

Key Finding from ITU Interconnection Dispute Settlement Mini Case Studies

In 2003, the International Telecommunication Union (ITU) conducted mini-case studies of interconnection dispute resolution in Botswana, Denmark, India, Jordan and Malaysia with the involvement of the telecommunication regulators in those countries, which are available at <http://www.itu.int/ITU-D/treg/>. The preparation of the mini-case studies was followed by an on-line discussion of interconnection dispute resolution among regulators worldwide on the ITU's Global Regulators Exchange (GREX) forum. The ITU then hosted a live "virtual conference" for regulators globally on 10 November 2003 in which the principal countries involved presented and discussed their perspectives on and experiences of interconnection dispute resolution.

This short paper draws together a number of key findings and observations based on the mini-case studies, the GREX discussion and the virtual conference. Direct reference should be made to the country mini-case studies in order to gain a fuller understanding of the issues the various countries have been facing. Further, this short paper merely touches on various issues and experiences that are explored in considerably more depth in a joint ITU and World Bank discussion paper prepared by Robert Bruce and Rory Macmillan of Debevoise & Plimpton, and Timothy Elam, Hank Intven and Theresa Medema of McCarthy Tétrault entitled *Dispute Resolution in the Telecommunications Sector: Current Practice and Future Directions – Discussion Paper*", which is available on the Global Symposium for Regulators webpage at <http://www.itu.int/ITU-D/treg/>.

I. Recognition of the Importance of Dispute Resolution

It is widely recognized that dispute resolution, particularly in interconnection, is now a core strategic issue in telecommunication sector regulation. Interconnection disputes raise issues that are fundamental to sector development. They concern the very availability on a cost-effective basis of the infrastructure necessary to provide competitive services. Prolonged unresolved disputes can make interconnection effectively unavailable. This can seriously hamper investment and competition. Regulators are increasingly facing up to the challenge of providing effective resolution efficiently as their markets liberalize. An efficient and effective interconnection dispute resolution process is now a necessary hallmark of a mature telecommunications market.

II. Addressing Underlying Problems

Interconnection disputes may arise as a simple product of resistance to market liberalization. Operators that dominate their markets may refuse the physical and logical connection with other networks. They may also charge prices that are so far above costs that other operators cannot provide services on a competitive basis.

More fundamental market structure issues often underlie such common disputes. For example, regulators commonly seek to achieve cost-based pricing of interconnection charges. Insufficient retail price rebalancing, however, can render this effectively unachievable. This can sometimes be beyond the scope of the regulator's immediate power to change given political circumstances.

The Jordanian regulator, the Telecommunications Regulatory Commission (TRC), encountered this problem in its June 2003 decision on interconnection charges. According to the TRC, Jordan Telecom's international transit rates were higher than costs and best international practice. The profit on international outgoing traffic was subsidising the access deficit and the deficit on Internet Service Provider calls, both matters of government policy. As a result, the TRC decided to continue to determine Jordan Telecom's international transit rates on a retail-minus basis, phasing in reductions. This is not a problem unique to less developed markets. Local loop unbundling has been hampered in the German market, for example, as a result of low local retail pricing.

Another underlying sector structure problem was illustrated by the complex Indian access deficit charge (ADC) and interconnection usage charge (IUC) system. The basic service operators (BSOs) subsidize below-cost line rental and local calls, as well as other requirements, through the ADCs. The ADCs, however, make the BSOs' national and international services less competitive. The result is contributing to a flow of traffic away from the BSOs' services towards competing GSM and limited mobility wireless services (WLL(M)). The arrival of voice over Internet protocol (VoIP) services has driven international rates down further. This kind of problem illustrates the need, mentioned below in Section VII B, for regulators to take a step back and review the sector and its structural problems as a whole. The Telecommunications Regulatory Authority of India (TRAI) has been doing just this.¹

India's case illustrates how the transformation of telecommunication sectors worldwide is challenging interconnection regimes. The extraordinary growth of mobile services is posing competitive challenge to fixed line operators. Frequently, regulators are finding that interconnection arrangements established early in the life of the mobile sector cannot keep pace with dramatic changes in market share – as mobile penetration overtakes fixed line services. Revenue sharing contracts or interconnection pricing among operators may quickly stop reflecting commercial reality, fuelling the likelihood of disputes. Robust but flexible dispute resolution systems are crucial to ensure that the market can accommodate such underlying sector changes.

Interconnection dispute resolution, then, is not merely a domain of lawyers who are expert in dispute procedures. Nor is it even a simple matter of enforcing policies promoting sector liberalization. The resolution of disputes and disputatious circumstances is often central to the economics of the sector.

III. Drawing on Available Resources

A common theme that emerged from this interconnection dispute resolution project was the increasing tendency of regulators to draw upon resources external to themselves. This is not surprising given the importance of successful interconnection dispute resolution to sector development.

