform and re-balancing issues. But for incumbent carriers, the pricing of local access (unbundled network elements, for example) may be uneconomic if local retail prices are subject to tight regulatory control. If an incumbent carrier's local exchange services will be priced on a wholesale or unbundled basis below its costs, it may be reluctant to enter into interconnection agreements quickly, or even to help establish new interconnection frameworks. This may result in higher prices of services and less competition in the sector (see Box 4-10).

In its July 2003 decision on interconnection rates, the Jordanian TRC approached interconnection by taking into account the interrelation of such factors. The TRC had been engaged in a consultative process to develop cost-based interconnection rates involving the fixed and mobile companies. The TRC decided to leave Jordan Telecom's international interconnection rates relatively high – well above costs. It did so in order to allow for the inherent subsidies provided to local and Internet access services and other costs of historical policy-driven investment.

Some disputes, then, challenge regulators to be able to "de-compartmentalize" their view of proceedings and bundle together issues that may have important inter-relationships. Most traditional remedies are not designed to do this. One way to address the conceptual or institutional

compartmentalization of inter-related issues is through innovative consultative and consensus-building forums. Chapter 6 discusses the shape such forums might take.

4.8.3 Institutional and Jurisdictional Complexities

The costs of compartmentalizing issues can be aggravated if the compartmentalization is embedded in institutional and jurisdictional structures. Thus, not only do the issues in dispute sometimes cross definitional boundaries, there can also be overlap and conflict among the very dispute resolution procedures and forums themselves.

4.8.3.1 Overlapping agencies and responsibilities

Telecommunications regulators are not necessarily always the sole or even the primary actors in various areas of telecommunications-related regulation. Where agencies' responsibilities overlap, there is increasing complexity in how the agencies, their respective regulations, and their responsibilities for dispute resolution interact.

The remit of consumer protection agencies, for example, can extend to price-related decisions that conflict with telecommunications sector policies of price rebalancing. Unaligned policies by different institutions or ministries can result in a lack of regulatory transparency and stability for investors and operators. With respect to interconnection, the problem of compartmentalization can be exacerbated where a sector ministry or agency has responsibility for interconnection policy but a consumer protection ministry or agency has responsibility for retail pricing. This may not only introduce uncertainty, it also may introduce financial pressures in one area that are not compensated for in another. Pressure on retail rates from a consumer protection agency, together with pressure to bring interconnection rates into line with costs, can result in an unsustainable squeeze on revenues.

The increasing overlap between generic competition policy and sector regulation is opening new jurisdictional complexities in relations between telecommunications agencies and authorities responsible for competition or "antitrust" matters. Applied competition policy has long been a key driver of telecommunications sector reform in many countries. Indeed, competition law is expanding into telecommunications sector regulatory issues, and sector regulation is increasingly aligning with competition law. For example, in the EU the focus is increasingly on the definition of relevant markets, analysis of those markets for the presence of market power, and the enforcement of competition policy.

Telecommunications sector regulation and competition law are not always consistent. Where they differ, it may be unclear which agency is primarily responsible for addressing a dispute. The institutional overlap between competition law and sector regulation is exemplified by the Deutsche Telekom price-squeeze case described in Box 4-10. As a result, coordination among agencies is more and more important.

Box 4-10 – Policy and Jurisdictional Complexity in Germany

After liberalization, new market entrants challenged Deutsche Telekom's wholesale rates, alleging that they were actually higher than DT's retail rates. The European Commission's Competition Directorate General, applying competition policy, said that Deutsche Telekom was profiting from its market power and was effectively breaching anti-dumping provisions applying to retail rates.

Deutsche Telekom's basic defense was that both rates were within the price caps that had been approved by the telecommunications regulator, RegTP. The Competition Commission rejected this defense, saying that that Deutsche Telekom was autonomous enough to be able to lower its wholesale prices. Indeed, it could even have petitioned RegTP to raise its price caps on retail rates.

The underlying problem in the case was a lack of price rebalancing. It was difficult for policy-makers and regulators in Germany to take the decision to raise Deutsche Telekom's retail rates. Thus, it was left to competition policy to be used as a lever to open markets where national sector policy failed to overcome the obstacles in its way.

4.8.3.2 Public and Civil Law Dimensions

Different approaches to public administrative law and private law result in particular jurisdictional complexities. Civil law countries, for example, frequently distinguish between public law, administrative law, and private commercial law. The distinction in some countries is carried into institutional structures. For example, like many countries, France has administrative courts that have responsibility specifically for dealing with reviews of administrative actions.

In Spain, the telecommunications regulator, known as the Telecommunications Market Commission (CMT), has power to resolve disputes where the conflict results from the application or interpretation of the relevant telecommunications regulations. In matters of private law, for example, the interpretation and enforcement of contracts are dealt with in private law courts. Contracts among telecommunications companies, however, may involve both public law and private law issues. For example, an interconnection agreement may require cost-oriented charging. Since the determination of costs may be a matter regulated by telecommunications regulations, the CMT may have jurisdiction to resolve such matters. Thereafter, however, interpretation and enforcement of the contract becomes a matter for the normal private law courts. Similarly, in the Netherlands, OPTA does not have enforcement powers over agreements that have been subject to its dispute resolution procedures. Payments required from a party, for example, must be enforced by a civil court action, resulting in a two-stage process.

In France, disputes involving contractual agreements are viewed as private disputes over private agreements to be brought before the French civil courts. As the telecommunications regulator, however, the Autorité de Régulation de Télécommunications (ART) may submit its observations on the dispute to the appeals court.

The experience of OPTA in the Netherlands further illustrates the challenges presented by the distinction between civil law and public law. The Dutch legal system maintains a clear distinction between the two systems. OPTA is formally considered to be an administrative body. OPTA is authorized, however, to influence relationships between civil parties. It cannot prescribe generally binding rules, but does offer guidelines for clarity among parties. OPTA is, then, traversing the boundaries of public and civil law and institutions.

4.8.3.3 International dimensions

The availability of judicial review of decisions is generating increasing complexities between state and federal levels, as well as between national, regional, and international levels. The WTO GATS regime has put international telecommunications sector disputes on the international agenda. In the EU, the Connect Austria case, described in Box 4-11, highlights the increasing complexity in the national implementation of EU policy.

Box 4-11 – Jurisdictional Complexity in the European Union

Connect Austria appealed the terms of a competitor's spectrum license⁴⁵ to the Austrian Constitutional Court. The Constitutional Court was clearly the sole competent authority to deal with such appeals under the Austrian constitution. However, Article 5a of the then-relevant European Directive⁴⁶ effectively required the appeal to be brought in an administrative court, despite the wording of the national constitution.

In keeping with the EU directive, the Constitutional Court dismissed the appeal and referred it to Austria's Administrative Court. The Administrative Court then referred to the European Court of Justice (ECJ) the question of whether the European directive had direct effect "so as to override a contrary domestic rule of jurisdiction and establish the jurisdiction of a particular independent body at national level to implement a suitable mechanism for dealing with an appeal brought by an aggrieved party against a decision taken by the national regulatory authority". The ECJ found that it may indeed be necessary to disregard national law if doing so would give effect to European Community law.

All of these areas of increasing complexity arise for good reason, but they introduce a fundamental challenge to the integrity of regulation. There is an increasing risk that decision-making – including decisions that resolve disputes – may be caught between different jurisdictions. As discussed in Chapter 6, regulators may find it useful to supplement official procedures with informal approaches for dealing with disputes. Such approaches may offer the advantage of combining issues in a manner that transcends institutional and jurisdictional boundaries.

⁴⁵ Further detail on the licensing issue at stake in the Connect Austria case is discussed in Box 4-11.

⁴⁶ Article 5a paragraph 3 of Directive 90/387: Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.

5 THE ROLES OF “OFFICIAL” AND “NON-OFFICIAL” SECTORS IN DISPUTE RESOLUTION

In this chapter we consider the different roles that the “official” and “non-official” sectors may play in telecommunications dispute resolution. We use the term *official sector* to refer to government authorities, regulators, and courts, which are established by law to play a role in resolving disputes. The term *non-official sector* refers to other participants in dispute resolution processes, such as arbitrators, mediators, and negotiators, who do not hold permanent government or judicial appointments.

Representatives of the official sector receive their mandates to develop or implement sector policies from constitutional, legislative, and regulatory frameworks. Part of the official sector, particularly members of the judiciary and legal counsel, also act as guardians of the rule of law and due process.

The way telecommunications disputes are resolved can clearly impact the implementation of telecommunications sector policies and the future of the telecommunications sector generally. Accordingly, the official sector traditionally has played a direct role in many telecommunications sector disputes by managing dispute resolution processes and adjudicating the results. If officials have the resources and time, they may be able to resolve disputes in a manner that supports their roles as guardians of national telecommunications policy, the rule of law, and due process.

As discussed throughout this report, however, there are various means of resolving disputes that involve non-official participants and processes that are not directly controlled by the official sector. These include arbitration, mediation and negotiation processes.

Given their legislative and regulatory mandates, and their responsibility for the rule of law and due process, government officials may rightly have concerns about relinquishing direct control over telecommunications dispute resolution. International experience demonstrates many ways, however, in which officials and non-official actors can play complementary roles in resolving telecommunications sector disputes. In many cases, for example, official sector participants delegate, oversee, and monitor the roles of non-official dispute resolution professionals without ceding complete control.

This chapter considers issues relating to the roles of official and non-official sector participants, and the relationship between them. The sections of this chapter are organized as follows:

- Section 5.1 discusses the distinctions between official and non-official sectors. As will be seen, the type of dispute resolution process generally determines the appropriate role of the official sector.
- Section 5.2 considers the differences between the two basic types of dispute resolution proceedings – adjudications and negotiated proceedings – to set the stage for considering the role of official and non-official sector players in each.
- Section 5.3 discusses the threshold question of whether and when non-official processes are suitable for dealing with public law disputes.
- Section 5.4 discusses appeal and oversight functions in relation to adjudication procedures.
- Section 5.5 discusses ways in which the official sector may permit extensive non-official processes while protecting against abuse of process.
- Section 5.6 discusses issues relating to enforcement and interim measures.
- Section 5.7 explores various “confidence factors” related to non-official processes.

5.1 Official versus Non-Official Roles

There is not always a sharp distinction between official and non-official dispute resolution. Box 5-1 illustrates how official and non-official factors are intertwined in dispute resolution participants and processes.

Box 5-1 – Overlap of Official and Non-Official Dispute Resolution

The distinction between official and non-official participants and processes is not always clearly demarcated. For example:

- Arbitrators usually are not employees of the state, but when their awards are enforceable by law in the courts, they have a partly official role.
- Mediators may or may not be officials, but when regulators perform mediation roles, their presence introduces a dynamic that is shaped by their official powers.
- Telecommunications operators may not be purely non-official parties where they are partly owned by the state. Less directly, the state may have an indirect financial or “property” interest in operators through license fees or revenue-sharing arrangements.
- Regulators can be actual parties to the dispute rather than purely adjudicators.
- There may be oversight functions that are managed not by official courts and regulatory bodies but by internal private dispute resolution bodies like the ICC’s own court.
- Official proceedings may have considerable policy input from the non-official sector, such as at the Malaysian Access Forum, discussed in Chapter 6 of this report.

Nevertheless, the basic distinction between official and non-official participants is usually quite clear. What varies is the roles these participants play in different types of dispute resolution proceedings. Before considering the possible allocation of roles between official and non-official participants, it is useful to identify what those different roles are. The various roles include:

- Adversaries in a dispute, including but not limited to service providers and customers;
- Adversaries’ professional advisors, representatives, and lawyers;
- Adjudicators (whether arbitrators or regulators) who establish fact and apply rules with the backing of state enforcement mechanisms;
- Mediators and other ADR professionals who facilitate improved negotiation processes without state enforcement mechanisms;
- Appeals bodies that review decisions for their correctness from a policy perspective;
- Oversight bodies that review decisions to ensure they are legally authorized and procedurally correct;
- Bodies that enforce agreements, rules, awards, and decisions;
- Participants – normally telecommunications regulators that are concerned with implementing regulatory and sector policy; and
- Policy-makers (often ministries) concerned with developing and implementing sector policy.

Different approaches to dispute resolution involve different combinations of official and non-official involvement in these various roles. Indeed, the regulator can itself play different roles, even in regulatory processes, as illustrated by Box 5-2.

Box 5-2 – The Many Faces of a Regulator

In the Netherlands, OPTA illustrates the various roles that a regulatory body can take in dispute resolution. OPTA may settle disputes as an independent adjudicator. Or, in response to an objection, OPTA may reconsider its decisions through internal administrative appeal, thereby taking an executive role. In appeals of OPTA decisions to the courts and to the appeal commission, meanwhile, OPTA may become a defending party. Where OPTA appeals an adverse decision, it may become the plaintiff. OPTA also sometimes plays the role of a mediator.

In designing and evaluating the role of the official sector in dispute resolution processes, the concern should be:

- *Less* about rigid lines between official and non-official sectors, and
- *More* about seeking the roles in which the official sector can best use its efforts and presence to assist in the speedy resolution of disputes – and in a manner consistent with regulatory policy, the rule of law, and due process.

5.2 Adjudicated and Negotiated Proceedings

As discussed in more detail in Chapter 2, the various dispute resolution processes may be divided into two broad types, adjudications and negotiations:

- Adjudicated proceedings are those where a third party, and not the disputing parties, has power to decide the result. The third party may be an official (a regulator or judge) or a non-official (an arbitrator). In such cases, the disputing parties may influence the adjudicator with facts and arguments, but the adjudicator ultimately determines the result.
- Negotiated processes, such as mediation and conciliation, are those where the resolution of the dispute is, in the end, a matter of choice for the parties. The decision is their mutual, negotiated voluntary act – despite the influence of others such as the mediator or the conciliation service.

Different concerns arise in relation to adjudications and negotiated proceedings. Because the decision of the adjudicator is not within the control of the disputing parties, it is more important in adjudication proceedings to ensure the quality of the ultimate decision and protect against abuse of process.

The approach to ensuring the quality of decision-making, however, depends also on whether a dispute resolution mechanism is more official or non-official in nature. More official procedures, such as regulatory adjudication, can be appealed to higher review bodies, also within the official sector. These might review a decision for its findings of fact, applications of rules, and the procedures followed. The effectiveness of regulatory adjudication depends upon a balance between reviewing and refraining from reviewing various matters. Review is important to ensure correct decisions, but if a regulatory agency's decisions are always appealed, the regulator will lose legitimacy and the power to resolve disputes. Administrative law in many countries therefore restricts review, even of official regulatory decisions, to the application of rules and procedures.

The very existence and effectiveness of a non-official mechanism such as arbitration depends on its results not being appealed. If arbitration results can be appealed, arbitration loses its basic value and parties can simply revert directly to official dispute resolution procedures. As noted above, however, arbitration is an adjudication, in which the parties have relinquished their control over the result. It is necessary therefore to provide for some measure of control over the quality of adjudication by arbitrators, without undermining the institution of arbitration itself.

Similarly, if regulators encourage or require disputing parties to resort to negotiated processes such as mediation and conciliation rather than regulatory adjudication, it may be necessary to ensure that such processes are effective. If parties cannot resort to regulatory adjudication, they will require protection from any abuse of negotiated processes by other parties. However, negotiated processes tend to work successfully when the parties themselves drive them, and when there is no review of the results.

5.3 Public Policy in Private Hands?

Before exploring the details of the relationship between the official sector and the non-official sector in dispute resolution, a threshold question needs to be considered. Should public policy matters be

addressed through private, non-official mechanisms? This question is at its sharpest where there could be a conflict between public policy and the resolution of a privately negotiated or arbitrated dispute.⁴⁷

5.3.1 Ensuring Public Policy Implementation

Government officials wish to ensure that public policy is given due emphasis in privately resolved processes. But they generally should not be concerned about the resolution of management, technical, financial, or commercial issues that have no bearing on public policy. One key question is, “What national policy objective is the regulator trying to implement by becoming involved in a dispute?”⁴⁸

The central issue for policy-makers is what role the official sector should play in structuring, conducting, or overseeing dispute resolution. Where public policy issues are involved, such as in regulated industries like the telecommunications sector, policy-makers are interested in ensuring that government policies are followed, that consumers are protected, and that safeguards are in place to ensure against arbitrary and wrongful decision-making.

5.3.2 Existing Experience with Non-Official Approaches

The issues related to official oversight of non-official dispute resolution are not new. They have often arisen where private-sector dispute processes have been allowed to function independently of the courts or as an adjunct to them. Different jurisdictions have adopted various solutions in general commercial contexts. Some have embraced self-regulation, leaving it to professional organizations to educate, control, and discipline their members, which offer dispute resolution services. Other jurisdictions have vested ultimate supervisory power in the courts. While questions of jurisdiction, competence, experience, and ethical standards have to be addressed, there is ample experience upon which to base workable solutions outside of courts and court-like forums.⁴⁹

When a key policy issue is at stake, or the power asymmetry between parties requires it, regulators may insist on conducting an official adjudication process, in which the parties may present their cases and the regulator will make the decision. Where a matter is particularly sensitive, a regulator may refuse to defer to results determined through unofficial methods of dispute resolution. In such cases, the regulator will be willing to take into account public policy considerations or arguments of interested parties, regardless of whether disputes have already been – or are in the process of being – resolved in arbitration or mediation.

Regulators will have to consider those areas or situations for which they will guarantee the availability of an official process.⁵⁰ The history of general commercial arbitration offers lessons about how the official sector has approached non-official processes in such situations. Many countries’ courts have

⁴⁷ To take an obvious and relatively simple example, the regulator may have chosen long run incremental cost models over historical cost models as appropriate for determining interconnection pricing because it believes LRIC models produce more efficient outcomes. In the absence of an interconnection contract specifying an LRIC model, must an arbitrator insist on following the regulator’s choice? What would be the consequences of a failure to uphold the regulator’s choice?

⁴⁸ Meeting with regulators, Geneva, October 15, 2003.

⁴⁹ The same issues have also arisen in the context of investment in emerging countries, particularly in the context of developing major economic sectors and extracting natural resources. Regimes for regulation and protection of foreign investment, such as ICSID, have of necessity involved striking the balance between the private and public interest, and delineating the powers and functions of regulators, the courts and private consensual dispute resolution.

⁵⁰ It is not only key policy areas that may need to be reserved for the control of the official sector. Certain technical issues may also need to be managed by regulators rather than being left to parties to resolve. For example, in its February 2003 statement on dispute resolution, Oftel noted that the Radiocommunications Agency believed that “Due to the fact that radio spectrum disputes are likely to be complex issues about interference or spectrum use compatibility, [...] disputes about radio spectrum, failure to comply with license conditions or interface with services are not suited to ADR and therefore are more appropriately dealt with by [the regulator]”. Oftel, Dispute resolution under the new EU Directives, February 28, 2003, at 3.18.

struggled with whether and how non-official mechanisms can be used to resolve disputes where important public policy issues are at stake. Various concerns have been identified, including concerns that:

- Society at large will suffer from private arbitration of public law-related claims.⁵¹ Since representatives of the public are not present, the public interest is not represented.⁵² At a policy level, operators resolving interconnection pricing disputes might do so in a manner privately determined by them, such as through arbitration or mediation. Regulators may be concerned about how to ensure that interconnection pricing determined by such processes would reflect regulatory policy – whether it is cost-oriented, for example.
- Third parties that have an interest in a dispute may not be involved, and thus will be prejudiced.⁵³ To continue the interconnection example, pricing that does not reflect costs may introduce or perpetuate distortions in retail and wholesale pricing. This may have an impact on the pricing of services to customers, whose interests are not represented in a private dispute resolution process.
- Arbitrators may not uphold key tenets of public policy. Arbitrators are private parties with duties to the disputing parties, not to the public sector.⁵⁴
- Dispute processes will not develop a body of precedent that will lead to clear expectations about the results of disputes.⁵⁵ Confidentially resolved disputes using ADR mechanisms would offer little or no precedent.
- The development of precedent in privately resolved disputes might infect or corrupt the public policy implemented by regulators or courts.⁵⁶

5.3.3 “Arbitrability” – Reserving Matters for Official Control

To address concerns in the context of general commercial arbitration, the courts in most countries have developed the concept of “arbitrability”. Thus, for the courts to accept parties’ agreements to arbitrate a matter, there is a threshold question of whether a matter may or may not be submitted to arbitration

⁵¹ Reluctance to permit matters to go to arbitration becomes an issue in arguments that the cases are too complex factually or legally, that arbitration proceedings are too informal, that arbitrators may have a business-orientation and may neglect the public interest. Here the contrast between arbitrators privately chosen by parties and public adjudicators (whether regulators or courts) is thrown into sharp relief. Arbitrators in ordinary commercial arbitration are only paid to do justice between the parties presenting before them. They are not guardians of the public interest. Furthermore, society at large has never signed the agreement to arbitrate and it is not a party to the arbitration.

