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Dispute Resolution Mechanisms in the Telecom Sector: Relating International Practices to Indian Experience

by

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Abstract

This paper analyzes the impact of the changing telecom environment on the nature of disputes that arise in this sector. It focuses on the need to resolve disputes in an efficacious, expeditious and transparent manner to ensure unhindered growth of the telecom sector. The paper draws upon several country specific examples to show how this subject is receiving increasing attention and has in fact become a significant feature of regulatory initiative. A major impact on European countries has been the European Commission’s directives, which have induced the member-states to introduce measures in their regulatory framework in this behalf. Other countries have also been refining their dispute resolution processes to cope with the growing complexities in the nature of disputes.

The paper devotes considerable space to the uniqueness of the dispute settlement mechanism in India, examines at length merits and deficiencies in the existing arrangements and suggests measures for fine tuning the system. It stresses how India can draw upon some innovative practices followed in such countries as the U.K., Australia, Canada, France and Malaysia and also looks at the use of ADR methods as a complement to the role of the existing dispute settlement entity TDSAT.

Keywords: Telecommunications, regulator, dispute resolution

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1. A study commissioned by the International Telecommunication Union (ITU) and the World Bank on dispute resolution in the telecom sector has identified increasing globalization, fast changing technology, unleashing of market forces and rapidly growing customers’ needs as major factors responsible for transforming the telecom sector. The transformation has brought about a qualitative change in the nature and complexity of disputes that arise in this sector. Disputes may relate to infrastructure, competition, and such technical issues as interconnection or investment, or to trade or consumers-related issues. The issues in such disputes may also fall within the ambit of various laws and agreements, such as sector specific laws, provisions relating to telecommunications under the General Agreement on Trade-in-Services (GATS), and contract laws or competition law or other laws dealing with protection of consumers’ interests. There is also an increasing realization that the development of telecommunications will be seriously impaired if delays and uncertainty become a common occurrence in the sector. Hence, effective and expeditious resolution of disputes in the telecom sector comprises today a high priority in the agenda of policy makers and regulators alike.

2. The paper is organized in four sections followed by the conclusion as indicated below:
   Section I: Genesis of disputes and modes of dispute resolution;
   Section II: Impact of European Commission’s Directives and GATS on dispute settlement processes in EU member-states;
   Section III: Features of dispute settlement processes in France, Germany, the U.K, the USA, Canada, Australia and Malaysia;
   Section IV: An overview and analysis of dispute settlement practice in India; and
   Section V: Conclusion.

Section I: Genesis of disputes and modes of dispute resolution

3. The genesis of disputes generally lies in the conflict of interests between the parties involved or in the violation of contractual obligations and regulations, or it arises from an inadequate appreciation of the business practices and legitimate interests of the parties involved. The issues can range from simple to complex to very complex. Historically, courts have played a significant role in the resolution of disputes and continue to do so. The court’s orders, no doubt, impart a decision with a degree of finality, but the decisions come with a cost in terms of the time and expenses involved. Things have changed, however, as more and more countries have opted for liberalization in the broadest sense of the term. Technological innovations spurred the shift to a new paradigm that valued individual entrepreneurship and prowess and sought responsiveness from the system to create a climate for this to happen.

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4. As a result, the role of government has declined and new institutions have emerged to act as watch dogs in the new competitive environment. The general emergence of the institution of independent regulator can be attributed to this development and the telecom sector has been no exception. The regulator in the liberalized telecom sector became a permanent fixture to lay down the ground rules, protect consumer interests and promote fair competition. In this process, an adjudicatory role devolved to the regulator as a court of first recourse in the resolution of disputes. This lightened the burden of the traditional courts and provided the parties to a dispute an avenue for quicker resolution of their problems through a body that had a better appreciation for telecom issues.

5. Today, telecom regulators play a key role in the resolution of disputes alongside the courts in most of the countries where liberalization has occurred. In fact, the resolution of disputes through the regulator with the option to seek final determination through the courts has emerged as a preferred method both in the developed and developing countries. The concept of a specialized tribunal to address disputes in the telecom sector is a much later development and is in vogue in only a couple of countries. This is a further refinement of dispute settlement processes and indicative of the growing complexity of telecom disputes and the perceived need for resolving such expeditiously to ensure orderly growth of the sector. Since the 1970s, there has been an increasing focus on alternate dispute resolution (ADR), such as, negotiation, mediation and arbitration to resolve disputes. The processes followed under ADR are seen as confidential, time sensitive and conducive to maintaining long-term commercial relationships. The merit of ADR methods lies in the flexibility of their use as complements either to the court-based or regulatory-based adjudication, or as a stand-alone measure.

Section II: The Impact of EC Directives and GATS on dispute settlement processes in EU member states.

Guiding principles of dispute settlement in European countries

6. The subject of dispute resolution has attracted considerable attention in the wake of the liberalization of European telecommunications. The European Commission and the European Council (formerly the Council of Ministers of the European Communities) with the support of the European Court of Justice have guided the course of liberalization since 1990, through various directives aimed at liberalizing and harmonizing telecom operations and service provision and promoting competition in telecommunications markets. The key directives relate to ending restrictions on the sale of terminal equipment, value-added services and leased lines, and lifting restrictions on the use of cable TV networks for the provision of liberalized telecommunications services. The Commission’s Directive 2002/77/EC of 16 September 2002, enjoins, amongst other things, upon the member states “to remove … exclusive right
and special rights for the provision of all electronic communications networks, not just those for the provision of electronic services…. The electronic communications services include the transmission and broadcasting of radio and television programs whereas the electronic communications network would include telecom networks and cover fibre networks. The Directive also makes it clear that “Member States should no longer make the provision of electronic communications services and the establishment and provision of electronic communications networks subject to a licensing regime but to a general authorization regime…” The telecom services directive and the open network provision (ONP) directive, in particular, respectively provided deadlines for the full liberalization and access to voice telephony in an environment of open and competitive markets. The result was a framework based on competition principles that bound the member states to liberalization measures but left them free to determine the structure of the state-owned enterprises. This approach avoided mutual recrimination by transcending national differences and allowed a smooth transition to community-wide regulations and policy. To ensure adherence to the rules of competition, the natural focus fell on the role of the national regulator and the issues involved in disputes.

