

# 6.6

## Functional Aspects of Regulation

When measuring the effectiveness and independence of a regulator, it is necessary to look not only at the structural and organizational design, but also at the functional aspects of regulation. In addition to the institutional design, in order to regulate effectively, a regulator should possess the proper authority and competency to exercise its regulatory functions. The scope of the regulator's mandate should be clearly established, which can vary depending on the degree of independence of the regulator and its interaction with other entities responsible for the ICT sector, such as the sector ministry, as well as its institutional design. Effective regulation also requires that the regulator adopt and implement procedures that are transparent and open to public participation and ensure accountability. These elements encourage public confidence in the regulator, compliance with regulatory decisions, laws and regulations, and create an enabling environment conducive to growth and development in the sector.

This Chapter provides an analysis and overview of the regulator's competencies and mandate, as well as regulatory procedures, focusing on three main issues: (i) ensuring an open participatory decision-making process through public consultations, (ii) ensuring the accountability of regulator's activities to the state and to consumers, and (iii) ensuring regulatory efficiency and promoting growth and competition of the sector through dispute resolution and enforcement procedures.

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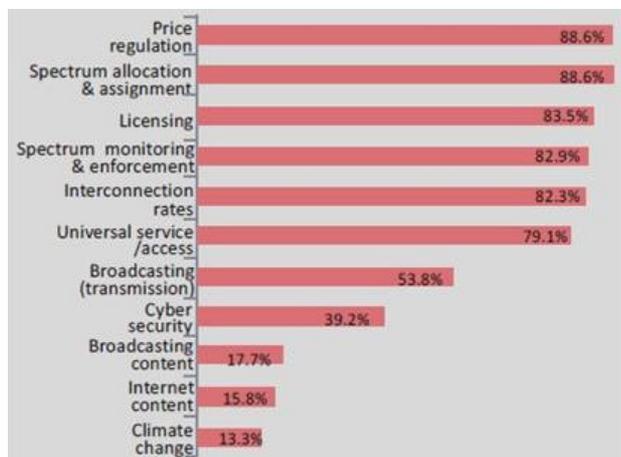
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### 6.6.1 OVERVIEW OF REGULATOR'S FUNCTIONS AND RESPONSIBILITIES

Telecommunications regulators generally are granted authority to carry out a broad range of functions through legal instruments such as the telecommunications law, subordinate regulations, and government decrees. These functions include the authority to

conduct rulemakings and issue regulations, grant licences and other authorizations, undertake adjudication and enforcement matters, as well as address various telecommunications issues, including interconnection, price regulation, numbering, and spectrum management.

In a global survey conducted by the ITU, 158 countries reported a wide range of responsibilities under the regulator’s jurisdiction (see Figure 6-A).<sup>1</sup> Nearly 90 per cent reported that the regulator is responsible for price regulation and spectrum allocation/assignment. Other prominent functions under the regulator’s mandate include licensing; spectrum monitoring and enforcement; interconnection rates; universal access/service; and broadcasting transmission (i.e., non-content related issues). Less often, regulators are also responsible for cybersecurity; broadcasting and Internet content; and climate change issues.



◀ Figure 6- A: World Survey of Ten Regulatory Functions

Source: ITU, *Trends in Telecommunication Reform 2012: Smart regulation for a broadband world*, 2012.

Similarly, in Taiwan, the 1996 Telecommunications Act specifies that the Directorate General of Telecommunications (DGT) is responsible for developing an integrated telecommunications development plan, supervising telecommunications enterprises, and promoting the development of an information society so as to enhance public welfare.<sup>3</sup>

The rapid development of the telecommunications and information technology sectors, as well as the evolution of convergence, creates an increasing number of responsibilities for regulators regarding the manner in which to regulate (i.e., the appropriate structure and regulations), as well as the manner in which to treat new technologies and services. This has produced a need to reorganize administrative functions in the telecommunications sector. For example, as described in Chapter 6, many regulators are including information technology as one of the areas of focus, and therefore have created offices dealing with such issues. In other countries, regulators are also dealing with broadcasting issues. Moreover, in yet other countries, regulators are still charged with dealing with other sectors such as postal services.

### 6.6.1.1 OVERVIEW AND COMPARISON OF DIFFERENT INSTITUTIONAL DESIGNS

There are four main institutional designs for telecommunications regulatory entities. First is the single-sector regulator whose sole function is to oversee the telecommunications sector (designated as Model 1 in this Section). The term single-sector is somewhat misleading as these entities, which in most cases originated from the separation of the operational and regulatory activities of state-owned post and telecommunications companies (PTTs), often include the postal and telecommunications industry as well as radiocommunications. The second design is known as the “converged” regulator, meaning those regulatory entities that oversee a broader range of services which, in addition to telecommunications, also include information and communications technologies, including broadcasting (designated as Model 2 in this Section). The multi-sector regulatory authority (Model 3) usually encompasses various industry sectors that are considered public utilities, e.g., telecommunications, water, electricity, and transportation. The fourth category is not a regulatory authority per se, but an approach in which general competition policy is the main method of overseeing the telecommunications sector (designated as Model 4 in this Section).

Characteristics of these models of institutional entities for telecommunications regulatory agencies are as follows.

#### Model 1 – Single sector regulators

**This organizational structure** focuses mainly on the telecommunications (and sometimes postal) sector, with other government entities responsible for broadcasting and information technology issues. Many countries around the world still use the single-sector regulatory authority approach,<sup>1</sup> including Algeria (Regulatory Authority for Post and Telecommunications), the Comoros (National Society of Postal Services and Telecommunications), Jordan (Telecommunications Regulatory Commission, which includes postal oversight), Egypt (National Telecommunications Regulatory Authority), and Oman (Telecommunications Regulatory Authority).<sup>2</sup> The single-sector regulator also includes organizational structures where the ministry is a regulator, such as the Ministry of Internal Affairs and Communications in Japan.

Prior to liberalization it was common for a state-owned operator to be responsible for regulating the post and telecommunications industries as well as for radiocommunications issues, and in some cases, even serving as international representatives of their respective countries with regard to their operations. After liberalization, this structure was no longer possible under most countries’

legislation.<sup>3</sup> Thus, the operation and regulation functions were separated and independent regulators were established. In many countries, when telecommunications regulators were initially established, they simply took over the “regulatory function” from government-owned PTTs and therefore their mandate almost automatically included the administration of radiocommunications and postal services in addition to telecommunications.

In Europe, once the PTTs were separated and privatized, the regulation of telecommunications, radio and the postal sector often was assigned to one agency.<sup>4</sup> Telecommunications regulators in Europe were established by combining certain units within the public administration (or from the state-owned operator) or by transferring employees or units from the ministry to the new organization. The units that were transferred often remained the same and were integrated into the structure of the new organization, which was based on fields of activity and communications technologies. Within this context, regulators in Europe were generally organized in a technology/field-oriented regulatory structure and emphasis was placed on the recruitment of technologically-oriented staff (e.g., engineers).

A key advantage of a single-sector regulatory authority is that it can be focused on the complex technical challenges of the telecommunications sector, including network and service development. The telecommunications sector tends to be more dynamic than other utilities and a single-sector regulator can often adapt to this more easily. One disadvantage of sector-specific regulators is that sufficient resources may not be available to staff the different regulator agencies and there may be duplication for regulatory activities that are common to different industries.

A justification for a single-sector regulator is based on the perception that the telecommunications sector includes specific technical issues, such as numbering, that are unique to the telecommunications sector and exhibits specific characteristics that differentiate it from other industries. Decision-making within communications policy is based on the expertise of the regulators. As experts, they participate in drafting laws and act as advisors to the appropriate ministry or other authorities when necessary. Regulators require not only need expertise in the technical, financial, and legal aspects of communications, they also need to systematically analyse present and future developments, and be able to cooperate with other countries on sector issues at the international level. Therefore, it is vital that staff is sufficient in number and suitably qualified to be able to face such a task. The perceived need for a specialized skill-set led the Cape Verde Government to establish a separate ICT specific regulator in 2004 (Institute of Communications and Information Technology – ICTI) in parallel with and despite the existence of a multi-sector (economic) regulator (Autoridade de Regulamentação Económica – ARE) which also has a mandate to regulate telecommunications. Since becoming operational, ICTI has in practice undertaken both the technical and economic tasks in the ICT sector, with ARE focusing on the other sectors. This has been in part because ICTI has the staff and desire to review a wide range of telecommunications issues, including tariffs, that would normally be within the purview of ARE, and because the two institutions have come to an agreement allowing ICTI to take the lead role on telecommunications issues.<sup>5</sup>

Another advantage of single-sector regulators relates to the origin of their staffing. In many cases, single-sector regulators tend to inherit staff from the former PTT and therefore have a core of specialized professionals from the start with a thorough understanding of the technical issues and strong engineering skills, a key advantage when dealing with complex network issues. Opponents of the single-sector regulatory structure argue that the origin of this specific skill set is, in fact, one of the key disadvantages of establishing a single-sector regulator. These critics argue that staff could be biased in favour of the incumbent, and thus more subject to capture by dominant forces. While this is an issue to be considered, it is not unique to the single-sector regulator. Whatever the option chosen, there must be a series of “checks and balances” to ensure that the regulator can perform its mandate independently.

One major concern within the single-sector model is the possibility of institutional rigidity. Since a single-sector regulator is restricted to telecommunications, this type of structure can limit the effectiveness of the agency and its staff members as it faces the issues raised by convergence. Given that regulatory authority has historically focused on a narrow sector, the regulatory authority may become nearly frozen in time in terms of defining the sector it is regulating. As a consequence, it may not necessarily draw the appropriate staff from across the broader communications sector necessary to be flexible and, therefore, is unable to adapt to the continuous changes in the communications sector. A practical example of such difficulties has been the case of single-sector telecommunications regulators having difficulties when incorporating next generation technologies and services into the regulatory framework.

In recent years, and especially with convergence in the communications sector blurring the boundaries between industries, overlapping responsibilities between sectoral regulators has also become an issue, leading sometimes to duplication of regulations and required authorizations for what are essentially similar services being offered to the public. This can cause conflicting decisions across sectors, or indeed lack of decisions where overlap between mandates cannot be resolved on a political level. The challenges of convergence have led several countries, including South Africa and the United Kingdom, to move away from single-sector regulators and evolve towards a converged regulator, thus merging agencies in charge of the various aspects of the communications sector.

**Model 2 – Converged regulator** With a **converged institutional design**, all communications services *i.e.*, telecommunications including radiocommunications, broadcasting and media (and in some instances postal services), are under the umbrella of one agency.

Several countries have followed the route of converging their institutions dealing with the communications sector, typically combining formerly discrete agencies responsible for telecommunications, broadcasting or information technology into one entity:

- In December 1999, the Info-Communications Development Authority of Singapore Act of 1999 disbanded the former

telecommunications regulator (Telecommunications Authority of Singapore, TAS) and the information technology agency (National Computer Board, NCB), to create one new statutory board, the Infocomm Development Authority (IDA).<sup>6</sup>

- The Independent Communications Authority of South Africa (ICASA) is the regulator of telecommunications and the broadcasting sectors. It was established in July 2000 as a result of the Independent Communications Authority of South Africa Act No.13 of 2000. It took over the functions of two previous regulators, the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA).
- In 2001, the Saudi Arabian Council of Ministers issued a decision changing the name of the Saudi Communications Commission to the Communications and Information Technology Commission in light of new tasks it assumed in information technology.
- Several EU member states, including Finland and the Netherlands, are also moving to converged regulators that regulate the licensing of infrastructure across the telecommunications and broadcasting sectors through a single regulatory body. In 1997, Italy created a single regulatory body with responsibility for all telecommunications and broadcasting matters. Austria also established such a regulatory authority in 2001.
- A similar approach was also taken by the United Kingdom. The Office of Communications (Ofcom) was established in the United Kingdom in December 2003 as a result of the Communications Act 2000<sup>7</sup> and became the regulator for television, radio, and telecommunications. Ofcom combines five former agencies: the Broadcasting Standards Commission (BSC), the Independent Television Commission (ITC), the Office of Telecommunications (OfTel), the Radiocommunications Agency (RA), and the Radio Authority.
- Even the European Commission's Information Society Directorate was granted new responsibilities for audiovisual and media policies. The new Information Society and Media Directorate General brings together all three aspects of modern day electronic communications: broadcasting; computer networks; and electronic communication services.<sup>8</sup>

Like the single-sector telecommunications regulator, the converged communications regulator tends to be strong in specialized engineering skills in the communications sector, which is an important core expertise in dealing with complex network issues. In addition, the converged communications regulator also meets the challenges posed by service convergence by bringing in related skills, and therefore overcomes what is generally viewed as being one of the main disadvantages of a single-sector regulator (e.g., a telecommunications regulator overly focused on the telecommunications sector).

This model also better meets the need for flexibility in terms of its internal administration's ability to meet market realities. It gives the regulatory authority and its staff the flexibility to better handle the continuous technological and regulatory changes and developments within the ICT sector. By having all services – which are increasingly provided over a single network – under one regulator, the staff responsible for specific services can work with other parts of the regulator that are dealing with related issues, and therefore the regulator can take a more consistent approach when considering changing technologies and their effect on legacy regulations.

In addition, the converged model tends to resolve some of the overlap between telecommunications and broadcasting that has tended to become one of the regulatory issues regarding convergence. As was clearly shown in the EU's 1997 Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors,<sup>9</sup> and in its "99 Review,"<sup>10</sup> convergence in communications has called into question the service-based vertical regulatory system, with industry increasingly demanding a reorganization of the regulatory institutions in order to address the challenges posed by convergence.

As further stated by David Currie: <sup>11</sup>

*"Ofcom believes that convergence is a reality and that a converged regulator is best placed to nurse that convergence. When the Internet can deliver what looks to all intents and purposes like television broadcasting in a few years' time, then Ofcom and the Government will face awkward choices. Should, in the interests of fairness, the content regulation of terrestrial, cable and satellite broadcasting be rolled out to Internet broadcasters? Or should the content regulation of terrestrial, cable and satellite broadcasters be significantly rolled back, passing the baton to smart navigational devices that allow people to find the content that they want (subject to the law) and avoid the content that they do not want to see or hear? A converged regulator like Ofcom will I hope be able to bring wisdom to that debate."*

### **Model 3 – Multi-sector regulator**

**Multi-sector regulators** oversee not only the telecommunications sector, but other industry sectors with common economic and legal characteristics (e.g., telecommunications, water, energy, and transportation). Costa Rica, the Gambia, Jamaica, Latvia, Luxembourg, Niger and Panama, as well as state public utility commissions in individual states in the United States, have chosen this type of organizational structure.<sup>12</sup>

The advantages and disadvantages of multi-sector regulators have been discussed in various fora, and opinions vary. One of the main arguments generally raised in favour of a multi-sector regulator is based on the perceived lack of resources and the need for economies of scale to effectively regulate the different infrastructure industries and sectors. It is often argued that with this type of structural organization, one set of staff can be used to oversee a variety of industries. The rationale is that telecommunications is considered to form part of the overall infrastructure sector along with other utilities, such as electricity and water, and that infrastructure services share certain aspects: they are aimed at providing basic needs to the public; they often use similar rights-of-way; and they typically involve the economic regulation of large monopolies with network economic characteristics (i.e., high sunk

and fixed costs). However, experience in some countries, such as Latvia, has shown that existing multi-sector regulators are performing poorly.

The answer to the staffing question is straightforward on the one hand and more complex on the other. Looking at the question in the strictest sense, single-sector regulators will look for highly technical staff focused on the telecommunications sector and generally organize their staff in industry-based units (e.g., post, telecommunications, radiocommunications). Converged regulators will look for staff that can bring in the expertise and know-how from the different sectors they are regulating. Generally these regulators are organized in functional units or indeed in horizontal, project-based units (See section 6.1.2.3. for details on administrative structures regarding functions of regulatory authorities). Multi-sector regulators will recruit staff specialized in the different sectors, and are generally organized in terms of the sectors within their mandate although some pool legal and economic resources to deal with, for example, tariffing issues that may be common across the different sectors.

An important question within this context, however, is to what extent staff can actually be used across the sectors. Our experience shows that staff within this model is generally recruited in terms of the sector they are regulating and only legal and occasionally economic staff is pooled to deal with specific issues that occur across the sectors. Luxembourg, for example, has organized its agency according to industries/services: telecommunications, electricity, gas, postal and spectrum management issues – these are then divided into smaller issue-specific units.<sup>13</sup> This can also be seen in Belize and Niger. An interesting discussion of this issue is presented in the WDR Discussion Paper # 0204 of March 2002 which claims that:

*“Examination of the actual organization of U.S. state-level multi-sector regulatory agencies, the Public Utility Commissions (PUCs), does not provide much evidence of economies of regulation, except at the level of the decision-makers, or Commissioners. Generally, staff members specialize in a particular sector such as telecommunications or water and work within distinct divisions that are devoted to sector-specific regulation. Resources are shared at the levels of commissioners, who hear cases pertaining to all sectors, the senior staff who manage the agency as a whole, and the legal staff responsible for hearings and related procedural matters. Generally, the different divisions are located in common facilities and use common amenities such as libraries, which may yield certain savings. ... It must also be noted that U.S. PUCs do not have jurisdiction over frequency management, cable and broadcasting. ... The U.S. PUC experience shows that there may be significant economies in areas such as use of buildings, libraries, and training facilities in common. This does not, however, justify multi-sector regulation as such, only close collaboration among sectoral regulatory agencies.”<sup>14</sup>*

It is also often the case that a multi-sector regulatory authority is not created from scratch, but is the result of merging several existing agencies. In most countries it is not possible to dismiss employees in the course of such a merger, negating the realization of the hoped-for economies of regulation. In addition, a merger of two going concerns often creates significant morale problems and results in increased expenditures.<sup>15</sup>

Another disadvantage of this model is that often the telecommunications sector is the most liberalized sector under the auspices of the multi-sector regulator and therefore can be negatively affected if the telecommunications regulator is merged with other more highly regulated and less agile industries. Indeed, it may make matters worse by having telecommunications regulated in an environment with utilities that are progressing at a different pace where the needs and priorities are different, or where resources are practically non-existent. Moreover, by adding sectors, such as electricity and gas, that do not always produce revenues for the regulator, the telecommunications sector may bear a disproportionate share of the costs of regulation, potentially driving up regulatory costs for telecommunications providers.

Supporters of this model argue that having a multi-sector regulator can reduce political and other influences regarding the decision-making process as opposed to, for example, the single-sector regulator. Despite such claims concerning “capture” (meaning undue influence by politicians and/or dominant players), this does not necessarily seem linked to the institutional design option *per se* but is more a product of whether a clear set of “checks and balances” is incorporated in the design of the regulator. Indeed, a risk of the multi-sector regulator could even be that “capture” by a dominant ministry or entity not only affects a single sector but all sectors regulated by the multi-sector regulator. In addition, there may be greater complexity in establishing the legal framework for the multi-sector regulator, including the level of independence and allocation of functions as between the minister and the regulator.<sup>16</sup> Furthermore, potential delays in instituting necessary reforms may result due to the disadvantages mentioned above.