⁵² In the telecom context, for example, the new Jordanian Interconnection Dispute Procedure allows the parties to choose between regulatory adjudication and arbitration. However, it is not yet clear whether the TRC will have a right to participate in an arbitration proceeding where the parties have elected arbitration.

⁵³ This has arisen, for example, in anti-competitive practices cases where a third party may have the right to penalties.

⁵⁴ This concern may be overblown. Arbitrators are likely to understand quickly the importance of upholding in their judgments the core areas of regulatory policy. As one commentator remarked with respect to commercial arbitration, “Although arbitrators are neither guardians of the public order nor invested by the State with a mission of applying its mandatory rules, they ought nevertheless have an incentive to do so out of a sense of duty to the survival of international arbitration as an institution”. Pierre Mayer, Mandatory rules of law in international arbitration, 2 *Arbitration International* 274 (1986).

⁵⁵ See W.W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 Brooklyn J. In’tl L. 629 (1986).

⁵⁶ Ibid.

in the first place.⁵⁷ If a matter is too sensitive, the courts reserve control over adjudicating such matters.

Widely accepted arbitration rules tend to recognize that there may be broader public policy concerns that limit the scope of arbitration, particularly non-official arbitration. Thus, courts also may refuse to force parties to arbitrate, or to recognize and enforce their arbitral awards, where doing so would be contrary to public policy.⁵⁸

The concept of arbitrability is a valuable one for telecommunications sector regulators as well. Much of the reasoning of courts in using this concept in commercial arbitration is pertinent to telecommunications sector disputes.

Arbitration offers well-established ways of approaching key concerns about areas of policy that should be reserved for the official sector to resolve.⁵⁹ In the telecommunications sector, certain types of policy-related issues can be designated as remaining within the exclusive decision-making control of the official sector, or at least subject to its review and final determination.

5.3.4 ADR as a Form of Self-Regulation

As discussed throughout this report, regulators in various countries seem increasingly inclined to require market participants to resolve disputes themselves. This may simply be part of a wider trend to involve regulated companies in the regulatory process.⁶⁰

The concern about maintaining the influence of regulatory policy in dispute resolution may be applied more broadly. There may be a general concern that industry participants and self-regulatory initiatives may arrive at far-reaching proposals for the sector that are not envisioned by the regulator.

57 Thus, just as the freedom to contract generally in many countries is not absolute, since it is subject to various laws of contract, consumer protection and public policy restrictions, so also the freedom to arbitrate is not absolute. It is generally very extensive and varies from country to country. The United Kingdom, for example, has traditionally been relatively permissive in allowing arbitration, having little or no developed concept of subject matter non-arbitrability beyond areas of fraud and the United Kingdom's obligations under European law. Swiss law is similar, and the United States has a well-developed body of case law which explores the issues yet limits the scope of non-arbitrable matters. French law has historically been much more restrictive, prohibiting arbitration of public policy matters.

There may be limits on parties' abilities to waive recourse to the courts – the public dispute resolution system – in favour of private arbitration procedure when courts perceive that the private disputes implicate very sensitive public policy questions. Where these issues are so sensitive that they feel they should be reserved for decision by officials of the community, they may be treated as “non-negotiable” public interests so significant that the role of the public adjudicatory branch is a matter of public concern. These are termed “non-arbitral” matters. In the arbitration field, these may include disputes concerning employment laws, anti-corruption laws, competition laws, securities regulations, patents and punitive damages. In such cases, courts have refused to compel parties to arbitrate – i.e., the courts have not recognized the validity of the choice of arbitration as opposed to the court system. Their reasons are that private adjudicators may under-enforce or wrongly enforce laws designed to protect the whole society. For an example of a discussion of this issue, see W.W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 Brook J. Int'l L. 629.

58 Thus the New York Convention permitted the refusal of recognition and enforcement of awards where the subject matter “is not capable of settlement by arbitration under the law of that country” or if recognition and enforcement “would be contrary to the public policy of that country”. New York Convention, Article V(2). See footnote 13.

59 Examples of seminal decisions of the official sector—in these cases, courts—which discussed whether, and the extent to which, private parties may arbitrate over public law matters include: with respect to antitrust matters, *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985); with respect to securities law matters, *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974) and *Rodrigues de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989); with respect to bankruptcy law matters, *Sonatrach v. Distrigas*, 80 B.R. 606 (1987).

60 Initiatives for self-regulation of interconnection in Malaysia are discussed in Chapter 6, Box 6-3, for example. In the United Kingdom, Professor Martin Cave's independent 2002 “Review of Spectrum Management” recommended that “The [Radiocommunications Agency] should explore fully the scope for, and means of, transferring more responsibility to operators for interference management”. It is significant that this has been proposed given the public policy importance of a scarce resource such as radio frequency – probably not the strongest candidate for alternative dispute resolution since not only must radiofrequency spectrum be coordinated with military usage, but it is essential to the market that it is managed in an orderly manner. The report is available at:
<http://www.spectrumreview.radio.gov.uk/>

Regulators are well-positioned to mitigate this concern by setting guidelines within which public consultation and other processes can occur.⁶¹ Some countries, such as Australia, have taken extensive steps, and accumulated valuable experience, in allowing the industry to take responsibility for areas of regulation (see Box 5-3). These initiatives are also instructive for regulators in working out what level of influence they are required to retain and how to exercise it.

Box 5-3 – The Australian Communications Industry Forum

The Australian Communications Industry Forum (ACIF) is a model for establishing industry consensus-building and dispute resolution procedures. The ACIF is a grouping of Australian industry representatives headed by an independent chairman. The ACIF provides input and advice to the Australian Communications Agency (ACA), the Australian telecommunications regulator, on matters of industry codes, standards, and practices.

The ACIF has issued documentation relating to issues ranging from interconnection, number portability, and implementation of Internet services to more technical matters relating to codes and standards. The ACIF has entered into a Memorandum of Understanding with the ACA setting out the basic roles of both institutions. More recently, the ACIF has been examining various ways that the work of consumer groups can be taken into account in its activities.

The ACIF functions in a developed institutional environment, which includes an independent regulatory body as well as the Australian Communications Competition Authority. In this respect, the role of the ACIF can easily be focused on issues of policy implementation. It also has a highly “corporatist” orientation and has generated significant detailed documentation. In addition, the ACIF has established procedures through which industry participants can seek dispute resolution services under its auspices.

While regulators are unlikely to refuse to deal with disputes in areas important to public policy, there may be advantages to permitting disputants to take full advantage of efficient and cheaper alternatives before resorting to the regulator. Even in matters of regulatory interest, there may be significant commercial incentives to resolve disputes quickly through mediation or another ADR process.

Concerns that regulatory policy might lose its influence can be mitigated by providing certain key procedural safeguards. These will preserve basic parameters of regulatory policy and quality of decision-making. Where asymmetries of market power are a factor, a key issue will be to ensure that parties with greater power cannot use that power to abuse the procedure. Appeals and oversight of adjudications and voluntarily negotiated proceedings are discussed in the following sections.

5.4 Review of Adjudications

Both official and non-official adjudication decisions are generally subject to appeal or oversight procedures, which are often part of a system of checks and balances designed to prevent arbitrary, incorrect, or procedurally flawed decisions. These procedures are often considered essential, since regulatory adjudicators ultimately are exercising the authority and power of the state to make decisions and enforce them through judicial or other means. Similarly, where parties have the right to enforce arbitration awards in the courts, arbitrators are making decisions that, indirectly, will rely upon the authority and power of the state for their implementation.

As mentioned in Section 5.2, the adjudicator – not the parties – has the last word on the result of the dispute resolution process. In such cases, it is important to provide certain safeguards as to the quality

⁶¹ For example, the Malaysian Access Forum, discussed in Box 6-3, is constrained in developing an Access Code by the guidelines laid down by the regulatory authority. It is possible, however, that imposing overly directive guidelines could have the effect of hampering industry initiatives. There is a balance to be struck to ensure a necessary level of regulatory policy input while capitalizing on the resources and initiatives of the private sector. <http://europa.eu.int/ispo/infosoc/legreg/docs/90387eec.html>

of decision-making on substantive and procedural matters. There are two potential types of review over adjudicators' decisions:

- Judicial-type review for defects in the case's procedural integrity and, where necessary, public policy concerns (termed here as "procedural oversight"); and
- Review by a higher body of the actual substance of the decision on the facts and the law (termed here as "substantive appeals").

To these might be added a third: no review at all.

The different activities and concerns involved in procedural oversight and substantive appeals imply that different types of expertise may be required for each. In the judicial context, courts tend to perform both functions. Judges of higher courts deal with claims from lower courts appealing decisions on the legal merits, as well as matters of due process and public policy. But the situation is usually different in the context of regulating industries such as telecommunications.

5.4.1 Procedural Oversight

Procedural oversight is less concerned with substantive decisions and more with the overall functioning of the adjudication system in question. The purpose of such oversight is to establish and maintain good conditions for the effectiveness of the adjudication process itself. Both regulatory adjudication and arbitration are appropriately the subject of procedural oversight.

The experience of general commercial arbitration illustrates clearly the difference between substantive appeals and procedural oversight.

5.4.1.1 Procedural Oversight in Arbitration

Arbitration awards are generally not subject to judicial appeal to review the correctness of the arbitrators' decision or interpretation, or the application of the law.⁶² In countries where arbitration is well-developed, courts tend to meddle with arbitration awards only where there are fundamental problems that, if allowed to persist, would threaten the overall quality of the arbitration system.

The effectiveness of arbitration depends upon this approach, since losing parties could otherwise simply appeal all arbitration awards to the courts. This would leave no benefit to parties in pursuing arbitration, which would be less effective as a dispute resolution mechanism.⁶³

Although different countries have different approaches to oversight of arbitration awards,⁶⁴ courts have tended to pay attention to:

- Whether the process followed in the arbitration was the "due process" that the parties contracted for; and
- Whether the decision affects key public policy issues.

In commercial arbitration, the fundamental basis for the courts' oversight role is the parties' own contract to arbitrate.⁶⁵ Arbitration normally is a voluntary process that the parties have agreed to pursue. The courts' oversight focus is on protecting the parties to be sure they get the process to which they agreed. Since parties have agreed to follow a procedure that is an alternative to the courts, one

⁶² Thus, to take a typical U.S. court judgment reviewing an arbitral award, courts must enforce an arbitral award "even in the face of 'erroneous findings of fact or misinterpretations of law'". *French v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 784 F.2d 902, 906 (9th Cir. 1986).

⁶³ Courts do not subject such cases to *de novo* review since that "would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid". *Northrop Corporation v. Triad International Marketing*, S.A. 811 F.2d 1265, 1268 (9th Cir. 1987).

⁶⁴ For example, Swiss federal law provides for judicial review of arbitration awards only in order to insure the procedural integrity of the process, even permitting parties voluntarily to exclude judicial review altogether. Belgian courts decline to set aside arbitral awards made in Belgium for any reason, including an arbitrator's fraud or excess of authority.

⁶⁵ See the New York Convention, Article V(1), referenced at note 15.

can assume that they have agreed to a minimum level of due process. Courts have therefore reviewed arbitration awards on the basis of issues relating to due process.⁶⁶

Countries vary in their approaches to due process. Factors generally seen to undermine due process include: lack of proper notice of the commencement of proceedings, improper conduct of hearings, and inadequate time to prepare pleadings.⁶⁷ Some countries identify other due process factors. The U.S. *Arbitration Act*, for example, permits courts to vacate arbitration awards where there was corruption, fraud or undue means, or partiality or misconduct of the arbitrators. This is particularly common when arbitrators have compromised parties' fair treatment – such as by refusing to postpone hearings or to hear pertinent evidence – or have exceeded their powers.⁶⁸

Thus, courts tend not to reject arbitration awards if the arbitrators were fully briefed, the parties had an opportunity to argue before them, and the arbitrators considered all relevant issues and reached reasoned written decisions. The courts will simply enforce such arbitration awards even if the arbitrators reached decisions that may be wrong on the interpretation and application of the law.⁶⁹

5.4.1.2 Procedural Oversight in Regulatory Adjudication

In the case of regulatory adjudication, procedural oversight is also concerned with preserving the viability and integrity of the adjudication mechanism itself. There are, therefore, advantages to having external oversight mechanisms. A key concern is to ensure that due process was followed in the initial decision-making.

In most cases, procedural oversight of regulatory adjudication remains within the domain of the court system. Most countries have some form of judicial review of ordinary administrative actions, including regulatory adjudication. In traditional administrative law, courts review the decisions of regulators not only for the correctness of procedure but also for the legal basis of the decision-making itself. Thus, courts will want to ensure that legislation has given the regulator the necessary powers to adjudicate a dispute and that it is acting within its powers.

Where reviewing courts lack expertise in complex sector issues and regulation, their review process can result in restrictions on the regulator that may impact the sector. In the Netherlands, for example, the administrative courts have taken a particularly restrictive approach to OPTA's powers. The courts view the "national regulatory authority" as comprising both OPTA and the Minister for Economic Affairs. OPTA is viewed as having defined powers. With a strict interpretation of the Telecommunications Act, the administrative courts generally have tended not to take into account underlying policy objectives in reviewing OPTA's decisions. This has curtailed OPTA's use of discretion. As a result, the Court of First Instance (the Court of Rotterdam) has annulled OPTA's decisions, or suspended them by interim measure, on many occasions, citing lack of authority or infringement of general administrative law principles (see Box 5-4).

⁶⁶ For example, recognition and enforcement of awards may be refused if the parties did not have the capacity to contract to arbitrate in the first place. Awards may also not be recognized or enforced if the agreement to arbitrate was not valid contractually under its governing law.

⁶⁷ Further, if the award dealt with a dispute that was not the subject of an agreement to arbitrate, or went beyond the scope of the arbitration agreement, or if the procedure was not in accordance with the agreement of the parties, then the award need not be recognized or enforced.

⁶⁸ *Federal Arbitration Act*, Title 9, U.S. Code, Section 1-14, Section 10.
http://www.chamber.se/arbitration/shared_files/laws/arbitract_us_cont.html

⁶⁹ There are limits, of course, in deference to the permissible defects of arbitrators' decisions. "Manifest disregard" of issues and similar types of problems inherent in the awards may subject awards to judicial scrutiny.

Box 5-4 – Restrictive Judicial Review in the Netherlands

The restrictive view of OPTA's powers taken by the Dutch administrative courts is illustrated in the case of OPTA's decision on mobile termination rates. The courts have taken the view that OPTA has no competence to resolve a dispute on *indirect* interconnection, since there is no explicit authority given in the Telecommunications Act. OPTA may, however, give exemptions to *direct* interconnection. Even OPTA's general authority to set rules to settle disputes could not be relied upon, since this authority had to be applied in the specific circumstances of the case in question.

As a result, OPTA cannot effectively regulate mobile termination tariffs, whether by rule-making or dispute resolution. The interpretation of the definition of interconnection and dispute resolution powers are examples of the real obstacles regulators often face in regulating and resolving disputes effectively.

In some countries however, a quasi-judicial or non-judicial body may carry out procedural oversight. India's Telecommunications Disputes Settlement and Appellate Tribunal (TDSAT), which is discussed below, provides an interesting example of a body entrusted with both procedural oversight and substantive appeal roles (see Box 5-5).

5.4.2 Substantive Appeals of Regulatory Adjudication

Unlike procedural oversight, substantive appeals may permit decisions to be broadly reconsidered. Errors can be rectified and overall policy can be reaffirmed and implemented correctly.

There are different approaches to substantive appeals. In some countries, including a number of parliamentary democracies, government ministries are considered ultimately responsible to the public, through parliament, for major decisions of government authorities. So even where regulators operate in a generally independent manner, their decisions may be subject to appeal to Ministers or generally to the executive branch of government.⁷⁰ In such cases, the professional staff of the ministries responsible for telecommunications may add input on more complex policy matters.

Appeals of decisions to the political level are inherently controversial, particularly when they involve adjudication of the rights of parties to a dispute. There frequently are allegations of political favoritism or, in the case of state-owned operators, genuine conflicts of interest. In addition, political appeals obviously can undermine the integrity and credibility of the regulatory process. Consequently, there are good reasons to discourage or limit political appeals. Sometimes this is done as a matter of precedent, in countries where government ministers decline to consider or overturn virtually all appeals. In addition, some of the problems inherent in political appeals can be minimized through transparent processes. These may include requiring public disclosure of appeal documents, conducting public comment processes, and disclosing orders that require regulators to reconsider decisions.⁷¹

In cases where a non-official arbitrator undertakes a regulatory adjudication, substantive appeals may sometimes be made to a telecommunications regulator. However, in such cases, it is important that the rules of the process limit appeals to significant matters of telecommunications policy. Absent such a limitation, unsuccessful parties may have an incentive to appeal arbitration awards to regulators, thereby undermining the purpose and effectiveness of non-official arbitration.

⁷⁰ An example can be found in Canada, where decisions of the CRTC may be appealed to the federal government Cabinet pursuant to section 12 of the *Telecommunications Act*. <http://laws.justice.gc.ca/en/t-3.4/101829.html>

⁷¹ See, for example, the process set out in section 12 of the Canadian Telecommunications Act, which requires circulation to other parties of petitions to reconsider CRTC decisions as well as a public notice process that increases transparency of the appeal process. <http://laws.justice.gc.ca/en/t-3.4/101829.html>

Box 5-5 – Regulatory Oversight Tribunals: India’s TDSAT

A novel approach to dispute resolution can be found in India’s Telecommunications Disputes Settlement and Appellate Tribunal (TDSAT). The Tribunal consists of a panel of three members, all of whom have served at the highest levels of the Indian judicial or civil service systems. TDSAT is a traditional governmental structure that has been devised to facilitate the resolution of disputes in the complex Indian telecommunications sector. Unique among official institutional arrangements worldwide, it exists in juxtaposition to TRAI, which had been previously established as the sector-specific regulator. TDSAT has two major roles: as a specialized appellate body and as a dispute resolution forum of first instance.

At the time of writing, the regulatory environment in India was undergoing an overhaul with the expected imminent enactment of the long-awaited 'Convergence Act'. While the Convergence Act will bring about many changes in the regulatory environment in India, it essentially retains a bifurcated institutional structure with TRAI as the “regulator” and TDSAT as the separate institution for settling disputes.

One of the major reasons for the creation of TDSAT was to rationalize the process of judicial review in the sector, including the review of TRAI decisions. Decisions from a diverse range of courts might lack the consistency and uniformity necessary to provide coherence to an important national scheme of regulation.

TDSAT’s role as a forum of first instance for telecommunications sector disputes introduced particular challenges. It is TDSAT, not TRAI, that has ultimate responsibility for making certain final administrative determinations in India.