7. The Electronic Communications Committee of the European Conference of Postal and Telecommunications Administrations (CEPT) in its 43rd report (October 2003) provides general information regarding disputes and focuses on dispute resolution procedures. It has laid considerable stress on dispute avoidance, which saves both time and cost. The steps suggested in the report are 1) clarity in license/contract agreements as regards obligations of the parties involved; 2) informal arrangements, as distinct from a business contract between parties, for building up working relations with the objective of maximizing their business interests and minimizing the scope for conflict; and 3) providing for a facilitator, who understands the industry and is an expert in group dynamics, to intercede among the parties involved in furtherance of their common interests. In the context of European countries, this report enumerates types of disputes, which broadly include: anti-competitive behavior, interconnection non-performance of the obligations cast on operators, cross border disputes, radio spectrum disputes, consumer-related disputes, and failure to comply with the license conditions involving stakeholders.

8. Anti-competitive disputes may involve anti-competitive cross-subsidization and/or failure to make available to other service providers relevant technical and commercial information that is required for providing services. As for interconnection disputes, in cases where the interconnection operators are both partners and competitors, a noticeable tendency among incumbent operators is to delay interconnection agreements and increase the entry costs for new entrants. Sometimes, a variety of obligations cast on operators to provide different kinds of services may also cause disputes between the
regulatory authority and service providers. In Europe, differences in national laws and jurisdiction also
can create complex cross-border issues, where the dispute may lie within the competence of regulators
from more than one member state. In such cases, the two national regulatory authorities decide jointly the
procedure for settling the dispute. Interconnection issues are a familiar source of cross-border disputes.
Consumer-related disputes mainly relate to consumer rights for access to services and quality of services.
Interference with the radio spectrum network or disruption of access to a radio-spectrum-based network
also causes disputes.

9. Since in the member states of the European Union the dispute resolution function falls within the
purview of the telecom regulator,\(^2\) the EU directives maintain that the regulatory authority must be
independent and function in a transparent, impartial manner. The regulatory authority should be vested
with enough authority to call for the information needed to make effective regulatory decisions. Further,
the Directives also cast an obligation on the regulator to identify such markets as are non-competitive and
take appropriate measures. As well, the Directives give very wide powers to the regulator to resolve
disputes and oblige him to give a binding decision within four months of the case being brought before
him. The Directives provide for appeal against the regulatory decision to an appropriate appellate
mechanism (e.g. courts) in the member countries, which they are required to appoint. Due importance has
been given, too, to alternative dispute resolution (ADR) methods that allow the regulator not to entertain a
specific dispute if he considers that it could be better resolved through such ADR methods as mediation.

10. Another multilateral agreement, the General Agreement on Trade-in-Services (GATS) also
influences telecom regulations. Under the GATS framework, the emphasis is on opening national
telecommunications markets to international competition. Unlike the EU directives, disputes arising from
an alleged infringement of the GATS can be brought before the dispute settlement mechanism of the
WTO only by the concerned member-states and not by an individual. The Annexe on
telecommunications, which forms a part of the GATS, provides for “reasonable” and “non-
discriminatory” access to telecommunications services in countries that have made specific commitments
in this regard.

11. The two instruments discussed above greatly influenced the telecommunications markets and set
the pace for timely liberalization in EU countries. This required rising above country specific differences
in legal systems and traditions, as well as the transfer of certain matters from the national to the European
domain. Reading between the lines of the EU Directives, Annete Ottow in his paper: “Dispute Resolution
\(^2\) The exception is Denmark where the Telecom Complaints Board functions as a sort of an appellate body that
entertains complaints against the decisions of the regulatory body.
under the new European framework” 3 has commented that, in terms of the general principle of European law pertaining to the principle of national autonomy, the member states can set their own rules in relation to enforcement and appeal procedures, which may “complicate the implementation of the European regulation involved.” In the same breath, he has added that the “principle of effectiveness,” applicable to member states, imposes a duty on them to fulfill the Community obligations.

12. This obligation ensures that procedures devised by the member states do not conflict with the EU Directives regarding the right of telecom companies to seek effective dispute resolution. The European Commission (EU) was very much aware of the key role of national regulatory authorities in dispute settlement and the need to avoid delay in the dispute resolution process. Therefore, with this end in view, the EU advocated that the regulator should have the powers to make a binding decision in the shortest possible time -- say, four months -- to resolve a dispute. The EU has been equally serious in exercising its oversight role and has initiated prompt action against concerned member states that have infringed the EU’s telecom rules. Some of these infringements relate to the failure to complete market reviews to assess competition in national telecom markets, as well as the failure to provide caller location information for all calls to the single European emergency number. Another instance of EC intervention has been to impose a fine of more than 151 million Euros on the Spanish incumbent telecom operator, Telefonica, which levied unfair prices in the Spanish broadband market for a period exceeding five years.4 The EU also launched infringement procedures against Germany in February 2007 to counter amendments to the German telecoms law as it felt that these amendments could grant Deutsche Telekom AG a “regulatory holiday in spite of its dominant position in the broadband market.”5

The wave of reforms in the regulatory institutions of western Europe in the telecommunications sector, witnessed since the 1990s, was actuated by many factors, some embedded in a changed perception in these countries about the role of telecommunications in an increasingly competitive environment but, in large measure, due too to supra-national pressures in the form of EC directives that have sought to harmonize telecom operations in the member-states of the European Union. These changes from a controlled regime to a liberalized regime did not follow a uniform pattern and occurred in different time spans, depending upon the preparedness in these countries to embrace the new paradigm shift. The process of reform is still continuing as exemplified in the developments occurring in the sector in France, Germany and Great Britain. In these processes, apart from laying stress on institutional reform, one

5 Ibid
cannot fail to notice the increasing attention directed towards the dispute resolution role of telecommunications regulators.

Section III: Features of dispute settlement processes in France, Germany, the U.K., the USA, Canada, Australia and Malaysia.