Some argue that using cross-sector institutions to regulate telecommunications is justified in light of the growing convergence between telecommunications and other sectors. Ensuring that cross-sector rules and institutions are used to regulate telecommunications as well as other similar (utility) sectors may bring benefits, such as greater regulatory certainty (as operators may better forecast what to expect by observing how the regulatory framework is applied in other sectors) and lower risks of distortion between different activities. A counterargument is that the rationale behind establishing a multi-sector regulator is more a question of regulatory efficiency than of dealing with convergence in the communications sector. Even within this model it really depends on the mandate of the multi-sector regulator (*i.e.*, whether it deals with just telecommunications or with communications as well as water, electricity, and transport) to determine whether a utilities-based regulator has the staff and internal administration that allows it to effectively cope with the challenges posed by ICT convergence.

As the market develops, and convergence affects the way in which communications is offered to the people, regulators not only are expected to possess high technical expertise, but to have an understanding of the structure and development trends of the communications market. Furthermore, regulators should be able to anticipate potential situations that could threaten or interfere with the development of the electronic communications industry. The concern that staff in a single-sector telecommunications regulator may face difficulties when incorporating next generation technologies and services into the regulatory framework is

heightened with a multi-sector regulator since the staff of a multi-sector regulator would not necessarily be as technically focused on the communications sector. Obviously, a multi-sector regulator could recruit staff suited to the task of regulating the communications market, but the risk, especially where economists and legal experts are shared across the utilities sector, is that the pool of expertise becomes more diluted, thus compromising the capability and ultimately the credibility of the regulator.

A clear discussion of the advantages and disadvantages of multi-sector regulators is presented by Schwartz and Satola in the Table 6-3.17

#### Model 4 – No specific telecommunications regulatory authority

An alternative approach is to rely on the application of competition and antitrust rules rather than on detailed sector-specific rules and institutional designs. Until the passage of the Telecommunications Act of 2001, New Zealand, for example, had chosen to entrust antitrust authorities with the task of administering all rules controlling market power in telecommunications.<sup>18</sup> There was no sector specific regulatory requirement except for special obligations on Telecom New Zealand, called the Kiwi Share Obligations, which in effect regulate the price and availability of residential telephone service. Instead of sector specific regulation, the regulatory regime for telecommunications in New Zealand relied primarily upon general competition law, the Commerce Act 1986, to prevent anticompetitive behaviour. Thus, the primary constraint on the conduct of telecommunications firms in New Zealand was the same competition law that applied to all economic enterprises in New Zealand.<sup>19</sup>

However, in late 2000, the Minister of Communications determined that New Zealand’s reliance on the Commerce Act and general competition authority was inadequate in some respects to regulate the telecommunications sector.<sup>20</sup> As a result, the Telecommunications Act 2001, which contained sector-specific provisions, was passed in December 2001 to complement the generic competition provisions of the Commerce Act. Furthermore, the position of a Telecommunications Commissioner, a specialist stand-alone commissioner within the Commerce Commission, was established, *inter alia*, to regulate the telecommunications sector, and in particular to resolve disputes over regulated services, to report to the Minister on further designations or specifications of additional services, and to monitor and enforce the Kiwi Share obligations.<sup>21</sup> Additionally, the Telecommunications Commissioner has statutory responsibility for decisions made under the Telecommunications Act.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>▪ Simple to implement.</li> <li>▪ Inexpensive.</li> <li>▪ Reliance on economy-wide rules and institutions to regulate the sector promotes a coherent treatment between telecommunications and other sectors.</li> <li>▪ Less risk of political capture where the judges are ultimately in charge of enforcing economic regulation in the telecommunications. Judges are seen to enjoy a clearer and more straight-forward protection against undue pressures from the government and are independent from industry.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Non-specialized judges are ill-equipped to deal with complex telecommunications regulatory issues (e.g., local interconnection cases in New Zealand).<sup>22</sup></li> <li>▪ Legal processes are often not designed to give a voice to those who are not directly parties to the dispute.</li> <li>▪ Costs of protracted litigation and regulatory mistakes can be very high.</li> <li>▪ Sector-specific issues such as interconnection and number portability may be difficult to resolve in the absence of sector-specific requirements.</li> <li>▪ Lack of clear accountability channels renders it unnecessary to set and achieve sector objectives such as universal service, thereby opening the door for ineffective or sometimes unnecessary regulation.</li> <li>▪ There is no actual functioning example of this model.</li> </ul>

◀ Table 6-4: Model 4 – No Specific Telecommunications Regulatory Authority

- [Case Study Converged Regulator: Ofcom \[6.1.1\]](#)
- [Case Study Multi-Sector Regulator: Latvian Public Utilities Commission \(PUC\) \[6.1.1\]](#)
- [Case Study Single Sector Regulator - Instituto das Comunicações de Portugal \(ICP-ANACOM\) \[6.1.1\]](#)
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### 6.6.1.2 OVERVIEW AND COMPARISON OF DIFFERENT ORGANIZATIONAL AND ADMINISTRATIVE STRUCTURES

#### Organizational Structures

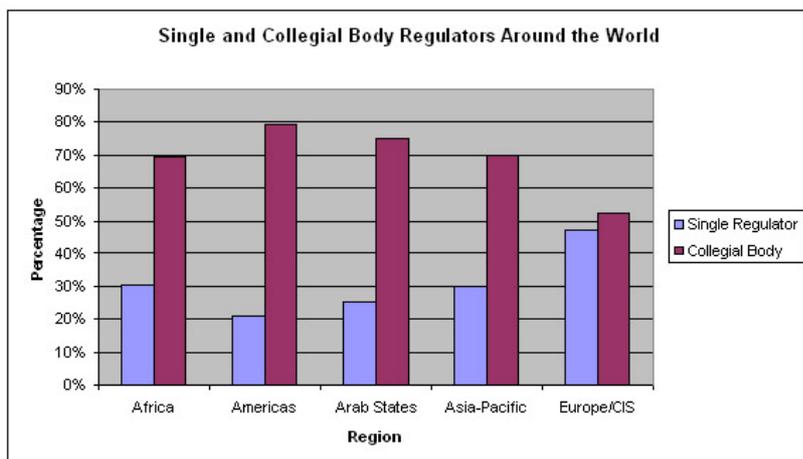
Determining the ideal organizational structure for a regulatory authority requires an assessment of various factors including: the country’s needs and objectives; political environment; legal requirements; and available expertise in the labor market.<sup>1</sup> There are essentially two models of leadership organization for regulatory authorities: (i) the collegial body (a board or commission composed of multiple members); and (ii) the single regulator (often given the title of chairperson or president). Each has its advantages and disadvantages, and variations of each model are in use around the world.

The collegial body model usually involves a board or commission made up of individuals with different areas of expertise, potentially bringing those varied perspectives to bear on each regulatory issue. In addition, a collegial body could be seen as more independent, as it is less likely that all members would be influenced by the same actors, whether in the government or the private sector. Collegial bodies also often impart a sense of legitimacy in decision-making, as it is less likely that a single individual was responsible for any particular decision. However, as in any decision-making process involving more than one actor, the development of regulatory decisions can be a slower process and more subject to internal struggle.

By comparison, the single regulator model has the potential benefit of a consistent approach to regulation and decision-making, as decision-making authority is vested in a single individual who may have a unified plan for the telecommunications sector. In contrast to the collegial body model, single regulators can make decisions much more quickly, even when constrained by due process regulations. However, the single regulator is also potentially more vulnerable to undue influence exerted by external actors, whether in the government or in the private sector. In addition, a single individual may not be able to match the expertise of a collegial body made up of individuals from different backgrounds, although experienced staff can provide substantial expertise.

The number of regulators led by collegial bodies and single regulators continues to fluctuate as governments restructure their regulatory frameworks for telecommunications. However, based on responses received by the ITU to its annual Telecommunications Regulatory Survey during the past two years, approximately 75 per cent of the regulators are collegial bodies with the remaining 25 per cent constituting single regulators.<sup>2</sup> Based on 2005 data,<sup>3</sup> it can be seen that there are significant differences between the balance of collegial bodies and single regulators in various regions. (See Figure 6-A.)

In the Americas, 20 per cent of the 29 countries indicated that their regulatory agencies were headed by a single regulator, while among the 38 European/CIS states, 47.4 per cent reported regulators headed by a single individual. Approximately 30 per cent of countries from both the African and Asia-Pacific regions reported that they had single regulators, as did 25 per cent of the Arab states.<sup>4</sup>



◀ Figure 6- A: Single Regulators and Collegial Bodies Regulators around the World

## Management Structure

### *(a) Regulatory authorities headed by a collegial body*

Almost two-thirds of the 131 countries that submitted responses to the 2005 ITU survey indicated that their regulatory agencies are collegial bodies.<sup>5</sup> These multi-member commissions or boards of directors are composed of a varying number of members (usually an odd number from three to seven to minimize tie votes) that oversee and direct all activities of the regulator. One member is the chairperson or president of the commission/board and sometimes has a "casting" or deliberative vote that counts twice and acts as a tie-breaking vote, if necessary.

Depending on the appointment process of the regulator, collegial body members can be appointed by one single branch of government, multiple branches of government and/or other industry stakeholders. This issue is further discussed in Section 6.2 on Staffing and Remuneration.

### *Management and administrative functions*

The day-to-day management and administrative functions of the regulator are handled in varying combinations by: an executive director, chief executive officer (CEO), the chairperson, and/or managing director (collectively referred to herein as managing director). In some countries, like Botswana, Brazil, Canada, Greece, Ireland, Jordan, Malaysia, Mexico, Portugal, South Africa, and Venezuela, the managing director of the regulatory authority is the chairperson of the commission/board.<sup>6</sup>

The managing director acts as a liaison between the commission or board of directors and the departments/divisions that comprise the regulatory authority. In the Dominican Republic, the managing director is part of the board and acts as its secretary, but does not vote.<sup>7</sup> In Peru, the managing director of the Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTel) participates in the board of directors' meeting sessions, but essentially acts as an observer and cannot vote.<sup>8</sup>

The duties and responsibilities of the managing director differ from country to country. In Bahrain, the general director not only handles the day-to-day affairs of the regulator, but also determines the internal structure and organization of the agency, and has authority to: delegate his functions to other agency staff; employ staff members and consultants; and establish conditions of employment for staff members (this last one with approval from the board).<sup>9</sup> In Peru, OSIPTel's managing director is responsible for managing the regulator and carrying out the policies established by the board of directors and president of the regulator. In addition, the managing director is responsible for: the legal, administrative and judicial representation of the regulator; proposing policies and strategies for the development of OSIPTel; developing the annual report and the regulator's budget for approval; and hiring, promoting, suspending and firing staff members (decisions regarding management staff members need approval from the board of directors and president of OSIPTel).<sup>10</sup>

### *(b) Single individual structure*

Single individual regulators are headed by a CEO, president or director general (collectively referred to herein as CEO) who oversees all policy, management, and administrative activities of the regulatory authority. In most cases, the CEO is appointed by the central government, often the minister responsible for communications. The term of office is fixed and generally varies from two to six years. However, in certain countries, including Estonia, Ethiopia, Iran, Liechtenstein, Norway, Oman, and Sudan, the CEO does not have a specific term of office.<sup>11</sup>

The duties and responsibilities of the CEO differ from country to country, but they are generally granted a broad scope of authority and responsibility. In Romania, the president of the National Regulatory Authority for Communications (ANRC) has a broad slate of responsibilities including managing the regulator, issuing decisions, approving the regulator's organizational structure, and acting as the liaison with high-ranking authorities and officials both in Romania and abroad.<sup>12</sup> In Guatemala, the Superintendencia de Telecomunicaciones (SIT) is headed by a superintendent who is responsible for managing and defining SIT policies, developing the regulator's organizational structure, appointing and removing SIT employees, preparing its annual budget, and informing (at least twice a year) the Ministry of Communications, Transportation and Public Works of the regulator's activities and internal administration issues.<sup>13</sup> In addition, recent global events such as the Enron and Worldcom incidences have led to the evolution and shaping of a broad body of corporate governance and reporting principles which are gaining wide acceptance globally. The move to define principles for corporate standards of performance has also been quite active leading to new legal requirements as shown by the King Report in South Africa and the Sarbanes-Oxley Act in the United States.

The CEO is typically assisted by one or more deputies to whom he can delegate responsibilities. For example, in Romania, the president of the ANRC is assisted by a vice-president.<sup>14</sup> Similarly, in Denmark, the director general of the National IT and Telecom Agency is assisted by two deputy generals.<sup>15</sup>

## Administrative Structure regarding Functions of Regulatory Authorities

Once the scope of work and type of management structure is established, a country must determine how the functions of the regulatory authority will be organized (e.g., whether by industry/service, function or project).

### *(a) Industry or service-based departments*

Many regulators follow a vertical (all regulatory issues) structure comprised of departments that address specific services areas (e.g., broadcasting, telecommunications, and information technology) under the authority of the regulator, as well as departments

typically responsible for operations and administrative functions.<sup>16</sup>

Denmark's National IT and Telecom Agency, a converged regulator, is divided into seven departments/divisions: (1) telecommunications; (2) IT and Media; (3) frequency and technical; (4) IT security; (5) documentation and international coordination; (6) corporate IT; and (7) the administration secretariat. The Telecommunications, IT and Media and Frequency and Technical departments are further divided into smaller units that are responsible for specific issues such as public content, frequency, consumer and market affairs within those industries/services.<sup>17</sup> Below is the organizational chart for Denmark's National IT and Telecom Agency:

◀ Denmark - National IT and Telecom Agency

Source: <http://www.itst.dk/mainpage.asp>



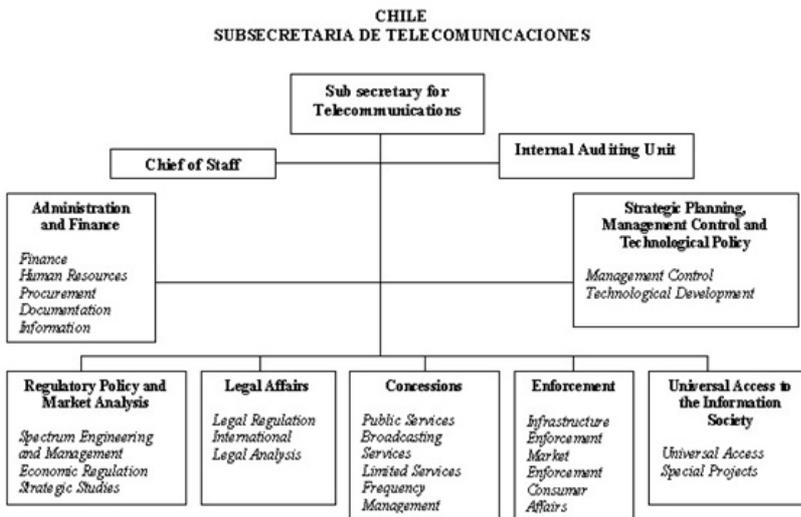
In the case of Luxembourg, which has a multi-sector regulator, departments/divisions are responsible for the following industries/services: telecommunications, electricity, gas, postal and spectrum management issues. Similar to Denmark's regulatory authority, each of these departments/divisions is divided into smaller issue-specific units.<sup>18</sup>

*(b) Function-based departments/divisions*

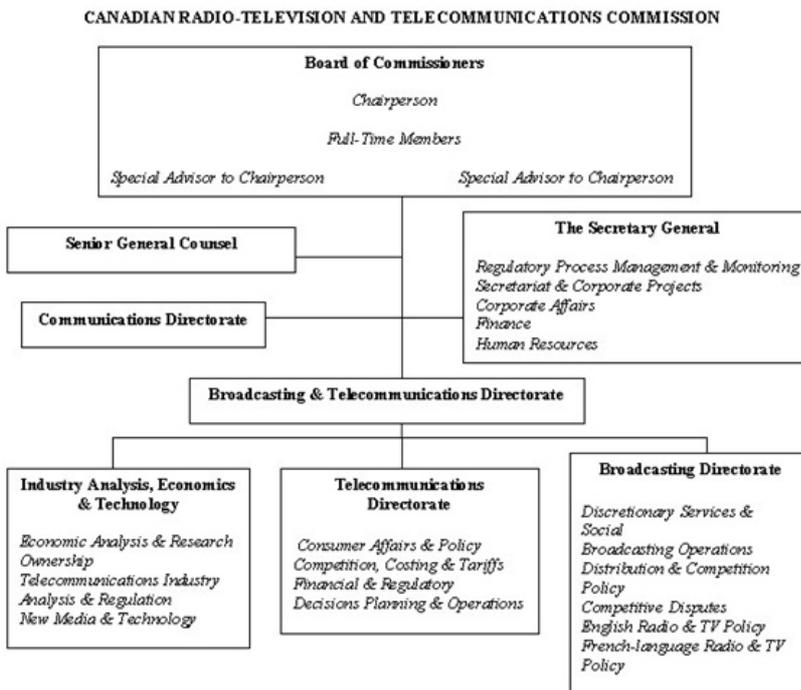
These regulators follow a horizontal (narrow range of regulatory issues) structure, but they cover all the specific service sectors that are regulated. Function-based departments/divisions have responsibility for areas such as: administration and human resources; enforcement; legal analysis; licensing; public relations; technical analysis and development; research and market analysis; user/customer services; and universal service fund administration.