The Indian approach to dispute resolution in the telecommunications sector is more complex than in countries that have not vested final administrative authority in a specialized tribunal like TDSAT. Nevertheless, the WLL(M) controversy (see Box 4-6) suggests that TRAI and TDSAT are carrying out their responsibilities effectively. Complex and inter-related issues raised by new WLL(M) services in India – including concerns about interconnection, new license fees and terms and conditions for fixed and wireless operators – are now in the process of being resolved.

5.4.3 Lessons for the Telecommunications Sector

Telecommunications regulators are increasingly considering when and how to encourage or permit parties to resolve their disputes through arbitration rather than regulatory adjudication. The difference between substantive appeal and procedural oversight of official and non-official dispute resolution mechanisms is important for telecommunications regulators because:

- The viability of arbitration depends upon the finality of arbitration awards without endless appeals, subject to procedural impropriety and public policy concerns;
- The availability of procedural oversight mechanisms permits regulatory officials to use less-official mechanisms, such as arbitration, while being assured of proper procedures; and
- It is possible to establish substantive review mechanisms to ensure that where public officials have a pressing concern, that concern may override the non-official dispute process.

The arbitration industry has developed its principles through experience, over many years. The principles and approaches it relies on are useful for telecommunications regulators in designing dispute processes that draw upon the resources, rely upon the initiative, and give more responsibility to private parties. Telecommunications regulators also can use these ways of incorporating safeguards into non-official dispute systems such as arbitration to ensure that their benefits are available to the sector without relinquishing a basic level of control that remains the responsibility of regulators for the sector as a whole.

5.5 Procedural Oversight of Negotiated Dispute Resolution Mechanisms

Mediation is traditionally subject to fewer controls by the official sector than arbitration or regulatory adjudication, for the following reasons:

- Mediation is a consensual process;
- Mediation has generally developed at the initiative of the parties and not the official sector;
- The central benefits and effectiveness of the mediation technique lie in its informality, the flexibility of the process, and its availability to spontaneity and reframing of perspectives; and
- Mediation generally is not prejudicial to parties' rights to pursue other legal remedies if they fail to reach settlement;

Nevertheless, procedural oversight is becoming an increasingly important element in mediation, primarily because more powerful parties may abuse the procedure, in order to deny its benefits to less powerful parties. Indeed, they may use it to stall negotiations and the overall resolution of the dispute.

Experiences of general commercial mediation offer insights to regulators who are seeking to capitalize on the benefits of voluntary informal mechanisms and reduce the burden on their resources – yet not abandon the sector to chaotic dispute resolution systems that may not be effective.

5.5.1 Emerging oversight of negotiated processes

The codes of civil judicial procedure in several jurisdictions in Australia, Canada, the United States, and the United Kingdom increasingly require parties to attempt mediation prior to using official resources in the courts. This is strengthening the importance of oversight measures as an aspect of the system. These measures tend to involve reporting, and they are focused on whether the parties have acted in good faith.

Mediation is almost fruitless – and, indeed, can be harmful – when parties do not negotiate in good faith to resolve the dispute. Parties may use mediation as a “fishing expedition” to ascertain whether the other party’s case is well-developed. They also may use it to buy time or give the appearance of cooperation, while not being willing to adjust their position.

It is notoriously difficult to ensure that parties act in good faith, particularly in the context of a dispute. As explored in this section, however, there are some ways of doing so. It should be emphasized that these are generally the exception to the rule. Mediation in most countries tends to be unregulated – for good reason, since excessive regulation of mediation is likely to destroy the process.

5.5.1.1 Reporting Requirements

Requiring reporting of mediation processes provides incentives for parties to act in good faith.⁷² Practices vary from jurisdiction to jurisdiction. Countries like the United Kingdom emphasize the informal nature of mediation. They consider the lack of reporting to be central to the confidentiality that is so essential to the success of the process itself. In such countries, reporting is only required where there has been a crime or fraud committed, or if there has been misleading conduct.

Some jurisdictions require mediators to report simply on whether the mediation occurred, whether the parties attended, and whether they reached agreement.⁷³ Although brief, such oversight is nevertheless valuable. It introduces an effective requirement that parties commit to enter into the process itself. Such minimal commitment can result in parties’ uncovering the potential benefits of the process and going forward to find consensual resolution to their disputes.

⁷² This discussion draws in part on a most useful presentation made by Miryana Nesic to a gathering of CEDR mediators in 2003, attended by one of the authors of this report.

⁷³ See the rules of the courts in Queensland, Australia, and section 7 of the U.S. Uniform Mediation Act 2001. http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/J/JusticeRuC67_001.pdf <http://www.mediate.com/articles/umafinalstyled.cfm>

Where statutes and court procedures require parties to enter into mediation before coming to court, they sometimes require mediators to summarize for the court the conduct of the parties and the results of the mediation. This is particularly useful where there is a severe power inequality between the parties.⁷⁴ Reporting requirements may be enforced simply by withdrawing the accreditation of mediators if they fail to report as required.

Some jurisdictions even require detailed mediation summaries from mediators.⁷⁵ These may be intended to address the procedural issues in a manner that ensures that mediation actually has occurred. For example, reporting requirements may cover what seem like obvious questions, such as:

- Did parties make opening statements?
- Were the issues at conflict identified and isolated?
- Was there sufficient face-to-face contact to enable each party to understand the other's perspective?
- What settlement options were proposed, if any?

Official sector dispute resolution bodies may require the parties to satisfy such questions before resorting to the resources of the state.⁷⁶ This increases the likelihood that the parties will engage each other and seek, in good faith, to resolve their disputes voluntarily.

5.5.1.2 Presence of Officials as a Means of Oversight

The presence of officials during mediation can increase the likelihood that parties will not abuse the process or take unrealistic positions. In the United States, for example, the FCC offers customers the opportunity to contact the Market Disputes Resolution Division of the FCC's Enforcement Bureau before filing an official complaint. Parties must accept the FCC's mediation process before the staff will accept streamlined "mini-trial" complaint cases. The FCC encourages the use of its mediation services generally before filing complaints regarding violations of local competition rules.⁷⁷ The FCC has said that it believes that the presence of regulatory staff reduces stonewalling and use of unsupportable arguments. This, in turn, produces efficient dispute resolution that fits the disputants' interests and needs.

It should be noted, however, that there are also drawbacks to the presence of regulatory officials in mediation processes. As mentioned above, a key aspect of mediation is that it is voluntary and confidential, and does not prejudice parties' rights to legal remedies. If the parties fail to reach a settlement, the case may end up before the regulator. If the regulator has been present in the mediation, parties may fear that facts, positions, and compromises discussed in the mediation may prejudice the later regulatory proceeding and influence the regulatory adjudicator. Thus, if regulators are involved, parties may be less willing to engage in mediation, or they may do so more cautiously.

5.5.1.3 Measuring "Good Faith"

The difficulty of ensuring that parties engage in good faith negotiations is partly due to the difficulty of defining good faith. Actually, courts are increasingly trying to identify and define indications of good faith. Parties in the United States and Australia, for example, have succeeded in bringing actions against parties that were not engaging in mediation in good faith.

⁷⁴ See, for example, the *Farm Debt Mediation Act* in New South Wales, Australia.
http://www.austlii.edu.au/au/legis/nsw/consol_act/fdma1994163/

⁷⁵ See the New South Wales Rules of Court (Supreme Court).

⁷⁶ Less formal ways of permitting reporting than requiring mediators to report include the UK Construction and Engineering Pre-Action Protocol, which permits parties to hold pre-action meetings (which would cover mediations); to disclose to the court whether a meeting took place (and if not, why not), who attended, who refused to attend (and why) and any agreement reached. http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_ced.htm

⁷⁷ Known as Section 208 complaints. Section 208 of the *Communications Act* of 1996.
<http://www.fcc.gov/reports/1934new.pdf>

Good faith does not have to be evidenced by a failure to reach a reasonable settlement as interpreted by regulators. There are other, more procedurally oriented ways of identifying a lack of good faith, such as the indicators developed by the Australian courts (see Box 5-6).⁷⁸

Box 5-6 – Indicators of “Bad” Faith Negotiation		
Unreasonable delay	Unnecessary postponement of meetings	Failure to contact the other parties
Failure to make proposals	Failure to make counter proposals	Adopting a rigid non-negotiable position
Failure to attempt to organize a meeting	Unexplained failure to communicate with other parties within reasonable time frames	Failure to follow up on a lack of response from other parties
Failure to take reasonable steps to engage in discussions	Failure to respond to reasonable requests for information within a reasonable time	Stalling negotiations
Sending negotiators without authority	Refusing to agree to trivial matters	Shifting position just as agreement seems in sight
Refusing to sign an agreement in respect of the process	Unilateral conduct that harms the negotiation process, such as issuing press releases	Failure to do what a reasonable person would do in the circumstances

Identifying the presence of some – perhaps all – of such features will depend, at some level, upon what appears to be “reasonable”. The notion of reasonableness may be subjective, and ultimately may reach into the substance of a dispute. It is helpful, however, that the features above focus on procedural behavior. This is more likely to get parties to engage with each other. This, in turn, increases the likelihood that they may find areas of mutual interest that reduce the scope of the dispute, or even resolve it.

Regulators often will be aware of whether parties have sought to engage in good faith negotiation or mediation, because they are the mediators. In France, disputing parties must furnish evidence to the ART to show that they have sought and failed to negotiate the issue in dispute. At the outset of a proceeding, therefore, the ART is provided with the documentary history of communications between the parties. This often shows where one party has resisted constructive engagement with the other. It is useful for regulators to be informed of, and take into account, the negotiating behavior of parties as they seek to resolve disputes. This is also valuable, moreover, in influencing the behavior of parties in the negotiated dispute resolution process itself.

5.5.1.4 Sanctions for Misbehavior

Other than refusing to hear a dispute, what can a telecommunications regulator do if it is evident that parties are refusing to negotiate in good faith? Indeed, refusing to hear a dispute may be counter-

⁷⁸ *State of Western Australia v Thomas and Ors* [1998] NNTTA 8.

productive, since it might actually help a recalcitrant party that does not want to see the dispute resolved. In this and similar circumstances, various sanctions are available in policing mediation processes:

- The United Kingdom's civil courts sometimes require the party that refused to mediate to pay the other's costs, even if the refusing party wins the court case on the merits.⁷⁹
- Fines may be imposed on parties for refusing to engage in mediation, as has occurred in the United States.⁸⁰
- More radically, regulatory adjudicators may even refuse to address issues or arguments presented by a disputing party that could have been dealt with in a consensual mediation process.

5.5.2 Lessons for the Telecommunications Sector

As this section has illustrated, there is a wealth of existing resources for regulators to use in setting the conditions for voluntary negotiated dispute resolution processes. These include established (and some still developing) institutions and bodies of judicial precedent in several countries, including Australia, the United States and the United Kingdom. There is considerable scope for regulators to encourage telecommunications sector participants to resolve their own disputes in ways that are optimal for the sector. The concern that parties may abuse voluntary negotiated processes to resist resolving disputes is very appropriate. Nevertheless, there are various ways available to regulators to police parties' behavior and increase the possibility of negotiated settlements.

5.6 Official Enforcement and Non-Official Decisions

All dispute resolution processes ultimately require some level of support from the official sector in the area of enforcement. Decisions of regulatory adjudicators rely upon the enforcement powers of the regulator, and ultimately the courts, depending upon how the sector regulatory regime has allocated enforcement powers. Arbitration requires courts to enforce the awards of arbitrators, subject to the oversight review discussed in the previous sections.⁸¹ Even consensual, negotiated processes such as mediation and negotiation rely upon courts to enforce settlement agreements entered into by the parties. Courts tend to view such agreements as ordinary contracts, without reviewing the dispute resolution process the parties used to negotiate.

In considering how to improve dispute resolution, then, it is necessary to consider how resolutions of disputes will be enforced. This includes evaluating:

- How to ensure that available official enforcement mechanisms are best employed; and
- Enforcement-related concerns that are particular to non-official processes, such as the availability of interim measures.

Where countries' civil justice systems – courts, justice, and police systems – are effective and efficient, they may suffice for enforcement of the results of dispute resolution processes. In many

⁷⁹ See *Dunnet v Railtrack*, [2002] 2 All EK 850, *Dyson and Field* (Executors of Lawrence Twohey deceased) v. *Leeds City Council* unrep. 22 November 1999; *Leicester Circuits Ltd. v. Coates Brothers p/c* [2003] EWCA Civ 333; *SITA v. Watson Wyatt* [2002] EWHC 2401; *Cowl v. Plymouth City Council* [2001] EWCA Civ 1935X. <http://www.cedr.co.uk>

⁸⁰ See *Roberts v. Rose*, 37 S.W. 3d 31, 33 (Tex. App.-San Antonio 2000, no pet. h.); *Universal Co-operatives Inc. v. Tribal Cooperative Marketing Federation India*, 45 F. 3d 1194, 1196 (8th Cir. 1995); and *Dvorak v. Shibata*, 123 F.R.D. 608 (D. Neb. 1988).

⁸¹ The valuable and indeed potentially essential role of the public sector in helping to broaden the options for alternative methods of resolving disputes is illustrated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958. The "New York Convention", as it is referred to, (see Footnote 13) ensures that international agreements to arbitrate are respected and that resulting arbitral awards are enforced. The agreement to the convention – and its predecessor conventions – by the government signatories was an important stage in boosting confidence in arbitration as a process and giving it the enforceability required to make it an effective means of resolving disputes. There may, then, be important steps that regulators can take in introducing arbitration-type dispute processes for the telecommunications sector.

developing countries, however, civil justice systems lack expertise, impartiality or the resources to provide necessary enforcement.

Telecommunications sector legislation and regulation is often at the cutting edge in such countries' overall efforts to improve the quality of regulation and governance. Many countries' telecommunications statutes give regulators the power to enforce the law and regulations, including regulatory decisions resolving disputes.

Regulators may be able to offer their enforcement powers as an alternative to ordinary civil enforcement mechanisms to support non-official dispute resolution initiatives. By employing the powers and resources of the regulator, enforcement may be accelerated and improved. In this way, regulators may be able to perform a function similar to that provided by courts in developing arbitration regimes.

Such enforcement issues are relevant for consensual negotiated processes as well as adjudication processes like arbitration. In many civil court procedures, after parties have started court proceedings and reached a negotiated settlement, the court will stamp the settlement agreement. This gives the settlement agreement the force of a court order. It is possible for regulators to perform a similar role, giving settlement agreements the force of a regulatory order. This would make the regulator's enforcement powers available to ensure the implementation of the agreement.

Similarly, non-official consensus-building processes that resolve sector problems may benefit from the endorsement of regulators. Ultimately, the viability and enforceability of dispute resolution outcomes may depend partly on the willingness of government officials and/or courts to assist in establishing alternative approaches and implementing privately reached agreements or settlements.

5.7 Building Confidence in Non-Official Dispute Resolution

The full benefits of non-official approaches to dispute resolution can only be secured if the official and non-official sectors work together to develop their capabilities. Once such capabilities are demonstrated, both the government and the industry gain confidence in non-official dispute resolution.

Various factors are important in considering the capability of the non-official sector in resolving disputes. They include:

- The development of institutions, experts, and professional dispute resolution roles;
- The utilization of procedures, codes, and review procedures by dispute resolution institutions;
- The voluntary nature of non-official dispute resolution mechanisms and the operation of the “market” in dispute resolution; and
- The availability of ways for officials to be involved in non-official dispute resolution procedures other than through oversight and review.

To the extent that the official sector recognizes advantages in developing non-official dispute resolution approaches, it can take affirmative steps to strengthen such factors. Such support is discussed in Chapter 6 on ways forward in dispute resolution.

5.7.1 Institutions and Professionalism

Systems of ensuring quality control are often relatively invisible in traditional dispute resolution systems such as national courts. This may be because they are so obvious. They include the ways in which judges are appointed and limitations on their terms imposed. Personal relationships within the small community of judges strengthen the courts as adjudicative institutions. Judges are accountable among themselves, partly due to their network of relationships.

These are confidence factors that can make the judicial branch more or less successful. Similar factors can be evaluated in the context of non-official dispute resolution systems.

Some non-official dispute resolution institutions consolidate their expertise, draw professionals together, and provide forums for the development of capable dispute resolution.⁸² The development of institutions has been important in gaining the confidence of both officials and private users. Similar trends are already evident in the telecommunications sector. Oftel's February 2003 statement on dispute resolution indicated that it had greater confidence in ADR because it was "aware" of a number of organizations, including the following, all of which provide dispute resolution services:

- The International Chamber of Commerce's International Court of Arbitration;
- The London Court of International Arbitration (LCIA); and
- The Centre for Effective Dispute Resolution (CEDR).⁸³

General commercial arbitration gained the confidence of the official sector as it became evident that highly responsible decision-makers were being appointed as arbitrators. Further, the arbitration community developed institutions that promulgated their own procedures and principles, including ways of reviewing arbitration awards internally. The high standard of institutions such as the ICC, the American Arbitration Association (AAA), ICSID and others was a highly influential factor in strengthening the place of arbitration in the dispute resolution world.⁸⁴

Similarly, the emergence of mediation institutions, such as in the CEDR and the ADR Group in the United Kingdom, has given the British courts and legislators confidence to persuade disputing parties to attempt mediation before resorting to official dispute resolution in the courts.⁸⁵

Widely recognized arbitration and mediation training courses establish a notion of professionalism through accreditation. Many arbitration institutions provide a roster of qualified arbitrators from which parties may choose their arbitrators – lending further professionalism. Indeed, in many cases, the failure of parties to agree on appointing an arbitrator may result in the arbitration institution itself making the appointment. Requiring registered arbitrators and mediators to follow professional development seminars and courses further develops their roles. Professionalism promotes high standards and puts reputations at stake within recognizable structures.

The development of institutions is also valuable in informal ways. Simple informal gatherings, held under the auspices of dispute resolution institutions, further the sense of a community of professionals. These gatherings increase the sharing of experiences and methodologies, enhancing the development of a lore and institutional memory. While not necessarily constituting binding precedent, this certainly contributes to developing a normative environment.

5.7.2 Internal Procedures, Codes, and Review Processes

Another key factor in the success of traditional court systems concerns the agreed ways of conducting judicial functions:

- Adherence to pre-agreed procedure ensures fairness of process and establishes common expectations of parties.

⁸² See Chapter 2 for detailed descriptions of some of the major international dispute resolution institutions.

⁸³ Oftel, Dispute resolution under the new EU Directives, 28 February 2003, at 3.15. See Box 2-4 and <http://www.ofcom.org.uk>

⁸⁴ These factors made the courts more willing to entrust dispute resolution increasingly to the private sector. A landmark case in the United States expressed this progression, saying that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution". See *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

⁸⁵ The U.K. courts are increasingly comfortable in influencing parties to pursue mediation and establishing basic incentives for them to do so, including making payment of expenses conditional upon parties having attempted good faith mediation. This trend has occurred amid a growing confidence in the quality of mediators and institutions which provide training, guidance on procedure and ongoing professional development. In the context of the telecom sector, there may be ways to go further in strengthening the confidence of public policy-makers and regulators in private dispute resolution techniques. To the extent that regulators can ensure that basic procedures are recognized, they may be more comfortable with private dispute resolution.

- Appeal and oversight functions in higher courts enhance overall quality control of decision-making.
- Requirements that decisions refer to legal authority (statute or precedent, depending on the tradition and situation) enhance consistency and diminish arbitrariness.
- Requirements that judgments be published contribute to accountability.
- The very tradition of legal reasoning itself helps maintain a common philosophical core within the community, even where different judges employ different modes of legal reasoning.

Likewise, a crucial confidence factor in the success of non-official dispute resolution has been institutions' development of their own internal procedures, codes, and review mechanisms. They are "internal" in that they are implemented and managed by the key players within the institutions rather than by external review of the official sector. The presence of such internal mechanisms is a valuable indicator to regulators of the maturity of non-official dispute resolution and its suitability as an alternative to regulatory adjudication.

