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Question 18/1: Domestic enforcement of laws, rules and regulations on telecommunications by national telecommunication regulatory authorities

STUDY GROUP 1

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TITLE: DOMESTIC ENFORCEMENT OF TELECOMMUNICATIONS LAWS: GUIDELINES FOR THE INTERNATIONAL COMMUNITY - REPORT ON QUESTION 18/1

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I. INTRODUCTION

A decade ago there were very few telecommunications regulatory authorities in either developed or developing countries. In fact, in 1990 there were only thirteen.[1] Since that time, the number has roughly doubled every four to five years. Today there are no less than one hundred twenty three regulatory authorities – a little more than nine times the number fourteen years ago.

During this time, much attention necessarily has been devoted to forming these organizations, and creating and taking the first steps to apply regulations that implement the telecom policies promulgated by the legislative arm of government. At the same time, these new regulatory authorities have had to contend with major changes in the telecommunications industry including liberalization, privatization, and competition, while simultaneously looking for ways to ensure and safeguard universal access to telecommunications services. More recently, convergence issues have been presenting new challenges. Consequently, there has been little time to consider how best to enforce newly promulgated laws, rules, and regulations. Where such enforcement and dispute resolution functions have existed in the past, they were primarily the province of the courts.[2]

Effective enforcement, however, is a critical component of regulating in the public interest. Broadly speaking, without the ability to enforce laws, a regulatory regime is meaningless. Even in the most deregulatory environment, its value is self evident: to give effect to those rules deemed necessary to maintain order in the sector; to facilitate stability, predictability, progress and investment; to deter wrongdoing; and to maximize social and corporate welfare. In the telecommunications context, effectively enforcing laws can help protect consumers, ensure service quality, guard public safety and other services from interference, foster the efficient use of spectrum, and promote competition, growth, and investment in the sector. It has been said that astute enforcement can remedy design defects in regulatory mechanisms while ill-enforcement can undermine the most sophisticated designs of regulation.[3] Of course it is crucial that a decision by a national regulatory authority (NRA) to undertake an enforcement action be based on objective facts. Arbitrary or capricious enforcement actions undermine the fairness and effectiveness of an enforcement regime.

In this paper, we will look at ways for regulatory authorities to effectively enforce domestic telecommunications laws. Contributions to our work to date remind us that for many countries, certain concepts of regulation in telecommunications are unfamiliar, and practices or solutions that are suitable in developed countries may not work well in ones that are developing or emerging.

We also note the distinct challenges faced by many countries due to lack of resources and capacity,[4] and will look to make recommendations that can address these circumstances in particular. Ultimately, we hope to be able to provide a menu of recommendations that may be applied in diverse circumstances that will assist our Member States' efforts to enforce their domestic

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[1] See "Trends in Telecommunications Reform 2003," International Telecommunication Union, at 15.

[2] *See* "Effective Regulation, Trends in Telecommunication Reform 2002", International Telecommunication Union at 54. Experience seems to be showing, however, that excessive division of regulatory responsibility among different government agencies can lead to delayed and inconsistent responses to market and regulatory developments. Id.

[3] "Understanding Regulation – Theory, Strategy, and Practice," Robert Baldwin, Martin Cave, Oxford University Press, Inc. New York 1999 at 96.

[4] See e.g., "Domestic Enforcement of Telecom laws and regulations and limits: **Uganda's** Experience" December 2002, Uganda Communications Commission Contribution to ITU-D question 18/1 at 1 – 2. (UCC Contribution to ITU-D Question 18/1, December 2002); "Effective Regulation: Case Study - Morocco", International Telecommunication Union at 41.

telecommunications laws. This in turn should facilitate delivery of the benefits a robust telecommunications sector is capable of providing to all.

II. SOURCE of ENFORCEMENT POWERS

A. Overview

Most regulatory authorities derive their power to enforce regulation first and foremost from their domestic enabling legislation.[5] In addition to conferring power to dispose of substantive matters,[6] enabling legislation generally empowers the regulatory authority to: (i) inquire; (ii) collect information; (iii) investigate; (iv) determine culpability, and (v) impose penalties. In addition, some regulatory authorities place conditions for enforcement or even enforcement mechanisms themselves in the licenses they issue. In **Egypt**, for example, a system to receive and investigate complaints and repair faults must be specified in a license.[7] In **Morocco**, quality of service standards are included (and presumably enforced by the National Regulatory Authority (or NRA) as license conditions. In others, e.g., **Singapore** and **Brazil**, quality of service standards are adopted as regulations applicable to all service providers.[8] When asked to describe the source of their enforcement powers, many countries also refer to regulations promulgated by the regulatory authority itself that presumably carry out or further interpret the legislature's stated goals. Regulatory authorities of the **European Union** member states must follow the relevant directives issued by this supra-national body.

B. Country Examples

Pursuant to the **Uganda** Communications Act, the Uganda Communications Commission's (UCC) regulations, and license provisions, the UCC may receive, investigate, and act on complaints and violations, impose fines for unlawfully providing communications service or for unlawfully possessing, installing connecting or operating communications equipment/apparatus. The UCC may also appoint inspectors to verify compliance with the Uganda Communications Act, and pursuant to permission granted from the Uganda Director of Public Prosecutions, may criminally prosecute offenses concerning communications services.[9] The Uganda Communications Act and UCC regulations also provide for the protection of consumers. Accordingly, the UCC has incorporated broad provisions in operator's licenses relating to quality of service, master service agreements, tariffs, interconnection, customer assistance, conflict resolution, equipment type approval, and confidentiality.[10]

In **Brazil**, Law No. 9472 enacted on July 16, 1997 is known as the General Telecommunications Law. This law created ANATEL as a regulatory agency of the indirect Federal Public Administration, reporting to the Ministry of Communications. Under this law, ANATEL has

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[5] An exception to this is **Columbia**, where the regulatory authority is not responsible for enforcement actions in the telecom sector. Rather, an entirely different government agency maintains this responsibility. *See* "Trends in Telecommunication Reform 2002", International Telecommunication Union at 45.

[6] For example, Article 8 of **Morocco's** Law 24-96, requires ANRT to establish terms and conditions for interconnection and to establish the procedure for submitting interconnection disputes. ANRT also must establish the rules governing the radio frequency spectrum. "Effective Regulation: Case Study - Morocco," International Telecommunication Union at 23.

[7] Arab Republic of **Egypt**, Law No. 10/2003, Issued February 2003, Article 25, no. 18.

[8] *See* "Trends in Telecommunication Reform 2002," International Telecommunication Union at 46.

[9] *See* UCC Contribution to ITU-D question 18/1, December 2002, at 1 - 2.