France

13. Considerable importance is being given to the subject of resolution of disputes in the member-states of the European community. In France, Autorite de Regulation des Telecommunication (ART) was a statutory body established in January 1997 to regulate the telecom sector. It became the Autorite de Regulation des Communications Electroniques et des Postes (ARCEP) in May 2005, with the assignment of additional responsibility for regulating the postal sector. ARCEP is an independent administrative authority the executive board (EB) of which comprises seven members who are appointed for an irrevocable and non-renewable six-year term. The EB members are appointed by the President, the National Assembly and the Senate. The policy-making function resides with the Ministry of Finance, Economics and Industry. The reporting obligation of the regulator is restricted to the submission of an annual report to the government and the parliament. The objectives behind the transformation of ART into ARCEP are to adapt the legal framework to address issues arising from convergence of networks, “bring together sector law and competition law and harmonise the market at the European level.”

14. The telecom regulator is vested with quasi-judicial powers to settle disputes. The regulator performs three major functions, namely, a regulatory function, a consultative function, and a dispute-settlement and conciliation function. It is competent to rule on disputes between operators in four areas: i) in case of denial of interconnection, the signing and execution of interconnection agreements and the conditions of access to a telecommunication network; ii) provision of telecommunications services on cable networks; iii) shared use of existing installations on public or private land; and iv) cross-border disputes. It has powers to sanction operators that fail to fulfill their obligations. A dispute before the authority can be raised only if the party concerned has been able to establish that negotiations on a specific issue that is the subject matter of the dispute have failed. The regulator under the new provisions is required by a EU directive to hand down a decision within four months, which can be extended to six months in exceptional circumstances. Its decision can be reviewed by administrative or ordinary courts depending on the nature of the decision. Administrative courts deal with sanctioning powers granted to the regulator; ordinary courts deal with disputes of a contractual nature between parties. The relevant court can amend the regulator’s decision or annul it. The major grounds for appeal are: (a) the legality of
the decision, i.e. whether the regulator was competent to make it and (b) whether the regulator followed due procedure and based its decision on an explanatory order.

15. Even a decision of the ordinary courts can be challenged before a still higher court (Cour de Cassation – Court of Appeal) on points of law. Only parties to the dispute and not the regulatory authority can be an appellant. The regulator is afforded an opportunity, however, if it so desires, to submit its comments and explain the rationale behind its decision. An appeal can be filed within one month against the decision of the regulator and the average duration of the appeals procedure is four to five months. There are two conditions required to be met for suspending the enforcement of a decision, namely, (i) irreparable consequences will follow the execution of the decision, and (ii) the decision is likely to be quashed in final determination. There have been rulings of the Court of Appeal that have confirmed the powers of the regulator to settle disputes between operators overruling the contention of France Telecom that it had no such jurisdiction.

Germany

16. In Germany, beginning in 1989, reforms in the telecommunications sector occurred in phases through various policy and regulatory initiatives. The 1996 Telecommunications law led to the setting up of a National Regulatory Authority (RegTP) as a sector specific regulatory body separate from the Federal Ministry of Economics and Labor that retains the responsibility for policy-making together with certain regulatory responsibility for such areas as standardization in the sector. Reg TP is responsible for licensing, universal service obligation, planning and allocation of frequencies, regulation of rates for telecommunication services, checking anti-competitive behavior of dominant operators, dealing with interconnection disputes, numbering and number portability, as well as matters relating to consumer protection. In the case of merger, Reg TP is responsible for the verification of compatibility with the licensing conditions. Also, with regard to spectrum planning, the regulator shares the responsibility with the ministry. The Chairperson of the regulatory body, which also has two vice Presidents, is appointed by the President of the Federal Republic of Germany. Appropriation from the federal budget constitutes the financial resources of the regulator.

There is also parliamentary oversight on the functioning of the regulator through an Advisory Council (Beirat) that comprises members drawn from the two houses of the German Parliament. This gives rise to concerns regarding the independent character of the regulatory body. Regulatory reform in Germany has been driven, to a large extent, by the pro-competition stance adopted by the European Union (EU) through various directives. Amendments to the Telecommunications Act which became effective in
June 2004 were done pursuant to EU guidelines on market and access regulations and also on curtailing anti-competitive practices.

17. In so far as dispute resolution is concerned, RegTP can initiate proceedings on its own initiative or upon a motion. It initiates proceedings on its own in matters concerning universal service obligations, examination of rates and anti-competitive behavior of service providers. It can also initiate proceedings upon a motion in such matters as granting of licenses, interconnection issues, and assignment of numbers and frequencies. Under the relevant rules, the parties to a dispute consist of the person making the motion and the public telecommunication carrier or service provider against which the motion has been made. In other situations, the parties to a dispute could also be persons or associations of persons whose interests may be affected by the decision.

18. The decision of the regulator can be overturned by none other than the court. The decision can be appealed in the administrative court that has the requisite expertise in telecommunications matters. Appeals can be made on two grounds: either the decision of the regulator is unlawful or it violates rights of the appellant. Appeal is required to be made against the decision of the regulator within a month. The fact that an appeal has been made does not automatically result in suspension of the regulator’s decision; suspension requires a specific order by the courts. The general practice is for the court to ask the regulator to suspend its decision, which obviates the need for the court to issue an injunction order. An OECD study has drawn attention towards “delays and blockages of regulatory decisions” and identified time taken to implement regulatory decisions “as a key problem in (the) German regulatory environment.” This study goes on to show how the dominant player, Deutsche Telekom, has “successfully used the courts to suspend the obligation to comply…” and how “many rulings have been contested over months or even years, as they work their way from a lower court to a higher one….”. This study has also mentioned other factors that contribute to delay, including the German confidentiality rules, which at times inhibit Reg TP from submitting key data “to the courts to justify its decision,” and has pointed to the urgent need to provide “disincentives against the use of excessive delaying measures through the legal appeals process and other tactics”.

U.K.

19. In the UK, regulation of the communications sector is the responsibility of the Office of Communications (OFCOM). The communications sector includes telecommunication, visual-media, radio-communications and the broadcasting standards. The OFCOM is a body corporate established by the Office of Communications Act 2002 and the chairman of this body is appointed by the secretary of

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6 Germany: Consolidating Economic and Social Renewal by OECD. Published by OECD, 2004
state for a term of five years. The regulatory principles and statutory duties of this body have been
enunciated in the Act. One of the key regulatory requirements of OFCOM is to ensure that its
interventions are evidence-based, proportionate, consistent, accountable and transparent in both
deliberation and outcome; it is charged with seeking the least intrusive regulatory mechanisms to achieve
its policy objectives.