For example, Chile's Subsecretaria de Telecomunicaciones (SUBTEL), is divided into seven function-based divisions: Administration and Finance; Regulatory Policy and Market Analysis; Legal; Concessions; Enforcement; Universal Access to the Information Society; as well as a division for Strategic Planning, Management Control and Technological Policy. Each of these divisions is subdivided into units that are responsible for more specific topics. The Administration and Finance Division, for instance, is subdivided into five units that are responsible for finance, human resources, procurement, documentation, and a unit that handles information (including claims and suggestions). The Regulatory Policy and Market Analysis Division of SUBTEL is subdivided into three units, one for spectrum engineering and administration, one for economic regulation, and one for strategic studies.<sup>19</sup>

Malaysia's Communications & Multimedia Commission (MCMC), a converged regulator, is also divided into function-based divisions. They include: Industry Development; Regulatory State Coordination; Technical; Resource Planning & Management; Monitoring & Enforcement; and Management & Support Services. Similar to the Chilean model, each of these divisions is then subdivided into topic-specific units. The Regulatory State Coordination Division is subdivided into two departments, one for regulatory coordination (which includes units for licensing and for universal service provision) and the other for state coordination (which includes a unit to manage regional office matters).<sup>20</sup> Below is the organizational chart for Chile's SUBTEL showing how this regulator has divided responsibilities by function:



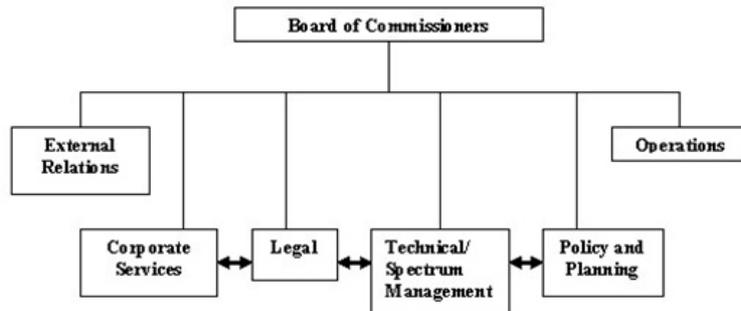
Some regulators combine aspects of the industry/service and function-based structure models. The Canadian Radio-television and Telecommunications Commission (CRTC) divides the Commission's responsibilities into the following departments/divisions: Broadcasting and Telecommunications Directorate; General Counsel Directorate; Communications Directorate; and Secretary General.<sup>21</sup> The SIT of Guatemala distributes responsibilities among three main departments/divisions: telecommunications; administrative; and legal.<sup>22</sup> Below is a diagram of Canada's CRTC showing how a regulatory authority can combine both industry/service and function-based departments/divisions within its organizational structure:



(c) Project-based departments/divisions

These regulators can be organized as either industry/service-based or function-based departments/divisions, but they have a horizontal structure because departments/divisions collaborate when a project needs the support and expertise of various competencies.<sup>23</sup> Morocco's Agence Nationale de Réglementation des Télécommunications (ANRT) is a function-based regulator divided into departments/divisions that deal with technical, administrative and operator issues, but has as a horizontal structure because staff members from units within these different departments/divisions are, as a matter of course, brought together to work on projects that require varied skills.<sup>24</sup> The Malta Communications Authority (MCA) also utilizes a matrix organizational structure that allows the regulator "to adapt to change and maximize its expertise by shifting emphasis from a functional to a project-based approach."<sup>25</sup> Below is a diagram of Malta's MCA, showing how this function-based regulatory authority uses a horizontal structure:

## MALTA COMMUNICATIONS BOARD



Source: MCA Annual Report 2004

However, it should be pointed out that regardless of the departmental/division structure of the regulators, it is often the case that multiple departments and subunits will work together to accommodate the evolving needs of the telecommunications market, as well as facilitate and expedite internal procedures.

### 6.6.2 GENERAL FUNCTIONS

#### 6.6.2.1 RULEMAKING FUNCTION

The rulemaking function allows regulators to issue proposed regulations setting forth their intended procedures before issuing new rules and regulations. In order to fulfill this function, regulators must implement appropriate internal procedures that not only include detailed steps to govern all aspects of the regulator's decision-making process, but also have the institutional capacity necessary to effectively handle all of its regulatory roles. The rulemaking function generally includes the following procedures: petitions for rulemaking; requests for declaratory ruling; complaint procedures; licence applications; licence modification requests; guidelines for interaction with members of the public and interested parties during consideration of a particular issue; procedures for the formal issuance and publication of decisions; and procedures for seeking formal appeal or reconsideration of regulatory decisions. Box 6-1 below describes the decision-making process of the FCC in the United States.

Many regulators have implemented detailed procedures which address each of the processes mentioned. A complete analysis of the decision-making and public consultation processes is included in Section 6.6.

The rulemaking process consists of the following stages:

**Preliminary Consultations**  
**Petition for rulemaking:** The initiative to change FCC rules and regulations, or to adopt new ones, originates from sources both within and outside the Commission. When submitted from outside the FCC, the interested party must file a "petition for rulemaking" requesting that the FCC undertake such action. If the FCC determines that the petition presents sufficient reasons to warrant the initiation of a rulemaking proceeding, an appropriate notice of the proposed rulemaking will be issued. In cases where the FCC determines that insufficient grounds exist for initiating a rulemaking proceeding, the petition will be denied and the petitioner will be notified of the FCC's decision along with the basis for the decision.<sup>1</sup>

**Petition for Declaratory Rulings:** This procedure is one that may be utilized by members of the public who want the FCC to clarify the scope or application of an existing rule.

**Notice of Inquiry (NOI):** If the FCC is interested in a particular issue but has not formulated a specific rule change proposal, the agency may issue an NOI. In an NOI, the FCC generally asks interested parties to respond to specific questions regarding novel issues or concerns for which the FCC seeks further information before deciding on the appropriate course of action. For example, recent NOIs have addressed such issues as IP-enabled services and mobile termination rates. NOIs are initiated either in response to an outside request or by the FCC itself.

**Rulemaking**  
**Notice of Proposed Rulemaking (NPRM):** When the FCC seeks to introduce changes to its rules, it issues an NPRM and seeks public comments on these proposals. NPRMs are publicly available, placed on the FCC website, and summarized in the Federal Register. A deadline is specified for both comments and reply comments. Interested parties may visit the FCC commissioners and staff to express views on the proceeding, but they must file an *ex parte* letter in the public record of the proceeding, detailing whom they visited and what they discussed. In any rulemaking where the FCC determines that an oral argument, hearing or any other type of proceeding is warranted, notice of the time, place, and nature of such proceeding will be published in the Federal Register.<sup>2</sup> After considering comments in response to an NPRM, the FCC renders its decisions in the form of a Report and Order (R&O). In the R&O, the FCC not only issues its final rules, but discusses and responds to comments submitted by interested parties. The R&O explains the FCC's decision and its rationale. It may develop new rules, amend existing rules or decide not to take any action.

**Confidentiality request:** If the public requests that the comments be withheld from public inspection, the documents must be clearly marked as "Confidential - Not for public inspection."

## 6.6.2.2 OVERSIGHT FUNCTIONS: OVERVIEW OF DISPUTE RESOLUTION AND ENFORCEMENT

This function consists of the regulator's ability to monitor the performance of telecommunications companies and ensure compliance with the telecommunications regulation and other subordinate rules. To ensure the effectiveness and transparency of the oversight function, regulators must put in place detailed subordinate guidelines such as dispute resolution and enforcement procedures.

Dispute resolution regulations generally include procedures for handling and resolving disputes between: (i) licensees and consumers; (ii) licensees, and (iii) the regulator and investors, operators or service providers.

Additionally, to ensure compliance and enforcement of regulations and licence conditions, the regulator must have the authority to investigate the activities and company records of all service providers when needed, and to impose penalties for violation of laws, regulations or licence conditions. This need is accentuated in markets transitioning to a competition market. Here, the regulator must focus on facilitating the development of the marketplace to ensure that the market power of previous monopolies, or dominant players, does not damage the prospects and opportunities for commercial development in the sector by the newer participants. In these conditions, incumbents have clear incentives to delay the entry of such new market players (e.g., by obstructing interconnection) in order to prolong their dominance. Therefore, the overall success of a regulator's mandate is directly related to the adequate discharge of oversight powers in order to track the performance of incumbent operators, as well as their compliance with regulatory obligations.

Generally, regulations regarding monitoring and enforcement include procedures for conducting investigations regarding violations, determining fault standards, imposing penalties, requesting the regulator's review of enforcement decisions, and submitting appeals to the regulator or to the courts.

The following are examples of various procedures implemented by regulators as part of their oversight functions (Box 6-2):

Regulators have implemented internal procedures and guidelines to ensure that information requests to stakeholders and the public are issued in accordance with pre-established parameters. These information requests are to effectively monitor and analyse telecommunications markets.

**Peru** The regulator, Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL), has oversight functions that include the power to request information from both public and private parties. For instance, OSIPTEL may request telecommunications companies to provide information regarding items such as their financial records, customer contracts, and installed infrastructure. Any information provided to OSIPTEL in response to its request will be considered as having been submitted in the form of a sworn legal statement. If the information provided is incomplete, unclear or equivocal in any way, the providing party may be deemed in breach of its statutory obligation to supply information and documentation to OSIPTEL.

**Portugal** Regulators have also implemented oversight procedures allowing their personnel to access a licensee's premises. Portugal's regulator, Autoridade Nacional de Comunicações (ICP-ANACOM), for example, has regulations governing the inspection of a licensee's premises or sites.<sup>1</sup>

#### **Article 12 - Exercise of Oversight**

1. Under terms of the law, ICP-ANACOM may proceed with inquiries and tests at any site or entity within the scope of those functions. 2. For effects of the aforementioned paragraphs, ICP-ANACOM may accredit especially skilled or qualified persons or entities.

#### **Article 48 - Supervisory Functions**

ICP-ANACOM's workers, respective attorneys and the qualified and duly accredited personnel or entities who perform oversight functions, when exercising their functions, shall be considered agents of the authority and thus shall enjoy the following prerogatives:

- Access to installations, equipment and services of entities subject to inspection and control by ICP-ANACOM;
- Authority to requisition documents and analysis, as well as material to conduct tests;
- To identify, for subsequent action, all individuals who violate the laws and/or regulations whose observance they are obliged to respect;
- To demand the collaboration of the proper authorities when deemed necessary for the performance of their duties.

### **6.6.2.3 DISPUTE RESOLUTION AMONG ICT PROVIDERS**

As the telecommunications sector continues to undergo changes caused by privatization, liberalization, and convergence, it becomes increasingly important for countries and regulators to have an effective and efficient dispute resolution and enforcement system.<sup>1</sup> The failure to resolve disputes quickly can limit competition, cause delays in the introduction of new services and infrastructures, block or reduce investment in the sector, and impede liberalization and development of the sector.<sup>2</sup> The appropriate dispute resolution mechanisms, however, vary depending on the stage of a country's telecommunications market and regulatory development, regulatory framework and approaches, as well as general business culture.

The following sections review the various dispute resolution and enforcement mechanisms employed in the telecommunications sector, with particular emphasis on regulatory adjudications and the various mechanisms of alternative dispute resolution. In addition, this section tracks the systems of dispute resolution available to foreign telecommunications operators, mainly international investment disputes and trade dispute arbitrations.

#### **Overview of the main types of disputes in the telecommunications sector**

Disputes in the telecommunications sector generally arise out of various circumstances. However, disputes with the greatest impact on telecommunications investment and growth typically relate to: (i) interconnection and other relations between various network, service, application and content providers; (ii) liberalization; (iii) foreign investment and trade; and (iv) radio frequency use (e.g., harmful interference or spectrum refarming).

Interconnection disputes are among the most prevalent type of disputes between service providers, as operators of all different types of access networks (e.g., fixed-mobile, wireline-wireless) must be able to interconnect with each another. (See **Box 6-3**.) Many aspects of the interconnection relationship involve key policy considerations for the telecommunications sector; therefore, most regulators consider it important to maintain some form of regulatory oversight of the negotiation and implementation of interconnection arrangements. In recent years, for example, an increasing issue regarding mobile interconnection has been the often high rates charged by mobile providers to terminate traffic on their networks. As a result, many regulators have made determinations that mobile providers have a monopoly over termination on their own networks and should be regulated. Regulators have opted between various mechanisms in order to strike an appropriate balance between the need to protect the interests of new market entrants while also leaving room for parties to negotiate agreements on their own. Among such approaches are: (i)

prescribing interconnection arrangements on an *ex ante* basis; (ii) establishing interconnection guidelines; (iii) approving reference interconnection offers (RIOs) or model interconnection agreements; (iv) policing operators with significant market power; and (v) generally overseeing the interconnection process.

In addition, disputes also may arise as a consequence of introducing competition into the telecommunications market. The liberalization process often undermines the established financial and business interests of incumbent network operators. These liberalization-related disputes generally derive from the incumbent's desire to protect and maintain its dominant position in the market. Similarly, investment and trade disputes often occur where regulatory reforms or actions diminish the value of private-sector interests. These types of disputes have the potential to *internationalize* disputes arising between regulators and foreign investors in the telecommunications sector. Investment disputes typically stem from complaints by investors, operators, and service providers about early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licences. Current trends indicate a recent rise in international investment disputes within the telecommunications sector, based primarily on provisions of bilateral investment treaties. Trade disputes in the context of the WTO, on the other hand, are instituted by member states against other member states primarily due to lack of compliance with obligations assumed under the GATS and related documents.

Finally, radio frequency allocation and assignment disputes are dealt with internationally through mechanisms available through the ITU, particularly the Radiocommunications Bureau (ITU-R). Domestically, disputes may arise from interference, licence conditions, and pricing.

### **Approaches towards dispute resolution**

Dispute resolution can be addressed from two separate approaches, namely through official and non-official mechanisms. Governmental authorities, statutory bodies and courts commonly discharge official functions in dispute resolution, their authority deriving principally from the constitutional, legislative and regulatory framework applicable to the telecommunications sector. Non-official dispute resolution – or alternative dispute resolution (ADR) – consists of mechanisms such as arbitration, mediation, and negotiation, where the individuals associated with these processes do not discharge any executive or judicial duties.

A well-resourced “official” sector, utilizing regulatory adjudication and the courts, is crucial to a successful dispute resolution environment. The resolution of disputes through regulatory adjudication with the option to seek final determination through the courts has emerged as a preferred method in both developed and developing countries.<sup>3</sup> Alternative approaches, however, are often useful to deal with the lack of available regulatory or judicial resources, or where less formal techniques offer particular advantages.<sup>4</sup> Therefore, it is important to identify those circumstances in which the use of each mechanism is more appropriate.

ADR mechanisms, such as arbitration and mediation, traditionally have been associated with solving private and commercial disputes, while regulatory adjudication has been understood as best suited for public policy issues. This compartmentalization may be too strict. As the case of interconnection disputes in the United States and Jordan evidence, regulators are increasingly using arbitration tools, either informally or formally. Moreover, in light of the rapid changes in the telecommunications sector, countries such as Saudi Arabia have instituted highly flexible approaches to determine which mechanisms (*i.e.*, mediation, arbitration, or regulatory adjudication) to adopt for resolving specific disputes.<sup>5</sup>

From a different perspective, other countries, as is the case of the United Kingdom, take the position that ADR techniques can be employed where disputing parties have similar levels of market power, since in that case parties are more likely to negotiate solutions that meet their mutual or on-going needs.<sup>6</sup> In such cases, regulatory intervention is more often considered necessary where disparities of market power mean that one party effectively requires the protection of the official sector from abuse of process by the other.<sup>7</sup>

Thus, when 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.<sup>8</sup>

Due to differences in social, legal, and commercial traditions the approach for selecting a method of dispute resolution varies considerably between jurisdictions; even with regard to similar types of disputes. The following are certain elements to consider when making such a determination:<sup>9</sup>

#### **§ 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 also may 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.

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

### **§ 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 the effective use of the oversight procedures.

### **Official Dispute Resolution Mechanisms: Regulatory Adjudication**

Regulatory adjudication refers to the legal powers exercised by regulators pursuant to the resolution of the disputes brought before them. Currently, regulatory adjudication is recognized as the cornerstone of dispute resolution in telecommunications sector. However, regulatory adjudication is a relatively new mechanism since until recently, with the exception of a few countries, regulatory and policy-making responsibilities were concentrated in a single governmental structure. With liberalization and the introduction of competition in the telecommunications market, these functions were separated and regulatory authorities were created and charged with responsibility for overseeing and regulating the telecommunications sector.

In the United States, a country with long-developed administrative tradition, the FCC interprets, coordinates, and adjudicates policy issues, as well as disputes arising out of them. The FCC’s internal processes for dispute resolution include a final decision handed out by a Commissioner or a panel of Commissioners. Such decisions may be subject to internal review by the agency within a prescribed period, and can also be appealed before the U.S. Court of Appeals. In Canada, the CRTC follows court-like dispute settlement procedures. An Industry Committee consisting of parties and experts also has been established to resolve most telecommunications issues. Recourse to the CRTC is taken only when consensus cannot be reached by the Committee. In the United Kingdom, Ofcom follows a methodology for dispute settlement that involves the placing of evidence into a complaint before initiating a formal investigation. Investigation into the complaint involves clear identification of a relevant obligation or abuse under the Competition Act and deadlines are given for settlement of a complaint or dispute. France’s regulator, ARCEP, is also vested with dispute settlement authority to rule on disputes between network and service providers in four areas: i) interconnection and access disputes; ii) provision of telecommunications services on cable networks; iii) shared use of infrastructure on public and private rights-of-way; and iv) cross-border disputes. However, ARCEP can only hold a hearing on a dispute if the complaining party has attempted to resolve the issue and negotiations have failed.<sup>10</sup> Many countries with newer regulatory authorities also have empowered such agencies to consider and adjudicate disputes among telecommunications market players. In Morocco, for example, the regulator has been given broad power over interconnection dispute resolution (**Box 6-4**).

#### *(a) Advantages and disadvantages of regulatory adjudication*

When effectively and efficiently applied, regulatory adjudication has certain distinct advantages.

§ It can draw upon the legitimacy of the official sector, as well as the benefits of its enforcement mechanisms;

§ A well-staffed regulatory agency can access staff resources with different expertise (e.g., technical, economic, and legal) to provide input into decisions;<sup>11</sup>

§ The adjudication process can give the public a channel to provide input into the decision-making process.

However, the potential drawbacks to regulatory adjudication can be significant, and thus warrant paying close attention to the alternative approaches of dispute resolution. Some of these disadvantages are the following:

§ It can result in lengthy and cumbersome procedures;

§ Possibility of misuse of regulatory intervention by market-players, particularly incumbent operators, as part of a strategic response in order to hinder competitive conditions;

§ Legislative mandates dealing with issues of sector development, such as convergence, can reduce the regulator’s flexibility in confronting significant disputes and sector issues; and

§ A tendency of regulatory bodies to fragment or compartmentalize decisions into separate proceedings, as regulatory adjudication is 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.

#### *(b) Procedural considerations of regulatory adjudication*

When establishing a framework for regulatory adjudication, it is important that the procedural rights and obligations of the parties to the dispute, as well as the powers of the regulatory authority, are addressed. This would include establishing whether aggrieved parties are entitled to a closed hearing or whether the dispute, as well as all testimony and other evidence, is to be made publicly

available. Additionally, other considerations include the regulatory authority's power to call witnesses and order the production of documents.

#### *(i) Formal hearings*

As an official dispute resolution procedure, regulatory adjudication may involve a hearing by quasi-judicial body, which may be the telecommunications regulator or independent tribunal. Regulatory adjudicatory hearings are typically led by a panel or tribunal following formal, written and published procedures for filing initial complaints, introducing evidence and witnesses, hearing parties' arguments and issuing decisions. Where formal hearings are established, the rules of procedure should generally follow standard best practices for judicial proceedings. In particular, formal hearings should be open to the public to help ensure transparency and fairness. However, there may be provisions for closing certain portions or types of hearings to the public, such as where confidential or proprietary information is discussed. Another consideration in hearings is whether the parties' testimony is introduced in written or oral form. Unlike traditional court proceedings, hearings for regulatory adjudication often involve the submission of written testimony and other evidence with the tribunal or regulator reserving the right to call witnesses for cross-examination, if needed. Malaysia's regulator, the MCMC, also follows a public hearing approach in which parties generally submit written arguments, but may be required to present witnesses in front of the tribunal for cross-examination or clarification.<sup>12</sup> In such cases, it is important that the regulator or tribunal has the authority to issue subpoenas for witnesses, if necessary, as well as possess the general authority to order the production of documents.