[10] "Addendum to Uganda's Contribution on the Enforcement of Laws, Rules, and Regulations by National Telecommunication Regulatory Authorities," January 3, 2004, at 3 (Addendum to Uganda's Contribution).

authority to regulate, among other things, telecommunications service offerings, licensing, interconnection, use of radio frequency, use of orbital slots, universal access and quality of service obligations, unfair competition practices, ownership and corporate control of telecommunications operators, and to enforce associated regulations in these areas.[11] The Law gives ANATEL the power to request specific information, inspect operators' premises, and if warranted, search and seize telecom equipment or halt and seal unlicensed operation.[12] Article 19 of the General Law gives ANATEL the duty to "settle conflicts of interest among telecommunication service providers."[13] ANATEL may also function as an arbitrator in order to settle conflicts among telecommunications operators and users.

In that case, the parties must agree to submit their conflict to ANATEL and accept its decision in arbitration as final and binding.[14] Together with the Administrative Council for Economic Defense (CADE), ANATEL is responsible for assuring a healthy competitive environment in the telecom sector, curbing unfair commercial and technical practices.[15]

Egypt's National Telecommunications Regulatory Authority (NTRA) derives its enforcement powers from Law No. 10/2003 – Telecommunications Regulation, issued at the Presidency in February of 2003. This law gives Egypt's NTRA authority to regulate and administer spectrum use, (Article 49) establish licensing fees, conditions, and rules for frequency or bandwidth, (Articles 51 & 53) and in coordination with the Armed Forces and the national security authority, monitor spectrum and inspect licensed wireless equipment to ensure compliance with relevant license conditions (Article 55). This law also gives NTRA the power to establish the price for services identified as being primary for operating and providing licensed telecommunications services, (Article 29) establish criteria and regulations for non-economic telecom services, develop rules for user's protection, and develop a system to receive user's complaints. (Article 5).

Chapter 12:05 of **Zimbabwe's** 2000 Postal and Telecommunications Act created the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) as a separate, legal entity with administrative and financial autonomy. Under the Act, POTRAZ' duties with regard to telecommunications includes promoting development of and ensuring domestic and international telecommunications services, issuing licenses, promoting effective competition, monitoring and approving tariffs, administering the national numbering plan, and promoting the interest of consumers.[16]

The **Bhutan** Telecommunications Act of 1999 established the Bhutan Communications Authority (BCA) within the Ministry of Information and Communications (then called the Ministry of Communications) on January 1, 2000, and on July 1, 2000 created Bhutan Telecom, formerly the

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[11] *See* "Enforcement and the Brazilian National Telecommunications Agency" Contribution from ANATEL to ITU-D Question 18/1, March 12, 2003 at pp. 2 - 4. (ANATEL contribution to ITU-D Question 18/1, March 12, 2003). *See also* "Enforcement and the Brazilian National Telecommunications Agency (ANATEL)," Contribution from ANATEL to ITU-D Question 18/1, July 30, 2003 at 2. (ANATEL Contribution to ITU-D Question 18/1, July 30, 2003).

[12] Though provided for in the General Telecommunication Law, ANATEL's power of search and seizure is currently being challenged before the Supreme Federal Court. ANATEL Contribution to ITU-D Question 18/1, July 30, 2003 at 2.

[13] *See* Trends in Telecommunication Reform 2002, International Telecommunication Union at 50. ANATEL has already arbitrated several cases involving interconnection and network access. Id.

[14] ANATEL Contribution to ITU-D Question 18/1, July 30, 2003 at 2.

[15] Id. at 5.

[16] "Contribution of Zimbabwe to Domestic Enforcement of Laws, Rules, and Regulations on Telecommunications by National Telecommunications Regulatory Authorities" January 2004 at 1- 2.

Department of Telecom. The BCA is responsible for regulating telecommunications and radio communications infrastructure and services, cable television, and postal communications. Among other things, the 1999 Act empowers the BCA to regulate the price of telecom services; financial and technical aspects of interconnection; universal service; and the national numbering scheme. BCA may also issue licenses for radio communications facilities and services, and to achieve interoperability, set technical standards for telecommunication systems and terminal equipment.[17] The 1999 law also gives BCA the authority to conduct administrative hearings to resolve technological issues, disputes and complaints, and to make and enforce regulations and issue guidelines and codes of practice governing the telecom sector, particularly in the case of public telecommunications systems or services.

BCA can act to eliminate any abuse of market power or anticompetitive behavior, and can order an operator to comply with appropriate international equipment and technical standards.[18]

Bolivia's telecommunications sector underwent significant structural changes in the mid-nineties. Specifically, a sector regulation system (SIRESE) was established; a new telecommunications law was promulgated; and an independent regulatory institution called the Telecommunications Superintendence was created.[19]

The Superintendence regulates Bolivia's infrastructure and services in telecommunication and radio, within the policy framework defined by the Executive through the Ministry of Services and Public Works. It has technical, economic, and financial autonomy, and its activities are financed by a regulation rate determined by law for all holders of concessions, licenses, or registries, irrespective of whether they are service providers or radio programming providers.[20]

Bolivia's Telecommunications Law, No. 1632, and its subsequent modifications, together with Supreme Decrees and Ministerial Resolutions determine the legal framework for the telecommunications sector. This law is complemented by its Framework Procedures (D.S. 25950), the Interconnection Regulations (D.S. 26011), the Market Opening Plan (D.S. 26005), and the Regulations for Invoicing, Collection and Service Cuts (D.S. 26401).[21] Under the SIRESE Law (No. 1600) the Telecommunications Superintendence can, among other things, promote competition, and regulate licenses, service quality, prices and rates, and technical standards. It can also investigate anticompetitive or discriminatory conduct, hear and process complaints under SIRESE jurisdiction, and apply sanctions.[22] In addition, the Telecommunications Law authorizes the Superintendence to regulate the electromagnetic spectrum, and concession contracts including those pertaining to accounting rates, among other things. The Law also authorizes the Superintendence to establish technical standards, identify non competitive services, and require information necessary to fulfill its obligations.[23]

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[17] "Enforcement of the Bhutan Telecommunications Act and the National Radio Regulations" (Contribution of Bhutan to ITU-D Question 18/1, April 2004) pp 1-3.

[18] *See* Contribution of Bhutan to ITU-D Question 18/1, April 2004 at 2.

[19] *See* "Observance of the Normative Framework for the telecommunications Sector in Bolivia," Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at 2.

[20] *Id.*

[21] *Id.*

[22] *See generally Id. at 3.*

[23] *Id.* at 3.