5.7.2.1 Internal Procedures and Review in Arbitration

As general commercial arbitration developed, it became obvious that the arbitration industry had to invent its own system of controls to build confidence in its services. Lack of confidence would have resulted in increased court interference in arbitration processes and a lack of demand by users.

Most arbitration institutions have established sound basic procedural requirements.⁸⁶ The plan for conducting arbitrations may be adapted by parties' mutual agreement. But unless the arbitration agreement sets the issues out in detail, the institution's rules commonly will cover the commencement of disputes, selection of arbitrators, choice of venue, conduct of proceedings, discovery processes, and issuance of awards (see Annex). Some arbitration institutions also provide for internal control processes by which an institutional committee reviews the awards – in some cases, before issuance of the award by the arbitrator (see Box 5-7).

Box 5-7 – Internal Review of ICC Arbitration Awards

At the "high" end of the review spectrum, ICC arbitration requires the arbitrator to submit the award in draft form for scrutiny by the ICC Court of Arbitration, an ICC-appointed body composed of eminent leaders in the field.⁸⁷ The ICC Court may modify the award and draw the arbitrator's attention to points of substance. The Court must approve the award before the arbitrator signs it.

The ICC Court is directed to pay "particular attention to the formal requirements laid down by the law applicable to the proceedings and, where relevant, the mandatory rules of the place of arbitration, notably with regard to the reasons for awards, their signature, and the admissibility of dissenting opinions".⁸⁸ The ICC Court has the power to draw the arbitrator's attention to substantive issues. Its focus, however, is more on "oversight" than "appeal" – that is, on the preservation of the overall acceptability, and thereby viability, of the process in countries where it is required to be effective in law.

Less-intensive forms of control include requirements that arbitrators provide their reasoning in written decisions. Also, requiring records to be kept of proceedings is a way to ensure higher standards of process. The rules of the Japan Commercial Arbitration Association, for example, require taking a summary record of each hearing. If a party requests it – or the tribunal orders it – a stenographic

⁸⁶ Basic procedures for major arbitration institutions are summarized in Chapter 2 and Annex C.

⁸⁷ International Chamber of Commerce, International Court of Arbitration – Rules of Arbitration, Article 26. <http://www.iccwbo.org/court/english/arbitration/rules.asp>

⁸⁸ International Chamber of Commerce, International Court of Arbitration – Rules of Arbitration, Article 17. <http://www.iccwbo.org/court/english/arbitration/rules.asp>

recording of the proceeding must be produced. And a statement of reasons for the award must be drafted, unless the parties agree otherwise.

5.7.2.2 Internal Codes and Procedures in Mediation

Like arbitration, mediation is increasingly exposed to influences on procedure. For example, mediation institutions often insist on a formal mediation agreement being signed by the parties that employ their services. Such agreements cover, for example, the basic agreement to mediate, the role of the mediator, the authority of parties to enter into a settlement, and the confidentiality of the process.

Some mediation institutions have their own ethical codes, to which their registered mediators are required to adhere. These codes cover matters such as conflicts of interest and confidentiality, as well as certain reporting obligations. The mediation agreement and codes of ethics address key areas that are essential in preserving the field of mediation itself as an effective functioning means of resolving disputes.

While not normally mandated, there are now clear expectations about the structure of mediation processes, as described in more detail in Chapter 2. They tend to include pre-mediation exchanges of case statements; pre-mediation communication between the mediator and parties separately; initial joint sessions with parties and the mediator; and caucus meetings with separate parties. Just as in arbitration, where parties can adapt the procedures, mediators retain the flexibility to adapt and depart from these expectations. However, the “normal” mediation is well enough established to provide a level of predictability to the process.

5.7.3 The “Market” in Voluntary Dispute Resolution

In addition to the quality of the institutions and their procedures, the operation of a voluntary “market” in dispute resolution is in itself a confidence factor. Non-judicial forms of dispute resolution generally rely upon the willingness of the parties, whether by an agreement to arbitrate or mediate, or otherwise. This willingness is an important factor in developing effective dispute resolution. Parties will only pursue such approaches if they meet their needs.

Consequently, arbitration and mediation institutions are constantly improving their services because they are under competitive pressure. There are three main areas of competitive pressure on a dispute resolution institution:

- Other institutions in the same field (i.e., in arbitration, the ICC competes with the LCIA; in mediation, CEDR competes with ADR Group);
- Other forms of non-official dispute resolution (i.e., arbitration, mediation, and conciliation all compete with one another); and
- The official dispute resolution mechanism of the courts.

The success or failure of using non-official methodologies will be proven by the operation of the “market” in dispute resolution and the imposition of such competitive pressures. If non-official processes do not succeed, parties quickly will turn to regulators to solve their problems. Indeed, the trial-and-error evolution of various approaches will constitute an important learning process.

5.7.4 Official Influence over Non-Official Procedures

The official sector can, in some cases, be more confident in non-official approaches to dispute resolution where it has had an opportunity to influence the development of such approaches. There are a variety of ways in which officials can encourage the development of non-official processes. One is to clearly define areas for official decision-making and, conversely, define areas that must be dealt with through non-official means. There are other ways to strengthen regulators’ confidence in non-official processes. These include, for example:

- Involvement in the choice of who resolves the dispute;
- Involvement in the dispute itself; and
- Setting clear policy guidelines.

5.7.4.1 Choosing Who Resolves a Dispute

When regulators are concerned about the quality of arbitrators or mediators, or whether those individuals will defer to established public policy, regulators can assume a role in their selection. Regulators might establish registers of arbitrators and mediators, and they might ensure that such registered individuals be suitably trained and experienced.

Dispute resolution professionals could be required to have particular qualifications, as lawyers, economists, or regulatory experts. This may be necessary for the credibility of the institution or process. Dispute resolution practitioners could also be required to have sufficient awareness of the key issues of regulatory policy. Alternatively, the regulator could take direct control of the appointment of arbitrators in specific disputes, as in the case of the Nigerian NCC's consumer disputes (see Box 3-7).

Influencing the choice of dispute resolution professionals should be approached cautiously. In many respects, regulating the choice of arbitrators and mediators may be inconsistent with the voluntary nature of non-official dispute resolution methods. Indeed, excessive regulation might go against the very grain of flexible informal dispute resolution mechanisms and could stunt their growth. There is, then, a necessary balancing act in determining the appropriate level of influence over the choice of who will help resolve a dispute.

5.7.4.2 The Official Sector as a Third Party

Regulators could require telecommunications operators that enter into arbitration or mediation to notify the regulator that the dispute process is occurring and which issues are in dispute. Such notification should include sufficient information to permit the regulator to determine whether to insist on being heard.

Regulators could require that they be included as observers or parties in proceedings addressing sensitive policy issues. Regulators also may require that parties or the decision-makers consult them and seek their comments. For example, they might have the right to provide their views, which would be taken into consideration.

5.7.4.3 Establishing Clear Policy Guidelines

Even where there are important matters of public policy at stake, it is not always necessary for regulators to be directly involved in dispute proceedings to ensure that substantive policy is implemented. Regulators can set clear and detailed policies for the sector before disputes occur. They can develop clear and detailed guidelines, rules, and methods for implementing such policies. The more clearly they establish such measures, the more likely parties and arbitrators will follow such measures. Setting guidelines in advance can establish expectations in a way that ensures policy implementation.

5.8 Timelines and Procedures

An increasingly widespread concern of regulators in designing dispute resolution processes, it appears, is setting timetables for disputes. Comparing these timetables can provide insights into the various approaches regulators are taking, creating opportunities to benchmark procedures against each other (see Annexes A and B for some representative timetables for dispute resolution of various regulators and other bodies).

Disputes can take a considerable amount of time to resolve, (see Box 5-8).

Box 5-8 – Dispute Resolution Timing in Spain⁸⁹

The Spanish regulator, the Telecommunications Market Commission or CMT in Spanish, has power to resolve the following types of disputes:

- Access and interconnection disputes;
- Access to and use of spectrum;
- Disputes over shared infrastructure; and
- Internal appeals (*Recurso de Reposición*).

CMT is supposed to issue its decisions within six months, a period that will be reduced to four months pursuant to the new EU Framework Directive and recent telecommunications legislation. The CMT's decisions may be appealed within the CMT's internal appeal process, which allows parties a month after a decision to bring the appeal, and a month for the CMT to reach its decision and notify the parties.

The CMT's decisions also may be contested before the national courts under the procedures for judicial review of administrative actions. This can take roughly two years. Within 10 days of the decision of the national court, some cases (including cases involving claims exceeding a relatively low amount) may be appealed to the Supreme Court. Resolution of the case before the Supreme Court may take up to four years.

In total, six or seven years may elapse between commencing the dispute and reaching final resolution.

The fact that regulators are focusing on timetables for disputes is significant in itself, particularly where there are serious attempts – as in the EU – to ensure that a dispute is totally resolved within a certain time limit (as opposed to time requirements for various stages). This attempt to focus on an end-point suggests that regulators increasingly are concerned about the detrimental impact on the market of delays through over-use of process. It may also suggest that regulators are increasingly taking a transactional, ends-oriented approach, in which moving forward may be deemed more valuable than achieving the perfect due process. Finally, regulators may recognize concerns about the potential abuse of regulatory process by parties with incentives to resist the airing of issues or adjustment of the *status quo*.

Prescribed timelines are particularly valuable where disputes are approached through consensual methods such as mediation, since such timelines guarantee that recalcitrance and lack of good faith cannot be used endlessly to perpetuate the dispute. With more regulatory policing of processes and timelines, there may be greater scope for use of informal dispute resolution approaches.

In designing timetables it is important to take three broad concerns into account:

- The process must be kept moving toward a solution in a manner that will not cause disruption or stagnation in the market;
- The process should ensure that sufficient time is available for relevant issues to be raised as early as possible, and then properly reasoned through; and
- The process should ensure that errors in fact, law, or policy can be minimized in the first instance or remedied efficiently in the second.

While total time limits may appear to be a relatively blunt approach, regulators may contribute procedures to the sector, offering them to parties as standard or default approaches until parties adopt their own alternative procedures. Such procedures might cover the appointment of arbitrators or mediators; the holding of meetings and hearings; the setting of basic criteria for decisions; determinations of whether or not proceedings should be recorded; the benchmarking of information;

⁸⁹ Presentation of Clifford Chance at British Institute for Comparative and International Law, 30 October 2003.

requirements relating to good faith participation in the process; and, ultimately, enforcement arrangements.

The government's establishment of standard or default procedures would provide parties to a dispute with a focal point for beginning their non-official dispute processes, reducing the burden of establishing their own procedures themselves. Where parties are in a dispute, there is already a loss of trust. Using up the "social capital" of existing trust on creating procedures may not be the best expenditure of such capital, which may be better focused on actual negotiations within a pre-established structure. Nevertheless, there may be considerable advantages in allowing parties the flexibility to depart from regulator-proposed procedures.

Regulators are faced with complex issues in using aggregate time limits for disputes, particularly regarding when the clock starts and stops, as well as any interruptions that temporarily "stop the clock". For example, the new EU requirement to resolve disputes within four months could be interpreted and implemented differently in different EU member states. It is not clear whether this time period should be interrupted, for example, when the regulator requests further information from the parties.

In the United Kingdom, Ofcom must treat the four-month period as the total time required for resolving disputes, except in exceptional circumstances. When Ofcom requests information from the parties, it must take into account the four-month outer limit in setting a deadline for compliance.⁹⁰ However, regulators in other EU countries have indicated that they believe the four-month period is interrupted whenever the regulator asks for information that will take parties time to provide.⁹¹

There are arguments both for and against the different approaches to timetables and deadlines. The most important concern is that regulators provide as much transparent guidance to parties as possible on how they will impose timelines. If regulators cannot always provide detailed rules on how they will apply timetables and deadlines in advance of disputes, they could at least publish their approaches afterwards and maintain consistent approaches to implementing the procedures.⁹²

⁹⁰ See Box 2-4.

⁹¹ Meeting with regulators at British Institute for Comparative and International Law, October 30, 2003.

⁹² See Chapter 6 with respect to the development of procedural histories.

6 IMPROVING TELECOMMUNICATIONS DISPUTE RESOLUTION

This chapter focuses on ways to improve dispute resolution in the telecommunications sector. Section 6.1 discusses how the available dispute resolution techniques outlined in Chapter 2 could be improved and better tailored to the sector. Section 6.2 explores opportunities for telecommunications-related technology to improve sector dispute resolution. Section 6.3 then offers some ideas about how to devise new procedures to build consensus and agreement on new commercial or business arrangements. This section considers the underlying theme of how to reduce the destructiveness of a highly competitive and contentious culture and to enhance constructive collaborative solutions to problems.

6.1 Improving Existing Dispute Resolution Mechanisms

6.1.1 Improving Access to International Precedents

Telecommunications regulation and telecommunications dispute resolution are relatively new disciplines in most of the world. As a result, many regulators have not developed a body of domestic precedents to assist in resolving disputes or making future decisions. The result, in some cases, is that regulators and dispute resolution practitioners constantly have to “re-invent the wheel” when they could be relying more on the experience and approaches developed in other jurisdictions.

Countries with a longer tradition of regulatory decision-making (as well as many with newer ones) normally publish decisions in paper format, and increasingly in electronic versions on their websites. These decisions provide important precedents for the domestic telecommunications sector.

In the age of the Internet, the problem of finding good precedents is as much one of information overload as of scarcity. Any good search engine can find thousands of documents on interconnection and tariff disputes within 10 seconds. The problem is finding relevant precedents to assist in resolving specific disputes. The reality is that many precedents are less than optimal, and are simply inappropriate to the circumstances of other countries.

An example in the realm of interconnection disputes can be found in the revenue-sharing approaches for resolving interconnection rate disputes with state-owned incumbent telephone companies. Some incumbents have agreed to permit new entrants to interconnect, but they have required the new entrants to pay what amounts to a “tax” to the incumbents, or to pay them “compensation for loss of market share”. This method of resolving interconnection disputes has not resulted in efficient interconnection arrangements. In fact, it provides a poor precedent for other countries.

How can one find good precedents for regulatory adjudication and other dispute resolution cases? Several international organizations have taken initiatives to provide this information. The ITU has developed the Global Regulators Exchange (G-REX) as an online medium for the exchange of information and opinions among regulators on issues they face. Regulators can use G-REX to establish precedents and gain from the experience of other regulators.⁹³

The *infoDev* program of the World Bank commissioned the preparation of a *Telecommunications Regulation Handbook*,⁹⁴ with the aim of distributing information on approaches and “best practices” used to resolve major regulatory issues in various countries. It has been distributed as a book in six languages by the ITU and *infoDev*, and is available on both the ITU’s and World Bank’s websites.⁹⁵ Websites of ITU, the World Bank, the European Commission, and leading regulators also provide a

⁹³ More details on G-REX are provided later in this chapter.

⁹⁴ InfoDev, *Telecommunications Regulation Handbook*, Toronto, McCarthy Tétrault, Hank Intven, editor (2000).

⁹⁵ <http://www.infodev.org/projects/314regulationhandbook> and see also <http://www.itu.int/ITU-D/treg/index.html>

source of good precedents and opinions on how to deal with major telecommunications issues, as have several sites run by telecommunications institutes and consulting organizations.⁹⁶

However, more effort and resources clearly could result in improved access to precedents by regulators and other dispute resolution practitioners. These efforts could be taken by national or international organizations. Each regulator, professional, or dispute resolution organization could play a role by simply documenting and publishing information on their proceedings. As in legal jurisprudence, good precedents will be recognized by dispute resolution professionals and become international benchmarks.

There are two levels at which developing such bodies of precedent may be helpful:

- Substantive decisions, and
- Dispute resolution procedures.

6.1.1.1 Publishing Substantive Decisions

Greater dissemination of information would provide useful benchmarks arbitrators and mediators, as well as regulatory adjudicators and disputants themselves. For example, the publication of pricing information from various markets (such as mobile termination rates and roaming charges) would make it harder for operators to take untenable positions on their costs in the face of contradictory evidence from other markets. The accumulation and organization of relevant information would frame issues for disputants, provide reality checks, and reduce potential abuses even before disputes commence.

6.1.1.2 Procedural Precedents

Regulators and international bodies could contribute to dispute resolution practice by developing better records of approaches to the dispute process itself. “Networks” of process-oriented precedents for future dispute resolution would be a resource for regulators, arbitrators, mediators, and others involved in dispute resolution. Good procedural precedents would record, for example:

- The procedures followed;
- Modes of case presentation used (oral hearings, written submissions, responses);
- Timelines followed and deadlines set;
- The levels of disclosure required by parties;
- Sanctions imposed on recalcitrant parties; and
- Other procedural issues.

As the body of procedural precedent grows, it is likely to generate expectations and internal standards in the telecommunications sector and the dispute resolution community. This will enable regulators to shift their focus from making substantive decisions in disputes toward oversight of the dispute processes managed by non-official sector participants. Section 6.1.2 below discusses how technological solutions may be used to support such precedent networks and information banks.

Regulators also can encourage the dispute resolution professionals in their jurisdictions to develop their own institutions, internal procedures, codes, and review procedures. Many models already exist worldwide. Access to these procedures and precedents will provide confidence to regulators as well as potential disputants in trusting non-official dispute resolution techniques.

6.1.2 Strengthening Non-Official Dispute Resolution Mechanisms

Regulatory adjudication is currently the standard mode of dispute resolution in liberalized telecommunications markets. In some cases regulatory adjudication works well, but in many others there are concerns about problems such as regulatory delays, excessive workload burdens for

⁹⁶ <http://www.itu.int/ITU-D/treg/>, <http://www.ofcom.gov.uk>, <http://worldbank.org>, <http://www.fcc.gov>, <http://europa.eu.int>, <http://www.crtc.gc.ca>

regulators and industry staff, high costs of regulatory proceedings, and lack of resources or skills to deal effectively with complex and controversial disputes.

As discussed throughout this report, non-official dispute resolution mechanisms, including arbitration, mediation, and conciliation, increasingly are being used to help solve these problems. Used properly, these mechanisms complement regulatory adjudication, while maintaining the regulator's role as prime decision-maker on the major substantive and procedural issues of regulation. Such mechanisms also address the perennial staffing and budget constraints of regulators by freeing up regulatory resources. Regulators can focus on disputes and regulatory initiatives that require their attention for policy reasons, while steering less critical disputes toward alternative mechanisms.

Regulators can take a number of steps to support and encourage the appropriate use of alternative dispute resolution techniques.

6.1.2.1 Endorsing Non-official Techniques

Parties do not always feel able to turn to mediation and arbitration. Some regulatory statutes clearly empower regulators alone to make key decisions affecting the telecommunications sector. However, most regulators encourage consensus and would be delighted to consider regulatory approaches that reflect general agreement of the key players in the sector. Non-official dispute resolution techniques often can be used to create such an agreement.

Regulators can encourage disputants to consider non-official dispute resolution mechanisms by endorsing them officially. They may do so by adopting procedures that explicitly provide for the use of such processes.

In Japan, a special dispute resolution commission with powers to use mediation and arbitration has been established with the Japanese Ministry of Public Management, Home Affairs, Post and Telecommunications (MPHPT) through new legislation. This commission is an integral part of a new policy framework that has been designed to cope with what Japanese policy-makers characterize as a shift from a “telephone-age” to an “IP-age” regulatory framework (see Box 6-1).

Box 6-1 – Japan’s Dispute Settlement Commission

In Japan, the Telecommunication Business Law was revised in 2001 to establish the Telecommunications Business Dispute Settlement Commission. The Commission is a special body for settling disputes over issues, such as interconnection, between telecommunications carriers. The Commission operates within the MPHPT but is independent of the MPHPT department in charge of issuing permits and approvals. It consists of a secretariat and five commissioners appointed by the Minister with the consent of both the Japanese House of Representatives and Councillors.