India's approach to regulatory adjudication provides a clear example of the formal hearing process. The Telecom Regulatory Authority of India (TRAI) Act, as amended in 2000, established the Telecom Dispute Settlement and Appellate Tribunal (TDSAT).<sup>13</sup> Independent from TRAI, India's ICT regulator, TDSAT is composed of a Chairperson and two Members. The TDSAT Chairperson must also currently be or have previously acted as a Judge of the Supreme Court or the Chief Justice of a High Court while the two Members must have held a high official post in the central or a state government for at least two years or must be an expert in the field of technology, telecommunication, industry, commerce or administration.

As the independent tribunal for telecommunications disputes, TDSAT conducts quasi-judicial hearings of any party—whether the government, an operator, a consumer or other stakeholder—who seeks to appeal a decision, order or other ruling made by TRAI. In 2005, the TDSAT published formal procedures for hearings, which includes:<sup>14</sup>

- Procedures for filing a petition, appeal or other pleading, including fees;
- Procedures for the Tribunal's denial of a pleading;
- Procedures for the hearing of a petition or appeal, including requirements for parties to present their arguments on the specified hearing date;
- Procedures for introducing evidence, which requires written affidavits and permits the Tribunal to require the presence of the witness for cross-examination;
- Requirements that the hearings be open to the public, unless otherwise determined by the Tribunal that proceedings should be closed.

#### *(ii) Public consultation*

Rather than hold court-like hearings, the formal regulatory adjudication process may instead involve a public consultation that allows any party to openly participate (see Section 6.5 below for more on public consultations). Under this framework, the regulator or appeals tribunal follows a set of published rules of procedure that governs the introduction of complaints and pleadings, as well as who may participate, how comments and evidence must be submitted and how the tribunal will decide the issues. Public consultations for dispute resolution are useful for ensuring the greatest amount of participation from all stakeholders. However, they may also require the authority to review and a large number of submissions, which can lead to a lengthy process that demands a high amount of staffing resources. One of the main draws of the consultation process is to help ensure transparency and maximize participation. As such, all statements, arguments and other "evidence" to be introduced should be made publicly available unless certain documents (or portions of documents) must be withheld or redacted in order to protect proprietary and other confidential information.

In the United States, for example, although there are rules of procedure for conducting formal hearings, public consultations are also used to resolve controversies or clarify rules causing uncertainty in the market. Referred to as "declaratory rulings", the FCC's rules of procedure permit any party to request review of an issue. After consideration of the request, the FCC may initiate a public review to terminate a controversy or remove an uncertainty in the rules, policies or laws.<sup>15</sup> The bureau or office within the regulator to which a petition for declaratory ruling has been submitted must seek comment on the petition via public notice and provide a 30-day public comment period. The FCC will then issue a decision to clarify the controversy or uncertainty based on these comments.

#### **Unofficial Dispute Resolution Mechanisms: Alternative Dispute Resolution**

Alternative Dispute Resolution (ADR) encompasses different processes and procedures directed at settling disputes by means other than litigation and administrative adjudication. ADR methods include arbitration and mediation, and several other hybrids and variations.<sup>16</sup>

ADR is based on the general premise that, where possible, it is more beneficial for private parties to settle disputes by private

process and negotiated agreement as opposed to contentious litigation or regulatory adjudication. These methods have the benefit of preserving and, in some cases even enhancing, business relations that otherwise may be negatively affected by an adversarial process.<sup>17</sup> Moreover, ADR can aid in saving costs associated with litigation. ADR procedures may either take the place of formal adjudication or complement adjudication and litigation by producing settlements within those fields. Flexibility is thus another principal advantage of ADR, as it usually allows parties to address different kinds of disputes through different procedures and approaches.

These mechanisms also may serve to alleviate the burden on official institutions in charge of settling disputes, by redirecting many types of disputes away from traditional courts and regulatory authorities. In Europe, for instance, the EU Framework Directive explicitly contemplates that national regulatory authorities should encourage the use of ADR mechanisms, such as mediation, where they are available.<sup>18</sup> Pursuant to such initiatives, the Office of the Telecommunications Adjudicator was created in the United Kingdom to facilitate swift implementation of the processes necessary to enable competitors to gain access to the local loop. The Telecommunications Adjudicator also has the function of bringing all parties together to find prompt, mediated resolution of working-level implementation disputes. The scheme is a private contractual mechanism for dispute resolution agreed between the parties, and in this respect is similar to arbitration.<sup>19</sup>

ADR procedures fall into three primary categories: (i) negotiation; (ii) mediation and conciliation; and (iii) arbitration.

#### *(a) Negotiation*

Negotiation is the premise upon which all consensual ADR activity is based. It is a consensual process designed to allow parties to arrive at a mutually agreeable solution. Negotiations are usually held on a confidential basis, and “without prejudice” to any legal recourse to which the parties may have a right. Negotiation differs from mediation because no third-party facilitator is usually involved. This provides additional flexibility because parties can generally schedule the process of negotiations on their own, avoiding adversarial processes present in other ADR mechanisms.

#### *(b) Mediation and Conciliation*

Mediation is a consensual process involving a neutral third party whose role is to facilitate resolution of the dispute. Both regulators and private individuals not involved in the regulatory process may act as mediators.

In discharging its duties, the mediator must initially solicit the views of the parties on the nature of the dispute and its key issues. The objective here is to seek potential points of agreement between the parties and propose constructive “win-win” solutions. The mediator often serves as a neutral third party that conveys views of the dispute between the parties to facilitate communication, and potentially develop a direct negotiation. At the appropriate time in the mediation process, the mediator may be able to suggest potential solutions or views of the underlying issues to both sides. For example, in Japan, mediation is used to resolve interconnection disputes.

Conciliation is closely related to mediation, but involves more formal procedures. Here, the parties do not meet together, as the conciliator assumes the role of an intermediary or liaison. The conciliator’s primary function is to communicate each disputant’s position to the other, relay settlement options, and sometimes offer nonbinding advice in an effort to bring the sides closer to settlement.<sup>20</sup>

The United Nations has long encouraged conciliation and mediation to resolve disputes among states, and has recently recognized that mediation and arbitration are becoming common in commercial practice. 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). See [Box 6-5](#) for the UNCITRAL Model on International Commercial Conciliation.

#### *Advantages and disadvantages of mediation*

Mediation has many benefits. These include the following:<sup>21</sup>

- § It may preserve 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;
- § Mediation allows the selection of a mediator with specific technical experience on the issue;
- § 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.

Notwithstanding such benefits, mediation has certain drawbacks:

§ The success of this method depends on the willingness of the parties to work together in good faith; and

§ Mediation can also be subject to abuse by parties seeking to protract a dispute or obtain information that may be relevant at another stage of a dispute resolution process.

#### *Factors for success*

Various factors can contribute to the success of mediation:

§ The parties involved should be committed to arriving at an agreeable outcome;

§ Mediators and the parties must be able to establish a successful rapport;

§ While the parties have ultimate control over their participation in the process, the mediators' management of the discussion makes it more structured than negotiation;

§ 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;

§ The mediator plays a critical role by focusing parties on their underlying interests rather than the abstract merits of their positions; and

§ Good mediators demonstrate patience, insight, and psychological finesse to convince parties to modify their entrenched positions.

Successful mediation in the regulatory context can depend on the role of regulatory officials. Involving regulatory staff 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 may be preferable to use an outside neutral mediator, who can be trusted by both parties to maintain the confidentiality of the mediation process.<sup>22</sup>

#### *(c) Arbitration*

Arbitration is a dispute resolution method that takes the place of conventional litigation. Through this consensual process, parties agree to submit a dispute to a neutral third party arbitrator or panel of arbitrators for resolution. The commitment to arbitrate may arise at the outset of commercial agreements through arbitration clauses that bind parties to seek arbitration for future disputes or it may derive from legal instruments or international agreements. Arbitration may also be chosen as an alternative to litigation or regulatory adjudication when a dispute arises.

Arbitration is of particular importance in the international context, since arbitral awards are enforceable in a large number of different countries under the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Agreements and Awards.<sup>23</sup>

#### *Advantages and disadvantages of arbitration*

Arbitration has several advantages. First, since it is generally a private or non-official procedure, it can better assure privacy and secrecy, protecting against disclosure of a party's confidential business information. Parties can agree on the confidentiality of the information and documents disclosed during arbitration proceedings. In addition, the fear of a negative precedent may be reduced due to the private nature of ADR mechanisms.

The flexibility of ADR mechanisms allows parties to combine arbitration with informal negotiations or mediation, thus resolving their dispute in a manner similar to an assisted negotiation. This helps foster a continuing working relationship which is valuable if the parties' dealings require ongoing interaction.

Arbitrations can sometimes take less time than conventional litigation or regulatory adjudication because of several factors, including the following:

§ Ability to design and schedule the steps needed at an early stage of the proceedings;

§ Ability to reduce steps that are otherwise mandatory in conventional litigation; and

§ Increased availability and flexibility of arbitrators.

From industry's perspective, the potential shorter timeframe offers commercial advantages, including reduced interference with business objectives. In the case of international arbitration, a considerable advantage is the availability of more neutral forums for adjudicators than parties would find in either party's national courts.<sup>24</sup>

Among some of the potential drawbacks of arbitration are the following:

§ Arbitration is an essentially adversarial process, thus when used in isolation, it generally does not create "win-win" solutions or improve relationships;

§ Arbitration may be more expensive than litigation when the issues in dispute are complex and a considerable amount of time is required to hear the dispute; and

§ Arbitration proceedings cannot be consolidated into one action without the consent of all the parties, thus they create a risk of contradictory decisions on closely related issues.

#### *Using arbitration in telecommunications disputes*

Although arbitration as a dispute resolution tool is generally agreed upon by the parties involved in a specific contractual relation, in certain instances arbitration is compulsory or encouraged either by regulatory policy or legislation. For example, in certain countries internal regulation require interconnection disputes to be resolved through arbitration. Such is the case in Brazil, where disputes pertaining to the application and interpretation of the regulations during interconnection contract negotiations must be resolved by 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.<sup>25</sup>

In some countries, the regulatory framework adopts a more flexible approach and allows disputants to select the type of dispute resolution method. This is the case of interconnection dispute resolution in Jordan, where after a dispute continues 20 working days after the parties have begun negotiating a solution, the parties may either: (i) ask the regulator to intervene; or (ii) 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.<sup>26</sup>

In addition, arbitration is also used in the context of consumer disputes in the telecommunications sector. For example, some privately-run ADR bodies have created specific programs resolving such disputes. This is the case of the [American Arbitration Association \(AAA\) Wireless Industry Arbitration Rules](#).<sup>27</sup>

#### *Factors for success*

Numerous issues arise out of the use of arbitration mechanisms in the telecommunications regulatory context, including: (i) the role of the regulatory authority in the arbitration process; (ii) whether the arbitrators will be regulatory officials or independent persons approved or appointed by the regulatory authority; and (iii) whether the results of the arbitration proceeding will be subject to public comment and ultimately approved by the regulatory authority.

Because of this, the use of arbitration techniques and tools in the telecommunications sector requires addressing several important public policy concerns such as:<sup>28</sup>

§ 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;

§ 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.

Where these concerns are successfully addressed, it may be possible to structure credible, efficient, and effective alternatives to regulatory agency adjudication through arbitration, thus possibly improving the overall quality of dispute resolution in the telecommunications sector.<sup>29</sup>

#### **Disputes Involving Foreign Operators**

The privatization and liberalization trends that have characterized telecommunications regulations in the past decade have introduced a steady flow of foreign investment into the telecommunications sectors of many countries. However, such processes also may give rise to disputes between investors of telecommunications companies and regulatory agencies or ministries responsible for regulatory reform.

This section addresses two specific types of disputes resolution regimes directly related to foreign investment in the telecommunications sector, namely: (i) international investment disputes; and (ii) international trade disputes.

#### *(a) Investment disputes*

Investment disputes tend to arise when the process of regulatory reform negatively affects the value of foreign investors' stakes in the sector. Among the examples of such regulatory changes are: (i) the termination of an incumbent operator's monopoly; (ii) rate rebalancing; (iii) mandatory interconnection; (iv) the introduction of a new rate-setting structure; and (v) changes in the terms and conditions of concessions or licences.<sup>30</sup>

The legal basis on which investors may initiate a claim against the government varies from jurisdiction to jurisdiction. An investor may argue that a government's actions constitute an unlawful seizure of property or diminish the value of their property rights. Furthermore, investors may claim that the government has not complied with existing legislation or its statutory obligations (e.g., in a rate-setting case, an investor may argue that the government did not take into account certain statutorily required criteria). Such a claim has been made in various cases recently instituted against the Government of Argentina due to price-freezes associated with the emergency economic measures taken in the wake of the 2001 financial crisis.

Claims also may derive from an alleged breach of contract between the investor and the government. In such cases, failure to comply with contractual commitments to conduct regulation of the telecommunications sector in a certain way may serve as a basis for an investor's compensation claims. These types of disputes may arise in the case of privatization of publicly-owned telecommunications companies, where it is not uncommon for contracts governing the sale of a government-owned stake in a telecommunications operator, to include an exclusivity period and a minimum rate of return, as well as to allow an increase in rates within a certain timeframe.

As an increasing number of countries have dropped foreign investment restrictions, sometimes in conjunction with commitments to open market access under the WTO GATS, it has become common for local operators, including incumbents, to be owned in whole or in part by foreign investors. Disputes arising in this context often become more complicated because they may 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.

#### *(b) International investment disputes*

International investment disputes (*i.e.*, disputes between states and nationals of different states), may be referred for resolution to the World Bank Group's [International Centre for Settlement of Investment Disputes](#) (ICSID), as well as other centers such as the International Chamber of Commerce (ICC). This may be achieved through: (i) provisions in contracts between governments of member countries and investors from other member countries; and (ii) the operation of local investment laws and bilateral investment treaties.

A vast majority of the claims currently pending before the ICSID were brought pursuant to bilateral investment treaties. This reflects a trend whereby the ICSID caseload has shifted in recent years away from disputes brought pursuant to individual investment contracts toward cases invoking an international investment treaty.<sup>31</sup>

#### *Relevant aspects of bilateral investment treaty based disputes*<sup>32</sup>

Investment treaties typically provide foreign investors with the ability to bypass local and national legal systems, in favour of international arbitration, as they rarely require investors to exhaust their domestic legal remedies as a prerequisite to pursuing an international claim. This holds true even where contracts between an investor and a state expressly limit recourse to local dispute settlement options. For example, in the dispute between the Government of Ghana and Malaysia Telekom (further developed in [Box 6-6](#)) the arbitral tribunal upheld its jurisdiction to hear *treaty* claims, notwithstanding the fact that the contract in question provided for different means of dispute resolution.

Thus, once concluded, investment treaties containing open offers to investor-state arbitration open the door for foreign investors to take their claims out of the local legal system. Proponents of such mechanisms often describe them as safety valves that operate in the event that foreign investors may not be able to receive a fair hearing in a host government's courts.

In addition, investment treaty arbitration also insulates proceedings from extensive review by local court systems. Arbitrations under ICSID rules, for example, are exempt from the supervision of local courts, with awards subject only to an internal annulment process. Meanwhile, arbitrations under other sets of rules may be subject to limited challenge in domestic courts. This is evidenced in a case instituted by France Telecom against Lebanon where appeals were brought before the Swiss courts. Such review will typically be circumscribed by laws designed for ordinary commercial arbitrations, which, as a result, may accord a higher degree of deference to the findings of the arbitral tribunal.

Furthermore, investment arbitration can be plagued by lack of consistency in the interpretation of the substantive provisions of investment treaties from one case to the next. Thus, tribunals can, and have, reached widely divergent conclusions in parallel cases.<sup>33</sup> Governments can take steps during treaty drafting to minimize some of these problems, by including rules for the consolidation of related claims under the jurisdiction of a single tribunal, thus reducing the risk that parallel proceedings will lead to divergent rulings.

Hence, governments acceding to investment treaties should be aware that these agreements may serve to *internationalize* disputes

that arise between regulators and foreign investors in sensitive sectors, including telecommunications. In such cases, foreign investors may bypass domestic legal systems in favour of international dispute resolution forums.

#### *International investment disputes in the telecommunications sector*

The number of international investment disputes has increased in the past years, including telecommunications disputes.<sup>34</sup> Since 2004, 10 separate disputes between telecommunications sector participants and various States have been reviewed and concluded by the ICSID.<sup>35</sup>

Three cases at ICSID have been brought against the Argentine Government,<sup>36</sup> based on claims that the foreign investors are entitled to compensation for losses derived from emergency measures adopted during the 2001 financial crisis, mainly related to price freezes. For example, in the case of *Telefónica S.A. v. Argentine Republic*, investors are alleging that the emergency measures amounted to the expropriation of their investments, and are seeking monetary compensation for their damages. These cases evidence the risk, noted above, of similar disputes being resolved by separate tribunals operating in parallel, thus raising the prospect of a succession of different rulings.

The following Box 6-7 provides a short summary of certain telecommunications-related investment disputes before the ICSID.

§ ***Telefónica S.A. v. Argentine Republic***. Telefónica S.A., which provides basic telephone and long-distance service in Argentina, filed a claim alleging that the Argentine Government partially expropriated its investment following the imposition of emergency measures during the recent Argentine financial crisis.<sup>37</sup> Telefónica S.A. asserts that a freeze in service tariffs imposed by the Argentine Government, coupled with the 70 percent currency devaluation, cost the company US\$3.8 billion.<sup>38</sup> The parties reached a settlement and discontinued the proceeding in September 2009.<sup>39</sup>

§ ***Telenor Mobile Communications v. Hungarian Government***. The Norwegian firm Telenor Mobile Communications has registered a claim against the Hungarian Government in relation to Telenor's subsidiary Pannon GSM, which has a cellular telephone concession in the eastern European state. Telenor's ICSID claim was brought pursuant to the Norway-Hungary bilateral investment treaty and seeks to challenge regulatory rate-setting measures imposed on Pannon by the Hungarian Government. On September 13, 2006 the ICSID determined that it did not have jurisdiction over the matter and dismissed the case.

In addition, several other telecommunications-related investment disputes have been brought to arbitration outside the scope of ICSID. As of April 2004, at least four telecommunications-related claims had been conducted outside of ICSID, based upon provisions in bilateral investment treaties in force between the host and investor's countries. These cases include *Ameritech v. Polish Government*; *Telekom Malaysia v. Government of Ghana*; *France Telecom v. Lebanon*; and *William Nagel v. Czech Republic*. These proceedings involve claims of expropriation of investments, as in the cases against Lebanon and the Government of Ghana, as well as violations of contractual obligations related to the award of licences (i.e., the cases against the Government of Poland and the Czech Republic).