The **Tanzania** Communications Act, the Communication Operator (Licensing) Regulations, and licenses confer power upon the Tanzania Communications Commission to issue sanctions.[24]
The **Sri Lanka** Telecommunications Act No. 25 of 1991, amended by Act No. 27 of 1996 governs telecommunications in Sri Lanka. Under Section 9 of the Act, the Telecommunications Regulatory Commission is given broad power to inquire into complaints. The Act also empowers the Commission to direct the service provider to rectify the cause of the complaint, including financial redress.[25]

Law 24-96 under the aegis of His Late Majesty King Hassan II sets forth the overall framework of the reorganization of the telecommunication sector in **Morocco**.[26] Pursuant to this law, Morocco's National Telecommunication Regulatory Agency (ANRT) has powers of investigation and oversight. Its power of investigation is exercised through inquiries, including on-site inspections where ANRT staff can request "any necessary information" that will enable ANRT to verify that companies operating networks or telecommunications services are in compliance with their obligations.[27]

The Agence des Télécommunications de Côte d'Ivoire (ATCI) is responsible for telecommunications regulation in **Côte d'Ivoire**. ATCI derives its power to enforce telecom laws from Law No. 95-526 of 7 July 1995 of the Telecommunication Code, the Licensing Agreement between Côte d'Ivoire Télécom and the State of Côte d'Ivoire signed on 3 February 1997, and Order no. 97-173 of 19 March 1997 on radio communication charges and fees.[28]

The principal source of the **United States** Federal Communications Commission's (FCC) authority to enforce telecom laws and regulations is derived from its enabling statute, the Communications Act of 1934, as amended. This statute gives the Commission broad authority to conduct investigations into violations by regulated entities and to take enforcement action.

Through the formal complaint process set forth in Section 208 of the Communications Act, the Commission decides formal complaints between private parties. As an adjunct to the formal complaint process, the Commission provides mediation assistance to litigants or potential litigants to help them reach a private settlement of their disputes. The Commission also conducts informal investigations pursuant to Sections 218, 403, and 503(b) of the Communications Act. These investigations may lead to monetary fines or consent decrees. Most consent decrees also include significant compliance plans.[29]

New Zealand's key competition statute is the Commerce Act of 1986. Legislation amending this statute passed on May 26, 2001, and strengthened its core provisions as well as the enforcement powers and resources of New Zealand's competition enforcement agency, the Commerce

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[24] *See* "Four Steps to Enforcement," contribution of the Tanzania Communications Commission to ITU-D Question 18/1, 9 September, 2002, at 1. (TCC Contribution to ITU-D Question 18/1, 9 September 2002).

[25] *See* "Domestic Enforcement of Laws, Rules, & Regulations," Contribution of the Telecommunications Regulatory Commission of Sri Lanka to ITU-D Question 18/1, December 2002, at 1. (Sri Lanka Regulatory Commission contribution to ITU-D Question 18/1, December 2002).

[26] This law established the National Telecommunication Regulatory Agency, and introduced the concept of universal service in Morocco. *See* "Effective Regulation: Case Study - Morocco," International Telecommunication Union at 24.

[27] *Id*.

[28] Contribution of Côte d'Ivoire to ITU-D Question 18/1, May 28, 2004 at 1.

[29] *See* "Domestic Enforcement of Telecommunications Laws, Rules, & Regulations by National Telecommunication Regulatory Authorities," contribution of the United States of America to ITU-D Study Group Question 18/1, September 2002, at 1. (USA contribution to ITU-D Question 18/1, September 2002)

Commission. Key amendments include increasing the period for the statute of limitations, increasing the amount and range of sanctions that may be imposed, and empowering the Commission to impose a price control regime in certain circumstances.[30]

In **France**, the objectives of telecommunications regulation, ensured jointly by the Minister of Telecommunications and the Telecommunications Regulatory Authority (Authority), are defined by the Law of Telecommunications of July 26, 1996. The law sets forth the division of duties (or competencies) of both the Minister and the Authority. Divided competencies arise in four cases:

(i) The Authority instructs, for the benefit of the Minister of Telecommunications, requests for authorizations under Article L. 33-1 and L. 34-3.

(ii) The Authority proposes to the Minister of Telecommunications, who then notes the cost of universal service and the contributions of the operators.

(iii) The Authority returns public opinion on France Telecom's proposed tariffs before their approval by the ministers of economy and telecommunications and

(iv) Decisions of the Authority that are statutory in character are confirmed by the Minister (Art. L. 36-6).[31]

On March 7, 2002, the Council of Ministers of the **European Union** and the European Parliament adopted four Directives and one Decision introducing far reaching changes to the regulatory framework governing "electronic communications. [32] Key points in the new framework include establishing a harmonized regulatory framework for all electronic communications networks while maintaining separate arrangements for the services provided on those networks, establishing effective competition, and strengthening the role of regulatory authorities in implementing the directives and in their coordination with each other. The new framework does not cover content provided by communications networks or services, nor does it govern the distribution of audiovisual communications services, except in the case of conditional access services.[33]

As the **European Union** increasingly takes on more important functions in issuing various Directives, individual regulatory authorities are obliged to incorporate and implement these directives at the national level.[34] With regard to enforcement matters, Articles 20 and 21 of the new European Framework Directive requires national regulatory authorities (NRAs) in EU Member States to resolve disputes within the shortest possible time frame and in any case within four months except in exceptional circumstances. The new directives entered into force on April 24, 2002, and were required to be implemented by Member States by midnight, July 24, 2003.

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[30] *See* OECD report - "New Zealand: 1 September 2000 – 31 August 2001," http://www.oecd.org/docm00029000/m00029535.doc at 2 – 3. (OECD Report).

[31] *See* "Evolution of the Strengths of the Telecommunications Regulator: the Case of France," ART Contribution to ITU-D Question 18/1, January 2003, at 2. (ART Contribution to Question 18/1, January 2003).

[32] *See* "European Legal Framework for Electronic Communications," Contribution of Thales (France) to ITU-D Question 18/1, November 8, 2002 at 2. (Thales' (France) contribution to ITU-D Question 18/1, November 8, 2002.) The Council of Ministers of the European Union and its Parliament adopted: the Framework Directive (2002/21/EC); the Authorisation Directive (2002/20/EC), the Access Directive (2002/19/EC), the Universal Service Directive (2002/22/EC), and the Radio Spectrum Decision (676/2002/EC). Id. at pp 2-3.

[33] Id. at 2.

[34] France, for example, reportedly will need to amend its Post and Telecommunications Code, and the amended Act of 30 September 1986 on freedom of communication in order to implement the new Directives. *See* Contribution by Thales (France) to ITU-D Question 18/1, November 8, 2002, at 2.