When one telecommunications carrier requests the conclusion of an interconnection agreement, and the other carrier declines to negotiate, the first carrier can ask the Commission to mediate the matter. Both mediation and arbitration are expected to be useful in settling disputes between telecommunications carriers on a fair, simple, and prompt basis.

The Minister of the MPHPT is required to seek the views of the Commission before making administrative dispositions, such as orders or arbitration rulings concerning interconnection. The Commission deliberates on cases before it, then submits a report to the Minister. The Commission is able to make recommendations on new competition rules to the Minister of MPHPT based on knowledge gained in dealing with actual disputes.⁹⁷

97 Presentation, International Co-operation Division, MPHPT.

Australia and Canada have developed excellent examples of “formal” industry-based consensus-building organizations.⁹⁸ However, it is also useful to develop support for informal dispute resolution mechanisms. For example, the interconnection dispute procedures established by the TRC in Jordan explicitly give parties the option of arbitration. This demonstrates an official endorsement of a key non-official dispute resolution alternative. The TRC effectively has indicated that it does not have a monopoly over legitimate dispute resolution. Such endorsement is particularly important in countries with long traditions of state-run and centrally planned economies.

To support effective arbitration in Jordan’s telecommunications sector, it will be important for the TRC not to unduly interfere with the enforcement of arbitration awards when they are issued. It remains to be seen how the TRC will deal with cases where arbitrators do not follow TRC policy. In this respect, the courts’ interpretation of Jordan’s new arbitration law will be important – particularly the extent to which the law permits the Jordanian courts to refuse to recognize or enforce arbitration awards on the grounds of public policy. Perhaps the courts will take into account the spirit of the TRC’s interconnection dispute procedures and support awards in most cases.

6.1.2.2 Understanding and Strengthening the Local ADR Framework

The Jordanian situation illustrates the importance of reviewing the national arbitration law and assessing the maturation of the local arbitration community.⁹⁹ Doing so will help evaluate whether there are the capabilities and legal framework to enable arbitration to be an effective means of dispute resolution. A strong understanding of arbitration law and practice also will make it possible to consider the relationships involved between regulation, dispute resolution, and arbitration processes.

In some cases – particularly those involving significant direct foreign investment in countries with relatively weak dispute resolution traditions and laws – it may be necessary to provide access to international arbitration. This can be achieved, however, in a manner that supports rather than undermines the development of domestic dispute resolution procedures.

An interesting example can be found in the case of the Indonesian “KSO” projects,¹⁰⁰ which were established to encourage foreign investment in the development of the local telecommunications sector in the mid 1990s. The project agreements to implement the KSOs provided that disputes should, in the first instance, be resolved in accordance with the practices and procedures of the Indonesian arbitration rules. However, any party dissatisfied with that approach was entitled to have the dispute referred to international arbitration under the ICC rules. This approach encouraged greater reliance on domestic arbitration in order to avoid the expense and delay involved in international arbitration.

If local legislative frameworks are inadequate for an effective means of dispute resolution, regulators may be able to improve them. The information and communication technology sector has already contributed to the improvement of overall conditions in many countries’ economies. For example, the sector has driven improvements in intellectual property laws, investment laws, and corporate governance laws. Improvements to the arbitration scheme would be another welcome example.

6.1.2.3 Improving Enforcement

As indicated in Chapter 5, regulators in many countries have enforcement powers through telecommunications sector legislation. These powers may include the authority to levy sanctions, such as fines or license suspensions, where market participants do not comply with their rules, regulations, and orders.

Use of such official enforcement powers can be a necessary step to providing legitimacy for unofficial dispute resolution, particularly where the civil justice system is inadequate. This step should be taken cautiously. If not, the involvement of the regulator in overseeing or approving arbitration awards and

⁹⁸ Canada: See Box 4-2, Australia: See Box 5-3.

⁹⁹ The TRC did just this in Jordan before issuing its new procedure.

¹⁰⁰ “Kerjasami Operasi” joint operations schemes.

unofficial agreements prior to enforcement can undermine the voluntary nature that is so central to non-official means of dispute resolution.

6.1.3 Tapping into Human Resources

Much can be done to improve the capabilities of human resources available to assist in dispute resolution. In many countries, particularly those with relatively new regulatory regimes, new types of disputes are arising for which there is no accumulated dispute resolution experience. In many cases, however, the required human resources – experience and expertise – do exist. As this report demonstrates, extensive lessons can be drawn from existing practices in non-official dispute resolution activities outside the telecommunications sector. Moreover, other regulators who have dealt with similar types of issues can also be an invaluable resource. The issue is often not so much one of creating human resources that do not exist, but rather more of tapping efficiently into those that already exist in most countries.

6.1.3.1 Establishing Panels of Arbitrators and Mediators

The official sector can help build a credible bank of dispute resolution practitioners to whom disputes can responsibly be entrusted. Establishing new panels of arbitrators and mediators who are acknowledged experts in telecommunications sector dispute resolution would provide an identifiable resource. Once appointed, panel members would have professional and economic incentives to improve their capability and credibility.

An example can be found in Hungary, where the telecommunications regulator is establishing a panel of arbitrators to deal with disputes. Such initiatives can extend beyond national boundaries. International and regional organizations can also establish, train, and endorse such panels.

In some cases, such as those involving complex or sector-specific issues, it may be better to rely on panels of experienced international professionals rather than engaging in “on-the-job training” of domestic practitioners whose decisions may undermine development of the domestic sector. A good compromise can be to appoint a dispute resolution board or committee that combines domestic and international members. For example, in the case of the classic three-party arbitration board, domestic representatives could be selected by each of the two disputants, and these representatives could select an international arbitrator with good telecommunications sector experience as the neutral third arbitrator.

6.1.3.2 Collaborating with Existing Arbitration and Mediation Institutions

Existing arbitration and mediation institutions have a direct interest in the use of their services in organizing telecommunications dispute resolution. These institutions already have administrative resources from which regulators could benefit. Moreover, they have an incentive to improve their capabilities, since telecommunications sector disputes will be a new source of business for arbitrators and mediators registered with such institutions.

Regulators and international and regional bodies can work with institutions to develop registers of telecommunications dispute resolution specialists from within those institutions’ registered memberships. Combining the resources of telecommunications sector regulators and regional and international telecommunications organizations with those of existing dispute resolution institutions would create opportunities for arbitrators and mediators to develop expertise through conference meetings, discussion forums, dispute resolution congresses, training sessions and other events.

6.1.3.3 Improving Regulatory Networking

In meetings held during the preparation of this study, some regulators commented that they were more familiar with the issues they face than outside experts would be. This is clearly the case where issues are complex and sector-specific. Where countries are facing similar challenges, discussions among regulators can add useful insights and experience. But regulators currently have limited resources to draw on. Regulators would benefit from more accessible, and perhaps less formal, means of drawing upon each other’s experience. The Mexican regulator, the the Federal Telecommunications

Commission (Comisión Federal de Telecomunicaciones or Cofetel), is networking with other regulatory agencies, with which it can share relevant experience. Such informal networks will make it easier to pick up the telephone and obtain assistance. The Mexican initiative suggests that there may be a role for additional regulatory collaboration that current structures are leaving untapped.

Regional and international bodies could assist in building such networking relationships by receiving the questions of the day, matching regulators facing current problems with colleagues who have already resolved them, and organizing live virtual conferences to discuss the issues. As indicated, ITU's G-REX is an example of an initiative to build such relationships.

6.1.3.4 Creating Regulator Task Forces

It may be possible for regional and international bodies to assist in the creation of task forces of experienced regulators. These teams could be available to consult with regulators or dispute resolution specialists when specific needs arise. They would be able to direct their colleagues to useful resources, such as potential solutions, benchmarking information, and dispute rulings.

As a practical matter, however, most regulators have a heavy domestic workload, with little time or resources available to help other regulators do their jobs. Indeed, during research related to this report, some regulators reported that they experienced recent cuts in budgets for interaction with foreign regulators or regulatory organizations. Where travel budgets are limited, virtual conferences offer a viable alternative (see Section 6.2 below). Moreover, it takes little time for regulators to simply identify good dispute resolution organizations or domestic precedents, and resources should remain available for such assistance.

6.1.3.5 Cross-Fertilization of the Telecommunications and ADR Communities

Significant efforts could be made in “cross-fertilization” of experiences in the fields of telecommunications sector regulation and dispute resolution. Both fields are in the process of rapid transformation. Many of the new needs of the telecommunications sector can be met with the new resources of the dispute resolution industry. This enables natural synergies to take over and assist in allocating supply and demand of dispute resolution expertise to the sector.

Increasing the dialogue between organizations active in these two fields will improve the design of effective dispute resolution techniques and provide needed resources. New possibilities can arise from:

- Alerting experts in dispute resolution to the potential scope for their services in the telecommunications sector;
- Seeking their input in designing procedures;
- Obtaining their advice on specific cases; and
- Having ADR specialists train regulators in dispute resolution.

6.1.3.6 Encouraging Collegial Sharing of Experiences

One of the most beneficial aspects of dispute resolution communities is the sharing of experiences and problems. Telecommunications regulators responsible for regulatory adjudication may find their role somewhat isolating. They are likely to be the sole experts responsible for sector disputes in their jurisdictions. Increased use of regional and international forums to share experiences and approaches would be valuable in strengthening the institution of regulatory adjudication. Section 6.2, below, discusses ways in which the geographical space that separates regulators and the sharing of experiences can be reduced through information technology.

6.1.4 Providing the Right Economic Incentives

It is important to analyze and properly structure the economic incentives of various approaches to dispute resolution. Section 4.2 of Chapter 4 has identified some of the issues to be considered in this regard.

It is important for official sector participants to consider the economic incentives created by each type of dispute resolution approach. One interesting precedent can be found in the approach of Ireland's regulator, the Commission for Communications Regulation (ComReg), to funding the cost of mediation. While ComReg underwrites the parties' costs of resolving their dispute, dispute resolution is nevertheless not a "free good", since it is borne by the telecommunications community at large through regulatory fees. Time will tell whether this approach provides good incentives for efficient dispute resolution. Industry pressures to reduce costs should encourage efficient resolution. On the other hand, some disputants could abuse the system by imposing more than their share of costs on the industry.

Subsidies for unofficial dispute resolution may be more economically efficient for regulators than the cost of resources expended on regulatory adjudication. Economic studies of court systems could be employed to evaluate the likely cost reductions of targeted subsidies. Once a culture of mediation develops in the sector, there may be scope for passing some of the costs back to individual disputants.

6.2 Technological Solutions for a Technological Industry

Information technology and expanding telecommunications infrastructure clearly can assist in dispute management and resolution. This section discusses several ways that new and existing technologies can be used to develop and improve dispute resolution techniques and consensus-building measures.

6.2.1 Virtual Conferencing

The Internet has extraordinary capabilities for organizing and sharing information, as well as for consultation and the conduct of interactive processes. The simplest applications involve sharing documented materials. Telecommunications regulators already use websites extensively to disseminate information and publish consultative materials. International organizations such as the ITU also offer online consultation services, such as G-REX, through which regulators can ask each other questions and share experiences.

Written communications still fall behind live contact, however, when it comes to sharing experience. Virtual conferencing – creating virtual "consultative networks" – can enhance the capabilities of international development organizations like the ITU and the World Bank to encourage institutional and sector reform. However, the use of such networks at these institutions is still very underdeveloped.

One example of such capabilities is the use by the ITU's Telecommunication Development Bureau (BDT) of an Internet-based network for online conferences and exchanges, the first such virtual conference held among Wi-Fi experts and potential users. Subsequently, G-REX virtual conferences have been held on interconnection dispute resolution and international efforts to counter spam. These virtual conferences use an online, live conferencing service that allows a geographically dispersed group to participate in an audio conference call (which could be VoIP but often involves a conventional conference call) and simultaneously receive a video stream of the speaker's image and Power Point presentation. Online, live conferencing software and facilities are still quite rudimentary but may ultimately permit concurrent video streaming of all participants in a "roundtable setting".

These kinds of capabilities can enhance industry consensus-building and private dispute resolution in the telecommunications sector by using "virtual forums" to present and discuss the availability of international benchmarking data.

A seminar in 2002, organized by the Oxford Internet Institute, focused on using the Internet to enhance public participation in the functioning of public institutions and representative bodies. Such consultative networks can be used for consensus building and dispute management and resolution, as well as a vehicle for encouraging "bottom up" efforts to reform public institutions.

Internet-based "virtual forums" can ensure the widest possible accessibility of information about agendas, timetables, participants, and background information relating to the activities of the forum. A virtual forum also can involve observers and participants from geographically dispersed locations.

6.2.2 Collaboration with Institutions and ‘E-Businesses’

There is a strong case for having educational institutions, including major business schools and public policy institutes, take a leading role in developing new “consultative networks” and capabilities, in collaboration with international development institutions. Many educational institutions already have continuing education programs for business executives and public officials. Universities often have access to Internet bandwidth that other participants may not. So regulators can use this broadband access to increase live communication among regulators around the world.

“Consultative networks” can be increasingly critical to overall corporate governance and could play an increasingly important role in the management of public institutions, as well. It might be, for example, very promising to develop projects focusing on “consultative networking” as a basis for exploring a range of collaborative arrangements with “peer” educational institutions around the world.

There is considerable talk these days by senior executives of Internet-oriented firms about the next generation of the Internet and the creation of a new “computing grid”. The original Internet infrastructure was built through a collaborative undertaking among universities and research institutes. It may be possible, then, to develop a new Internet grid to address not only priorities relating to pure information processing and exchange but also to enhance the opportunities for real interactive exchanges of information. Such a grid would focus new attention on the importance of interactive activities to develop consensus on telecommunications issues. Such a project could be of interest to ICT equipment and service companies, as well as software firms that are developing “Net meeting” capabilities.

6.3 From ‘Dispute Resolution’ to ‘Problem Solving’

According to the conventional wisdom, a key to success in opening telecommunications markets is to establish independent regulatory bodies. This approach often follows the models of the FCC in the United States, Ofcom in the United Kingdom, the CRTC in Canada, and ART in France. Efforts by international agencies like the ITU, the World Bank, and more recently the WTO, have encouraged development of new independent administrative mechanisms to regulate telecommunications markets.

Regulatory bodies established for the telecommunications sector are slowly evolving to try to catch up with market developments. Institutional mandates are widening and refocusing to deal with the convergence of the telecommunications, media, and information service sectors. They are also addressing significant changes in competitive conditions in the industry. These trends may lead toward more emphasis on competition law and policy and a general focus on dispute resolution.

Increased attention also is focused on how regulation can create favourable conditions for investment, which is essential for the development of national telecommunications and information industries. Policy-makers’ attention is directed with renewed vigour at how regulatory mechanisms and policy might contribute toward economic development of a sector that suffered financial setbacks in recent years.

Traditional independent regulator models have drawbacks. These are visible in developed economic and institutional settings, such as the United States, where there is extensive use of litigation and formal administrative proceedings, often resulting in significant delays and, at worst, “regulatory gridlock”. These problems are becoming evident in some parts of the European market where regulatory initiatives are tied up increasingly in extended administrative proceedings and court reviews.

Furthermore, traditional approaches to dispute resolution often fail to take into account the broader structural problems underlying such disputes. The definition of the subject matter of a dispute is typically initiated by the party bringing it to the attention of the regulator. Typically, the other party disagrees and poses its alternative perspective by defense or counterclaim. As a result, every issue is structured in polar terms along the axis set by the two parties in question. Adjudicators are asked to choose which perspective best fits applicable regulation or, if neither does, to impose a third view.

Disputes in the telecommunications sector are often more complex than this, however, and they commonly involve the interests of a range of parties, including some not involved in the specific

dispute. Approaching dispute resolution necessitates going further than treating such disputes individually.

There is a need to increase focus on consensus-building measures that will lead to solutions that take into account other issues, other parties, and broader structural changes that may help re-frame the sector's problems. This would involve exploring not only ways of resolving individual disputes, but seeking consensus in solving underlying dispute-generating problems.

This section identifies various steps and situations where new approaches to consensus-building initiatives would be useful. The discussion is relevant to policy-makers and regulators in both developed and developing countries, and in countries of markedly different sizes. In fact, it may be easier to introduce new and innovative administrative mechanisms where regulatory institutions are only at an early stage of development. The regulatory frameworks and the rules of engagement among industry participants and government authorities in such countries are less established, and vested interests are less powerful. Since such countries often have weak official mechanisms, they may benefit particularly from consensus building and consultative forums.

6.3.1 New Approaches to Consensus Building

To increase reliance on consensus-building mechanisms, policy-makers and other official sector participants must experiment with approaches to regulatory process that including greater involvement, initiative, and even leadership by market participants.

6.3.1.1 Sector Reviews

Regulators and other “official” participants in the telecommunications sector frequently review their approaches to sector performance and governance. Such broad sectoral reviews can be designed to help resolve long-term disputes or the issues underlying them. Sectoral reviews can be structured to decrease the adversarial polarization inherent in traditional regulatory adjudication and to increase consensus-building.

In some cases, sectoral reviews have focused on the potential to improve sector performance through use of non-traditional regulatory approaches. A good example can be found in the review of the Danish telecommunications sector by the Danish regulator, NITA (see Box 6-2).

Box 6-2 – Reviewing the State of the Sector in Denmark

The National IT and Telecom Agency (NITA), the Danish regulatory agency, has been at the forefront of efforts in Europe to develop consensus-building and private dispute resolution among telecommunications operators. NITA has undertaken an overview of key issues facing the Danish telecommunications sector, exploring obstacles to the smooth evolution of competition in the sector. It conducted hearings involving all key participants in the sector and published a comprehensive report identifying a range of issues that participants in the sector believe need to be addressed, based on a view of the Danish telecommunications sector as a whole.

As a result, NITA has decided to establish new consultative procedures among key industry players. In order to resolve nagging, ongoing disputes and avoid future areas of potential conflicts, the NITA has decided to “take stock” and look at issues on an integrated and comprehensive basis – not merely in isolation. This is an effort to change the overall climate among competitors into one that is more cooperative in spirit. What is interesting and important is the overall effort to “clear the decks” and focus not merely on handling individual disputes but on changing the overall environment within the sector.

In many business and government circles, outside facilitators are used to conduct reviews of current approaches. This is occurring in corporate strategy, local government, and environmental planning, to cite only a few examples. Facilitators employ consensus-building techniques to bring together parties to share perspectives and explore and negotiate how differing interests may be combined to produce mutually beneficial results. Such techniques are available to regulators to tease out and identify

structural problems in the sector and identify ways of solving them, including by facilitated negotiations among market participants.

Facilitated reviews would not necessarily involve a formal “governmental proceeding”, although their results could be endorsed officially if necessary. Results of such consensus building measures might include:

- **Enabling paradigm shifts:** At the “macro” level, well-designed processes could enable participants to take a step back and review the big picture issues confronting the sector. This could produce improved conceptual ways of understanding and defining sector problems, as well as proposals for addressing them.
- **Integrated solutions in complex cases:** Existing complex disputes can be strong candidates for consensus-building measures during broad sector reviews. Governmental authorities could draw together interested parties, such as relevant ministries, operators, foreign investors, licensing authorities and consumers to explore various perspectives and potential value generating solutions.
- **Revising existing regulation:** Consensus-building measures could be used to rethink and revise existing regulations and rules, or to devise new ones.
- **Identifying converging interests and commercial opportunities:** Agreements governing commercial relationships among key industry players might emerge from consensus-building measures.
- **Industry codes and protocols:** Further development of industry codes and protocols could result from consensus-building measures.
- **Dispute prevention:** As mentioned elsewhere in this report, the prevention of disputes is as important as resolving disputes after they have arisen. Processes that encourage players to exchange perspectives about their respective interests are generally more likely to reduce the overall contentiousness of an otherwise competitive sector.