#### ◀ **Box 6-7** Telecommunications-related Investment Disputes Before ICSID

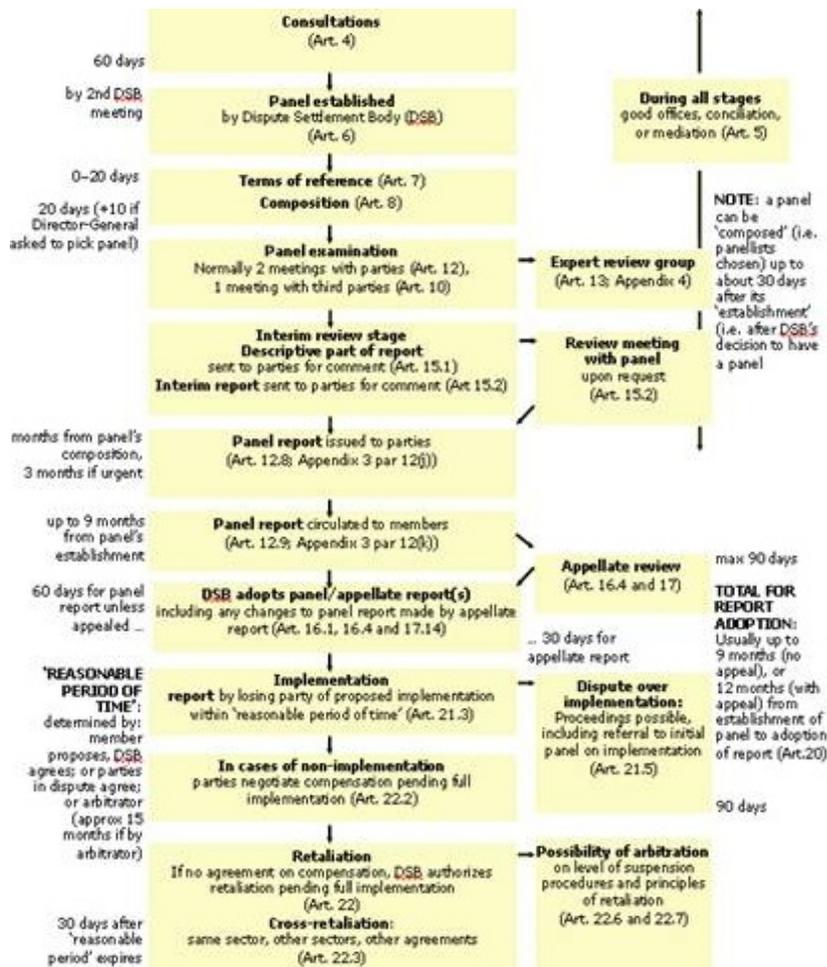
#### *(c) Disputes related to international trade: WTO dispute settlement*

International trade law is applicable, under certain situations, to disputes within a country's telecommunications sector. The WTO's GATS is the principal multilateral trade agreement affecting the provision of telecommunications services. In addition, a series of related documents contain specific commitments pertaining to the opening and regulation of telecommunications markets: (i) the Fourth Protocol to the GATS Agreement; (ii) the Schedules of Specific Commitments of Individual GATS Signatories; and (iii) the WTO Reference Paper, which was included in the commitments of most signatories.

In many cases, these obligations are applicable to telecommunications disputes arising in GATS signatory countries. An international trade dispute arises when one country adopts a trade policy measure or takes some action (e.g., interconnection rate regulation) that one or more WTO members consider to be in breach of pre-existing WTO agreements, or to be a failure to comply with validly acquired obligations. In such cases, WTO members have agreed to use the multilateral system of dispute settlement, rather than take unilateral action.

The following Figure 6-B is a diagram of the dispute resolution procedure before the WTO:

◀ Figure 6-B: WTO Dispute Resolution Procedure  
 Source: WTO available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm)



The main objective of WTO dispute resolution proceedings is to settle disputes, through consultation if possible.<sup>40</sup> To date, only one telecommunications case has been before a WTO Dispute Settlement Body (DSB) for resolution, the U.S.-Mexico case. In that case, the United States argued that Mexico had failed to comply with its commitments and obligations under the GATS, specifically it had failed to: (i) ensure that Telmex provided interconnection to U.S. cross-border basic telecommunications suppliers on reasonable rates, terms and conditions; (ii) ensure reasonable and non-discriminatory access to, and use of, public telecommunications networks and services for U.S. basic telecommunications suppliers; and (iii) provide national treatment to U.S.-owned commercial agencies. The panel's report on "Mexico – Measures Affecting Telecommunications Services", later adopted by the DSB on 1 June 2004, principally sided with the U.S. position. Nevertheless, following its adoption the parties notified the DSB that they had arrived at a mutually agreed solution to the conflict by which Mexico would, within a 13 month period: (i) adopt revised International Long Distance Rules eliminating the "uniform settlement rate" and "proportional return" systems in force at the time; and (ii) implement a regulation to allow the resale of international long distance public switched telecommunications service.<sup>41</sup>

Other telecommunications-related disputes between WTO Members have been under discussion and at least two cases have nearly come to the WTO but have been settled through purely bilateral channels, including: (i) a dispute between the United States and Japan on interconnection; and (ii) a dispute between the United States and the European Communities on standards for licensing mobile services.<sup>42</sup>

Under WTO rules, individual service providers lack "standing" to seek remedies through the GATS dispute resolution procedures. As such, typically, the service provider's country of origin puts pressure on another country's government to comply with its GATS obligations. These mechanisms have the potential of turning what could initially be characterized as a domestic dispute (e.g., about licensing or interconnection) into an international trade law dispute.<sup>43</sup>

#### 6.6.2.4 PROCESS FOR RESOLVING CONSUMER COMPLAINTS: ACCOUNTABILITY FOR CONSUMERS

Regulatory accountability also involves regulators having appropriate procedures to channel consumer inquiries or claims, to educate consumers regarding their rights, and to protect consumers in case of market failures. In a majority of countries, regulators assume responsibility for handling consumer complaints.<sup>1</sup> Disputes between service providers and consumers are also common and occur in every jurisdiction. These conflicts principally stem from the consumer's lack of bargaining power or the lack of consumer choice among service providers. The main type of disputes arising between consumers and service providers derive from the following causes: (i) service charges; (ii) billing; (iii) payment of charges; (iv) "slamming";<sup>2</sup> (v) quality and terms of service; (vi) violation of privacy; and (vii) false or deceptive advertising.<sup>3</sup> To ensure effective resolution of consumer disputes, regulators are using a variety of mechanisms, ranging from requiring service providers and consumers to initially resolve disputes themselves (the case of

the United States and Botswana); using ombudsmen type institutions (as the telecommunications industry Ombudsman in Australia); and even employing the broadcast media (as is the case of the Nigerian "Consumer Parliament" evidences). The particular mechanisms developed and instituted for consumer protection in each country may differ and require tailoring to the needs of the country depending on the country's particular legal and institutional systems and culture. For instance, certain mechanisms, such as ombudsmen, tend to work best in countries with a long history of consumer activism.<sup>4</sup>

### Mechanisms for consumer protection

Telecommunications regulators have implemented different methods to make themselves accessible to the public and to facilitate the handling of consumer complaints. Some countries have administrative offices outside the regulator, while others have utilized internal offices of consumer affairs. As telecommunications markets become more competitive, regulators continue to take a proactive role to protect consumer rights through consumer protection legislation, licence conditions, consumer education and information, and encouragement of industry self-regulation through industry codes. For example, many regulators have published consumer information fact sheets, guides and brochures on their websites. Most telecommunications legislation and related regulations contain provisions on quality of service standards, telecommunications fraud, number portability, carrier selection, and universal service. In many countries, consumers have more than one avenue to file complaints with the regulator so the regulator is better able to handle consumer concerns in a competitive market. Usually, consumers can file complaints in several ways: (i) in writing, (ii) by e-mail; (iii) by telephone, (iv) by fax, or (v) in person at the regulator's offices, in consumer centers/call centers or in a Consumer Parliament (e.g., Nigeria). The procedures for filing complaints with the regulator are generally simple in order to facilitate their submission, and are published on the regulator's website, in official publications and available at the regulator's offices.

In some countries, such as Australia, Hong Kong (SAR) and Malaysia, the regulators place significant emphasis on industry self-regulation and on codes that are developed by industry and approved and registered with the regulator, covering issues such as billing, number portability, pricing information, and complaint handling by operators.<sup>5</sup> Other regulators have also established consumer advisory committees and forums to provide the regulator with advice on consumer concerns, promote consumer input into policies and regulations and to ensure that the consumers' interests are taken into account during the regulator's decision-making process. In Australia, the regulator is required by legislation to establish a consumer forum.<sup>6</sup> Australia has also created an independent Telecommunications Industry Ombudsman to investigate complaints about the provision of telephone or Internet services and to help parties settle disputes regarding such services.<sup>7</sup>

In Canada, the Governor in Council issued *Order requiring the CRTC to report to the Governor in Council on consumer complaints*, which required the creation of an independent telecommunications consumer agency. Pursuant to the terms of the Order, telecommunications service providers are required to participate in and contribute to the financing of this independent agency. The Canadian regulator, the Canadian Radio-television and Telecommunications Commission (CRTC) was charged with approving the structure and mandate of such an agency. The CRTC subsequently gave provisional approval to the structure and mandate of the Commissioner for Complaints for Telecommunications Services (CCTS). The CCTS has been operating since the summer of 2007, although the CRTC has made a number of changes to its structure and mandate in order to ensure its effectiveness and its independence from the telecommunications industry.

Many regulators, particularly in developing and less competitive markets may not be able to rely on industry self-regulation and find it necessary to assume a larger role in consumer empowerment and protection. Some regulators, such as Anatel in Brazil and the Nigerian Communications Commission (NCC) have created innovative ways for addressing consumer complaints. (See Box 6-8 below for example of Brazil.) The NCC has established a Consumer Affairs Bureau to serve as the industry watchdog for educating, informing, and protecting consumers. Additionally, the NCC has published a Consumer Bill of Rights recognizing the inalienable rights that every consumer should have, including: (i) the right to be informed; (ii) the right to safety; (iii) the right to choice; and (iv) the right to be heard. The NCC also instituted a Consumer Parliament, which brings all stakeholders, consumers, operators, and the regulator together and provides a live broadcast, public forum where the regulator can educate the public and consumers can ask questions and voice their grievances.<sup>8</sup>

In Brazil, three entities work with Anatel to assist with consumer complaints: the Office of Consumer Affairs, Anatel's Citizen Rooms, and the Committee for the Protection of Telecommunications Service Users.

**Office of Consumer Affairs** The Office of Consumer Affairs within Anatel accepts consumer complaints sent to Anatel by e-mail, letters, or through Anatel Call Centers. Complaints about service providers must be sent first to the relevant service provider, which is required to contact the consumer within five days. Complaints about Anatel are sent to the specific department within Anatel that is subject of the complaint. The Office of Consumer Affairs has the following functions: (i) advise Anatel on matters of consumer rights; (ii) receive, respond, and channel internally and externally, complaints, requests or comments of consumers; (iii) implement and expand methods and procedures for the relationship between Anatel and consumers; and (iv) manage Anatel's Call Centers.<sup>9</sup>

**Citizen Rooms** Anatel's Citizen Rooms also provide a communication channel between Anatel and the public. Interested parties can use the Citizen Rooms to submit licence requests for the provision of a variety of services, and file complaints regarding services. The Citizen Rooms provide access to Anatel's public database and are equipped with computers, printers, fax, scanners, telephones, VCR, as well as attendants to provide information related to Anatel's activities. Any party can conduct online searches of Anatel's reports, contracts, decrees, resolutions, standards, and have access to telecommunications legislation.<sup>10</sup>

**Committee for the Protection of Telecommunications Service Users** Anatel has also created several strategic external committees, which are intended to develop studies, proposals and recommendations on specific matters. The committees act as advisory bodies to the Board of Directors. The Committee for the Protection of Telecommunications Service Users advises the Board of Directors regarding consumer protection. The Committee is comprised of members of different Anatel offices, a representative of the Department of Consumer Protection of the Secretary of Economy, a representative of users of fixed telephony services; a representative of users of mobile services, a representative of users of mass media services, a representative of users of other telecommunications services, and entities representing telecommunications service providers. The Committee has the following functions: (i) advise Anatel's Board regarding its relationship with the National System of Consumer Defense; (ii) provide Anatel's Board with directives regarding consumer rights; (iii) develop procedures for prevention of violation of consumer rights; and (iv) advise the Board regarding dispute resolution mechanisms for consumer disputes.

Some countries have specialized tribunals to assist consumers with adjudicating their claims against operators. In Peru, the Administrative Tribunal for the Settlement of Users Claims (TRASU)<sup>11</sup> adjudicates claims filed by users of public telecommunications services. TRASU is part of OSIPTEL but is fully independent in its rulings and is the last administrative review for users' claims. The six members of TRASU are elected by OSIPTEL's Board of Directors based on a recommendation submitted by OSIPTEL's Chairman, and are remunerated for their services. TRASU can be part of OSIPTEL's staff, or professional experts. Its functions are to: (i) resolve claims and appeals submitted for its consideration; (ii) propose to OSIPTEL's Managing Council the modification of the procedures to deal with users' claims, and those related to violations and sanctions; (iii) approve the content of forms and other materials to be used, to allow the expeditious resolution of claims and appeals submitted for its consideration; and (iv) engage in other matters entrusted to it by OSIPTEL's Managing Council.<sup>12</sup> TRASU has jurisdiction over:

1. Revision of decisions concerning users claims issued by telecommunications operators;
2. Claims or appeals against decisions issued by the operators in connection with claims filed against the operator's administrative procedures; and
3. Appeals against decisions related to quality of service problems.

Colombia has taken a different approach to consumer complaints. While one of the regulator's functions is to provide information to customers regarding telecommunications services, the authority to adjudicate disputes between telecommunications operators and customers has been delegated to the Superintendencia de Servicios Públicos Domiciliarios (Superintendency of Domestic Public Services -SSPD).<sup>13</sup> This is a multi-sectoral administrative body independent from the telecommunications regulator, created by the Colombian Constitution in 1991, to exercise the functions of supervision, inspection, and oversight of entities providing public services such as energy, gas, and telecommunications services. The SSPD receives appeals filed by users and subscribers after they have been filed directly with the telecommunications operator. The SSPD can impose sanctions on public service providers.

The United Kingdom has adopted an interesting approach to handle consumer complaints concerning telecommunications services. In January 2003, the Office of the Telecommunications Ombudsman (Otelco) was established as a voluntary dispute resolution service, independent from the regulator Ofcom. Otelco reviews and seeks to resolve consumer complaints against companies that are members.<sup>14</sup> Otelco's current members cover more than 96 per cent of the fixed line telephone market, over 55 per cent of the mobile telephone market and 33 per cent of the ISP market. Otelco is composed of an Ombudsman, two senior managers, a board composed of seven members (five nominated by member companies and two appointed from the independent council members), and a Council

whose main role is to appoint the Ombudsman and manage Otelo's services. Otelo's terms of reference detail the range of telecommunications services that are covered, and what Otelo can and cannot do.<sup>15</sup> Otelo considers complaints against member companies where the complainant and the company have been unable to reach an agreement, and determine whether the member company must take any action for the consumer's benefit.

With the development of the Internet, many countries are also in the process of drafting and adopting guidelines and regulations for protection of consumers involved in online activities, such as data protection laws, cybercrime laws, and anti-spam laws. The approach to consumer protection in the ICT environment varies among countries, with some countries, such as the United States, adopting a more hands-off approach and others, such as the EU, adopting a stricter regulatory approach.<sup>16</sup> Because of the variations in laws among countries, and the need to coordinate international efforts in handling the flow of Internet data and cyber-crimes, there is a movement to harmonize standards in ICT-related laws among countries.

### Consumer complaints against operators

The majority of consumer complaints relate to the conduct of telecommunications operators and service providers. Regulators have created specific standards and filing requirements for telecommunications operators to protect consumer interests. Regulations often require companies to establish procedures to handle consumer complaints. In addition, in some instances, the regulations also include a requirement that the company have customer service personnel available 24 hours to handle consumer inquiries, and that any information concerning the procedures and the right to submit claims should be publicly available and located conspicuously at the company's offices and/or on its website. Further, operators are sometimes required to create special forms designed to facilitate consumer claims, to keep registers of consumers' claims, and to establish specific timeframes for resolving consumer complaints or applying specific rules, such as the positive administrative silence rule used in civil law countries.<sup>17</sup>

Generally, primary responsibility for handling consumer complaints against telecommunications operators resides with the company providing the service, since the operator has all the relevant information concerning the service and therefore is better able to address the claims. The company's procedures dealing with the consumer complaint set the framework for the initial administrative review of the user's claim, before intervention by the regulator. The regulator generally intervenes only after the consumer is unable to resolve the issue directly with the operator or service provider, or if the consumer complaint involves a breach of the telecommunications law and regulations or licence provisions. In Hong Kong, OFTA states clearly that its powers and functions regarding consumer complaints against an operator are limited to the conduct and practices of the operators regulated under the telecommunications laws and licence conditions, and OFTA does not have any power to adjudicate contractual disputes between individual consumers and operators.<sup>18</sup> Contractual disputes between consumers and operators can often be resolved through dispute resolution mechanisms, as described in Section 7.4.1.

Additionally, depending on the nature of the complaint and whether the complaint is outside of the regulator's scope of authority, consumers may seek recourse with the courts or other consumer organizations or agencies. In Ireland, for example, consumers can address complaints to the Small Claims Court, the European Consumer Center, Regtel (the independent regulator for content and promotion of premium rate telecommunications services), the Office of the Data Protection Commissioner, the Advertising Standards Authority for Ireland, and the Office of the Director of Consumer Affairs.<sup>19</sup> The intervention of an attorney for consumer claims generally is not required because this would oblige the consumer to incur further expenses and discourage claims. The consumer, however, usually has discretion to use an attorney if desired.