The Federal Office of Communications (OFCOM), the new regulator for the **United Kingdom**'s communications industries created in 2003, has responsibilities for television, radio, telecommunications and wireless communications services. Section 3(1) of the Communications Act of 2003 outlines OFCOM's duties which include: (i) ensuring the optimal use of the electromagnetic spectrum; (2) ensuring that a wide range of electronic communications services – including high speed data services – is available throughout the UK; and (iii) ensuring a wide range of TV and radio services of high quality and wide appeal. [35] In enforcing rules under its jurisdiction, OFCOM abides by the provisions and standards of the Enforcement Concordat drawn up by the Cabinet Office to provide guidance to central and local government when carrying out enforcement work.[36] That document requires OFCOM to: (i) have clear standards setting out the level of service and performance the public and business can expect to receive; (ii) provide clear information and advice on the rules that apply, and be open about how they do their work; (iii) provide a helpful service with a well-published and effective complaints procedure; (iv) minimize the costs of compliance for business by ensuring that any action taken is proportionate to the risks; and (v) carry out its duties in a fair, equitable, and consistent manner.[37]

As OFCOM has assumed the duties of many of its predecessor agencies such as Oftel, it may investigate complaints about license breaches and anti-competitive behavior under the Telecommunications Act of 1984, consumer complaints about unfair contract terms, disputes, and where appropriate, initiates its own investigations.[38] In addition, the United Kingdom Communications Bill seeks to direct resources at those issues where genuine difficulties exist, by permitting OFCOM to recover its costs from operators who abuse the right to bring a dispute by making frivolous or vexatious claims. The Bill also gives OFCOM the right to charge a fee for resolving investigations involving disputes about radio spectrum as they are likely to be very resource intensive (e.g., involving technical compatibility tests or monitoring).[39]

The principal sources of authority for the Communications Regulatory Authority (CRA) of the Republic of **Lithuania** are the Law on Telecommunications and the Code of Administrative Offenses. Article 9 of the Law on Telecommunications – in force as of January 1, 2003 -- provides that Lithuania's CRA has the authority to control compliance with the law, regulations and other legal acts relative to telecommunication activity, to control equipment and devices according to the parameters of radio emission; to perform radio monitoring[40], and to receive information necessary to fulfill the above tasks.[41] Additionally, under Article 62, the CRA has authority to settle a number of disputes including those concerning the joint use of conduits, cable ducts, collectors, towers, masts, and for contractual conditions and charges. Dispute settlement proceedings are to be public in nature, unless a closed hearing is necessary to protect state, official, or commercial secrets or to

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[35] *See generally,* http://www.ofcom.org.uk.

[36] Id.

[37] Id.

[38] *See* "Dispute resolution under the new EU Directives - - a statement by Oftel and the Radiocommunications Agency (Ofter/Radiocommunications Agency Final Statement) 28 February 2003, http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/eud0203.htm ; "Dispute resolution under the new EU Directives – A consultation by Oftel and the Radiocommunications Agency," (Oftel/Radiocommunications Agency Report), 4 November 2002 at 22.

[39] *See Id.* at 14.

[40] *See also* Articles 45 and 46 of the Lithuania Law on Telecommunications. Contribution from Lithuania to ITU-D Question 18/1, March 10, 2003 at 5.

[41] *See Id.* at 1- 3.

ensure an individual's right to privacy. Parties dissatisfied with a CRA decision may appeal it to the courts.[42]

C. Challenges Identified

The following lists those challenges that are related to legislation reportedly faced by NRA's as they attempt to enforce their domestic telecommunications laws:

- The law provides no description of appropriate fines;
- The law provides no authority to issue fines;
- The Law lacks intermediate or mid-range economic penalties;
- The Law does not provide statutory fines that are high enough to provide sufficient deterrence;
- The Law does not provide for autonomy of the NRA;
- The law does not provide jurisdiction over or recourse at the NRA for complaints of companies not subject to a NRA license (e.g., ISPs);
- Courts sometimes issue preliminary injunctions that indefinitely suspend an NRA decision;
- Absence/delay in establishing a tribunal to handle communications disputes;
- The difficulty of accommodating the new European Directives into domestic legislation and procedures on a timely basis;
- The process to obtain an amendment to the law is too lengthy.

D. Draft Guidelines: Source of Enforcement Powers

- Ensure harmony between the constitution, legislation, and administrative powers. Identify change as necessary.
- Ensure that the telecom law provides sufficient power, authority, and financial resources to the NRA for it to impartially, swiftly, and transparently carry out the will of the legislature.
- Ensure that the law contains clear and unambiguous language describing the jurisdiction of the NRA and, where appropriate, other interested state agencies
- Ensure that the law is promulgated clearly, transparently, and precisely. Avoid technical terms that are not understandable by the public or that may be unclear before a reviewing court.
- Describe the objectives and rationale of promulgated laws to induce enforcement and compliance by all parties, including enforcement agents of the state.
- Ensure that consumers, operators, and service providers have recourse at the regulatory agency.
- Ensure jurisdiction over service providers who may not be licensed (e.g., ISPs)
- Ensure that the enabling law/telecom legislation provides the NRA with a wide range of penalties to include those appropriate for minor, mid range, and maximum offenses.

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42 *Id*. at 8.

III. ENFORCEMENT PRACTICE & PROCESS

A. Overview

Second only in importance to a regulatory authority's enabling act or statute are the day-to-day practices and procedures it employs to implement its laws. In some cases enforcement procedures (or certain of their components) are specified in the enabling statute. Often the regulatory authority develops and publishes additional procedures on its own to carry out powers conferred upon it by statute. Regardless of the source, however, it is essential to have processes in place that enable swift and fair adjudication of violations and complaints. Transparency in these procedures will facilitate compliance and is necessary for the decisions of the regulatory authority to gain public trust and withstand judicial, ministerial, or royal review.[43]

Some regulatory authorities have developed separate procedures for industry violators and complaints by consumers/end users. In either case, as many of the following examples illustrate, enforcement procedures generally include: (i) providing notice of the alleged infraction; (ii) providing an opportunity to respond; (iii) issuing interim decisions or orders; and (iv) imposing sanctions.[44]

Many regulators have the power to order operators to produce individual documents or records, and can enter an operator's premises and seize those documents if operators do not comply. Similarly, some regulators may conduct on-site tests in order to determine an operator's compliance with type approval, quality of service or radio communication non-interference requirements. Because these are fairly intrusive powers, agency officials – such as those in **Trinidad and Tobago** and in **Bolivia** – must often obtain judicial warrants before they exercise their search and seizure powers. In other countries, however, those powers are granted by statute and may require no judicial pre-clearance.[45]

With regard to those enforcement processes and practices that aim to settle conflicts or disputes between parties, some NRAs have elected to employ less formal methods to assist with their workload. Commonly referred to as alternative dispute resolution (ADR), these less official techniques include negotiation and mediation (voluntary, flexible, and consensual) and arbitration (adjudicatory; awards usually enforceable via the courts)[46] and may be conducted by entities other than the NRA or a court.