The results of consensus-building processes, if they are straightforward contractual agreements, would be enforceable privately and may not need further regulatory involvement. Where important issues of policy are concerned, however, they could be subject to review, adoption, and ultimately enforcement by governmental authorities. The Malaysian Access Forum is an example of a consensus-led body whose initiatives on infrastructure are within the bounds set in the regulator’s policy guidelines and will require approval by the regulator (see Box 6-3).

Box 6-3 – “Consensus” in the Malaysian Access Forum

The Malaysian Multimedia and Communications Act recognises the potential for using industry bodies to play a central role in the industry’s regulatory activities. For example, in the realm of interconnection issues, market participants have established the Malaysian Access Forum (MAF). The MAF, which is intended to develop the codes and guidelines for access issues, is independent of the Malaysian Communications and Multimedia Commission (MCMC) and is structured through a membership corporation separate from the Commission.

The MAF’s Board of Directors represents four categories of service providers under the Act. Although the forum is guided by a chief executive officer and secretariat, based on a work plan approved by the membership, its activities are based around working committees operating on the basis of a principle of consensus, as defined in the articles of association of the forum.

According to the articles, “Consensus is established when those participating in the consideration of the subject at hand have reached substantial agreement, and it requires that all views and objections be considered, and that a concerted effort be made toward their resolution”. The articles go on to provide that “[u]nder some circumstances, consensus is achieved when the minority no longer wishes to articulate its objection and no major interest maintains a negative standard”.

Box 6-3 – “Consensus” in the Malaysian Access Forum (*cont'd*)

The MCMC expects that the MAF can operate relatively autonomously, although the MCMC's approval is required for the regulatory instruments adopted by the forum. As a general matter, regulators will need to decide on the relationship between the roles and responsibilities of the regulatory body and the industry consultative body. Importantly, the Malaysian regulator does not view the informal forum as a part of its own consultative mechanisms but as an independent industry-driven forum. This important conceptual distinction should have an effect on the operation of the MAF.

The forum will have to address how to encourage involvement in the industry forum by consumer groups or even other governmental entities, for example, those with responsibilities for competition policy. Competition authorities do not currently have a significant involvement in the Malaysian telecommunications environment. In other countries, where there is likely to be a more significant role for such officials, it will be important to decide how the activities of an industry-oriented forum can accommodate potential concerns about collaborative discussions among key industry participants.

6.3.1.2 Industry Committees and Steering Groups

As previously discussed,¹⁰¹ countries such as Canada and Australia have developed successful forms of industry committees and steering groups to resolve key issues in telecommunications regulation. In seeking structures for consensus-building measures in the telecommunications sector, there are also resources to draw from in other sectors. One example of the problem-solving approach to negotiation is the concept of “partnering”, which has developed in the construction industry.

Partnering is a voluntary, non-binding collaborative process that focuses on solving common problems between different groups working on the same project or sharing a common purpose. This can be done by developing teams with common goals, establishing and implementing project action plans, and establishing conflict resolution machinery. It is primarily a means of dispute prevention rather than dispute resolution. The results, where partnering has been adopted within the construction industry, have been quite dramatic, with a significant improvement in the implementation of major infrastructure projects and a marked reduction in the number of disputes.

6.3.1.3 “Refereeing” Consensus-Building Processes

The role of public authorities in new institutional arrangements can take many different forms. In some situations, they might be direct participants in consultative discussions or dispute resolution processes. At other times, the role may be as an occasional onlooker or monitor of the process. Section 5.5 of Chapter 5 explored oversight methods by which regulators and courts could ensure that a mediation occurs and could review indicators demonstrating whether parties have acted in good faith. These types of indicators could be used in connection with self-regulatory mechanisms organized to develop consensus. This could result in regulators not even having to be directly involved in many areas of regulation. Intervention may be needed only where there are clear signs of bad faith or lack of attention to problems that are being raised by less powerful parties.

Regulators could then shift their focus from generating authoritative rules for the sector toward regulating the process by which sector participants themselves identify problems and ways of addressing them. Regulatory intervention would be needed more to police the process of discussions and decision making than the substantive decisions themselves.

Intervention might take the form of penalties or incentives for actions or inaction that indicated a lack of good faith. Participants falling short of the standards of the process could be made to forfeit positions. For example, a regulator might establish a consensus-building mechanism for interconnection issues, but an operator might refuse to participate and engage in exploring and

¹⁰¹ Canada: See Box 4-2, Australia: See Box 5-3.

evaluating all of the options. The regulator could penalize this refusal by removing the opportunity for the operator to argue its case and by imposing pricing models proposed by other operators.

The difference in such approaches from ordinary dispute resolution is in the greater focus on process and participants' behavior. The regulator would not determine the choice of an interconnection pricing model, for example. Rather, the penalty would relate to participants' failure to engage in good faith negotiations and the foreclosure of their involvement in the process. This would ensure that participants have incentives to engage in the process in good faith, exploring various ideas from each other's perspectives. The regulator would be acting more as a referee, issuing "yellow cards" and "red cards", and removing market participants from influencing the process that will define the regulatory regime going forward.

6.3.1.4 Consensus-Building Venues

The basic location or "venue" for private dispute resolution does not necessarily have to be an official public sector institution. Dispute-resolution discussions can occur under the auspices of arbitration institutions and international organizations (such as the WIPO or WTO) or the private sector (such as CEDR or the ICC). A number of experienced organizations offer dispute resolution services, particularly in jurisdictions with a long tradition and history of private sector dispute resolution.

6.3.1.5 Developing Procedural Histories

It is valuable for regulators that use consensus-building techniques to document and publish the approaches they have taken and the reasons for their apparent successes and failures. This will enable the development of procedural lore and allow regulators to identify techniques that will emerge as tried and tested approaches.

Sharing such procedural histories, or case studies, with other regulators internationally would greatly enhance expertise in conducting such processes. Regulators from other countries could become involved directly as observers or facilitators themselves, bringing their experience to bear on problems they have already dealt with at home.

6.3.2 Opportunities for Consensus-Building Mechanisms

As discussed throughout this report, a number of factors support the use of, or at least experimentation with, alternative consensus-building and dispute resolution approaches over traditional regulatory adjudication. Some of these factors are more relevant in well-developed industrial markets. Some key reasons for experimenting with alternative approaches are summarized below.

6.3.2.1 Traversing Legal, Institutional, and Jurisdictional Complexities

The telecommunications sector operates in the context of an increasingly complex institutional environment. There are often overlapping laws, jurisdictions, and authorities, including:

- Domestic, regional, and international legal systems;
- Telecommunications, competition, and foreign investment laws; and
- Telecommunications sector regulators, competition authorities, and consumer protection agencies.¹⁰²

¹⁰² In some jurisdictions, the roles and responsibilities of regulatory bodies and competition authorities are tightly compartmentalized. Industry players may face a need to choose a regulatory as opposed to a competition law forum, or their choice of forum may be governed by relevant principles or procedures determining which forum must be accessed initially. These principles may determine whether relief must be sought first from a sector specific regulator or whether the jurisdiction of competition authorities is pre-empted altogether. Some regulatory bodies such as Ofcom have only recently been granted authority to apply or consider the principles or criteria of competition law. Other agencies, such as the FCC, have long had a mandate to take into account relevant antitrust law principles and precedent even though such jurisdiction has seldom foreclosed an independent role and responsibilities for competition authorities. Nevertheless, jurisdictional disputes or concerns over overlapping jurisdiction have remained commonplace in the United States in cases involving mergers or acquisitions where the FCC and either the Federal Trade Commission or the Department of Justice have parallel jurisdictional claims.

Informal consensus-building procedures permit participants and decision-makers to take into account a diverse range of applicable legal standards and jurisdictions. Regulators and other officials with differing mandates can often adopt a broad industry and stakeholder consensus.

6.3.2.2 Dealing with Converging Industry Sectors

The rapid development of Internet-related services has resulted in the diversification of telecommunications sector firms into broadcasting, information services, entertainment, and electronic commerce activities. Issues in dispute may be beyond the ordinary jurisdictional reach of telecommunications regulatory frameworks and may involve areas that other laws or regulations do not address. Informal consensus-building mechanisms can enable market participants to cover areas such as intellectual property, broadcast standards, obscenity laws, security laws, data protection policies, and commercial practices for new electronic services in a combined forum. This can strengthen public confidence in the accountability of business or commercial practices, relieving government agencies of burdens that leave them limited time and resources to set the codes and protocols for important new Internet-based services.

6.3.2.3 Managing Technical Complexity

The regulatory issues raised by interconnected telecommunications networks can become very complex. Increasingly, seamless interconnection depends on the inter-operability of software-driven systems and embedded “intelligence” in networks, rather than merely physical interconnection of cables.¹⁰³ Associated regulatory issues can defy the capabilities of traditional regulatory institutions and may be better handled in industry consensus-building processes.

¹⁰³ For example, the unbundling of local loops requires very sophisticated intervention by regulators with respect to the operational architectures of complex telecom networks. This is also the case with the intermeshing of complex logistical systems for billing and ordering facilities that are maintained by large telecom operators today.

7 CONCLUSION

The development of effective and efficient dispute resolution is an important policy goal in the telecommunications sector in most countries. But there are numerous challenges in reaching this goal.

7.1 Increasing Complexity

In recent years, the challenges of sectoral dispute resolution have become increasingly complex. The causes include:

- Liberalization and rapid transformation of an increasingly wide range of telecommunications markets;
- Emergence of a multiplicity of new players in existing and new telecommunications markets, as well as the financial failure of many new players;
- Rapid technological change, particularly in wireless and Internet-related markets, including VoIP-related services;
- Increasing technical complexity of telecommunications services, particularly spectrum and interconnection-based services;
- A sector-wide financial crisis that has undermined operators' abilities to roll out new services, sometimes resulting in increasingly aggressive commercial behavior;
- Asymmetry of market power, sometimes complicated by government ownership in dominant service providers and potentially conflicted regulatory authorities;
- "Gaming" (i.e. strategic abuse) of regulatory processes to gain market advantage, by both new entrants and incumbents; and
- Inadequate or insufficiently detailed regulations or license conditions on major issues such as interconnection charges, the scope of licensed services, and spectrum use.

7.2 Rapid Change from New Technologies

In addition to complexity, the sector is experiencing rapid change. New technologies and services are changing business models and value chains radically, affecting financing and market structures. The impact of IP and computer-related technologies, as well as the increasing dissemination of broadband services, are challenging competitive relationships and the financial dynamics of today's telecommunications sector. The Japanese market illustrates how new ISP-based competitors leasing broadband capacity from incumbent operators can make inroads in the traditional telephone service markets of incumbents. It will become increasingly important for regulators around the world to understand the new dynamics of what Japanese policy-makers refer to as "IP age" telecommunications regulatory challenges. As the impact of IP technology on industry structures increases, approaches to regulation also will have to become more flexible and better modelled on industry and consensus-driven approaches to regulation.

7.3 The Increasing Importance of Dispute Resolution

In addition to increased complexity and the rapidity of market change, there is more at stake in telecommunications sector dispute resolution than ever before. Policy-makers and regulators are increasingly realizing that dispute resolution procedures are not merely an arcane concern of legal specialists but have a central strategic significance for sector development. It is widely recognized that failure to resolve disputes quickly and optimally can:

- Block or reduce the flow of capital from the financial community into the telecommunications sector;
- Delay the introduction of new services and infrastructure;
- Result in a lack of competition, higher pricing, and lower quality of service; and

- Retard sectoral liberalization, as well as the general economic and technical development of the sector.

The importance of these issues is as relevant for developing markets as for developed ones. Indeed, making infrastructure and services available to massive unserved segments of the world's population depends on attracting and deploying capital without the hindrances of prolonged, unpredictable sector disputes.

7.4 Areas for Improvement

With more at stake in an increasingly complex sector, there is a greater focus today on concerns about the transparency, predictability, and speed of decision-making. The intensified speed of technological and market change is requiring faster-paced decision-making in disputes. Some consequences of this trend are:

- Existing decision-making procedures, and the timing and scope of review procedures, have to be reconsidered so that an emphasis on due process does not result in losing sight of the imperative of quick and effective decision-making that allows the sector to progress.
- Regulators must operate on the basis of more overt timetables for resolving disputes, such as those in the EU framework for dispute resolution.
- Regulators have to draw increasingly on relevant experience of other regulators through better access to precedent, procedural timetables, and other operational and financial benchmarks.

7.5 Improvements Under Way and Available Resources

Many regulators are rising to the challenge of expediting and improving the quality of dispute resolution. Good models and precedents for regulatory dispute resolution are illustrated throughout this report. While regulatory processes in developed markets are often held out as models for developing countries, it is evident from this study that they have considerable needs for improvements in their approaches to dispute resolution. Excessive delays, through extensive use of review procedures and interim measures in some countries, for example, have delayed significantly the implementation of regulatory policy in local loop unbundling and leased lines.

In some countries, one may want to consider recourse to the courts, which in some cases may be another avenue for dispute resolution. In a few jurisdictions, the courts can encourage ADR or develop their own process to "fast track" disputes (such as court supervised mediation) or resolve issues without resorting to traditional means.

Substantial efforts are under way in most EU countries to remedy delays in dispute resolution. This report also has illustrated how several developing markets are taking innovative approaches and drawing upon non-official or traditional resources, such as in Botswana, Jordan, Malaysia, and Nigeria.

Many regulators simply do not have enough resources to address all disputes efficiently and optimally. There are many reasons for this. Some include:

- An excessive workload volume;
- Insufficient budgets, staff and other human and technical resources;
- Inadequate economic, legal, or technical expertise;
- Dysfunctional or abusive regulatory actions taken by some stakeholders;
- Poorly functioning formal regulatory dispute resolution processes; and
- Lack of experience in telecommunications dispute resolution.

There are both long- and short-term solutions to many of these problems. In the longer run, improved regulatory frameworks and better formal dispute-resolution procedures can solve some of the problems.

7.6 Tapping into Non-official Sector Resources

Some problems, however, will remain difficult for regulators to resolve in either the long run or the short run, due to budget constraints and the other problems listed above. Given these problems, regulators are increasingly looking beyond the “official sector” for solutions to telecommunications sector disputes. The major “non-official” or alternative approaches being taken by regulators have been discussed in this report. They include:

- ADR techniques such as arbitration, mediation, conciliation, and negotiation;
- Industry steering groups and other self-regulatory mechanisms (i.e., for access and interconnection issues) and ombudsmen schemes (i.e., for consumer disputes); and
- Use of outside consultants to supplement official staff where regulators lack expertise in reaching a decision.

Much of this report has focused on ways to move forward in utilizing such non-official resources and alternative approaches to dispute resolution. As the report has indicated, regulators should have strong incentives to use alternative approaches, given the cost to the sector of delays in resolving disputes swiftly and effectively.

Alternative approaches represent a considerable available resource for regulators. The non-official sector and alternative approaches to dispute resolution are rich in techniques, professional experience, and human capital that can help meet some of the demands being imposed on the official sector. Alternative dispute resolution, if well designed, can be less adversarial than traditional regulatory adjudication. Most good unofficial dispute resolution mechanisms focus on the long-term interests of stakeholders in the sector rather than their positions in a current dispute.

Policy-makers and regulatory officials in many countries have expressed concerns about the utility of ADR in the regulatory context. They are concerned, appropriately, about permitting the non-official sector to take a more prominent role in dispute resolution. In many cases, these concerns reflect problems in enforcing regulatory policy through voluntary rather than coercive mechanisms. In some cases, efficient regulatory adjudication will be the only means of ensuring the desired outcomes. In others, officials may be able to draw upon non-official approaches and resources, subject to sufficient oversight for implementation of such approaches.

Providing sufficient oversight will involve determining the appropriate levels of substantive appeal and procedural review over adjudication decisions of arbitrators and other non-official dispute resolution practitioners. Regulators must develop mechanisms to ensure that official policy will be implemented in non-official procedures.

To build useful and credible alternative dispute resolution approaches, regulators will rely upon, and can help develop, the confidence factors that demonstrate the non-official sector’s capacity to address disputes effectively.

Cross-Fertilization and Sharing of Experiences and Information

In addition to developing and supporting alternative dispute resolution mechanisms, the report has discussed a number of benefits of increased cross-fertilization between the non-official dispute resolution field and telecommunications sector regulators. Exchanges of experience and information between the arbitration and mediation fields and telecommunications sector policy-makers and regulators would generate resources to assist in resolving disputes – formally or informally. Such cross-fertilization would introduce new techniques to stimulate efficient dispute resolution. It also would make the experience of non-telecommunications dispute resolution professionals available to telecommunications regulators. Experimenting with new approaches and encouraging a “market” in dispute resolution will likely improve the quality of competing dispute resolution mechanisms.

Sharing experiences among policy-makers and regulatory officials will be important to consolidate the benefits and lessons learned from such innovative approaches. Greater reliance on “networking” and consultative exchanges in real time among regulators can greatly enhance this process. The ITU’s G-REX may be only a first step toward developing online capabilities for regulators to meet and

discuss common problems and challenges, as well as exchange strategically relevant information. The broadband revolution – and the emergence of a new generation of Internet services – offers great potential to facilitate the work of key policy-makers and regulators. Officials should incorporate the technologies they regulate into their dispute resolution practices.

7.7 Consensus-Building Measures

Dispute prevention is as important as dispute resolution. Sectoral consensus-building measures can help to reduce the antagonisms generated in competitive markets and identify converging interests among market participants. Industry steering groups, stakeholder committees, and other non-official forums can identify fault lines in the sector and anticipate disputes. By participating in such forums, regulators or their staffs can obtain useful input to improve overall sector policy and regulation.

The efficacy of dispute resolution depends fundamentally upon the behavior of disputing parties. A key issue for policy-makers and regulators, then, is to understand and work with the incentives of market players. This report has discussed ways of structuring economic and procedural incentives to reduce capricious abuse of dispute processes and to increase the scope for consensus. The telecommunications sector will see significant long-term benefits if parties can move away from their disputed and entrenched positions in official disputes, and move toward alternative mechanisms where they can share in developing mutually acceptable approaches for the sector to move forward. The purpose of this report has been to provide ideas, precedents, analysis, and suggestions for ways to achieve that objective.

ANNEX A INTERNATIONAL DISPUTE RESOLUTION TIMELINES

A.1 Timelines within EU Framework Directive

Policy-makers in the sector are becoming increasingly concerned about the time involved to resolve disputes and the related uncertainty that an extended dispute resolution process creates. For example, Article 20 of the Framework Directive of the EU provides:

In the event of a dispute arising in connection with the obligations arising under this Directive between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned, shall, at the request of either party, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.

A.2 Timetables for Adjudication in EU Member States

The following table provides examples of timeframes for dispute resolution in various EU Member States.

Austria:	Article 41(3) of the Austrian Telecommunications Act requires the Telekom-Control-Kommission to decide within 6 weeks with a possible 4 weeks for delay.
Finland:	Disputes are generally handled in 2-5 months with some issues relating to costing extending for two years.
France:	The ART, the French national regulator, is to act within 3 months with the possibility of an extension for up to 6 months.
Germany:	Section 37(1) of the Telecom Act provides for 6 weeks to resolve a dispute, with an extension of 4 weeks with Section 28(2) establishing this as a maximum period.
Luxembourg:	Disputes are generally resolved within 3 months.
Portugal:	Decree-Law No. 415/98 provides a 6-month period for handling complaints.
Spain:	Article 25 of the Spanish Telecommunications Law provides 6 months for the CMT to resolve interconnection disputes.
Sweden:	The Swedish Telecommunications Act provides 6 months for the national regulatory agency to deliver a decision; however, no timetable is established for mediation.
Switzerland:	Some disputes involving the Swiss regulatory agency have been extended, requiring up to 2 years to resolve though 6 months is viewed as a reasonable period for resolving disputes.
Greece:	A Presidential Decree issued 31 December 2002, provides for arbitration for disputes between operators, operators and the state or users. Legislation in force is applied. The National Telecommunications and Post Commission (EETT) Plenary names arbitrators who establish the schedule to be followed except where the schedule is deemed to be contrary to the national interest. Decisions are to be rendered within 3-6 months of the last discussion of the case.