20. There is a further refinement of the dispute resolution process under the OFCOM as compared
with that under its predecessor, OFTEL, namely, a more integrated approach to resolving disputes with
greater reliance placed on ADR methods. In mediating disputes, the OFCOM ensures it is satisfied with
the evidence brought before it before launching a formal investigation into a complaint. The parties
seeking settlement of a dispute are obliged to furnish details of the case along with evidence, to
demonstrate that recourse to OFCOM is being taken only after efforts made to settle the matter through
commercial negotiations have proved unsuccessful. During investigation, OFCOM attempts to identify
relevant obligation or abuse under the Competition Act and factual evidence supporting the allegations
made. Deadlines are given for settlement of a dispute and reason for delay is required to be published if
these deadlines are exceeded. Guidelines help businesses to understand OFCOM processes and the
manner in which a case is to be presented before it.

21. The telecom industry also attaches much importance to efficacious resolution of disputes in this
sector. The Office of the Telecommunications Ombudsman (OTELO) and the Communications and
Internet Services Adjudication Scheme (CISAS), both industry sponsored institutions, bear testimony to
their concern. These two bodies are required to provide “a free, independent and effective service” to
customers who fail to resolve their complaints through direct communication with their service providers.
OTELO is an independent institution funded by industry members and captures within its membership
96% of fixed line, 55% of mobile and 30% of ISP markets. It has jurisdiction over such core services as
voice telephony, fax and so forth; it can also deal with non-core services if so desired by a member. It
deals primarily with consumers’ complaints relating to services provided by a telecom company. It can
only look into complaints against such companies that participate in the Ombudsman scheme. If a
complaint reaches a deadlock with the service provider, the customer can seek the intervention of OTELO
or have the issue resolved through ADR methods. The complainant is not bound by OTELO’s decision
and has the option to appeal against the decision, if he so wishes. However, OTELO’s decisions will have
a binding effect on the complainant and the service provider if the complainant accepts the decision.
OTELO is competent to award compensation not exceeding 5,000 pounds sterling, or to propose another
appropriate remedy. The CISAS is another ombudsman scheme, founded by service providers, that
competes with OTELO. It has functions similar to OTELO and is funded by CISAS members.
22. In the USA, the Federal Communications Commission (FCC) is the telecom regulator and draws its authority from the Communications Act, 1934 and the Telecommunications Act, 1996. The FCC is administered by five commissioners appointed by the President for a term of five years, one of whom is designated to serve as the chairperson by the President. It has seven bureaus and ten offices that perform regulatory functions in various areas assigned to the body under the Act. It interprets, coordinates and adjudicates on policy issues as well as disputes arising from them. Fairness, consistency, timeliness and transparency are the objectives of licensing and regulation policy. Innovation and efficient use of public resources as well as providing expanded access to services and fair competition are some of the other objectives the regulator is required to pursue. To do so, the FCC employs flexible licensing procedures that it applies to multiple operators and adopts a position that is “technology neutral,” leaving the choice of technology to the marketplace. In the USA there is no separate or exclusive appellate mechanism for the telecom sector as there is in India. Normal legal mechanisms are in place that provide an avenue for appeal against the decisions of the regulator. Usually, the FCC takes a pro-consumer, anti-monopoly stance in discharging its regulatory and dispute resolution functions.

23. One note of interest is that the resolution of disputes occurs at various levels within the FCC. The internal processes for dispute resolution in the FCC cut through the office of administrative law judges and the various policy making bureaus. Administrative law judges are responsible for conducting hearings ordered by the Commission, during which documents and sworn testimony are received in evidence. The process followed is somewhat similar to proceedings before a court. At the conclusion of the evidentiary phase of a hearing, the judge issues an initial decision, which may be appealed to the Commission. The final decision is given by a Commissioner or by a panel of Commissioners. It is unnecessary to follow hearing procedures in all cases of dispute. Commissioners are competent to take action on the basis of written submissions. There is also a provision for reconsideration of the final decision or its review on the basis of a petition to be received in this behalf within a prescribed period. The decisions taken by the FCC as a body are treated as final for all practical purposes; they can be appealed against, however, in a US Court of Appeal. Numerous orders of the FCC have been subject to review in the Federal Appellate Court of the United States.

24. Some of the policy-making bureaus also play an important role in the resolution of disputes. The bureaus are manned by professionals who are well-versed in telecom and related matters. The Market Disputes Resolution Division (“MDRD”) of the FCC resolves issues raised by competitors against dominant telephone carriers. It also deals with issues emanating from cable operators/telecommunications
carriers concerning reasonableness of rates. In keeping with the FCC’s intention to use ARD methods for expediting decision-making, the MDRD also offers a mediation program and contesting parties are encouraged to settle their dispute through mediation before filing a formal complaint.

25. The Spectrum Enforcement Division located in the Enforcement Bureau concerns itself, amongst other things, with the resolution of complaints regarding spectrum use, public safety, and technical issues. Similarly, the Telecommunications Consumers under the Consumer & Governmental Division of the FCC handles consumer complaints involving issues such as accessibility of telecommunications services and malpractice on the part of telephone companies. The dispute resolution process followed is extremely slow and, therefore, increasing attention is being given to alternative dispute resolution methods to accelerate the process of decision making.

26. Alongside the FCC, which operates at the federal level, the task of regulation of telecommunications at the state level devolves on the public utility commissions (PUC), which follow regulatory processes similar to those followed by the FCC. The Telecommunications Act, 1996 spells out the areas of responsibilities of the FCC and the State PUCs. The FCC regulates inter-state telecom issues, ranging from interconnection, to licensing of spectrum, to universal service, to long-distance service and to access to advanced technology. The PUCs also are concerned at intrastate level with such issues as interconnection rates, wholesale prices for telecommunications services, compliance with quality of service standards, universal service, customer issues and dispute resolution. Jurisdictional problems between the FCC and the PUCs do arise but generally are resolved through the good offices of the National Association of Regulatory Utility Commissioners (NARUC). The roles of the two bodies have become increasingly complementary in promoting competition, which is the focus of the Telecommunications Act.