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43 **Brazil's** Anatel, for example, has undertaken an initiative to promote enforcement consistency by developing a manual that dictates fixed methods for investigating companies and penalizing those that commit specific violations. *See* "Trends in Telecommunication Reform 2002," International Telecommunication Union at 49. This initiative promotes transparency as well. Another illustration of transparency is **Oftel**, which publishes details of disputes and investigations in its quarterly Competition Bulletin. This publication gives details of new and closed cases. Under the new regime, Oftel will publish details of Compliance cases as they are opened and closed. This information will only be published on Oftel's web site. Oftel/Radiocommunications Agency Report at 20. The **New Zealand** Commerce Commission's quarterly newsletter "Fair's Fair" provides information about recent and current work. This includes investigations, decisions, enforcement, education activities, and appointments of senior staff. OECD Report at 9.

44 "Trends in Telecommunication Reform 2002," International Telecommunication Union at 48. Some NRA's, e.g., **Zimbabwe's** POTRAZ, and **Mexico's** COFETEL do not have the authority to levy fines. In the case of Zimbabwe, this is carried out by the courts. *See* Contribution of Zimbabwe to ITU-D Question 18/1 (January 2004) at 2. In Mexico's case, the Secretary of Communications and Transportation imposes a fine on the recommendation of the NRA, COFETEL.

45 *See Id*. at 47.

46 *See generally* "Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions," ITU and World Bank Discussion Paper, August 2004, http://www.itu.int/itudoc/gs/promo/bdt/86215.html at 10.

Dispute resolution via alternative means in the telecom sector is at a relatively early stage and, like the telecommunications sector, is changing rapidly.[47] Some regulators, e.g. in 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. For those who favor the use of ADR techniques by NRA's, 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.[48]

Official dispute resolution mechanisms are important as a basic guarantee that sector policy will be implemented.[49] Given that a significant portion of an NRA's enforcement practices are aimed at settling disputes -- itself a basic function of the regulator – and the credibility derived by NRAs through exercising their statutory authority to adjudicate and enforce the law and NRA decisions – it is important to identify those circumstances in which ADR is appropriate. In certain circumstances for example, an interconnection dispute may lend itself to ADR while in other cases official mechanisms may be preferable. Disputes involving spectrum may be less likely to be suitable for ADR techniques than conflicts involving some other matters.

Issues of sufficient jurisdiction, authority, and enforcement capabilities are additional considerations that arise when an entity other than the NRA or a court is employed to resolve a dispute. Further, a new NRA seeking to establish itself may wish to balance its need to conserve resources with its need to be taken seriously by those it regulates. Nevertheless, in appropriate circumstances, ADR can provide a useful means of augmenting an NRA's arsenal of enforcement practices. Indeed, in addition to ADR by outside entities, many NRA's (e.g., the U.S. Federal Communications Commission) conduct mediation as part of their own enforcement procedures. As noted recently by the ITU and the World Bank, even in alternative dispute methods, the presence and participation of the regulator can help create incentives for improved behavior on the part of the parties.[50] The appropriate place for ADR in the regulated and fast-changing telecommunications industry is still evolving and its potential to assist NRA enforcement objectives will continue to be defined in the future.

B. Country Examples

In **Singapore**, IDA's code of practice for competition sets out the procedures and steps that must occur before IDA can impose a sanction. There are five steps: (1) IDA notifies the licensee in writing of its intent to take legal action. The notice specifies the time permitted for reply; (2) the licensee has 15 days to respond in writing (time can be extended at IDA's discretion); (3) IDA reviews the licensee's response and may issue a temporary cease and desist order; (4) if IDA determines that a violation of the Code of Practice for Competition has occurred it may issue a warning, cease and desist order, or a directive to take remedial action, it may also impose a fine, suspend, cancel, or shorten the duration of all or part of the license; (5) a licensee may appeal an IDA decision to modify its license provided the appeal is filed within 14 days of the IDA decision. Pending the Minister's decision (and only in cases involving license modifications) the IDA cannot enforce its decision. In situations other than license modifications IDA's decisions are generally enforceable pending appeal. The Ministry's ruling on the appeal is final.[51]

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[47] *See generally* Id. at 11 – 12.

[48] Id. at 12.

[49] Id. at 14.

[50] Id. at 10.

[51] Trends in Telecommunication Reform 2002," International Telecommunication Union at 48.

In the **United States**, the FCC uses a variety of tools to investigate violations including letters of inquiry, field inspections and investigations, and administrative subpoenas. These tools are used to gather relevant information and form the basis for a decision to take further enforcement action or to conclude the matter. Once it has determined that a violation has occurred, the Commission and the Enforcement Bureau have several tools to address this circumstance: (i) Letter of Admonishment/Warning (response not always necessary); (ii) a Field Office Notice of Violation (requires response); (iii) citation for non licensees or others not usually before the FCC; a Notice of Apparent Liability ("NAL") and monetary forfeiture (fines) (see discussion below in "Sanctions"); consent decrees; Cease and Desist Order following an Order to Show Cause why a cease/desist order should not be issued; license revocation following an order to show cause why the license should not be revoked; in coordination with the U.S. Department of Justice, seizure of equipment; referral for criminal prosecution to the U.S. Department of Justice; and finally, damages in response to formal complaints.[52]

The FCC also employs mediation in certain circumstances. The Market Disputes Resolution Division of the Enforcement Bureau[53] participates in negotiations (mediations) between carriers to facilitate settlement of disputes before complaints are filed.[54] Mediation is a corollary to the complaint process and can occur before or during the complaint process. It is a highly successful enforcement tool. A separate, accelerated complaint process exists that requires parties to first attempt mediation. This is also very effective.

Pre-complaint meetings and mediation are encouraged; participation is voluntary. FCC staff finds mediation to be extremely successful because it promotes speedy resolution of the dispute, avoids the expense of litigation, helps to narrow the issues in dispute, and brings parties together to resolve matters that are not in posture for litigation.[55]

Mediation also facilitates communication and the parties' assessment of their positions. Typically, pre-mediation statements are employed. There, the parties exchange positions regarding factual background and legal positions. These statements are destroyed at end of the session to maintain the off-the-record nature of mediation. In a mediation session EB staff will usually meet with parties together and individually. The FCC strongly encourages the attendance of business representatives who are integral to the dispute, not just legal counsel, because FCC staff has found that the direct involvement of relevant business representatives can produce a more clear understanding of the issues and increase the probability of a quick resolution. FCC staff gives each side an informal, off-the-record assessment of their arguments in the individual sessions. Subsequently, more information may be exchanged after the session with follow-up phone calls and possibly more in-person sessions.[56]

While mediation may be ideal for settling private disputes, FCC staff has found that it is not the most advantageous for policy making because a negotiated result only applies to the negotiating parties even if there are similar disputes between other carriers. An additional difficulty is that

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52 *See generally,* USA contribution to ITU-D Question 18/1, September 2002, at pp. 8 – 10.