There are several ways in which regulators are drawing upon available external resources where their resources are not sufficient alone for efficient and effective solutions:

- using data from other markets to benchmark information, such as cost-models, where reliable data is not available in the domestic market (e.g., Botswana, Jordan);
- employing external consultants to gather such information and to assist in reaching decisions to supplement and strengthen in-house expertise (e.g., Botswana);
- allocating external costs incurred by regulators in the dispute resolution process to the parties (e.g., Jordan);
- encouraging the use of non-officials, such as arbitrators, to resolve disputes (e.g., Jordan, Australia);
- initiating industry consultation focused on identifying key underlying sector issues the resolution of which may result in an overall less contentious sector (e.g., Denmark);
- trying self-regulatory structures whereby industry bodies can anticipate issues that will arise in disputes (e.g., Malaysia, Australia).

¹ See the various consultative documents of the TRAI attached as annexes to the India Interconnection Dispute Resolution mini-case study on TREG at <http://www.itu.int/ITU-D/treg/> and also available on the TRAI's website at <http://www.trai.gov.in>.

IV. Information Deficits in Dispute Resolution

Information is a crucial aspect of interconnection disputes. One of the most frequent causes of interconnection disputes, particularly in developing economies, is a lack of information about matters that are essential to provide interconnection services in accordance with regulatory policy.

Consistent with the World Trade Organization (WTO) Reference Paper on Regulatory Issue, regulators are generally seeking to ensure that operators charge cost-related interconnection prices. Establishing what these should be, however, is difficult, particularly in less developed markets. Operators may be slow in providing cost models, whether because they lack accounting systems, accountants or as a strategic mode of resisting cost-based charging. When they do provide them, the models may be based on assumptions or allocations of costs that the regulator considers inappropriate.

Both the TRC in Jordan and the Botswana Telecommunications Authority (BTA) in Botswana faced this problem in 2003, when the operators failed to provide satisfactory cost models. In their decisions on interconnection rates, both institutions chose to determine interconnection rates based on benchmark data drawn from European Union countries.² These rates will be used on a transitional basis until cost-based pricing is calculable. The BTA's choice of European Union averages was justified because of competitive conditions in the European Union interconnection market and the usage of Long Run Incremental Cost (LRIC) methodologies.

Relying on international benchmark data raises the twin problems of how to choose the data and how to apply it to the home market, since the competitive conditions of the benchmark countries may be quite different. Labour and other costs may also be incomparable in developed benchmark markets relative to those in the home market. For this reason, some regulators are sceptical about the usefulness of benchmark data. Many believe, however, that benchmarking remains the only alternative way of continuing to build the momentum towards using cost-based pricing in the absence of reliable cost-models.

Given the importance of information in resolving disputes, the availability of well-organized data from competitive markets is likely to be immensely helpful to markets that lack such information at home. The European Union is a frequent source of such information, but there is scope for more gathering and organizing of such information on a regional and worldwide basis. This observation is relevant to procedures as well as market data. Organized banks of procedural precedent would also be useful in equipping regulators in assessing what approaches they can take to resolving disputes, including using innovative techniques like mediation and arbitration.

V. Costs in Dispute Resolution

The question of who bears the cost of resolving disputes can affect the way dispute procedures are used by parties, as well as their results. Parties are less likely to engage in potentially expensive frivolous proceedings if they are likely to bear their costs. In developing markets, regulators may lack resources necessary for effective dispute resolution.

Countries are taking a variety of approaches to allocating the direct costs of resolving disputes. The direct costs are external expenses incurred by the regulator in hiring advisors and technical experts, the regulatory body's own internal costs of its staff involved in dispute resolution, as well as the parties' costs of their own advisors.

Some regulators take the view that since dispute resolution is part of the legislative mandate their expenses are to be borne from the regulator's allocated budget. The Botswana Telecommunications Authority (BTA), for example, bore the cost of hiring an outside consulting firm to assist with a benchmarking exercise relied on in its 26 February 2003 ruling in the dispute between Botswana

² See the ITU Interconnection Dispute Settlement mini-case studies for each country.

Telecommunications Corporation and Mascom Wireless. The BTA paid for this from its budget, which in turn is drawn from fees imposed on the sector.

Other regulators may allocate the costs of external expenses to the parties. Jordan's new Interconnection Dispute Procedure permits the Jordanian Telecommunications Commission (TRC) to require the parties to the dispute to bear costs incurred by the TRC in connection with the dispute. The TRC may be able to allocate those costs to a party that it considers ought to bear them, perhaps for bringing a frivolous case or due to its behaviour in the proceedings.

At the core of design of effective dispute resolution procedures is the framing of parties' incentives. The allocation of costs is an essential component of such incentives.