### 6.6.2.5 ENFORCEMENT AUTHORITY

In order to ensure that parties to the regulator's dispute resolution process abide by the decisions, the regulator must be given sufficient power to enforce its decisions. In addition, the regulator must have sufficient authority to enforce all provisions under the telecommunications law, regulations and other rules. The regulator should have the ability not only to enforce rules of general applicability, but also to issue directions and mandate operators to carry out or to stop a particular activity. The Telecommunications Regulatory Authority (TRA) of Bahrain provides a good example of the necessary tools that regulators must have to carry out their responsibilities. Among other rights, the TRA has the power to:

1. Issue regulations, orders and determinations as necessary to implement the provisions of the Telecommunications Law;
2. Monitor and enforce compliance with licence terms;
3. In coordination with the Radiocommunications Authority, monitor and enforce spectrum usage in accordance with the Telecommunications Law and to ensure efficient spectrum usage;
4. Encourage, regulate and facilitate adequate access, interconnection and interoperability of services, including enforcing sharing of facilities and property by operators;
5. Examine complaints and resolve disputes between licensees, subscribers, and other interested parties, as well as take any necessary and proportionate measures in relation to such matters.<sup>1</sup>

Except in emergency cases, if a TRA enforcement action is expected to have a material impact on a particular telecommunications market, it must give affected parties an adequate opportunity to submit comments on the planned action.<sup>2</sup>

*The regulator should also possess the proper authority enabling it to sanction operators. The sanction power consists of the ability of the*

regulator to establish a fault standard for violations as well as the level of fine applied due to the violation. Most regulators' competencies include the ability to impose sanctions in order to enforce compliance with applicable laws, regulations, and licence conditions.

### 6.6.3 CORE RESPONSABILITIES

#### 6.6.3.1 LICENSING

In most countries, licensing is one of the primary functions of the regulator, although in certain countries, this responsibility falls under the jurisdiction of the sector ministry or is shared between the regulator and the ministry. Through licensing, governments often implement policies aimed at opening the market, providing services to underserved areas, modernizing telecommunications infrastructure, and supporting ICT policies. Licensing responsibilities generally include: preparation and publication of model licences; development of licence application guidelines and evaluation criteria; establishment of licence fees; and licence renewals. Recently, regulators have begun to re-examine their licensing practices as a result of increasing technology convergence and are moving towards unified or converged licensing models.

As more regulators examine the need to adopt new licensing regimes in light of increasing liberalization and technological developments, it is critical to take into account and review the impact of the proposed new licensing regimes on the existing licensees and, in particular, any exclusivity provisions that were previously granted to incumbent operators. Usually, incumbent operators are concerned with issues such as licence parity; therefore, regulators are often faced with the challenge of facilitating the market entry of new service providers while at the same time addressing the acquired rights of existing operators.

In addition, when establishing licence award processes in cases where a beauty contest (comparative evaluation) process is used to select and award the licence to the best applicant, regulators should formulate objective and transparent evaluation criteria. Not only will transparent evaluation criteria be more attractive to potential new entrants, but these will also minimize the potential for unsuccessful applicants to appeal the licence award.

#### Practice Notes

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- [Facilitating Cooperation between Regulatory Agencies – Memorandums of Understanding and Cooperation Protocols](#)

#### Reference Documents

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- [Netherlands: Agreements between the Commission of the Independent Post and Telecommunications Authority \(OPTA\) and the Director General of the Netherlands Competition Authority \(the NMa\) on the method of cooperation in matters of mutual interest, 2004](#)
- [Nigeria: Memorandum of Understanding between the Consumer Protection Council and the Nigerian Communications Commission](#)

#### 6.6.3.2 COMPETITION POLICY AND COMPETITIVE SAFEGUARDS

Liberalization and increased competition in telecommunications markets require active regulatory involvement to provide new entrants with a level playing field when attempting to compete against well-established incumbent operators. Incumbent operators usually have substantial advantages, such as a legacy ubiquitous network that is largely depreciated, a substantial customer base, and market power. New entrants require assurances that adequate regulatory protection will in place so that the incumbent operators will not be permitted to engage in anticompetitive behavior or abuse their dominant position. Accordingly, regulators are generally given the power to establish competition policy and address anticompetitive practices in the telecommunications market. Regulations developed in this regard generally include elements such as market definitions, definitions of thresholds for market power, and accounting separation.

##### *(a) Jurisdiction and Mandate over Competition Matters*

Many regulators have explicit mandates in the telecommunications law to deal with anticompetitive practices in their sector. Nevertheless, countries frequently also have a separate competition authority with statutory responsibility for competition matters, generally in consultation with a sector-specific regulator. One example where this approach has been followed is Peru.

Although there is an established competition bureau, Instituto Nacional de Defensa de la Competencia y de Protección de la Propiedad Intelectual (INDECOPI), the telecommunications regulator Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL) was given primary responsibility to regulate anticompetitive behavior in the telecommunications sector. OSIPTEL's regulation states that "the rules of free competition are ancillary to regulations issued by OSIPTEL within its areas of competence. In cases of conflict, the rules issued by OSIPTEL shall prevail."<sup>1</sup>

##### *(b) Mandate to Issue Regulations on Competitive Safeguards*

A major responsibility of a regulator in a liberalized telecommunications market is to ensure that operators with market power or dominance do not abuse their position with respect to their customers and existing and potential competitors. In the telecommunications industry, a dominant operator has the ability to control the essential facilities involved in interconnection unless

measures are in place to restrict the operator from doing so. For example, the power to deny or overprice interconnection and network facilities gives a dominant service provider unfair and potentially insurmountable advantages over its competitors. Thus, safeguards must be designed to define, deter, and punish anticompetitive activities while at the same time creating an enabling environment that will attract the investment needed to establish competing ventures.

As telecommunications markets continue to become more competitive, many ways exist in which dominant operators can engage in anticompetitive behavior (e.g., predatory pricing, cross-subsidization, price discrimination, discriminatory provisioning of network facilities, overpricing of essential facilities and other network elements and services provided to competitors, unfair trade practices, tie-in sales, and anticompetitive bundling). Regulators can anticipate many complaints from new entrants in this regard and it is extremely important that clearly defined rules are in place to deal effectively and transparently with such allegations.

Regulators have several tools to deal with competition issues. Competitive safeguards applied to dominant operators may be: **2**

§ Structural, by requiring the establishment of a fully separate subsidiary to draw a clear distinction between the provision of competitive and non-competitive services;

§ Non-structural, such as accounting safeguards employing cost allocation rules for various services;

§ Conduct compliance requirements and specific obligations; and

§ Explicit pricing rules.

Finally, regulators must demonstrate their credibility from the outset when dealing with competition issues. This requires resources to thoroughly investigate cases brought forward by complainants as well as to initiate investigations in instances where the regulator determines there is a need to do so. Furthermore, regulators also require strong enforcement powers in order to impose penalties and apply remedies in proven cases of anticompetitive behavior. Without these powers, the regulator cannot adequately ensure that sufficient incentives and protection exist for potential new entrants and thus the market will not be fully competitive.

### 6.6.3.3 TARIFF REGULATION

Regulators must establish effective and transparent tariffing regimes in order to contribute to the orderly evolution to competition in the telecommunications sector. As markets become more competitive, tariff regulation becomes a less important regulatory function. However, when tariffs are still being set by the regulator, they should be set formally through the issuance of rules and other regulatory instruments. Additionally, before the market is fully competitive, regulators usually apply different tariff regulations on non-dominant operators versus dominant operators. In order to ensure that fair competition can develop, non-dominant operators are generally subject to less onerous tariff regulations. Dominant operators, on the other hand, can be subject to *ex ante* tariffing regulation. For example, dominant operators may be required to submit their tariffs for regulatory approval, whereas non-dominant operators may be subject only to publication requirements.

A fundamental reason for tariff regulation is to prevent the abuse of dominance. There are two market situations in which tariffs are required to address dominance: non-competitive or monopoly markets and competitive markets. For service markets in which a dominant operator does not face effective competition, the regulatory concern is that prices will be set substantially above cost so that the operator earns a monopoly level of profit. In this circumstance, regulators have historically used “rate of return” regulation, which establishes the maximum return on capital invested, or increasingly, regulators have imposed a price cap regime (with or without consideration of the rate of return), which provides some level of incentives for operators to function efficiently and reduce costs. Price cap regulation involves the regulator creating “baskets” of services that are non-competitive. The composition of such baskets tends to vary by country to reflect individual market circumstances. Some examples of possible “baskets” of services include: basic services; basic and mobile services; basic local service; and local and access service.

For those markets in which a dominant operator faces competition, especially in the early stages of liberalization, the regulatory concern shifts to anticompetitive pricing tactics (e.g., predatory pricing and cross-subsidization) that are intended to weaken or damage new entrants. In this case, the concern is that retail prices for some services will be set below cost by a dominant carrier. Many regulators have explicit prohibitions regarding anticompetitive pricing, particularly predatory pricing.

For example, Singapore’s regulator, Infocomm Development Authority (IDA) requires dominant carriers to provide telecommunications service on terms and conditions that are just, reasonable and non-discriminatory and pursuant to filed tariffs. A dominant carrier may not abuse its market position by, for example, setting prices at levels that are so low so as to unreasonably restrict competition. The IDA<sup>1</sup> utilizes a three-pronged test for predation, namely whether:

- The dominant carrier is selling service at a price below marginal cost;
- There is a likelihood that such price cutting will drive efficient rivals from the market or deter future efficient rivals from entering the market; and
- Entry barriers are so significant that, after driving rivals from the market or deterring entry, the dominant carrier could impose price increases that would be sufficient to recapture the full amount of the loss that it incurred during the period of price cutting.

After making a determination of dominance, all regulators should adopt consistent principles and procedures to ensure that prices

are just and reasonable, which is often expressed as “cost-based” prices.

Implementation of such tariff-fixing processes and procedures also requires that the regulator establish or approve a cost accounting system and allocation regime so that all of a dominant operator’s costs that relate to regulated services are identifiable and consistent with the cost accounting system.

#### 6.6.3.4 INTERCONNECTION

Regulators play a critical role in overseeing interconnection. In most cases, they must review relevant economic principles regarding interconnection pricing, analyse and propose interconnection costing approaches, develop common cost models to be utilized by all operators, and develop interconnection guidelines and regulations. Interconnection is often the most contentious regulatory issue given its fundamental impact on the overall operation of competing telecommunications networks. It is also one of the most important regulations to put in place before competition can be successfully introduced. To facilitate competition, regulators must ensure that the interconnection framework is clearly defined and that interconnection charges between networks are based on objective, economically sound, and solidly substantiated costs.

As with tariff regulation, before the market is fully competitive, interconnection regulation is generally applied asymmetrically on dominant versus non-dominant operators to ensure that non-dominant operators have access to interconnection services controlled by dominant operators. Generally, dominant operators are required to publish reference interconnection offers and interconnection agreements, which serve to inform and facilitate interconnection by new entrants and other non-dominant operators, and to discourage discriminatory behaviour by dominant operators in providing interconnection.

Investor concerns regarding interconnection regimes have grown steadily over the last five years due in large part, but not limited to, numerous problems encountered between mobile operators and fixed line service providers. In the early days of competition, regulators often have difficulty in establishing adequate interconnection guidelines for mobile-to-fixed and mobile-to-mobile calls. Many investors have suffered financially as a result and thus are more diligent about ensuring that the interconnection regime is economically sound and supported by a clear regulatory position.

In this era of convergence, regulators are facing new issues such as how to transition different rights of individual groups of licensees under a specific interconnection regime to a unified licensing regime. Finally, regulators are also facing the challenge of how to address the complexities created by a multiplicity of operators utilizing a variety of technologies interconnecting among themselves. In the ITU-D study group question on interconnection, for example, the participants studied possible solutions to this issue, including the interconnection gateway exchange and interconnection billing clearing house.<sup>1</sup>

#### 6.6.3.5 SPECTRUM MANAGEMENT

As a scarce resource that is becoming increasingly valuable as the number of mobile phone users and the range of bandwidth-hungry services and applications grow, spectrum management is an essential part of telecommunications policy and regulation. Spectrum management refers to a wide array of responsibilities, including spectrum allocation, methods of spectrum assignment, development of technical and service rules and enforcement of rules and licensing obligations, such as preventing harmful interference or coverage obligations. At the national level, spectrum management may be under the authority of the ICT regulator or a government ministry or responsibilities may be shared between the two. Whether the ICT regulator or a ministry is better for managing spectrum depends largely on each country’s particular circumstances. Regardless of the entities that manage the spectrum, it is important that the mechanisms for allocating and assigning spectrum are transparent, non-discriminatory, fair and provide effective accountability. Additionally, where spectrum management responsibilities are shared, it is important that there are clear measures in place to facilitate cooperation between the regulator and ministry. Spectrum management and the role of the regulator are further addressed in [Module 5](#) on Radio Spectrum Management.

In Nigeria, for example, the Nigerian Communications Act of 2003 tasks the National Frequency Management (NFM) Council, a ministerial level body with developing Nigeria’s positions at the ITU, as well as preparing bilateral and multi-lateral spectrum allocation treaties with other sovereign administrations.<sup>1</sup> Notably, the NFM Council is responsible for preparing, updating and publishing the national frequency allocation table with the NCC’s advice. The NFM Council is comprised of members from various ministries, including ministries associated with communications, science and technology, aviation, transport and the national security agencies. In addition, the country’s independent ICT regulator, the Nigerian Communications Commission (NCC), and the National Broadcasting Commission also have membership on the NFM Council. Although the NFM Council is responsible for spectrum allocation, the NCC has the “sole and exclusive power to manage and administer the frequency spectrum for the communications sector.” As part of this authority, the NCC is tasked with granting spectrum authorizations and regulating licensees’ use of spectrum. By clearly identifying the roles that the NCC and the NFM Council play in spectrum management, as well as providing the NCC a position on the Council, the Nigerian Communications Act helps to ensure that the bodies function in a cooperative and effective manner.

#### 6.6.3.6 QUALITY OF SERVICE - REGULATORY ROLES AND RESPONSIBILITIES

Often, a regulator’s responsibility is to establish quality of service (QoS) guidelines or parameters, as well as the methods and procedures for monitoring operators’ performance against these established parameters. The fundamental objective in establishing QoS targets and reporting is to ensure that the general public (i.e., the consumer) is served and, at the same time, that the operator is not impeded from carrying out day-to-day operating routines as a result of excessive reporting requirements. The level of regulatory

intervention with respect to QoS is often dependent on the degree of competitiveness that is present in the market. Generally, the regulator takes a more hands-off approach with respect to QoS monitoring and reporting requirements if a market is highly competitive. Nonetheless, the reporting and the report analysis process should not be too onerous for either the operator or the regulator irrespective of market conditions. In addition, it also should be developed in consultation between the operators and the regulator to establish realistic benchmarks and make the process manageable and useful in identifying areas where the consumer is receiving inadequate service levels.

Although different approaches have been adopted in various jurisdictions, the regulatory goal should be to ensure: (i) the delivery of acceptable service for the telecommunications user; and (ii) that consumers are aware of the variations in performance from various service providers/operators thereby allowing them to make an educated choice regarding their preferred service provider. QoS indicators are one of the most effective regulatory tools in this regard.

Ultimately, consumer should reap the benefits from the enforcement of QoS regulations. In certain instances, for example, operators opt to run the risk of incurring a penalty as opposed to investing to improve the QoS. In such cases, the imposition of monetary fines does not result in any direct benefit to consumers. On the other hand, consumers may benefit directly when the penalty for violating QoS standards is, for example, to provide consumers with services free of charge; to give the consumer retroactive rebates as compensation for the poor QoS; or to move them up to the top of a waiting list for the provision of services.

### 6.6.3.7 UNIVERSAL ACCESS/SERVICES

Although universal access/service (UAS) policies and the underlying institutional framework are often first set out in national legislation or ministry policies, the telecommunications regulatory authority is often tasked with carrying out the policies and implementing regulations and enforcing UAS obligations in licenses. As such, regulators should be empowered to address universal service<sup>1</sup> and universal access issues.<sup>2</sup> Many find that the regulatory authority should implement universal access/service policies. For example, the West African Telecommunications Regulators Assembly (WATRA) set out Guidelines on Universal Access/Service in 2005, which provided that: "National Regulatory Authority's (NRAs) must be established and capacitated to play a key role in implementing universal access policies first through addressing the market efficiency gap (letting the market deliver universal access/service), and second through the true access gap."<sup>3</sup> The 2005 WATRA Guidelines further stated that NRAs should be responsible for implementing UAS policies directed towards assuring the best quality reliable services at the most affordable prices that meet the needs of consumers."

Despite a preference for implementation of UAS policies by the regulatory authority, in a number of countries, the ministry responsible for communications is tasked with carrying out policy relating to universal access or service, which is the case in Colombia, Guatemala and India.<sup>4</sup> The advantage of such an approach is that the entity that defines policy also carries it out. However, a problem may arise from this framework where UAS policies are funded through a specific Universal Service Fund (USF), which is often made from industry contributions in which government is not perceived as being far enough removed to be an independent administrator of the finances. This issue is more likely to arise where government still has any ownership interest in the industry.

Where USF is used to achieve universal service, it is important to ensure that the funds are administered and awarded on a transparent, non-discriminatory and timely basis. In Taiwan, for example, the Directorate General of Telecommunications (DGT), a division of the Ministry of Transportation and Communication (MOTC), administers and manages the Universal Service Fund. The DGT oversees the affairs of the fund through the Universal Service Fund Administrative Committee, composed of seven to eleven members from agencies, academia, and sector experts. The Director General of the DGT is the chairman of the committee, and other members of the committee are selected by the DGT. The main functions of the committee include: assessment of the annual implementation plans and subsidy applications for universal service; assessment of the revenues as reported by contributing parties; auditing and calculation of the contribution proportion and amount to be made by contributing parties towards universal service charges; auditing and assessment of the Telecommunications Universal Service Fund; evaluation of the universal service regime; and other matters related to universal service in Taiwan.<sup>5</sup>

Similarly, in Chile, the Telecommunications Development Fund (FDT) is managed by the Telecommunications Development Council, a group composed of three ministers (including the Minister of Transportation and Telecommunications who acts as Chairman of the Council) and three telecommunications experts representing different regions of the country. However, unlike Taiwan, the Council is supported by the regulator, SUBTEL, and the Council's members include a broader group of government representatives. Each year, the Council is responsible for: (i) determining the criteria SUBTEL will consider when evaluating projects; (ii) carrying out the annual agenda of projects to be tendered and those being subsidized, as well as establishing their priorities and the subsidies necessary for their execution; and (iii) determining, through public tenders, the disbursement of funds for subsidies for projects to be carried out. The Council can request necessary information from regional, provincial or community authorities. Once a project is selected, the Council forwards all relevant information to SUBTEL for the regulator to issue the pertinent authorizations. The Council also is responsible for preparing and distributing the FDT's annual report that allows for periodic assessments of the fund.<sup>6</sup>

### 6.6.4 NON-CORE RESPONSIBILITIES

In addition to their core responsibilities, ICT regulators are increasingly expanding their roles in areas not directly related to telecommunications (i.e., "non-core" responsibilities). These include areas where ICT regulators have long played a role, such as consumer protection, as well as new areas, such as cyber security and climate change. ICT regulators are particularly positioned to

impact these other areas due to the impact of technological convergence on every aspect of society and sector of the economy.