53 The FCC's Market Disputes Resolution Division of the Enforcement is responsible for resolving complaints against common carriers (wireline, wireless, and international) by competitors and other carriers involving market issues as well as for pole attachment complaints. "Federal Communications Commission - Adjudication and Mediation," Tracey Bridgham, Esq., Market Disputes Resolution Division, September 2004.

54 In the adjudication (complaint) process, an action is initiated against a carrier by a complaining party (consumer, company, or another carrier) rather than by the Commission. *Id.* at 1.

55 Id.

56 Id. at 2 – 3.

disputes sometimes relate to ambiguous areas of the law that a Commission decision, rather than an off-the-record settlement, would clarify.[57]

In **Uganda**, the UCC has the power to receive and investigate complaints by interested parties as well as on its own motion. Public petitions filed in response to license applications that have been filed with the UCC and published permit the UCC to discover possible violations of the law. The UCC inspects licensed facilities and takes action where it discovers violations of rules, regulations, license conditions etc. Letters of inquiry are issued by the UCC to obtain information from a licensee or other entity during the course of an on-going investigation or when following up a complaint.[58]

When a licensee breaches a license condition or acts contrary to **Tanzania**'s Act or regulations, a written notice may be issued specifying the breach and informing the licensee of the Tanzania Communications Commission's intention to take legal action. The licensee is afforded time to rectify the breach and/or respond to the Commission's notice. Thereafter, if the licensee fails to provide an explanation the regulator may impose a sanction.[59]

In **France**, ART's tools of regulation include but are not limited to: the ability to sanction for breaches of the rules, the ability to establish mediation, the possibility to manage investigations of the sector, and the ability to set up general rules of order framed by the approval of the Minister.[60] The legislature of 1996 endowed the ART with the ability to investigate. The two principal provisions of law that can serve as the foundation for the investigatory procedures are Articles L.32-4 and L. 40 of the code of Posts and Telecommunications. Under Article 32-4, ART can conduct a simple investigation of information or documents from the operators. If the operator refuses to defer to ART's request for this information, however, Article 32-4 does not provide an ability to coerce compliance. In order to assure itself that its requests will be respected, ART can employ the combined provisions of Articles 32-4 and L-40. The investigations effectuated under Article L. 40 regard a regime that is one of judicial police operations and is framed on a procedural plan. The law also institutes a simple right of access, but does not provide the power to search.[61]

In France, procedures for settling differences are at the center of the mechanism of regulation and permit resolution in a brief time - three to six months -- of differences between two parties in defining technical conditions and tariffs in lawsuits. In the current regulatory framework, ART is concerned with lawsuits/disputes on the following issues: access, interconnection, unbundling the local loop, placement of network cable for providing telecommunications services, dividing infrastructure, furnishing a list of subscribers for a universal directory or furnishing information on universal service. Currently, ART principally handles problems of interconnection access, and for the first time, the framework for placement of network cables. They have also rendered a decision settling differences about unbundling the local loop.[62]

[57] Id. at 3.

[58] UCC Contribution to ITU-D Question 18/1, December 2002, at 2.

[59] TCC Contribution to ITU-D Question 18/1, September 2002 at 2.

[60] *See* ART Contribution to ITU-D Question 18/1, January 2003, at 2.

[61] *See Id*. at 6.

[62] *Id*. at 3.

In **Brazil**, all of ANATEL'S bureaus (except for General Services) conduct enforcement activities for the services within their specific mandate.[63] After an inspection is performed, expert and other reports are issued, and if a violation of a regulation or license condition is found, ANATEL may either (i) send an infraction notice to the offender describing the violation and giving time for the offender to provide an administrative defense, or (ii) send an Official Letter requesting additional information or clarification. Based on the inspection, ANATEL may also initiate a procedure for Verification of Non Compliance with Obligation (PADO) to verify breach of a regulation. Following due process, an only upon conclusion of a PADO, a penalty may be established. This ruling may be appealed to a court. ANATEL may also initiate a PADO based on written complaints or those received by its call center from a customer or competitor of an operator.[64]

During its five-year existence, ANATEL initiated 42,300 PADOs, the majority of which were related to noncompliance with its regulatory obligations established in the General Quality Plan for Fixed Telephony, rather than for consumer complaints.[65] 11% were dismissed with no penalty; in 19% fines were imposed, and in 4% a warning was issued.[66] The vast majority - - 90.3% - - were initiated by the Radiofrequency and Spectrum Bureau; 7.3% were brought by the Public Utility Service Bureau; 1.26% by the Mass Communications Service Bureau; 0.77% were brought by the Private Services Bureau; and 0.63% by the Universal Access Bureau. The total amount of fines issued for these PADOs total R$ 126.5 million. Due to pending appeals, however, this full amount has not been collected.[67] Further, though fines are imposed by ANATEL, they are reviewed by the courts, and only a court may collect the fine, execute a judgment, or confiscate property.

When the Communications Regulatory Authority (CRA) of **Lithuania** has determined that a violation of the law or regulations has occurred, the CRA must inform the violator of its infringement and provide an opportunity to respond or eliminate the violation within one month after the date the notice is mailed. A shorter period of time may be permissible upon agreement of the putative violator or, in the case of repeated violations, on the order of the CRA. If the violator fails to remedy the violation within the time specified, the CRA may apply remedies to ensure compliance, including economic sanctions within two months after notice of the violation was sent.

Lithuania's telecom laws are enforced primarily by the CRA's inspectors, who are appointed and dismissed by the Director of the CRA.[68] Article 10 of the Law on Telecommunications provides that CRA inspectors have the authority to monitor compliance with the laws and regulations governing telecom networks and radio communication, radio equipment and telecom terminal equipment, issue records of administrative infringements, upon obtaining a warrant issued by the

[63] *See* ANATEL Contribution to ITU-D Question 18/1, March 12, 2003, at 3. ANATEL has six bureaus: Public Utility Services; Mass Communications Service, Universal Access; Private Services; Radio Frequency and Inspection, and General Administration. ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, at 3.

[64] Id. at 3. *See also* ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, at 5.

[65] Both incumbents and new entrants must comply with the General Quality Plan, which describe minimum access and quality of service obligations. *See* ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, at 4.

[66] Id at 7.

[67] Id.

[68] The Director of the CRA is appointed by the President of the Republic on the recommendation of the Prime Minister. *See* Contribution of Lithuania to ITU-D Question 18/1, March 10, 2003 at 2.

court inspect premises, vehicles or territories,[69] and seize equipment and devices as provided for in the law.