27. In dealing with disputes, the PUCs function like courts in which parties to a dispute present their respective cases. There is also an administrative law judge who presides over the court proceedings and on conclusion of a hearing pronounces decisions/recommendations. These recommendations are reviewed by utility commissioners before they are adopted. An appeal can be made to the courts of the concerned states against the decisions of the utility commissioners. Compliance with the principle of natural justice, adherence to the relevant state laws, and the quality of a decision (whether it is a perfunctory or a reasoned order) are the factors that the courts generally take into consideration while considering an appeal. Although the PUCs have built considerable expertise in such areas as finance, accounting, law, and consumer affairs, which helps them to discharge their responsibilities, their undue concern for procedure, essentially to ward off the possibility of a judicial review, to some extent hinders their
decision-making processes. Bob Rowe, President of the National Association of Regulatory Utility Commissioners, in a paper published in University of Colorado Law Review has mentioned how some PUCs have initiated new approaches to resolving disputes. In particular, he has cited the settlement conference approach of PUCs in Texas to address informal complaints on interconnection matters. He has also referred to alternative dispute resolution techniques adopted by New York’s PUC.

28. The duality found in the regulatory process in the telecom sector draws from the federalist pattern of the US constitution and places reliance on collegial wisdom both at the federal and the state levels. A common criticism of the split jurisdiction between the FCC and the State PUCs is that it entails duplication of work and fails to provide safeguards against inconsistent state policies. In turn, this militates against a uniform policy at the national level, which then impacts the effectiveness of the regulatory agencies. Another common criticism of the dispute resolution process at the federal and state levels is that it fails to yield speedy decisions, mainly perhaps for procedural reasons along with the involvement of many layers in the decision-making process. Hence, increasing attention is being given to alternative dispute resolution methods to accelerate decision-making. Section 252 of the Communications Act deals with the procedures to be followed to resolve disputes through negotiation, mediation or arbitration.

Canada

29. The Canadian Radio-Television and Telecommunication Commission (CRTC), established in 1968, is the regulator for broadcasting and telecommunications services in Canada. It has up to 13 full-time commissioners (including the chairman and the vice-chairman of broadcasting and the vice-chairman of telecommunications) and six part-time commissioners. The responsibility for decision-making for telecommunications devolves only on full-time commissioners. The approach of the CRTC in the matter of dispute resolution has undergone change in recent years; it has moved away from an exclusive reliance on traditional process, which essentially involved adherence to court-like procedures, to put in place new procedures and practices that accommodate expeditious decisions on new and emerging issues associated with competitive markets and advanced technology. One of the early initiatives in this regard was the Telecom Public Notice issued on December 8, 1995. This document introduced procedural mechanisms that favored early involvement of the Commission’s staff to seek timely resolution of disputes or at least

to establish communication between parties to a dispute. These procedures did not preclude the option to seek a formal determination through the Commission. The document also provided for appointment of an inquiry officer who would receive evidence from the parties and submit a summary of the evidence along with comments to the Commission for determination.

30. A further major initiative to promote timely decision making was taken through Public Notice CRTC 2000-65, issued on 12 May 2000. The main features of the new framework were i) constitution of a core team within the CRTC staff to “track and manage the progress of all disputes to ensure that they move towards resolution;” ii) use of a “self-facilitated process” in cases where that might be more effective in resolving disputes than the traditional process, which will continue to be used in disputes involving multiple issues; and iii) the requirement that parties to a dispute endeavor, in the first instance, to settle the matter bilaterally or through third-party mediation. An Appendix to the Public Notice graphically illustrates the process for resolution of competition and access disputes. This notice also provides three options for dispute resolution, namely, i) Staff-assisted dispute resolution, which should be particularly effective in disputes relating to the commercial or technical facts of a particular case; ii) Consensus-based problem-solving, which entails establishment of working groups “to focus on specific tasks and work towards creating a consensus industry position as to how a technical, administrative or operational issues should be resolved;” and iii) expedited commission determination, which could work well when a dispute meets four conditions, namely, a) when a small number of parties is involved; b) when resolution has not been possible through alternative methods; c) when interpretation or application of an existing Commission’s decision is involved; and d) when the issues involved in a dispute are few. Under any of these options, a decision is required to be issued within 90 days.

31. These procedures, however, did not yield the expected results. The Commission was dismayed to find that the resolution of most disputes took longer than the stipulated 90 days. Hence, a further refinement of the process occurred through the issuance of Telecom Circular CRTC 2004-2 on 10 February 2004, which envisaged the establishment of a series of Commission panels to conduct public hearings to deal with competition issues on an expedited basis. Under this procedure, once the Commission has decided to place a matter before the panel, parties to a dispute are required to bring all relevant documents and knowledgeable persons and attend a brief oral hearing where cross-examination of involved parties is permitted. After the hearing is over, the panel would issue written decisions on each of the matters considered. The CRTC also has enforcement powers appoints inspectors to ensure compliance with its orders.
32. A unique feature of telecom regulation in Canada is the industry committee, which is set up by the CRTC. It comprises representatives of the telecom sector as well as experts and it resolves most telecom issues; recourse to the CRTC is taken only when no consensus is reached on an issue. In this Committee, there are working groups and sub-groups dealing with specific telecom issues and the rules and procedures of the Industry Committee are laid down by the CRTC. The dispute resolution procedure in Canada is still evolving and an indication to this effect was given by the Chairman, CRTC, while addressing the 2008 Canadian Telecom Summit. According to him, the efficiency of the current two approaches of negotiated mediation and formally binding arbitration will be further improved along with the use of video conferencing for expediting hearings. Another objective seeks more powers for the CRTC to enforce judgments.