#### 6.6.4.1 CYBERSECURITY

Cybersecurity, which requires protecting network infrastructure, as well as individuals' data privacy, pose substantial technical and legal challenges to law enforcement.<sup>1</sup> First, increasing use of and reliance on ICTs means that even temporary service disruptions can cause significant economic losses. Secondly, with billions of Internet users worldwide, the number of potential targets for cybercrime makes it difficult to identify and track cybercriminals. Third, cybercrimes are often committed across national boundaries in which the offender is in one country while the victim is in another and the means for committing the crime may be in a third country. Without effective international cooperation, it is likely to be difficult—if not impossible—to locate, arrest and prosecute cross-border cybercriminals.

Due to the law enforcement and transnational components of cybersecurity, ICT regulators have not taken the lead on drafting and implementing cybersecurity regulations. Instead, these issues are typically addressed in national legislation, as well as through international and regional initiatives seeking to harmonize the legal frameworks of various countries. For example, the Group of Eight (G8) adopted Ten Principles to combat cybercrimes, which included commitments to 1) ensure that there would be no safe havens for cyber criminals anywhere in the world and 2) implement a coordinated international legal framework capable of investigating and prosecuting cybercrimes regardless of where the harm has occurred.<sup>2</sup> As addressed in Section 4.4.4, the Council of Europe's Convention on Cybercrime also sets out specific measures to be implemented by Member States to ensure that domestic laws regarding confidentiality, integrity and availability of computer data and systems, such as illegal access or interception, were consistent. Additional regional commitments to the prevention and prosecution of cyber crimes have been implemented through the Asian Pacific Economic Cooperation (APEC), Organization of American States (OAS), Association of South East Asian Nations (ASEAN), the Arab League and the African Union.

However, ICT regulators are in a position to leverage certain core competencies within the ICT sector to make significantly contribute to cybersecurity, particularly with respect to facilitating the mobilization of various stakeholders and coordinating the efforts of these stakeholders in the fight against cybercrime.<sup>3</sup> Additionally, ICT regulators can use their expertise to participate in developing or reviewing national legislation and policies related to data protection, data transmission, spam, and the responsibilities of ISPs and other Internet intermediaries. Particularly in developing countries with limited or no legislation to specifically address cybercrime, the ICT regulator is playing an advisory role to help draft effective legislation. For example, the Ugandan Communications Commission was a member of the multi-stakeholder National Task Force established in 2003 to draft cybercrime legislation.<sup>4</sup> This draft legislation is now part of a regional initiative called the East African Countries' Task Force on Cyber Laws seeking to develop and harmonize cybercrime laws throughout the region. In Zambia, as a member of the National Working Group on Cybersecurity, the Zambia Information and Communications Technology Authority (ZICTA) has also played an advisory role in drafting the country's cybersecurity legislation.<sup>5</sup>

Some countries are exploring the possibility of expanding the ICT regulator's role beyond that of an advisor to assisting with the enforcement of cybercrimes, particularly regarding copyright infringement and spam. For example, the United Kingdom passed a digital piracy law in 2010, called the Digital Economy Act (DEA), which places most of the implementation and enforcement powers with the ICT regulator, Ofcom, rather than with a law enforcement agency.<sup>6</sup> The DEA details a three-stage notification process for informing subscribers of copyright infringements and requires ISPs to provide infringing subscribers' IP addresses to the relevant copyright holders. Ofcom's powers include deciding upon the appropriate enforcement action against any person found to have breached the code, including imposition and collection of a financial penalty up to £250,000.

#### 6.6.4.2 ICTS AND CLIMATE CHANGE

Countries at all stages of development face environmental problems related to climate change, pollution, energy and decreases in biodiversity. ICTs can improve environmental performance and address climate change across the economy, particularly in energy, construction and transportation sectors and can also improve water management techniques, protect biodiversity and reduce pollution. Despite these benefits, ICTs are also a contributor to global emissions, an impact that will continue to grow with the rise of broadband-enabled devices using "always on" connections and increased processing capabilities that require greater amounts of energy in order to power these devices. Countries are examining new approaches to ICT policies and regulation in order to capture the benefits of ICTs on the environment, while minimizing their negative effects. Drawing on their expertise, ICT regulators may assist in developing policies to meet this objective.

Except for electromagnetic field (EMF) and radiofrequency field (RF) emissions from broadcasting and mobile communications towers or from handheld mobile devices, ICT regulators have not traditionally been involved in environmental policies. However, the growth of "green ICT" initiatives may prompt new levels of cooperation between the ICT and environmental regulators in order to accomplish ambitious cross-sector goals. For example, Egypt is implementing its Green ICT Strategy jointly through a Memorandum of Understanding (MoU) signed in February 2010 by both the Ministry of Communications and Information Technology (MCIT) and the Ministry of Environmental Affairs (MEA). The framework of the MoU between the MCIT and the MEA aims at achieving several goals, including:<sup>1</sup>

- Raising community awareness about green ICT challenges and opportunities,
- Setting national policies for green ICTs

- Adopting a multi-stakeholder approach to address how to use ICTs to reduce environmental impacts;
- Reducing the adverse environmental effects resulting from the expansion in the use of ICT; and
- Supporting the use of ICTs as an effective tool to reduce GHG emissions resulting from other sectors.

Other countries have begun cross-sector coordination efforts in order to take a more holistic approach to meeting environmental and ICT policy objectives. In Singapore, for example, multiple agencies have begun to collaborate more frequently on new cross-sector initiatives.<sup>2</sup> In November 2009, the Singapore Government announced the launch of the pilot project “Intelligent Energy System” (IES) that tests a range of smart grid technologies. The IES project requires the cooperation of several agencies, including the ICT regulator and the various regulators in charge of energy; the environment; economic development; science and technology research; and housing and development. More recently, the Singapore Government established the Energy Efficiency Programme Office (E2PO), which is a multi-agency committee led by the National Environment Agency (NEA) and the Energy Market Authority (EMA) and includes Singapore’s ICT regulator, the Infocomm Development Authority (IDA). The goals of the E2PO include promoting the adoption of energy efficient technologies and developing local knowledge expertise in energy management, as well as supporting research and development in green ICTs.

Since cross-sector initiatives to promote green ICTs are relatively novel, it is unclear whether they represent a new type of policy implementation. There is great potential to capture the high-level expertise from multiple agencies; however, these collaborative efforts may also result in new challenges, such as jurisdictional conflicts or funding issues. As ICTs continue to become an integral part of climate change challenges and solutions, policymakers will be increasingly presented with the opportunity to involve regulators of the ICT, environment and energy sectors in collaborative projects that can help to guide high-level legislation as well as sector-specific regulation in order to fully harness the potential benefits and efficiencies that ICTs can bring to society.

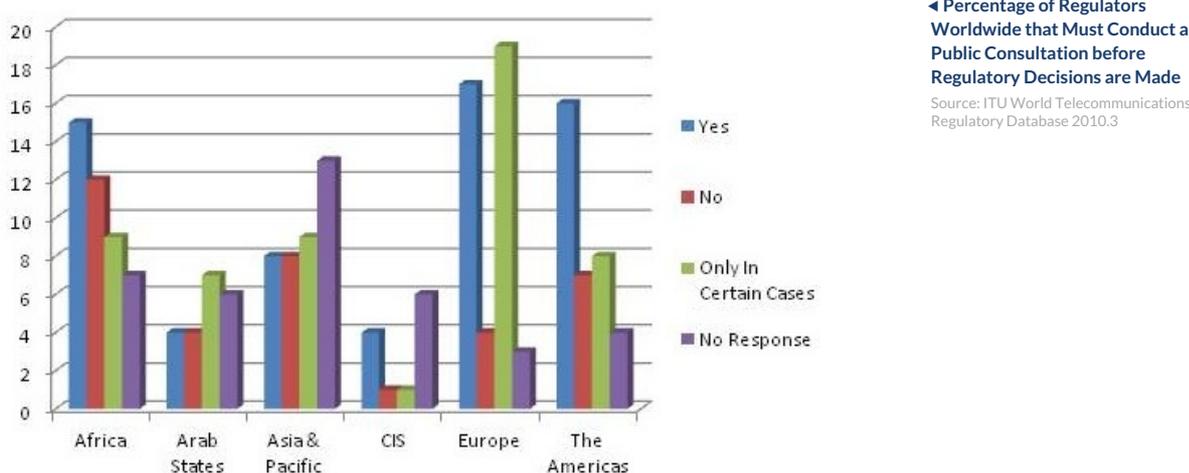
### 6.6.4.3 ICTS AND FINANCIAL SERVICES

### 6.6.5 DECISION-MAKING PROCESS AND CONSTITUTIONAL FRAMEWORK

Since regulations should be developed in an open and transparent fashion, with appropriate and well publicized procedures for effective and timely inputs from interested stakeholders, including domestic and foreign businesses, public interest groups and consumers, a public consultation helps to improve the quality of rules and programs, as well as improves compliance.<sup>1</sup> Holding public consultations are not required in all countries, but most regulators have adopted some form of consultation process (Figure 6-C),

e.g.,

before adopting policies, creating regulations or issuing licences.<sup>2</sup> See, for example, the consultation procedures for [Hong Kong \(SAR\)](#), [St. Vincent and the Grenadines](#), and the [United Kingdom](#) (in the online practice notes), which are illustrative of the public consultation procedures adopted by regulators in many countries.



In some cases, public consultations are not undertaken due to lack of resources or other immediate constraints that make it difficult to hold them. In Botswana, for example, when the Telecommunications Regulations were promulgated in 1997, the regulator did not include public consultations because it did not have sufficient staff resources to conduct consultations and it had a tight timetable. In subsequent years, however, the regulator added extra staff and developed more expertise, so that in 2000, the Botswana Telecommunications Authority (BTA) prepared its first consultation document on telecommunications services pricing.<sup>4</sup>

Other countries mandate public consultations in certain occasions. In Bahrain, the Telecommunications Law requires that, except in emergency cases, the Telecommunications Regulatory Authority (TRA) must provide interested parties the opportunity to present their opinions within a reasonable period on measures having a material effect on the telecommunications market. Procedurally, the TRA issues a bylaw regarding such consultations ensuring that the public is informed from a single information source of the ongoing

consultations, excluding confidential information.<sup>5</sup> The EU Framework Directive mandates national regulatory authorities of member states to publish their consultation procedures and the subsequent results when they intend to take measures in accordance with the Directive or other directives that have significant impact on the relevant market. This is intended to ensure that interested parties are given the opportunity to comment on the draft measure within a reasonable period.<sup>6</sup>

Where the requirements for holding public consultations are mandatory, the legislation typically specifies the particular instances when public consultations are compulsory and must be held by the regulator. For example, in Portugal, the Electronic Communications Law specifies that the regulator, the Autoridade Nacional de Comunicações (ICP-ANACOM), has discretion to determine matters that are subject to formal written public consultations, except for the following:<sup>7</sup>

§ Change in the conditions, rights and procedures applicable to the exercise of the activity;

§ Limitations on the rights to use frequency;

§ Allocation of rights to use numbers that are exceptionally valuable through competitive or comparative selection procedures;

§ Definition of quality of service parameters;

§ Release from the obligation to offer additional resources;

§ Definition of portability regulations;

§ Definition of the relevant markets for products and services, determination of a relevant market as being effectively competitive or not, identification of companies with significant market power in the relevant markets, and the imposition, maintenance, change or elimination of obligations by companies with or without significant market power;

§ Definition of carrier selection and pre-selection regulations;

§ Definition of obligation pertaining to the universal service providers applicable to the offer of public telephones;

§ Definition of the terms and conditions of the service offers specifically for people with disabilities;

§ Definition of the performance objectives applicable to universal service obligations.

Although public consultation procedures can vary from country to country, minimum procedural safeguards are generally instituted to make sure that there is maximum participation in the decision-making process, such as: issuing public notice of consultations; allowing for a proper comment and reply comment period; and publishing the consultation results and final decisions.

## Practice Notes

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- [Box 6-4: OECD Guidelines on Dealing with Conflict of Interest Situations \[6.5\]](#)
- [Case Study: Conflict of Interest Regulations in Bahrain \[6.5\]](#)

## Reference Documents

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- [Hong Kong Civil Servants' Guide to Good Practices](#)

### 6.6.5.1 NATURAL JUSTICE/PROCEDURAL FAIRNESS

Aside from the substance of the decision that a regulator ultimately reaches, it is important that stakeholders are confident that the process used to reach that decision was fair. As such, procedural fairness (also referred to as natural justice) is concerned with the procedures used by a decision maker, rather than the actual outcome reached, although it is also understood that a decision maker following a clear, objective set of procedures is more likely to reach a fair and correct decision. To ensure procedural fairness, several elements are necessary:<sup>1</sup>

- A competent, independent and impartial regulatory authority oversees the process and makes the ultimate decision;
- The regulatory authority exercises its authority within the scope permitted by its legal powers;
- Clear, published rules of procedure are available and consistently applied;
- Proceedings are open to the public, except where confidentiality is necessary to protect proprietary information or other confidential information;
- All parties are treated in a non-discriminatory manner; and
- The decision-making body uses evidence and arguments presented during the proceedings to justify its ultimate decision.

Procedural fairness provides the foundation of the public consultation process by offering authorities a better understanding of the facts and helping to improve the quality of evidence and reasoning on which the agency bases its enforcement actions and decisions.<sup>2</sup> For parties to the decision, procedural fairness bolsters confidence and belief in a fair legal system and in those applying

the law.

### 6.6.5.2 TRANSPARENCY

The principles of good regulatory decision-making are universal: (a) transparency; (b) objectivity; (c) professionalism; (d) efficiency; and (e) independence.<sup>1</sup> Although all of these principles are necessary for successful regulation, transparency is particularly critical, as it provides accountability and legitimacy to regulatory decisions. In the context of telecommunications regulation, transparency refers to the openness of the process of exercising regulatory power, which, in turn, ensures the fairness, accountability and credibility of the results.<sup>2</sup> Box 6-9 below provides a summary of the benefits of transparent regulation.

1. **Efficiency and Effectiveness** – Open processes enhance consensus and create confidence in the regulator. Increased public participation promotes diverse ideas in decision-making and increases support for rules and policies, making implementation easier. In addition, transparency can lead to greater efficiency by ensuring that duplication of functions is avoided.
2. **Certainty and Reliability** – Regulatory credibility and legitimacy builds stability, essential for attracting investment. This is particularly important in newly liberalized markets, where potential entrants need to trust that their investments are protected from arbitrary action and that further commercial development will not be thwarted by sudden changes to “the rules of the game.”
3. **Accountability and Independence** – Openness promotes accountability and legitimacy, reinforcing regulatory independence and reducing political and industry interference. Stakeholders will have confidence that their views will be heard, without bias, by the regulator. Where regulatory actions are exposed to public view, regulators are more likely to engage in careful and reflective decision-making.
4. **Continuity** – A stable set of rules governing transparency will transcend political changes and outlast political appointments, ensuring a continuous regulatory record regardless of who is in charge of the regulatory agency or which political party is in office.

#### ◀ Box 6-9 Benefits of Transparent Regulation

Source: ITU – Trends in Telecommunication Reform 2002, Chapter 6.

### 6.6.5.3 AVOIDING PERCEPTIONS OF BIAS

Regulators should ensure that there is a consistent policy in place addressing its role and functions in the decision-making process in order to provide greater confidence that its decisions are made on an objective, impartial and consistent basis, and avoid the risks of conflict of interest, bias or improper influence. The rule against bias is a principle of procedural fairness that requires the decision maker to not have an interest in the matter being decided, as well as to decide the issue in a fair and equitable manner, taking into account only the merits of the matter, and respecting the rights of affected citizens.

In addition, decision makers should avoid the *appearance* of any bias or interest in the outcome. As such, both actual and apparent bias should be avoided. In Australia, for example, the test of whether actual or apparent bias exists is “whether a fair-minded observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question.”<sup>5</sup> Overall, avoiding the perception of bias is necessary to instill confidence in the process, as well as in the regulatory authority itself.

### 6.6.6 OVERVIEW OF THE PUBLIC CONSULTATION PROCESS

Public consultations can take different forms depending on: the nature of the issue being consulted; the number of people that could be affected by the decision; the impact on the market; and whether a formal written consultation process is mandated by legislation. Public consultations can range from informal meetings to more formalized and structured written consultations. Some of the forms of public consultations used by regulators are:<sup>1</sup>

- Formal invitations for written submissions;
- Individual meetings with one or more interested parties;
- Meetings, seminars, and workshops with representative groups and other interested parties;
- Issuing draft documents containing the preliminary view of the regulator and soliciting comments from the public at large before taking a final decision;
- Public hearings;
- Surveys;
- Consultation with independent advisers; and
- Discussions and consultation with regulatory professionals and regulatory institutions in other jurisdictions.
  - The discussion time lasts a maximum of two hours.
  - Participants must register before entering the meeting, providing their company name or the institution that they are

representing.

- The participants speak according to the order on the registration list. Each participant has a maximum of three minutes to speak. In the case of companies or associations, only one representative (the first registered participant) is allowed to speak, unless the moderator permits additional representatives to do so and sufficient time is available.
- The number of rounds or times that participants are allowed to speak depends on the number of participants who have registered.
- Comments or objections must address the specific subject of discussion.
- The moderator has the right to preserve the orderly development of the discussion, and may interrupt a participant if the commentary is not related to the topic of discussion or the participant's time has passed.
- The public hearing is filmed and transcribed.
- The public hearing concludes once all registered participants have spoken or the scheduled time has expired.

Generally, regulators use formal written consultation procedures as a minimum safeguard to ensure public participation in its decision-making process, but often supplement this process with informal consultation methods such as public hearings or surveys. (Box 6-10 summarizes the objectives for holding public consultations.) For example, in Peru, the Board of Directors of the regulator, Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL), may form ad hoc consultative committees, composed of experts who, due to their authority, knowledge, and representation on the consultation issue can assist in the discussion or treatment of the regulatory initiative. Similarly, Hong Kong's (SAR) Office of the Telecommunications Authority (OFTA) has formed various advisory committees composed of members of the public, industry professionals and representatives of other government departments, from whom it can seek opinions during public consultations. Additionally, OFTA will also form ad hoc work groups and committees to discuss specific issues from time to time that fall outside of the purview of the advisory committees.<sup>2</sup>

Many regulators find the written consultation process to be the most efficient means of conducting a public consultation. The U.K. regulator, The Office of Communications (Ofcom), will usually engage in a formal consultation process to seek written views of the public. However, recognizing that formal consultation has its limits in reaching smaller businesses or community groups or individuals who lack time and specialist skills, Ofcom supplements the formal written consultation with other methods of gathering information, such as running road shows, open meetings, online bulletin boards, or organizing focused discussion groups.<sup>3</sup>

- To obtain input, information and feedback from persons affected by the proposed decision, other stakeholders and the public so as to ensure that consumers have the best telecommunication services possible in terms of choice, quality and value for their money.
- To acquire substantive information and knowledge from stakeholders, regulatory and industry professionals and other regulatory institutions so as to effect an orderly transition to a fully liberalized and competitive marketplace.
- To ensure that the Commission has investigated all aspects of an issue; and
- To ensure transparency of decisions of the Commission.