When discharging their official duties, CRA Inspectors produce an authority card and a document issued by the CRA certifying their authority and functions. Under Article 10 of the Law on Telecommunications, inspectors have the right to obtain oral and written information, obtain data and documents (and temporarily hold them for a period of up to 30 days in the course of an investigation) inspect/audit business activities and equipment on site, to employ specialists in an investigation. In order to enter and inspect premises or vehicles, inspectors must produce a warrant issued by the Vilnius Regional Administrative Court. In carrying out their duties, a CRA inspector may seek the assistance of police officers.

Inspector's actions may be appealed to the Director of the CRA within 10 days of the action complained of. The Director must issue a decision within 10 days after the appeal is filed, or the aggrieved party may appeal to the court. Parties disagreeing with the Director's decision may also appeal to the court, but such appeal does not suspend the decision of the CRA in the meantime.[70]

Morocco's ANRT has the power to enjoin, to compel, and to launch public action. The power to enjoin allows ANRT to put on notice any license-holder that fails to abide by the requirements imposed as a condition of the license. The power to compel allows ANRT to suspend the license and seize the equipment of anyone committing an offense. It also allows it to take the "necessary measures" to assure continuity of the service and protect users. If found guilty, a court may order the network confiscated or destroyed at ANRT's request.[71]

ANRT's employees have the power to enter the premises of any company "acting improperly" and seize any documents that will support its case. ANRT may also press charges through its own duly sworn and commissioned officers, through officers of the judicial police, and through officers of the public forces. Charges are set forth in a written statement and forwarded to the Royal Prosecutor within five days. The statement of charges is taken as confirmation of wrongdoing until proven false.[72]

When an interconnection dispute arises, ANRT becomes involved only when negotiations between operators have failed and one of the parties has requested ANRT's intervention. ANRT then has 30 days to hear the dispute and issue a decision. The decision must be supported by ANRT's

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[69] To obtain a warrant to inspect a vehicle, premises, or territory, CRA inspectors must file an application for authorization with the Vilnius Regional Administrative Court, which must deliver a reasoned decision on the application within 72 hours. CRA inspectors can appeal denials of the application to the Supreme Administrative Court of Lithuania within 7 days. The Supreme Court must examine the appeal within 7 days. Its decision on the matter is final and is not subject to appeal. In urgent cases, CRA inspectors may take action on a decision of the Director of the CRA. In this case an application for authorization must still be filed with the court within 24 hours of the Director's decision. If the court upon review denies the application, the inspection must be terminated and all information obtained destroyed. *Id.* at 5.

[70] *Id*. at 4.

[71] *See* "Effective Regulation: Case Study – Morocco," International Telecommunication Union, 2001, at 24.

[72] *Id.*

Management Committee.[73] ANRT also has the power to revise interconnection agreements if it deems this necessary. To carry out its duty to regulate service quality, ANRT conducts technical inspections on both operators' premises and on its own premises. It engages the services of external experts and conducts user and operator surveys.[74] Operators and service providers may appeal ANRT's decisions before an administrative judge, who has the power to rescind them, but not amend them. A maximum period of 2 months is established to settle this appeal – which may be in or out of court – and the regulatory decision remains in force during this period.[75]

The **Tanzania** Communications Commission (TCC) has included in licenses it has issued to telecom operators a condition providing powers to investigate when there is a breach of the terms of the license or violation of the Laws of Tanzania. Under this scheme investigation may occur where there is:

(i) failure to comply with installation and service requirements;

(ii) partial or total interruption of the licensed services for a continuous period of 24 hours in Dar es Salaam and 48 hours in other areas; or

(iii) failure of the licensee to provide information to the TCC.[76]

Members of the **European Union** have an obligation to develop dispute resolution procedures. Articles 20 and 21 of the new European Framework Directive reduce the former 6-month deadline for resolving interconnection disputes to requiring all classes of disputes - - including those regarding use of radio spectrum - - to four months (except in exceptional circumstances). The new directives entered into force in April 2002. Member States have 15 months - - until July 2003 -- to enact national legislation that is in line with the new Directives.

Ofcom's predecessor, the **United Kingdom's** Oftel, generated investigations in the following ways: (i) by a complaint about anti-competitive behavior; (ii) by a request for Oftel to resolve a dispute under the current interconnection Directive; or (iii) Oftel's own motion.[77]

In order to meet the EU new deadlines, Oftel proposed new procedures and sought comment from the public. Specifically, before it will accept a dispute, Oftel proposed that complainants be required to submit clear information on all details of the dispute including:

(i) a full statement of the scope of the dispute;

(ii) a description of the obligations to which the dispute relates, including a view on the relevant economic market;

(iii) full details of the preferred remedy; and

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[73] ANRT's Management Committee is chaired by the Prime Minister and has four representatives of the State: the Minister of the Interior, the Minister of Economic Affairs & Finance, the Secretary General of the Government, and the minister of National Defense. These members are appointed by the ANRT Board of Directors for a five year term. The Management Committee is charged with settling disputes between operators that are filed with ANRT. *See Id*. at 20. The Board of Directors is chaired by the Prime Minister or their delegate and consists of 9 representatives of the state: the secretary general of the government, ministers responsible for the interior, finance, higher education, commerce, economic development & privatization, telecommunications, communications, national defense, the Director General of ANRT, and five people from the public and private sectors appointed by the Prime Minister for a five year term. *Id.* at 18.

[74] *Id*. at 37 - 39.

[75] *Id*. at 40.

[76] TCC Contribution to ITU-D Question 18/1, September 2002, at 1.

[77] Oftel/Radiocommunications Agency Report at 11.

(iv) documentary evidence of commercial negotiations on all issues covered by the scope of the dispute.

Additionally, to facilitate compliance with this proposed new requirement, and to assist in uniformity, Oftel prepared and published for comment its preferred format for such submissions.[78]

Oftel also proposed to allow five working days for representations to be made on the practicality of meeting a deadline for providing information it has requested under the Telecommunications Act of 1984, or a telecommunications license. Oftel indicated that it would generally confirm or amend the information request within two working days, but "would not expect to agree to an extension to the deadline."[79]

The EU Directives allowed Oftel to decline to resolve a dispute where alternative mechanisms exist. Accordingly, Oftel maintained the view that Alternative Dispute Resolution should be used to resolve disputes between operators that are not dominant, as these would (in the absence of a regulator) be resolved through normal commercial negotiations. The exception is where a regulatory obligation (e.g., a general obligation about number portability) has been imposed on operators that are not dominant and the dispute refers directly to this obligation.[80]

The investigatory and adjudicatory powers of the Telecommunications Regulatory Commission of **Sri Lanka** (RCSL) are aptly illustrated by a recent example involving access in Sri Lanka to the SEA-M E-WE submarine cable landing system which connects South East Asia, the Middle East, and Western Europe. In an effort to introduce competition in both domestic and international telecommunication services, and pursuant to Section 7 of the Sri Lanka Telecommunications Act No. 25 of 1991, the RCSL requested and obtained written information via questionnaires from the incumbent and more than 40 other operators seeking access to the SEA-ME-WE cable.