VI. Using Non-regulatory Dispute Resolution Processes

Regulators are showing an increased tendency to involve non-officials in dispute resolution. Jordan's new Dispute Resolution Procedure, for example, offers parties a choice of arbitration or regulatory adjudication. If they choose arbitration, the TRC expects not to be involved in the dispute. This permits parties to choose their own suitable adjudicators, for whose services they will pay. This is expected to reduce the burden on the regulatory authority.

Similarly, the Australian Communications Commission (ACCC) has developed a dispute resolution approach that encourages parties to use independent experts, arbitrators and mediators. The approach is relatively flexible; the parties can involve the ACCC as an "honest broker" to facilitate resolution of the dispute outside of its normal adjudicatory role. A key conclusion of the ACCC has been that the availability of a robust regulatory adjudication process remains an important safety net for the effective operation of such approaches.

The use of non-regulatory actors and processes raises various issues about ensuring the quality of decision-making and that official policy is effectively implemented.

With respect to the quality of decision-making, the availability of professionals to the disputing parties is important. Thus, for example, the TRC in Jordan considered that while there is not a Jordanian arbitration institution, there are Jordanian arbitrators and there is a regional arbitration body. The TRC concluded that a professional arbitration service is an available alternative to regulatory adjudication. The proliferation of arbitrators and mediators worldwide is a helpful sign for regulators seeking to draw from non-official resources in resolving disputes.

With respect to effective implementation of policy, with reference again to the Jordanian example, it remains to be seen how arbitrators will choose to interpret the Jordanian Telecommunications Law of 1995, as amended, and the interconnection provisions in the main operators' license agreements. This is likely to become ever more complex as a third mobile operator is licensed in Jordan since interconnection and roaming issues are likely to be key to its ability to compete in the market. Achieving a sufficiently level playing field in the given context of existing licenses will require sensitive application of regulatory policy, including in disputes. Thus there are likely to be some types of dispute that involve such fundamental issues of regulatory policy that regulatory adjudication remains the only effective path to resolution.

VII. Towards Dispute Prevention

Dispute prevention is as important as dispute resolution. As a general matter, parties are less likely to dispute if they are able to pursue their interests constructively and openly. Sometimes this may mean that there is scope for self-regulation so that industry participants can identify and address the key issues themselves. Initiatives in self-regulation and consensus building are discussed below.

A) Self-regulatory initiatives

In keeping with the spirit of the Malaysian Communications and Multimedia Act of 1998, the Malaysian Communications and Multimedia Commission (MCMC) permits the market to engage in self-regulation.³ Consequently, companies in the sector have established the Malaysian Access Forum (MAF), itself a private corporate entity, in order to prepare an access code to deal with operators' access to infrastructure and services of others.

The MAF is closely modelled on the similar Australian Telecommunications Access Forum (TAF). It remains to be seen whether the MAF will succeed in developing more extensive self-regulation where the TAF did not. The TAF did develop an access code but was unable to achieve agreement concerning what services should be subject to the access provisions and it was eventually dismantled. It has been suggested that the Australian experience shows that while self-regulation does offer some benefits, threshold regulatory matters still need to be addressed by regulators, albeit with input from the industry after consultation.

Where regulators are releasing some or much control over regulatory processes, including dispute resolution processes, they are adopting ways of structuring the non-official process in advance and of checking it afterwards.

It is likely to be helpful if regulators establish secondary legislation or guidance to establish a framework of reference points for private decision-makers. Jordan's 2002 Interconnection Guidelines are an example of the kind of guidance that are frequently used and will be a reference point for arbitrators in reaching awards. In many markets, such guidelines even specify the type of cost-model (e.g., LRIC) to be used, thus imposing a relatively clear structure for self-regulatory institutions.

The MCMC has already listed the network facilities and services that should be subject to a self-regulatory code on access proposed by the MAF. Such an "Access Code" will also have to be approved by the MCMC, thus ensuring another level of regulatory approval after the code is prepared. Such "*ex ante*" and "*ex-post*" approaches can be used to ensure that non-official actors and processes will occur broadly in line with regulatory policy.

B) Consensus Building

A key challenge for policy makers and regulators is to ensure that the sector's basic structure balances the regulatory objectives of optimising the pricing, quality and range of services against the basic financial incentives and limitations of private companies. Some innovative regulators are using industry consultation and consensus building in order to tackle underlying areas for improvement. Denmark's wide-reaching industry consultation process in 2003 is an example of such an initiative.⁴

Achieving consensus is not easy where competing interests are at stake. The MAF, like the TAF before it, is intended to operate by "consensus". The Australian experience with the TAF indicated how the scope for achieving consensus could be limited except for a lowest common denominator of issues. There may, however, be ways to structure consensus building measures as hybrids of self-regulation and regulatory consultation to ensure that issues are properly aired and that the necessary regulatory backing is provided to address the issues with the weight of effectiveness that official bodies can offer.

³ See the ITU Interconnection Dispute Settlement mini-case study for Malaysia.

⁴ See the ITU Interconnection Dispute Settlement mini-case study for Denmark.