Australia

33. In Australia, the regulation of telecommunications takes place at two levels: the first through the institution of a regulator created under the Australian Communications and Media Authority Act 2005 and the Australian Competition and Consumer Commission, and the second through two bodies, namely, the Australian Communications Industry Forum (ACIF) and the Telecom Industry Ombudsman, which are industry sponsored entities. Section 4 of the Telecommunications Act 1997 established industry self-regulation as the corner-stone of telecommunications regulation and section 3 focused on the long-term interests of consumers and “the efficiency and international competitiveness of the Australian telecommunications industry.” The dispute resolution process in Australia revolves round these four institutions, each playing a distinct role in their respective spheres. The Regulator, Australian Communications and Media Authority (ACMA), settles issues involving contravention of industry codes, which may entail pecuniary penalties for breaches. It can issue a directive to a carrier or service provider on grounds of breach of industry code that is enforceable through the Federal Court. It is equally concerned with proper compliance with the provisions of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

34. The Australian Competition and Consumer Commission (ACCC) under the Trade Practices Act 1974 and the Telecommunications Act 1997 adjudicates telecom access disputes. There is a great deal of emphasis on timely resolution of issues through negotiations before they acquire the characteristics of a dispute. The ACCC places considerable reliance on arbitration as a way to resolve telecom access disputes. A revised guide issued in March 2004 on the resolution of telecom access disputes provides for three phases for arbitration: the first is the preliminary phase, when issues and parties are identified; the second is the substantive phase, when issues in dispute are deliberated; and the third is the determination phase, when, on conclusion of deliberation, a determination is made by the ACCC. The ACCC does not
function like a court, nor is arbitration treated as court proceedings. This lends flexibility in dealing with issues in dispute.

35. The institution of the Telecom Industry Ombudsman (TIO) is the result of an industry initiative that has created an authority to investigate and make determinations on complaints by end users. The Ombudsman’s office responds to concerns about billing, service faults, mobile phones, standard telephone service, internet access, privacy matters, breach of customer-service agreements and matters relating to industry codes. This institution is quite effective and provides to consumers a less complex way to resolve disputes. It investigates complaints, hears parties to a dispute and makes an independent assessment of the dispute and thereafter hands down a fair and reasonable decision. The TIO has classified complaints into four levels; the first level of complaint is capable of resolution instantly. Levels two and three complaints are such that they require information to be obtained from service providers. Set time frames for resolution have been prescribed for levels two and three complaints. Level four complaints are dealt with at Deputy Ombudsman level. Complaints get upgraded to higher levels if there is no response within the given time frame or if the response is considered inadequate. The Ombudsman cannot, however, investigate a complaint if legal proceedings are underway.

36. The Ombudsman also has an advisory role. It can advise the ACMA on industry codes and standards. A council comprising five representatives of the industry and six users with an independent chairman is appointed in consultation with the government to render policy advice to the Ombudsman. The Ombudsman has the power to award compensation to a complainant up to a maximum of AU$10,000. The ACIF is a further example of an industry initiative that develops and administers technical and operating arrangements to promote the long-term interests of the end user, as well as the efficiency and international competitiveness of the Australian communication industry. It develops standards and codes of practice to support competition and protect consumer interests. Evidently, there is considerable emphasis on self-regulation, and representative bodies have evolved through a fairly transparent process their own norms -- technical and other -- that are applied strictly. Disputes arise only when a party does not adhere to self regulation. A stiff set of mandatory disincentives, e.g. sharing the costs of litigation, has been provided to encourage the timely resolution of disputes before escalation.

*Malaysia*

37. In Malaysia, the Malaysian Communication and Multi-Media Commission, (MCMC) set up under the Communications and Multimedia Act 1998 has been assigned over-all responsibility “to regulate the converging communications and multimedia industries”\(^8\) and is also the regulator for the

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\(^8\) Malaysian Communications and Multimedia Commission Act 1998
telecom sector. The Commission consists of a Chairman, one member representing government and not less than two but not more than five members appointed by the Minister. In regard to resolution of disputes, the Act lays down that a dispute between two or more persons in matters under the purview of the Act or its subsidiary legislation shall first be resolved by negotiation between the parties. If negotiations fail, the parties have an option to seek resolution of the dispute by the Commission. For this purpose, party to a dispute is required to notify the Commission, in writing of the dispute. Upon receipt of the notification of the dispute, the Commission proceeds to decide the dispute if it is satisfied on three grounds, namely, i) an agreement will not be reached within a reasonable time; ii) the notification of dispute is not trivial, frivolous or vexatious; and iii) the resolution of the dispute would promote the objectives of the Act. The Commission also has the discretion to resolve the dispute upon such terms and conditions as it may deem fit, subject to the objectives of the Act and any guidelines issued by the Commission in the matter. The decision given by the Commission in such cases has to be in writing with reasons and will be binding on the parties. A copy of the decision is required to be provided to parties to the dispute. Further, such decisions are required to be registered with the Commission and are enforced by the High Court provided a certificate has been issued by the Commission to the complainant for leave to proceed to the court for enforcement of the decision except in the case of an injunction.

38. In section 17 of the Act, there is a provision for an appeal tribunal to be established by the Minister to review particular matters under the Act or its subsidiary legislation. It is the prerogative of the Minister to appoint a Chairman or at least two other members of the Tribunal. The Chairman has to be a person currently holding the office of a Judge of the High Court. A person is deemed as qualified to be a member of the tribunal if he has knowledge of or experience in the communications and multimedia industry, engineering, law, economics or commerce, or public administration. The appointment of a member is for a term not exceeding three years that can be renewed for a further term. The Minister is empowered to terminate the appointment of the Chairman or any member on certain specified grounds. The Minister is further authorized under section 10 and section 24 of the Act to make regulations regarding the operating procedures and the quorum of the tribunal, the conduct of hearings, and the employment of staffs, if any.

39. The Appeal Tribunal is convened on an ad hoc basis as the Minister considers necessary or expedient in the public interest or to assist in the performance of the Commission’s functions. Under section 18 of the Act, the tribunal may review, after an appeal, a decision or direction of the Commission but not its determination under section 55 of the Act. The Act, however, does not clearly spell out the ingredients of a determination. The tribunal takes decision by majority and its decisions are final and binding and not subject to further appeal. There is also a provision in the Act regarding judicial review of
a decision by the Minister or Commission subject, however, to the person seeking judicial review having exhausted all other remedies provided for in the Act.