A.3 Timeline – Adjudication by the ART in France

Another useful way to assess representative timetables for dispute resolution in the EU is to look at typical timetables for the various steps of a dispute. The following is an example of a typical timetable for the ART in France for handling disputes:

Commencement:	After the claimant documents its position, the Chief Legal Officer of the ART convenes the parties to establish a provisional timetable.
One month thereafter:	The defending party documents its position in the proceeding.
Two weeks later:	The complainant submits a memorandum in reply.
Two weeks later:	The defending party provides a response to this memorandum.
One week later:	The complainant has a final opportunity to present its position.
One week later:	The defending party makes its final submission.

A.4 Timeline – Mediation by the Swedish Telecommunications Regulator

An illustrative sequencing of mediation in Sweden may offer additional insights about the timetable for dispute resolution, though Swedish authorities do not generally impose any time limitations on the mediation process:

- Request for mediation from a party;
- Opportunities for both parties to outline their positions in the proceeding;
- Mediation meetings, one at a time or concurrently as appropriate;
- National Regulatory Authority, if requested, can deliver a non-binding statement providing the parties with the NRA's interpretation of the relevant legal issues involved;
- Parties reach agreement or one or both parties decide that a decision by the NRA is preferable.

A.5 Timeline – Adjudication by Swiss Communications Commission

The Swiss authorities have experienced some extended proceedings. The following is illustrative of some of the time intervals involved in the telecommunications sector proceedings in Switzerland:

Negotiations among the parties:	Three months
Request for intervention by the Communications Commission/Possible actions to preserve the status quo/ Exchange of documents	Periods ranging between 3 to 18 months
Consultation with the Competition Commission:	Period of 1 to 2 months during the investigation
Decision by the Communications Commission:	Period ranging from 1 to 2 years
Appeal to the federal high court:	Period ranging from 1 to 2 years
Final decision by the Federal Court:	Period ranging from 18 to 48 months

A.6 Timeline – New Zealand Commerce Commission’s Key Determinations

The New Zealand Commerce Commission followed the timetable below in making determinations relating to Telecom New Zealand’s cost of complying with its telecommunications service obligation (TSO):

23 April 2003:	Release of models to be used by the Commission in estimating net TSO costs. Concurrent release of analysis of Telecom’s TSO cost model.
8 May 2003:	Submissions on materials released on April 23.
15-16 May 2003:	Conference on Commission’s modelling and input.
30 May 2003:	Release of TSO draft determination.
30 June 2003:	Submissions due on TSO draft determination.
8-10 July 2003:	Conference on TSO draft determination.
As soon as practicable thereafter:	Final TSO determination.

The current timetable for the Commerce Commission’s determination relating to a review of unbundling and network element costs:

2 May 2003:	Release of Request for Proposals for cost-benefit analysis (CBA).
14 May 2003:	Date for written submissions on issues under study.
16 May 2003:	Closing date for proposals to conduct CBA.
30 May 2003:	Selection of consultancy to conduct CBA.
11 July 2003:	Submission of final report on CBA.
31 July 2003:	Publication of Commerce Commission’s draft report.
31 August 2003:	Written submissions on Commission’s draft report.
10-12 September 2003:	Public conference on draft report and written submissions.
1 October 2003:	Submission of final report to the Minister.

A.7 Timeline – Jordanian Interconnection Decision

The following timeline shows the process followed by the Telecommunications Regulatory Commission (TRC) to reach an interim determination of interconnection rates. With interconnection rates the subject of a dispute between Jordan Telecom, the incumbent fixed line operator, and Fastlink, the leading mobile operator, the process illustrates the relationship of consultation and dispute resolution – dealing with complex situations involving conflicting interests of parties. Thus, the consultative process has been used as the backdrop to and key component of the on-going dispute.

25 November 2002	Interconnection Guidelines approved by the TRC after a six-month review process.
	TRC establishes policy with key operators to implement the guidelines, including establishing cost-based interconnection rates.
December 2002	Due to requests from Jordan Telecom, Fastlink and MobileCom (Jordan Telecom’s mobile operator), the CEO of TRC requests the ISC to establish interim rates pending the establishment of cost-based interconnection methodology and charges.
18 December 2002	First ISC meeting, and ISC decides to determine cost-based interconnection charging by June 2003.

6 March 2003	With cost-based charging not proceeding on schedule, the ISC agrees that if a cost-based methodology is not ready by June 2003, the TRC may use international benchmarks.
June 2003	TRC announces designation of public telecommunications operators to be subject to the Interconnection Guidelines.
30 June 2003	The operators provide their cost-based models to the TRC but the TRC is not satisfied with the assumptions and allocations in the models.
September 2003	TRC issues its decisions on interconnection rates to apply from 1 July 2003 based on international benchmarks pending the development of cost-based methodologies.
1 January 2004	Rescheduled determination on cost-based rates for mobile termination charges.
	Rescheduled implementation of cost-based rates for mobile termination charges.

ANNEX B AGENCY AND APPELLATE REVIEW OF FEDERAL COMMUNICATION COMMISSIONS (FCC) ORDERS

FCC Internal Processes

B.1 Orders Pursuant to Delegated Authority

1. Final decisions of a commissioner, or panel of commissioners, following review of an initial decision shall be effective **40 days** after public release of the full text of such final decision. All other actions taken by delegated Authority shall be effected upon release or public notice.
2. Within **30 days** after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion. Within **60 days** after notice of any sanction imposed under delegated authority has been served on the person affected, the person, panel, or board that imposed the sanction may modify or set it aside on its own motion.
3. Any party seeking review of a final action taken pursuant to delegated authority may file either 1) a **petition for reconsideration** (with the person, panel or board that rendered the decision) or 2) an **application for review** (but not both) within **30 days** from the date of public notice of such action. If one party files a petition for reconsideration and a second party files an application for review, the Commission will withhold action on the application for review until final action has been taken on the petition for reconsideration.
 - a. The **petition for reconsideration** will be acted on by the designated authority (a bureau or office) or referred to the Commission by such authority. If a petition for reconsideration of a final decision made pursuant to delegated authority (by a commissioner or a panel of commissioners) is filed, the effect of the decision is **stayed until 40 days after** release of the final order disposing of the petition. see below for the pleading deadlines concerning petitions for reconsideration.
 - b. The **application for review** will be acted on by the FCC. The Commission may also, on its own motion, order the record of the proceeding before it for review within **40 days** after public notice is given of any action taken pursuant to delegated authority. In either case the **effect of the decision is stayed** until the FCC's review of the proceeding is completed.
 - i. The **application for review** must be filed within **30 days** of public notice of such action.
 - ii. Any opposition to the application must be filed within **15 days** after the application for review is filed.
 - iii. Replies to oppositions must be filed within **10 days** after the opposition is filed.
 - c. If the FCC denies the application for review, the aggrieved party may still file a petition for reconsideration with the FCC, but it will be entertained only if: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity. The petition must still be filed within **30 days** from the date on which the decision became final, and the deadlines for oppositions, replies, and briefs are the same as those discussed below for petitions for reconsideration of decisions not made pursuant to delegated authority.

B.2 FCC Decisions

1. Decisions made by the FCC as a whole (i.e., not made pursuant to delegated authority), including decisions made on application for review of a decision made by delegated authority, are deemed final, for purposes of seeking reconsideration at the FCC or judicial review, on the date of public notice.
2. A party may file a **petition for reconsideration** with the FCC asking the Commission to reconsider its decision. For actions of the Commission *en banc*, the filing of a petition for reconsideration does not excuse any person from complying with or obeying any FCC decision, order, or requirement, or operating in any manner to stay or postpone the enforcement thereof, absent special order of the Commission. However, upon good cause shown, the FCC will stay the effectiveness of its order or requirement pending a decision on the petition for reconsideration.
 - a. The petition for reconsideration must be filed within **30 days** from the date upon which public notice is given of the order.
 - b. **Oppositions** to a petition for reconsideration must be filed within **10 days** after the petition is filed.
 - c. The petitioner may **reply** to the opposition within **7 days** after the last day for filing oppositions.
3. The Commission may, on its own motion, set aside any action made or taken by it within **30 days** from the date of public notice of such action.

B.3 Appellate Review

A party may appeal any FCC final order (including an order issued on petition for reconsideration) to a United States Court of Appeal authorized to hear such appeals. This timeline discusses rules and procedures pertinent to the District of Columbia Circuit, the court of appeals in which appeals of FCC decisions are most frequently heard. Alternatively, a party may bypass the petition for reconsideration altogether and:

1. File a **notice of appeal** directly with the D.C. Circuit within **30 days** from the date upon which public notice is given of the order.
 - a. Any party filing a petition for review with a federal court of appeals must also file a copy of the petition with the Office of the General Counsel of the FCC within **10 days** after the issuance of the order.
 - b. After filing the notice of appeal, the appellant has **5 days** to notify each interested party.
 - c. Appellant may file a **motion for a stay** to the D.C. Circuit if it 1) can show that moving first before the FCC would be impractical, or 2) states that the FCC already denied the motion in whole or in part. The moving party must give reasonable notice of the motion to all parties.
 - d. **Responses** to any motion must be filed within **8 days** after service of the motion unless the court shortens or extends the time.
 - e. Replies to responses must be filed within **5 days** after service of the response.
 - i. When a response includes a motion for affirmative relief, the reply may be joined in the same pleading with a response to the motion for affirmative relief. That combined pleading must be filed within **8 days** of service of the motion for affirmative relief.
 - f. Any motion which, if granted, would dispose of the appeal or petition for review in its entirety, or transfer the case to another court, must be filed within **45 days** of the docketing of the case in the D.C. Circuit.

2. The appellant must serve and file a **brief** within **40 days** after the record is filed. The appellee must serve and file a brief within **30 days** after the appellant's brief is served.
 - a. The appellant may serve and file a **reply brief** within **14 days** after service of the appellee's brief but a reply brief must be filed at least **3 days** before argument, unless the court, for good cause, allows a later filing.
3. The clerk must advise all parties whether **oral argument** will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side.
 - a. The parties must provide the court with the names of counsel who will argue no less than **5 days** before the date of scheduled argument.

B.4 Timeline – Practical Experience with Appellate Review of FCC Orders

A substantial number of the FCC's orders are subject to judicial review in the Federal Appellate Courts in the United States. The analysis below is based on a review by the Litigation Division of the Office of General Counsel of the FCC and is indicative of timetables for appellate review with respect to a selected number of representative FCC orders.

In the D.C. Circuit, a petition for review in a typical case was filed in June 2000. Petitioner's brief was filed in January 2001; argument was held in April 2001 and a decision was published in July 2001 (13 months from start to finish).

In another typical case, a petition for review was filed in January 1999 but the case was held in abeyance pending FCC action on a petition for reconsideration. Following a decision on reconsideration, the case was reactivated in December 1999, petitioner's brief was filed in October 2000, argument was held in March 2001, and a decision was published in July 2001.

The Second Circuit Court of Appeals, covering Connecticut, New York and Vermont, is a bit slower. A petition for review was filed in November 1999 and the petitioner's brief was filed in late January 2000. Argument was held in January 2001 and a decision was handed down in September 2001 (22 months from start to finish).

The Eighth Circuit Court of Appeals (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), in a highly complex case, proceeded quickly. The petition was filed in September 1996, the opening brief was filed in November 1996, argument was held in January 1997, and decision was released in July 1997 (10 months from start to finish).

In the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), one petition was filed in April 1997 but held in abeyance. After the case was reactivated in October 1999, the opening brief was filed in December 1999, argument was held in November 2000, and a decision was issued in February 2001 (16 months after reactivation).

Finally, in the Eleventh Circuit (Alabama, Florida, and Georgia), the petition for review was filed in September 2000; the petitioner's brief was filed in March 2001; argument was held in October 2001 and a decision was rendered in November 2002 (22 months from start to finish).

B.5 Timeline – ICC Arbitration

Experience indicates that it would be fairly exceptional to complete a standard ICC arbitration in less than 270 days. The time taken for an international arbitration can greatly exceed this, especially if there are jurisdictional hearings and/or challenges. The real challenge for an arbitration tribunal is to effectively manage and maintain momentum so that the process is not endless and subject to delay tactics.

ANNEX C PUBLIC AND PRIVATE BODIES OFFERING ADR SERVICES

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre (AMC) • WIPO has organized a separate arbitration and mediation centre (WIPO AMC) which provides a procedure for expedited arbitration, online dispute resolution facilities, training for arbitrators and mediators and a resource centre for intellectual property dispute resolution. ^{104, 105} • WIPO AMC is an independent non-profit entity established by and within the WIPO. The WIPO AMC is managed by a director, assisted by a team of lawyers together with administrative staff. The WIPO AMC is guided by the WIPO A&M council consisting of external dispute resolution experts. On certain issues, individual members of the WIPO Arbitration Consultative Commission provide opinions and advice to the Center.	<ul style="list-style-type: none"> The basis of WIPO AMC's authority to invoke the dispute resolution services is the voluntary adherence of various IP-related associations and industries that have adopted WIPO dispute resolution in their standard agreements, private parties that adopt WIPO rules, and through cooperative agreements with other dispute resolution institutions.¹⁰⁶ 	<ul style="list-style-type: none"> • Appointing arbitrators and mediators • Administering arbitration and mediations and • Drafting tailor-made procedures. • Creating institutional procedure rules for mediators, arbitrations and expedited arbitration • Furnishing online dispute resolution facilities • Training arbitrators and mediators • Counselling on Intellectual Property Rights dispute resolution and • Providing free of charge meeting rooms for procedures.¹⁰⁷ 	<ul style="list-style-type: none"> • WIPO AMC administers dispute resolution procedures under WIPO rules,¹⁰⁸ and at request, also under UNCITRAL Rules.¹⁰⁹ • Private and confidential unless otherwise agreed by the parties 	<ul style="list-style-type: none"> • Mediation: from 2 weeks to 2 months • Arbitration: from 6 months to 11 months 	<ul style="list-style-type: none"> • Binding on the parties • Appeals are not possible unless waivers are prohibited under applicable law

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- 104 Inventory of Dispute Resolution Mechanisms, What are the Choices for the Telecommunications Sector? (The European Telecommunications Platform, ETP (98) 107) ("The ETP Inventory"), p. 61. <http://www.ftp-online.org/>
- 105 J. Paulsson, "The WIPO Arbitration Rules", B. Barin, *Carswell's Handbook of International Dispute Resolution Rules* (Toronto: Carswell, 1999).at p. 169.
- 106 <http://www.arbiter.wipo.int>
- 107 <http://www.wipo.int/center/index.html>
- 108 <http://www.wipo.int/center/index.htm/>
- 109 <http://www.uncitral.org/or-index.htm>

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
The American Arbitration Association (AAA) • AAA is a non-profit organization that offers dispute resolution services internationally to private and government parties. While it is principally known as a domestic arbitration body for U.S. parties, it has a separate international division with its own international arbitration rules. One advantage to AAA is that it is able to create tailor-made arbitration rules for specific sectors. ^{110, 111}	<ul style="list-style-type: none"> Under the international arbitration rules, the parties are free to agree to their own arbitrators or the AAA can appoint their own panel of arbitrators, which include some telecommunications experts.¹¹² The AAA has authority to administer those disputes where the parties have agreed that the arbitration rules of the AAA will apply to resolve their dispute.¹¹³ 	<ul style="list-style-type: none"> Appointing arbitrators and mediators Administering arbitrators and mediators Applying institutional arbitration rules for international disputes Drafting tailor-made arbitration procedures Training arbitrators and mediators and Conducting educational programs. 	<ul style="list-style-type: none"> Confidential in accordance with express provisions in the AAA rules. 	<ul style="list-style-type: none"> The AAA has established and maintains as members of its Telecommunication Panel individuals competent to hear and determine disputes administered under the Wireless Industry Arbitration Rules. Under the AAA international arbitration rules the parties are free to agree to their own arbitrators. The AAA will appoint from their own panel of authorities, which includes some telecommunication experts. 	<ul style="list-style-type: none"> International arbitration rules, but the enforceability of the waiver depends upon the applicable law.

¹¹⁰ In 1997, the AAA in conjunction with the Cellular Telecommunications and Internet Association (CTIA) created a series of special arbitration rules to deal with the disputes between CTIA members and customers.

¹¹¹ J.H. Carter, "International Arbitration Rules of the American Arbitration Association", B. Barin, *Carswell's Handbook of International Dispute Resolution Rules* (Toronto: Carswell, 1999) at p. 97.

¹¹² The ETP Inventory, see note 107, p. 65.

¹¹³ <http://www.adr.org>

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
<p>London Court of International Arbitration (LCIA)</p> <ul style="list-style-type: none"> The LCIA is a major international arbitration institution based in London. The LCIA operates as an administering body which oversees arbitrations. The LCIA has authority where the parties have agreed to adopt LCIA rules or the parties have agreed to appoint the LCIA to administer an arbitration.^{114, 115} The LCIA is a three-tier organization consisting of the Arbitration Court, the Board of Directors and a Secretariat. 	<ul style="list-style-type: none"> LCIA has authority where the parties have agreed (before or after a dispute arises) to adopt LCIA rules or where the parties have agreed to appoint the LCIA as administering or appointing authority in relation to arbitrations conducted under other rules.¹¹⁶ 	<ul style="list-style-type: none"> LCIA offers to appoint arbitrators and to administer arbitrations. LCIA also appoints mediators and conciliators and administers mediations and conciliations, but mediations also may be passed on to CEDR.¹¹⁷ <p>The LCIA provides:</p> <ul style="list-style-type: none"> institutional rules for arbitration advice service for dispute resolution for users, counsel and arbitrators (this is extensively used) facilities (meeting rooms are charged separately) and full arbitration service for the London Chamber of Commerce under the by-laws of that organization. 	<ul style="list-style-type: none"> LCIA administers arbitrations under its own rules and under UNCITRAL Rules. Parties may, by agreement, depart from standard rules (procedural timetable, nationality of arbitrators, fee scale and others). Private and confidential except with express consent by the parties to publish. 	<ul style="list-style-type: none"> Arbitrators are appointed by the LCIA Court, either at its own selection or at parties' nomination. Arbitrator and mediator information is maintained through a database based on CVs. The database is regularly updated. The LCIA monitors standards through detailed database criteria which is updated during and after appointment. Average time is six to twelve months 	<ul style="list-style-type: none"> Binding on the parties. Under Article 26.9 of the LCIA Rules, the parties "waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made".

¹¹⁴ The ETP Inventory, see note 107, p. 68.

¹¹⁵ M. Lalonde, "The New LCIA Arbitration Rules", B. Barin, *Carswell's Handbook of International Dispute Resolution Rules* (Toronto: Carswell, 1999) at p. 70.