#### ◀ Box Objectives of a Public Consultation

Source: Anguilla, *Administrative Procedures Regulation*, 2004.

The general public consultation process is based on a three-stage process, which can incorporate both informal and formal procedures depending on the nature of the proceeding.<sup>4</sup> (See Figure 6-D.) In the first stage, an issue is identified and the regulator issues a formal consultation document soliciting public comment. This is followed by a comment period in the second stage. In addition to the receipt of written comments, the regulator may use the comment period to engage in informal consultations as well, such as public hearings, to gather additional information or clarify information that it receives. In the last stage, the regulator makes a decision based on public policy and the information received.

### 1. Public Notice of Consultations

In the first stage, the regulator issues a formal consultation paper after identifying and formulating an issue. The decision-making process is typically initiated by either the regulator or by an interested person requesting a formal consultation.<sup>5</sup> For example, in the United States, the Federal Communications Commission (FCC) allows interested members of the public to file a Petition for Rulemaking requesting the FCC to amend an existing rule or to develop a new rule.<sup>6</sup>

The regulator can use this initial stage to conduct informal consultations on more complex issues to help it formulate the issue for the finalized consultation document. For example, in Hong Kong (SAR), prior to the OFTA consultation proceeding on the Interconnection and Related Competition Issues, OFTA provided written notice to all local fixed network operators informing them of its intent to initiate the review and inviting them to raise additional issues related to interconnection so that they could all be resolved in a single proceeding. Only after reviewing the responses received did OFTA issue a formal consultation paper outlining the specific issues and its own preliminary views on the issues.<sup>7</sup> In the United Kingdom, Ofcom may hold informal talks with individuals and organizations before announcing a formal consultation. If Ofcom does not have enough time for the informal talks, it may hold an open meeting to explain its proposal and gather comments before announcing the

consultation.<sup>8</sup> The FCC in the United States sometimes initiates a Notice of Inquiry (NOI) to invite public comments and information about specific topics when it is interested in a particular issue but has not formulated a specific rule change proposal. NOIs are used by the FCC to gather information about a broad subject or as a means of generating ideas on a specific issue.

### *Publication of the Consultation Notice*

Today, most regulators post consultation documents on their websites, in addition to publishing them in a government gazette or other official publication, or disseminating the documents through other forms of media such as newspapers, television or radio. In South Africa, the Telecommunications Act requires a three-month notice of the proposed adoption of a regulation, which must be published in the national Gazette.<sup>9</sup> In Bahrain, the TRA publishes public consultation documents on its website, and may use other means to keep the public informed of ongoing consultations, including publication in the national or international media and/or sending individual notices to potentially interested parties.<sup>10</sup> Some regulators, such as the Canadian Radio-television and Telecommunications Commission (CRTC), also maintain a mailing list of individuals who wish to be contacted when certain activities occur, such as when licence applications are filed. The regulator will inform those on the mailing list where they can inspect the filings and submit comments.<sup>11</sup> Box 6-11 provides an example from the CRTC illustrating the different methods that regulators use to inform stakeholders regarding public consultation proceedings.

The different ways that one can find out about CRTC public proceedings are:

1. **Official CRTC announcement** – These are available from any CRTC office and the CRTC website. Official announcements about broadcasting applications or issues also appear in the Canada Gazette.
2. **Information sheets** – The CRTC sends these to target groups and, in rural communities, ensures they are posted in rural post offices.
3. **Newspaper advertisements** – In affected communities, the CRTC places advertisements in newspapers of general circulation as well as community papers.
4. **Public Service Announcements** – These are made on the cable community channel serving the affected area.
5. **Billing Inserts** – These allow telephone companies to inform subscribers about CRTC public processes that involve them.
6. **Tariff Notices** – These are filed by telephone companies and are available from any CRTC office and the CRTC website.

#### ◀ **Box Finding Out about Canadian Radio-television and Telecommunications Commission Public Processes**

Source: Adapted from the Canadian Radio-television and Telecommunications Commission. Content of the Consultation Document.

At a minimum, the public consultation document should contain the following information: (a) purpose of the consultation and substance of the proposed decision or description of the subjects and issues involved; (b) consultation timeframe and deadline for submitting comments; (c) contact name and details of how and where to submit comments; (d) reference to the authority under which the consultation matter is proposed; and (e) information on the regulator's next steps following the consultation and/or where and how to obtain further information.

For example, in the United States, the FCC is required to provide the following information in a Notice of Proposed Rulemaking (NPRM): (a) statement of the time, nature, and place of any public rulemaking proceeding to be held; (b) reference to the authority under which the issuance, amendment or repeal of a rule is proposed; (c) either the terms or substance of proposed rule or a description of subjects and issues involved; (d) docket number assigned to the proceeding; and (e) statement of the time for filing comments and replies.<sup>12</sup> The FCC requirements are typical of the contents of a consultation document issued by regulators worldwide.

## **2. Consultation Period**

In the second stage, interested parties submit comments on the issue under consultation. The regulator's goal is to gather as much relevant information as possible so that it can make an informed decision, taking into account the information provided by interested parties. To make the consultation more efficient, the regulator should establish a schedule for submissions of comments in the consultation document. Timeframes for submission of comments can vary depending on the complexity or urgency of the issue, and the overall effect of the proposal on the market. For instance, in Bahrain, parties are allowed at least 28 days from the date of publication of the consultation to submit comments. In Portugal, the comment period cannot be less than 20 days. In the United Kingdom, 10 weeks are usually allowed for responses on more complex issues and five weeks for shorter consultations. If Ofcom conducts shorter consultations, it will issue an explanation (e.g., the issue or community involved is small or only affects a particular group, the proposal is a limited amendment to existing policy, an issue requires urgent review, or it is the second consultation on the same issue.)<sup>13</sup>

When deciding how long a consultation period should last, regulators should balance the need to deal with an issue as quickly as possible with the need to allow enough time for the public to prepare and their responses. If the consultation period is too short, the public may not have enough time to prepare their submissions. On the other hand, if the consultation period is too

long, the relevant market may have changed significantly from the time the issue under consultation was identified.

Some regulators, such as the TRA in Bahrain, will not accept unsolicited comments. They will only accept comments in response to a notice of consultation. In the absence of a notice of consultation, however, an interested party may submit comments where such party can show that the particular measure that forms the subject matter of the comments will have a material effect on a particular telecommunications market.<sup>14</sup> In addition to initial comments, some regulators, such as the FCC in the United States and the NTRC in St. Vincent and the Grenadines, specifically allow for reply comments<sup>15</sup> while other regulators, such as the TRA in Bahrain usually only invite a single round of comments per consultation.<sup>16</sup> The benefits of allowing replies to comments are that it allows interested parties to challenge the comments made by others, and also provides the regulator with additional information regarding the issue under consultation.

#### *Submission of Comments*

The goal of the consultation process is to gather as much information as possible; therefore, the regulator should make it easy for the public to submit their comments. Most regulators encourage the use of the Internet for electronic submissions, as well as submissions in writing by fax and standard mail.<sup>17</sup> Some regulators specify the particular format for written submissions.

#### *Publication and Confidentiality of Information*

To maintain transparency throughout the consultation process, regulators should publish comments so that they are publicly accessible either online or at the regulator's office. This assures the public that their submissions have been received and allows them to view the comments of other parties. It also facilitates "buy-in" or "consensus building" within the industry, thereby facilitating compliance with the proposed rule.<sup>18</sup> In Brazil, Anatel's consultation documents and related public comments are available on the regulator's website, where it maintains a virtual library of all of its regulatory proceedings.

Regulators, however, need to maintain a just balance between the requirement for a transparent public record and the need to respect confidential information from parties. Most regulators will post public comments received in a consultation process, or summaries of such comments on their websites, omitting any confidential information. Recognizing that companies may be reluctant to submit information considered commercially confidential, most regulators, including [Singapore<sup>19</sup>](#) and [Bahrain<sup>20</sup>](#), have implemented regulations regarding treatment of confidential information. Usually, regulators will require persons requesting confidential treatment of information to submit an abridged version to be circulated publicly. In some cases, such as the NTRC in St. Vincent and the Grenadines, the regulator will allow for anonymous respondents, provided that such persons employ the services of a lawyer to respond on their behalf.

Many regulators also have rules regarding *ex parte* (private) communications during a pending proceeding. Regulators should maintain transparency and fairness in the regulatory proceedings by giving equal access to all stakeholders and preventing any one single person from having an advantage in influencing the regulator's decision through secret or private contacts. *Ex parte* rules can ensure transparency in the decision-making process by requiring all communication made by the public to the regulator to be published and accessible to other stakeholders, and ensuring that all stakeholders are informed whenever one party has an undisclosed meeting with the regulator. Regulators also may exempt certain communication from *ex parte* rules, such as inquiries about the status of a decision (as opposed to arguments for or against a certain action or decision), inquiries about procedural rules (so long as the rules are not themselves the subject of the proceeding) and statements that are inadvertently or casually made about a pending issue.<sup>21</sup>

#### *Public Hearings*

During the consultation period, the regulator has the flexibility to use other informal means of gathering additional information or clarifying the information it receives, such as seminars and workshops, visits by or to representative groups and interested parties, Internet discussions, surveys, and public hearings. A common informal consultation procedure is the public hearing, which is open to all interested parties so that they may express their views in person. The CRTC in Canada generally relies on the public hearing process when dealing with applications for new broadcasting licences and when considering a major policy issue or amendment to its regulations.<sup>22</sup>

Before holding a public hearing, the regulator should make the details of such meetings publicly available on their website or published in a newspaper, or announced on television or radio. In addition, in order to enhance transparency in the consultation procedure, if possible, public hearings should be recorded and transcribed so that they are publicly available. Brazil's regulator, Anatel, and the FCC in the United States both post the agendas, schedules and subsequent minutes of public hearings on their websites. The FCC also "webcasts" its hearings and meetings on the Internet. On the other hand, the Telecommunications Authority of Turkey does not usually keep the minutes of the public hearings because "it causes a formal mood preventing a sincere and efficient discussion."<sup>23</sup>

In Peru, OSIPTEL organizes public hearings before adopting normative and regulatory decisions. The procedure for public hearings is summarized as follows:<sup>24</sup>

### **3. Publication of Final Decision**

After the conclusion of the consultation period, the regulator should publish a final decision. It is important that a final decision is issued within a reasonable period of time upon conclusion of the consultation period to ensure credibility and effectiveness

of the decision-making process. An important measure of a truly transparent decision-making process is the publication of the regulator's justification for its decision, as well as a summary and response to the comments and reply comments received during the consultation proceeding. This demonstrates to the public that the regulator has taken into account the input received during the public consultation process. For example, in the United Kingdom, Ofcom will provide reasons for its decisions and give an account of how the view of the interested parties shaped their decisions.<sup>25</sup> Furthermore, requiring that the regulator provide reasons for their decisions forces them to engage in rational decision-making, gives parties the ability to analyse the decision and decide whether there may be grounds for review or appeal, and ensures the legitimacy and accountability of the regulator.

Today, many regulators post their regulatory instruments on their websites, as well as in the official government publication or gazette. For example, in Brazil, laws, decrees, decisions, regulations and other regulatory instruments related to Anatel's competencies are published in the Official Gazette and posted on its website. In Venezuela, the telecommunications law mandates that the regulator establish and maintain a register of all administrative acts. Additionally, in various countries regulatory decisions are made public in national newspapers, television or radio and through postal mailings or e-mails to parties affected by the decision.<sup>26</sup> Publishing decisions online also makes it easier for regulators to publish all comments, reply comments and documentation supporting commenters' positions, which further improves transparency and credibility of the decision-making process.

As regulators institute public consultations, the following questions can serve as a quick reference for regulators to consider in assessing whether the most appropriate and effective mode of consultation has been adopted. Some of the questions to consider are:

- What resources are available for the consultation?
- Given the regulator's financial and human resources, what form of consultation should be used to achieve the desired outcome? (e.g., formal published documents and written responses, individual meetings between interested parties and the regulator, public hearings, working groups of representatives of service providers and/or consumers to address particular questions, internet discussions on the regulator's website etc.)
- Has sufficient and adequate time been allocated for the public consultation process?
- Is the consultation presented in a language/mode that the targeted stakeholders can readily understand and respond to?
- Does the consultation cover all the issues and questions that need to be addressed for the regulator to make an informed decision?
- Has the consultation been published in the relevant media so that it reaches the widest audience and ensures that all interested parties have access to the consultation?
- Does the consultation provide clear directions regarding submission of comments?
- Does the consultation provide for transparency? (e.g., publication of the consultation document, comments received, and the regulator's final decision with reasoning)
- Has the regulator provided for treatment of submissions that contain confidential information?
- Has the regulator been providing adequate information to the media regarding its activities? (i.e., are stakeholders aware of its activities?)

◀ **Box Quick Reference List for Public Consultations**

### **Online Public Consultations**

One of the many benefits of increased Internet availability and use is that it allows regulators to conduct public consultations online, which allows for greater civic participation in the decision-making process. In response to the growing number of countries offering online public consultations, the OECD has published some basic guidelines for regulators to follow, as shown in the Box below.

- Begin the consultation process long before the consultation:
- Advertise upcoming online consultations several months in advance of the actual consultation so that stakeholders expect and prepare for it.
- Request relevant public interest groups to help circulate the information.
- Identify the international newsletters that treat the subject and ask them to advertise the consultation.
- Relay the information via communication channels through news releases and public notices.
- On the regulator's website, explain the consultation procedure and how you will treat responses.
- Explain who will use the responses and for what purpose.
- Explicitly state to whom to respond to direct queries to, giving a name, address, telephone number and e-mail address (the project manager), and highlight the information.
- Clearly state the deadline for responses, any alternative ways of contributing and the language(s) in which responses are preferred.
- Make it clear that responses, including the names and addresses of respondents, may be made public unless confidentiality is specifically requested.
- State the date when and the web address where the summary of responses will be published.
- Simplify the process and provide all relevant documentation.
- Include relevant documents on the subject along with the online consultation document. Not only does this lead to a more informed consultation exercise, but it also ensures that stakeholders have a better understanding of the issues.
- Provide a well-written executive summary that covers the main points so that consultees can decide whether the consultation is relevant to them or not.
- Provide material on previous consultation(s) on the same topic, if any.
- Avoid jargon and only use technical terms where absolutely necessary. Explain complicated concepts as clearly as possible and, where there are technical terms, provide a glossary.
- Ask focused questions, and be clear about the specific points on which you are seeking views. Encourage respondents to provide evidence, where appropriate, to support their responses. Make it clear if there are particular areas where their input would be especially valuable. Responses are likely to be more useful and focused if the respondents know where to concentrate their efforts.
- Allow adequate time for responses.
- Allow 8 to 12 weeks for responses and reply comments.
- Allow enough time between the end of the consultation and the formal discussion of the results to distil the responses and summarize them in a way that is can easily comprehensible.
- Once the public comment period is over, analyze and summarize responses for formal discussion and publication on the website.
- Compile and analyze the comments, then draw up a short summary, emphasizing the main points. This should be presented for formal discussion and posted on the website at the end of the process.
- Do not simply count votes when analyzing responses. Particular attention should be paid to possible new approaches to the question consulted on; further evidence of the impact of the proposals; and strength of feeling among similar pressure groups.
- Make every effort to ensure that discussion takes the public input into account.
- Report back to the public via the website and other channels.
- It is not enough to simply publish the responses on the website. It is also important to present the final product under debate, and, where possible, any impact that the public input may have had on the discussion.
- Aim to publish the summary of public responses on the website at the end of the process. Other forms of feedback might also be considered, such as a note expressing appreciation for the public input and offering any information possible about its impact for publication on the website.
- Information should also be provided on themes that came out of the consultation which were not covered by the questions.
- Wherever possible, a summary of the next steps for the project should also be included.
- Consider sending any or all of the above elements to the organizations that helped circulate the information about the public consultation on their websites.
- Monitor your effectiveness.
- Invite respondents to comment on the consultation process and suggest ways of further improving it.
- Explicitly state whom to contact if respondents have comments or complaints about the consultation process. This should be someone outside the team running the consultation.
- Look at usefulness, scope and coverage, numbers and types of comments received for future reference.

Managing media relations is an important aspect of being a transparent regulator and ensuring that the public is informed about the regulator's activities. Although the development of information and communications technology has made the Internet the prevalent means by which regulators interact with the public, the Internet may not be easily accessible in some developing countries. Therefore, regulators still need to rely on broadcasting and print media, such as newspapers, television and radio to ensure that the public has access to important information. Other means of disseminating information include holding press conferences, issuing press releases, industry briefings, holding seminars and workshops or submitting articles and advertisement directly to trade magazines and newspapers. Some regulators also maintain a press office to manage relations with the media, and ensure that the media reporting of the regulator's activities is accurate.

In Brazil, Anatel has instituted various mechanisms to foster public outreach in addition to publication of its decisions in the Official Gazette and posting on its website. Anatel has created "citizen rooms" throughout the country, which are public spaces equipped with computers, printers, faxes, telephones, scanners, televisions and VCRs that provide a means for the public to interact with Anatel and for Anatel to provide information relating to its activities to the general public. Anyone can conduct online searches of Anatel's regulations and decisions in the citizen rooms, which are also staffed with attendants to answer questions.<sup>1</sup> In addition, Anatel conducts institutional campaigns periodically to inform the general public in specific cases when the society as a whole needs to be made aware of matters of interest to the broader community. In 1999, for example, Anatel sponsored a campaign to educate the public regarding the implementation of new procedures for domestic and international long distance phone calls. As part of the campaign, the Postal Service distributed thousands of brochures explaining the new procedures throughout the country. To complement this, Anatel's chairman and members of the Board of Directors also granted numerous interviews on the subject.<sup>2</sup>

In Romania, the National Regulatory Authority for Communications (ANRC) relies on the media to communicate with the industry. It has accredited 74 journalists as of 2003, and has dedicated time to educate them regarding its activities. Shortly after its establishment, the ANRC organized a seminar in December 2002 to familiarize journalists with ANRC's specific attributions and competencies. The ANRC held another seminar in October 2003 after the liberalization of the market in the beginning of 2003 to answer specific questions from journalists regarding the liberalization process and the new regulatory framework.<sup>3</sup>

Use of the media is particularly important for regulators that do not have the staff, resources, or legislative mandate to conduct public decision-making procedures. In Botswana, for example, no rules govern due process or transparency in decision-making, such as public consultation procedures or the publication of decisions in an official gazette. However, in an effort to increase transparency, the Botswana Telecommunications Authority (BTA) has used the media to publicize some of its decisions, such as holding a press conference to announce its mobile licence awards and publishing its leased capacity decision and justifications for it in major Botswana newspapers. As the BTA has increased its staff, it has issued more press releases and conducted more public consultations, which are also posted on the regulator's website.<sup>4</sup>

[Next: 6.7.2.2 Media Relations →](#)

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