40. There is a special emphasis in the Act on consumer protection. Section 189 of the Act provides for an industry body to be designated as a consumer forum by the Commission. Section 190 of the Act prescribes model procedures handling of customer complaints and disputes and procedures for the compensation of customers in the case of a breach of a consumer code. The MCMC is a statutory body that can investigate consumer complaints relating to matters of customer service and consumer protection and non-compliance with consumer codes by a licensee. The scope of dispute resolution also covers standard access obligations, spectrum interference, network facilities or right-of-way, rates, and terms and conditions. The process of dispute resolution is required to be simple, speedy and inexpensive.

Section IV: An overview and analysis of dispute settlement practices in India.

India

41. Dispute resolution has acquired considerable importance in India in the wake of deregulation of the telecom sector. The sub-sectors of value-added services were opened to private investment in July, 1992 followed by the opening of basic telecom service to private participation through the National Telecom Policy in 1994 that, inter alia, enunciated the need to protect and promote consumer interests and ensure fair competition. The New Telecom Policy, 1999 led to further liberalization in the scope of cellular mobile service, fixed service and cable service. It addressed other areas also, including e-commerce, resolution of problems of existing operators, restructuring of the Department of Telecommunications (DOT), universal service obligations, the role of the regulator, standardization, and so forth. The 1999 policy recognized the far-reaching developments in telecom, IT and the media industries worldwide, and the important issues concerning convergence. Subsequently, setting up a regulatory authority through enactment of a law in 1997 (the Telecom Regulatory Authority of India [TRAI] Act, 1997) and the corporatization of the service arm of the Department of Telecommunications in 2000 were the other important milestones in deregulation of telecommunications in India.

42. Initially, the dispute settlement function fell within the purview of the telecom regulator. Subsequently the regulator was divested of adjudicatory responsibility through an amendment of the TRAI Act, 1997 in 2000, which resulted in the establishment of a specialized dispute settlement mechanism known as the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) for the telecom sector. The policy makers perhaps realized that the mission of deregulation and competition as well as protection of consumers’ interests would be well-served if regulation and dispute settlement are viewed as
two different sets of activities. They felt that the formal separation of those sets of activities would bring more transparency and credibility to India’s dispute-settlement mechanism, and also expedite the settlement of disputes. The TDSAT has been entrusted with the responsibility for resolving disputes between licensor and licensees, between two or more service providers, and between a service provider and a group of consumers.

43. Section 14A (2) of the amended Act further provides that the central government or a state government or a local authority or any person aggrieved by any direction, decision or order made by the TRAI may prefer an appeal to the Tribunal. Such an appeal is required to be preferred within thirty days from the date of receipt of the regulatory authority’s order. The Tribunal also is empowered to call for the records relevant to disposal of the appeal from the TRAI. Jurisdiction of civil courts in matters relating to telecom disputes has been ousted and appeal against the order of the TDSAT lies only before the Supreme Court of India and that only when a point of law is involved. A period of ninety days from the date of the order of this body has been prescribed for preferring an appeal. The amended Act provides for a Tribunal comprising a chairperson and two members. The chairperson has to be either a serving or retired judge of the Supreme Court of India or a Chief Justice of a High Court. The two members would be persons who have held an office such as the post of Secretary to the Government of India for at least two years or other persons who have acknowledged expertise in the fields of technology, the telecommunications industry, commerce or administration.

44. Proceedings before the TDSAT, where decision are taken by majority, are treated as judicial proceedings and its orders are required to be executed as a decree of a civil court. The amended Act also provides for penalties for any willful failure to comply with the TDSAT’s orders. The Tribunal is empowered to regulate its own procedures and follow the principles of natural justice in dealing with disputes in the sector. The Tribunal has both original and appellate jurisdiction and functions typically as a court. Parties in dispute can submit petitions for consideration by the Tribunal, whereupon it decides on the admissibility or otherwise of a petition. Once the petition is admitted, notices are issued to disputing parties to file their responses within a stipulated period. Thereafter, a date is posted for hearing the case, at which the parties or their representatives make oral submissions. On conclusion of the hearing, the TDSAT pronounces its decision in open court or reserves the order for pronouncement on a date that it determines. The Act enjoins upon the tribunal to dispose of an application or appeal before it as expeditiously as possible and, finally, within 90 days from the date of receipt. However, in complex cases where hearings are exceedingly lengthy, the decision could take several months.

45. The number of cases presented to the Tribunal has been increasing consistently due in part to an addition to its responsibilities in January 2004 to deal also with disputes pertaining to cable and
broadcasting services. A total of 103 cases were filed before the Tribunal in 2001, and that number rose to 522 in 2006 and to 473 in 2007 through October.\(^9\) The TDSAT has decided some very important issues, including those pertaining to jurisdiction, interpretation of licensing terms, fairness of the competitive environment, inter-carrier compensation, spectrum allocation and consumers’ interests, most of which were essential for ensuring sustained growth of the telecom sector. It has also been organizing seminars/panel discussions in various locations to focus on the importance of speedy settlement of disputes in this sector, and to raise awareness among the various stakeholders about its activities and role in the development of Indian telecommunications.

46. The Indian regulation owes much to the regulatory experience of countries like the USA, the U.K, Canada and Malaysia. The regulatory institutions in these countries provided good examples of the value of a strong, independent regulator with well-defined functions, powers and responsibilities in a deregulated environment to discharge the mission of promoting fair competition, protecting consumer interests and expanding the reach of the telecom network. The Indian regulatory model, however, represents a significant departure in many respects from the experience of others, particularly so in the settlement of disputes where it has evolved its own unique approach. In Australia and Malaysia, for example, there is less emphasis on an institutionalized appellate mechanism for dispute settlement specific to the telecom sector. The Appeal Tribunal in Malaysia is set up by the Minister on an ad hoc basis and its independence is circumscribed, to a great extent, by the dominant role given to the Minister under the MCMC Act in the matter of appointment and removal of the Chairman and the members as also in such other matters as regulation of the tribunal’s procedures. In Canada and the USA also, there is no finality about the regulator’s decisions and contentious issues generally land in courts, even though one observes the efforts being made by the regulator in Canada to expedite the dispute settlement process. In the U.K., OFCOM’s detailed guidelines in the area of dispute settlement coupled with its emphasis on ADR methods provide a healthy approach towards speedy resolution of issues. The appeals process in most European countries involves various layers that may hinder speedy decision-making, notwithstanding supra-national pressures in the form of EC directives.