¹¹⁶ <http://www.lcia-arbitration.com>

¹¹⁷ <http://www.lcia-arbitration.com>

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
International Chamber of Commerce (ICC) The ICC is perhaps the best-known private dispute resolution body. Its mandate is to promote an open international trade and investment system in the market economy worldwide. The ICC is unique in having consultant status at the U.N. and its specialized agencies. It provides arbitration services through the ICC International Court of Arbitration. ^{118, 119} Business dispute resolution by arbitration, conciliation and mediation is handled exclusively by an autonomous body attached to the ICC, the International Court of Arbitration.	The ICC International Court of Arbitration is an autonomous body operated by the ICC. The court does not settle disputes itself but acts as an administrating body and has the function of ensuring the correct application of arbitration rules. ¹²⁰	The ICC Court provides the following services: <ul style="list-style-type: none">• Appointing arbitrators and administering arbitration procedures• Appointing conciliators and administering conciliation procedures• Appointing mediators and administering mediation procedures• Providing institutional procedural rules for conciliation/mediation and• Providing institutional procedural rules for arbitration.• Within the context of the Rules of Arbitration, the Court and its secretariat administer a wide variety of procedures as agreed upon by the parties or fixed by arbitral tribunals. The Court has administered and will administer arbitrations on an accelerated basis if the parties so agree.• The ICC International Centre for Expertise, which is independent from the court, provides services to parties or arbitral tribunals wishing to appoint experts either in aid of finding solutions to a dispute, or for establishing facts in the court of arbitration or litigation.	ICC Arbitrations are all administered in accordance with the ICC Rules of Arbitration. However, in addition to the Rules of Arbitration, the ICC has developed special rules and mechanisms for dispute resolution in specific areas. ¹²¹	<ul style="list-style-type: none">• Mediation and conciliation take between one and three months.• Arbitration takes between twelve and twenty four months.	<ul style="list-style-type: none">• Awards are binding on the parties according to Article 28.6 of the rules.

118 <http://www.iccwbo.org>

119 S.R. Bond, "The Rules of Arbitration of the International Chamber of Commerce", B. Barin, *Carswell's Handbook of International Dispute Resolution Rules* (Toronto: Carswell, 1999) at p. 36.

120 The ETP Inventory, see note 107, p. 71.

121 <http://www.iccwbo.org>

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
European Commission DG Competition • DG Competition is a directorate in charge of the European competition policy. ¹²²	<ul style="list-style-type: none"> Article 20 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).¹²³ Notice on the Application of Competition Rules to Access Agreements of 31st March 1998. 	<ul style="list-style-type: none"> It acts at the first instance regarding infringement of the competition rules of the treaty. The directorate plays the role of a <i>de facto</i> mediator and conciliator. The Commission also has the power to institute its own procedures, which are applicable to any area and service in the telecommunication sector. 	<ul style="list-style-type: none"> Article 85, 86, etc. seq. EC and Regulation 17/62.¹²⁴ Process is partly private. Parties have to disclose all information to the Commission. Commission is bound to protect professional secrets. 	<ul style="list-style-type: none"> DIRECTORATE ACTS AS <i>DE FACTO</i> MEDIATOR. A LIST OF NATIONAL AND/OR INTERNATIONAL TELECOMMUNICATION EXPERTS IS AVAILABLE. PARTIES MAY BE ASSISTED INDIVIDUALLY BY AN INDEPENDENT EXPERT AVERAGE TIME DEPENDS ON THE COMPLEXITY OF THE DISPUTE. 	<ul style="list-style-type: none"> Binding in accordance to Art. 85, 86 and Regulation 17/62. Decision is enforceable under national law. Appeals against the decisions of DG Competition can be brought to the Court of First Instance and European Court of Justice.
World Trade Organization (WTO) Dispute Settlement Body • WTO dispute resolution procedure is available to its members, which means that only states can refer cases for dispute resolution before a WTO panel. • Private parties will have no direct role in the WTO procedure, but may be able to persuade national governments to initiate a WTO dispute settlement procedure which is of interest to them. • WTO prefers for the countries concerned to discuss issues and settle disputes between themselves prior to resorting to the dispute resolution process. ¹²⁵	<ul style="list-style-type: none"> Agreement establishing the World Trade Organization.¹²⁶ 	<ul style="list-style-type: none"> WTO may adjudicate on a case-by-case basis under public international law. 	<ul style="list-style-type: none"> Procedure is mandatory if one party files a complaint and invokes the procedure. Procedure is only available to members. Reports are published on the Internet, in publicly available documents and in the WTO Dispute Settlement Report. 	<ul style="list-style-type: none"> WTO panel may consult experts or appoint an expert review group to prepare an advisory report in relation to the procedure. Average time is one to one and a half years 	<ul style="list-style-type: none"> Either side can appeal a panel's ruling. Appeals have to be based on points of law, such as legal interpretation – they cannot re-examine existing evidence or examine new evidence. Each appeal is heard by three members of a permanent seven-member appellate body set up by the

¹²² The ETP Inventory, see note 107, p. 40.

¹²³ http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/comgreen/index-en.htm

¹²⁴ [www.europa.eu.int/comm/dg4/](http://europa.eu.int/comm/dg4/)

¹²⁵ The ETP Inventory, see note 107, p. 45.

¹²⁶ <http://www.wto.org>

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
WTO (cont'd) <ul style="list-style-type: none"> General Council of the WTO meeting under different chairmen and different rules of procedure, also performs the functions of the Dispute Settlement Body (DSB), and the Trade Policy Review Body. DSB oversees the operation of the WTO dispute settlement system. It establishes panels to consider specific cases and appoints the members of the Appellate Body, which hear appeals of panel decisions. WTO Secretariat provides support to panels; the Appellate Body Secretariat provides support to the Appellate Body. WTO Secretariat also provides legal assistance to developing countries in dispute settlement matters. 					<p>DSB and broadly representing the range of WTO membership.</p> <ul style="list-style-type: none"> The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Appeals should not last more than 60 days, with a maximum of 90 days. The DSB has to accept or reject the appeals report within 30 days, and rejections are only possible by consensus.
International Centre for Settlement of Investment Disputes (ICSID) <ul style="list-style-type: none"> ICSID is part of the World Bank Group which promotes international investment. ICSID provides a neutral forum for the settlement of investment disputes. It seeks to achieve an ideal balance between the interests of foreign investors and those of the host states. In exchange for the governments of foreign investors renouncing their ability to exercise "diplomatic protection", developing countries agree to submit investment disputes to ICSID arbitration. 	<ul style="list-style-type: none"> ICSID is a public international organization created under a treaty, the Convention for Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).¹²⁷ 	<ul style="list-style-type: none"> Arbitrators or conciliators are appointed by the parties, with ICSID simply providing rules of procedure for arbitration and conciliation proceedings together with various administrative functions. Resolution of investment disputes arising from either treaties or arrangements are provided for under the ICSID convention.¹²⁸ 	<ul style="list-style-type: none"> Decisions rendered in certain ICSID proceedings, as well as several national court decisions relating to ICSID, are widely published with the consent of the parties. 	<ul style="list-style-type: none"> Majority of the members of a tribunal are required to be nationals of impartial countries unless each member of the tribunal has been appointed by agreement of the parties. Chairman of the Centre's Administrative Council is the residual appointing authority if the parties fail to appoint an arbitrator. 	<ul style="list-style-type: none"> No Contracting State or national of such a State is obliged to resort to such conciliation or arbitration without having consented to do so. Once the parties have consented, in the case of arbitration, to abide by the award.

¹²⁷ www.worldbank.org/icsid/basicdoc/

¹²⁸ The ETP Inventory, see note 107, p. 45.

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
ICSID (cont'd) <ul style="list-style-type: none">• Benefit is that the process mandated by ICSID assures that any lack of cooperation on the part of the host state will not result in a failure of the arbitral process.• ICSID provides a neutral forum which shields it from diplomatic protection.¹²⁹		<ul style="list-style-type: none">• ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting states.• ICSID does not itself engage in such conciliation and arbitration.• The Centre assists in the initiation and conduct of conciliation and arbitration proceedings, performing a range of administrative functions in this respect.¹³⁰		<ul style="list-style-type: none">• Chairman is not restricted in his choice to a Panel of Arbitrators. Arbitrators are explicitly to disclose any past and present professional business and other relevant relationship with the parties.• Average time is two years.	
ICSID Additional Facility <ul style="list-style-type: none">• Disputes between States and Nationals of other States that fall outside the scope of the Convention on the Settlement of Investment Disputes.¹³¹• Administered by the Secretariat at the request of the parties on matters that fall outside the scope of the ICSID Convention.	<ul style="list-style-type: none">• Terms on which the secretariat may administer the proceedings are set out in the ICSID Additional Facility Rules.	<ul style="list-style-type: none">• Conciliation and arbitration proceedings for the settlement of investment disputes arising between parties in which one party is not a Contracting State or a national of a Contracting State.• Conciliation and arbitration proceedings for the settlement of disputes that do not directly arise out of an investment, and in which at least one of the parties is a Contracting State or a national of a Contracting State; and• Fact-finding proceedings.¹³²	<ul style="list-style-type: none">• Additional Facility Rules.¹³³• The deliberations of the tribunal take place in private and remain secret.	<ul style="list-style-type: none">• Administered by the Secretariat.Average time varies.	<ul style="list-style-type: none">• Any award is final and binding on the parties.• The awards are not subject to any appeal.

¹²⁹ The ETP Inventory, see note 107, p. 45.

¹³⁰ <http://www.worldbank.org/icsid/basicdoc/>

¹³¹ The ETP Inventory, see note 107, p. 55.

¹³² The ETP Inventory, see note 107, p. 55.

¹³³ <http://www.worldbank.org/icsid/facility-archive/1.htm>

Name (Contact information for these bodies can be found at ANNEX D)	Basis for Authority	Services Offered	Law, Rules and Confidentiality	Appointment of Arbitrators and/or Mediators	Enforcement and Appeals
Centre for Effective Dispute Resolution (CEDR) <ul style="list-style-type: none"> CEDR is an independent non-profit organization supported by multinational business and leading professional bodies and public-sector organizations. CEDR works in partnership with business, governments and the judiciary, both in the United Kingdom and internationally, to develop effective dispute resolution practice. CEDR has been instrumental in helping to bring mediation into the heart of business practice and into the judicial system in England and Wales. CEDR's mediation accreditation is internationally recognised as a standard of excellence and CEDR's continuing professional development scheme for mediators aims to ensure that the high standards set in the CEDR Mediator Training continue beyond accreditation. Through CEDR's dispute resolution and prevention service (CEDR Solve), CEDR enables business to cut the cost of conflict by providing a world-class mediation service and a range of professional dispute resolution, training and consultancy solutions using the foremost practitioners in the field. 	<ul style="list-style-type: none"> For mediation, CEDR has authority where the parties have agreed to use CEDR as their dispute resolution service. For adjudication, CEDR is a recognised Adjudicator Nominating Body (ANB) and has also produced its own Rule for Adjudication, which is compliant with The Housing Grants, Construction and Regeneration Act 1996 (Part II, Section 108), which provides a statutory right to adjudication. 	<ul style="list-style-type: none"> CEDR offers a full range of solutions to enable parties to manage conflict including: <ul style="list-style-type: none"> Mediation, early neutral evaluation and expert determination. Training: CEDR trains business people and professionals for the practical skills they need to get the best from dispute resolution processes and to apply proactive and positive approaches to conflict management throughout their work. Consulting Service: CEDR offers a consultancy service for companies, governments and public-sector organizations to devise schemes and procedures to manage all kinds of conflict, both internally and with customers, partners and other stakeholders. 	<ul style="list-style-type: none"> CEDR works from a model mediation agreement that provides flexibility for the parties to decide on the specifics of the mediation, including the process and the outcome. All persons involved in the Mediation must keep all the information arising out of the Mediation confidential. 	<ul style="list-style-type: none"> Most mediations can be arranged within 3 weeks or even sooner and the formal mediation usually lasts for one or two days. 	<ul style="list-style-type: none"> Mediation is not binding until it is reduced to writing and signed by the parties. Adjudication is binding unless or until the dispute is finally determined by agreement, court proceedings or by reference to arbitration in accordance with the contract. The Parties shall implement the Adjudicator's decision without delay and shall be entitled to such relief or remedies as are set out in the decision.¹³⁴

ANNEX D ADR CONTACT INFORMATION

(i) European Commission

European Commission
Directorate General Competition
Rue de la Loi 200
B-1049 Brussels, Belgium

Telephone: +32 2 299 1111
Telefax: +32 2 296 98 19
Internet: europa.eu.int/comm./dg4/

(ii) World Trade Organization (WTO) Dispute Settlement Body

World Trade Organization
Rue de Lausanne 154
CH-1211 Geneva 21, Switzerland

(iii) International Centre for Settlement of Investment Disputes (ICSID)

International Centre for Settlement of Investment Disputes (ICSID)
1818 H Street, N.W.
Washington, D.C. 20433, United States

Telephone: +1 202 458 1534
Telefax: +1 202 522 2615
Internet: worldbank.org/icsid/

(iv) World Intellectual Property Organization Arbitration and Mediation Center

World Intellectual Property Organization
Arbitration and Mediation Center
34, chemin des Colombettes
1211 Geneva 20, Switzerland

Internet: <http://www.arbiter.wipo.int>
E-mail: wipo.mail@wipo.int
Telephone: +41 22 338 9111
Telefax: +41 22 740 37 00

(v) American Arbitration Association

American Arbitration Association
140 West 51st
New York, New York 10020, United States

Telephone: +1 212 484 4000
Telefax: +1 212 765 4874

(vi) ***London Court of International Arbitration***

London Court of International Arbitration
Hulton House
161 – 166 Fleet Street
London, EC4A 2DY, United Kingdom

Telephone: +44 171 936 3530
Telefax: +44 171 936 3533
Internet: <http://www.lcia-arbitration.com>
E-mail: lcia@lcia-arbitration.com

(vii) ***International Chamber of Commerce***

International Chamber of Commerce
38, Cours Albert I^{er}
75008 Paris, France

Telephone: +33 1 49 53 28 28
Telefax: +33 1 49 53 29 42
Internet: <http://www.iccwbo.org>
E-mail: icc@iccwbo.org

(viii) ***Centre for Effective Dispute Resolution***

Centre for Effective Dispute Resolution
Exchange Tower
1 Harbour Exchange Square
London E14 9GB, United Kingdom

Telephone: +44 20 7536 6000
Telefax: +44 20 7536 6001
Internet: www.cedr.co.uk
E-mail: info@cedr.co.uk

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GLOSSARY AND ABBREVIATIONS

AAA	American Arbitration Association, USA
ACIF	Australian Communications Industry Forum, Australia
ADR	Alternative dispute resolution, a family of dispute resolution techniques that may include arbitration, mediation and negotiated settlement of disputes.
ALJ	Administrative Law Judge
ANATEL	Agência Nacional de Telecomunicações, Brazil
ANB	Adjudicator Nominating Body, CEDR
ANRT	Agence Nationale de Réglementation des Télécommunications, Morocco
ART	Autorité de Régulation des Télécommunications, France
ATN	Atlantic Tele-Network Inc.
BDT	Telecommunication Development Bureau, ITU
BIT	Bilateral Investment Treaty
BOT contracts	Build-Operate-Transfer contracts
BTA	Botswana Telecommunications Authority
BTC	Botswana Telecommunications Corporation
CAT	Communications Authority of Thailand
CBA	Cost-Benefit Analysis
CBB	Court of Appeal, Netherlands
CEDR	Centre for Effective Dispute Resolution
CISC	CRTC Interconnection Steering Committee
CMT	Comisión del Mercado de las Telecomunicaciones, Spain
ComReg	Commission for Communications Regulation, Ireland
CPM	Conference Preparatory Meeting
CRTC	Canadian Radio-Television Commission, Canada
CTIA	Cellular Telecommunications and Internet Association, USA
CWD	Cable and Wireless Dominica
CWJ	Cable and Wireless Jamaica
CWWI	Cable and Wireless West Indies
C&W	Cable and Wireless Plc
DSB	Dispute Settlement Body (of WTO)
DSU	Dispute Settlement Understanding (in GATS)
DT	Deutsche Telekom, Germany
ECJ	European Court of Justice
ECTEL	Eastern Caribbean Telecommunications Authority

EETT	National Telecommunications and Post Commission, Greece
FCC	Federal Communications Commission, USA
GATS	General Agreement on Trade in Services
GOG	Government of Guyana
GSM	Global System for Mobile communications, a mobile cellular standard first codified in Europe and now used widely around the world.
GT&T	Guyana Telephone and Telegraph, Guyana
G-REX	Global Regulators Exchange, ITU
GSR	Global Symposium of Regulators, ITU
IBD	Inter-American Development Bank
ICANN	Internet Corporation for Assigned Names and Numbers. It is responsible for managing and coordinating the domain name system for the Internet.
ICC	International Chamber of Commerce, promotes the global interests of business and international commerce.
ICSID	The International Centre for Settlement of Investment Disputes, a member of the World Bank, promotes settlement and arbitration of disputes between member countries and investors from other member countries.
ICT	Information and Communications Technology
IDA	Info-communications Development Authority
ILD Rules	International Long Distance Rules (of a national telecommunications carrier)
IP	Internet Protocol
ISC	Interconnection Steering Committee, Jordan
ISP	Internet Service Provider
ITU	International Telecommunication Union
ITU-D	Sector of the International Telecommunication Union devoted to promoting the development of global telecommunications infrastructure and information and communications technologies.
ITU-R	Sector of the International Telecommunication Union responsible for coordinating global use of radio-frequency spectrum and other radiocommunication resources.
KSO projects	Kerja Sama Operasi (Joint Operation Projects), Indonesia
LCIA	London Court of International Arbitration
MAF	Malaysian Access Forum, Malaysia
MCMC	Malaysian Communications and Multimedia Commission
MPHPT	Ministry of Public Management, Home Affairs, Post & Telecommunication, Japan
NAFTA	North American Free Trade Agreement
NCC	Nigerian Communications Commission, Nigeria
NITA	National IT and Telecom Agency, Denmark
OECS	Organization of Eastern Caribbean States
Ofcom	Office of Communications, UK

Oftel	Office of Telecommunications, UK
ONPT	Office National des Postes et Télécommunications, Morocco
OPTA	Onafhankelijke Post en Telecommunicatie Autoriteit, Netherlands
OSIPTEL	Organismo Supervisor de Inversión Privada en Telecomunicaciones, Peru
OTELO	Office of Telecommunications Ombudsman, UK
PIPEDA	Personal Information Protection and Electronic Disclosure Act, Canada
POIs	Points of Interconnection
PSTN	Public Switched Telephone Network
PUC	Public Utilities Commission
RA	Radiocommunication Assembly
RAG	Radiocommunication Advisory Group
RegTP	Regulatory Authority for Telecommunications and Posts, Germany
RIO	Reference Interconnection Offer, a standardized offering of interconnection terms and conditions, usually mandated by national regulators and offered by the incumbent, dominant telecommunications service provider.
SC	Steering Committee
SG	Study Group
SMP	Significant Market Power
TDSAT	Telecommunications Dispute Settlement and Appellate Tribunal, India
TKK	Telekom Control Komission, Austria
TOT	Telephone Organization of Thailand
TRAI	Telecommunications Regulatory Authority of India
TRC	Telecommunication Regulatory Commission, Jordan
TSO	Telecommunication Service Obligation
VoIP	Voice over Internet Protocol
VSAT	Very Small Aperture Terminal
WG	Working Group
Wi-Fi	A radio network protocol for wireless local area networks (WLANs), which refers specifically to the IEEE 802.11(b) protocol, but which is commonly used to refer to all types of WLAN technologies.
Wi-Max	A radio network protocol, formally known as the IEEE 802.16 protocol, for wireless metropolitan area (WMAN) networks, which have larger coverage areas than WLANs.
WLL(M)	Wireless Local Loop (Mobility), a variation on a group of technologies that allow wireless access network connections for “last mile” telecommunications, in this case, with an allowance for restricted mobility of customer premises equipment.
WIPO	World Intellectual Property Organization. Based in Geneva, WIPO is a United Nations-sponsored international organization responsible for promoting and protecting the use of intellectual property.
WRC	World Radiocommunication Conference

WSIS	World Summit on the Information Society
WTO	World Trade Organization, the global organization that administers international trade agreements and provides a forum for resolution of trade disputes between nations.
UNCITRAL	United Nations Commission on International Trade Law