47. Compared to the regimes in these countries, the creation of a specialized dispute settlement body with the requisite authority and jurisdiction for the Indian telecom sector has emphasized a speedier resolution of telecom disputes. Although the TDSAT has reduced the work-load of India’s judiciary, the facts that it operates with due regard for the principles of natural justice and is headed by a retired judge of the Supreme Court of India inspires confidence among service providers, investors and consumers alike. The Tribunal is perceived as wholly non-partisan and as competent to regulate its own procedures.

\(^9\) Annual Report 2007-2008, Department of Telecommunications, Government of India, Page 26
to settle telecom disputes. In dealing with such a specialized body, the parties to a dispute have the assurance of uniform, objective interpretation of laws/rules for the sector, unlike the situation in civil court, where no such consistency can be expected.

48. This is not to suggest, however, that no drawbacks are found in this arrangement. Even though the Tribunal has served well in discharging its mandate, it is still saddled with court-like procedures that make its resolution of disputes an expensive and time-consuming exercise. One might also question its decision-making processes, and ask whether strict adherence to judicial interpretation of an issue should be modified to allow due appreciation for the policy intention of promoting and safeguarding competition as enshrined in the legislation. An equally important point to consider is the extent to which adherence to a formalized approach in dealing with issues serves the rationale for creating a specialized body: i.e. to make decisions in an efficient, objective and speedy manner while taking account of the dynamics of the telecom situation.

49. Following a court-like procedure where the parties to a dispute make written submissions, tends to bind them to formal positions on the issues, which at times can work against speedier resolution of disputes. By infusing more flexibility into working procedures to make them less formally court-like and by allowing interested parties to draw upon one of the ADR methods before resorting to formal processes of adjudication, the TDSAT might go some way towards mitigating current deficiencies. There is also a view that establishing the Tribunal with appellate jurisdiction over the regulator has diluted the regulator’s authority and also contributed to delays in implementing regulatory decisions. Some argue that the institution of the regulator should be further strengthened properly to address competition issues in a rapidly changing telecom environment. A requirement for that outcome is that the role of the appellate body should become less intrusive in matters falling under the regulator’s domain.

50. In addition, increasing priority now attaches to dealing with consumer complaints. Currently, under the provisions of the Act, the TDSAT can deal with complaints that emanate from a group of consumers but not the complaints of individual consumers, which fall to the Consumer Disputes Redressal Forum under the Consumer Protection Act, 1986. However, at the initiative of the telecom industry, efforts are afoot to appoint a Telecom Ombudsman, which will address individual consumer’s issues vis-à-vis service providers following a pattern broadly similar to the telecom ombudsman model found in the U.K. and Australia.

51. Clearly, the models employed by different countries have their strengths and weaknesses, and an ideal dispute resolution mechanism that incorporates the strengths of those in place in various countries is yet to emerge. Nevertheless, the imperative of improving the current measures to resolve disputes is self
evident as a means to enhance the growth of the telecom sector. A consensus-building approach to resolving disputes among parties without sacrificing public policy goals and the regulator’s willingness to invite greater involvement of telecom operators in periodic reviews of the state of the sector might reduce the frequency of disputes and promote a healthy telecom environment. Denmark provides a good example of a regulator that conducts such reviews with salutary effects. Industry forums in Canada, Australia and Malaysia are other good examples of the consensus-building approach.

52. A study of dispute resolution by the ITU/World Bank\(^{10}\) provided a number of suggestions to improve the dispute resolution process. These include better sharing of knowledge among the regulators and policy makers, development of greater synergies between the telecommunication and ADR communities in order to leverage dispute-settlement practices from the commercial sector, an exchange of views through participation in national and international forums, creation of an international database of best practices for resolution of disputes along with examples of innovative dispute resolution procedures, and encouraging the participation of related industries and universities in dispute resolution for telecoms. Implementing some or all of these recommendations could go a long way towards improving the methods currently used to resolve disputes.

**Conclusion**

53. In the changing dynamics of the Indian telecom environment the underlying emphasis for telecommunications has become more consumer and free-market oriented. At the same time, the blurring of differences between telecommunications and broadcasting is leading to a significant change in the structure of telecommunications. Keeping in view the current and future prospects for telecom development, the dispute resolution mechanism needs to be sufficiently flexible to respond to dramatically changing circumstances; it also should be both efficient and speedy and employ transparent processes. Such a mechanism should function, as well, in a truly independent manner with the enforcement powers required to steer properly the course of telecom development.

54. Innovative practices would need to be introduced in the regulatory and dispute resolution processes to meet the challenges of a dynamic telecom environment. Already, such practices are evident in countries discussed in this paper. Dispute avoidance is emerging as an important concept and there is considerable emphasis on this aspect in the European Union guidelines. Focus on this aspect can clear the battle over turf between service providers and also reduce regulatory intervention. The Australian examples of self-regulation, an industry code and the institution of an industry ombudsman are initiatives

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to instill a sense of responsibility among the stake-holders in telecommunications that could well be adapted to the Indian situation. Initiatives such as this would be bound to improve the telecom scene qualitatively. Again, emphasis on the use of ADR methods for resolution of disputes prior to approaching the regulator, as is the case in the U.K., France, and Malaysia, can be usefully tried in the Indian context. This could reduce the workload of TDSAT to some extent and also change the culture of seeking remedies through courts/tribunal in the first instance. The telecom sector in India suffers from multiplicity of wireless operators, attributable to the current policy framework that strains the ecosystem of wireless providers. This situation may result in the need to deal with issues in such areas as mergers and acquisitions, foreign equity ownership, interconnection, spectrum management, quality of service and business solvency. To cope with these and other issues, the existing policy framework should be revisited regularly and amended as the evolving imperatives of the sector dictate.
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