A hearing at which all affected operators were asked to comment concluded the paper investigation phase. As a result of its investigation and hearing, the RCSL determined that the incumbent's tariffs for its leased circuits were discriminatory, did not take into account excess capacity available, and therefore were anti-competitive. The RCSL directed the incumbent to submit a proposed plan for providing access to the cable; as of June 2003, the RCSL will develop tariffs for competitive use of the cable system.[81]

Some regulatory authorities have instituted special measures to address the needs of consumers. **Uganda's** UCC has established a Consumer Complaint desk along with procedures for handling complaints.[82] More recently, Uganda has developed a relationship with the Uganda Consumer Protection Association and has developed and published materials to increase consumer awareness of their rights and obligations.[83] Similarly, **Brazil's** ANATEL works closely with specialized consumer protection institutions and maintains a toll free call center to receive complaints from consumers. These complaints are processed by User Relations Assistance, which screens information and forwards it to the specific area for action.[84] A Committee has been appointed by

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[78] *See Id*. at 15.

[79] *Id*. at 19.

[80] *Id*. at 16. Oftel believes that its role in dispute resolution is to address "problems that arise as the result of the particular nature of electronic communications, or … disputes involving an operator with market power." *Id*.

[81] Telecommunications Regulatory Authority of Sri Lanka, contribution to ITU-D Question 18/1, June 11, 2003 at 1-3.

[82] UCC Contribution to ITU-D Question 18/1 at 2.

[83] Addendum to UCC Contribution to ITU-D Question 18/1 (January 2004) at 3.

[84] ANATEL contribution to ITU-D Question 18/1, March 12, 2003, at 5.

the Telecommunications Commission of **Sri Lanka** to resolve disputes between consumers and the service providers "by following a transparent, non-discriminatory process encouraging public participation and open dialogue." The right to appeal is available to any person aggrieved with the decision of the Committee on a question of law.[85] In **South Africa,** to help ICASA monitor performance, licensees must publish statistics on consumer complaints every six months.[86]

It is not characteristic of **Moroccan** culture for associations to defend consumer's interests, or for written complaints to be submitted to the authorities. Nonetheless, due to the good reputation enjoyed by ANRT, reportedly individuals do approach them directly with complaints and requests for assistance.[87]

C. Challenges identified

The following lists those challenges to effective enforcement procedures and practice reportedly faced by NRA's:

- Absence/delay in finalizing NRA regulations that implement their enabling act;

- It is often very expensive for the NRA to carry out its enforcement function, and it can be extremely time consuming.

- Often it is difficult for the NRA to obtain sufficient information to assist with investigations and compliance.

- NRA's are constituted as expert agencies with resources allocated to achieve efficiencies, yet are subject to the judiciary which largely has less expertise in communications matters and fewer resources dedicated to adjudicating those matters.

- Politicians, courts, and local administrative authorities sometimes take actions that affect or delay the NRA enforcement process;

- Preliminary injunctions issued by the courts that indefinitely suspend NRA decisions;

- Courts' unfamiliarity with telecommunications issues and consequent levying of fines not commensurate with the seriousness of the offense or the NRA's inspector's efforts;

- The existence of more than one authority involved in issuing a sanction (*e.g.*, where the NRA recommends a sanction and another institution imposes the sanction) results in duplication of procedures, and sometimes, conflicting recommendations.

- Operators sometimes resist a new NRA's inspections and enforcement orders;

- New entrants are sometimes unaware of their obligations; new entrants and incumbents are sometimes unaware of the NRA's power or mandate;

- Consumers/users are sometimes unaware of their rights and of the authority, role, or in some cases existence of the NRA as a vehicle for recourse of grievances or complaints

- Inability or difficulty keeping up with fast technological developments;

- Regulatory agencies' reliance on practices/methods used by developed countries which at times may not be suitable for developing countries' environment;

- Enforcement processes that require too much paperwork.

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85 Sri Lanka Regulatory Commission contribution to ITU-D Question 18/1 at pp. 1 and 3.

86 S*ee* "Trends in Telecom reform 2002," International Telecommunication Union at 46.

87 *See* "Effective Regulation: Case Study - Morocco," International Telecommunication Union at 41.

D. Draft Guidelines: Enforcement Process

- Develop and publish procedures for the NRA's internal operations and its external public functions that reflect fairness, speed, efficiency and transparency goals
- Design transparent procedures that enable the NRA to render and publish a decision that considers all relevant facts and law.
- Follow rules and laws; observe precedent.
- Include the consumer/user point of view in NRA deliberations and decisions.
- To assist in obtaining information necessary to evaluate compliance with laws, policies or regulations, adopt procedures for treating confidential or commercially sensitive information provided by operators, service providers, or other licensees that will protect the sensitive nature of the information.
- Identify areas where the actions of other interested state authorities (e.g., courts, local representatives, administrative authorities) frequently or significantly affect NRA enforcement processes. Where feasible and appropriate, develop a plan for communication, coordination, and cooperation with the goal of facilitating equitable and speedy resolution of violations.[88]
- Consider employing a variety of tools for investigation to include letters of inquiry, on-site inspections, and subpoenas.
- Insofar as possible, use technology to facilitate speedy but deliberative decision-making, and subsequent publication of these decisions.
- Place decisions and comments on the web.
- To compensate for limited staff and resources, consider placing the burden to produce information needed by the NRA upon service providers/licensees. Make this information public so that competitors and consumers can notify the NRA if they believe the information is inaccurate or otherwise flawed.
- To assist the NRA in gathering information from regulatees and for receiving complaints from consumers, consider publishing a standard format for each.
- To assist the NRA in gathering information to render a decision on r license applications or other line processing work, prepare a standardized work sheet for staff to ensure that all issues have been reviewed and relevant rules complied with.

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[88] Good examples of this approach include actions taken by **Uganda**, **Peru**, **Brazil, Mexico, and Colombia.** Noting that under the law only the Director of Criminal Prosecutions could prosecute criminal offenses under the Communications Act, and wishing to minimize any potential administrative delay or other inefficiencies, **Uganda's** NRA, UCC, petitioned the Director of Criminal Prosecutions for authority to prosecute criminal offenses under the Communications Act and won this authority. As a result, UCC compliance efforts in this area are less complex.

Recognizing that coordination with the judiciary is essential to successful enforcement of its telecom policies and laws, **Peru's** NRA, OSIPTEL, sponsored a 1-week training course in Lima for 30 – 40 judges at the end of 2003 covering highly specialized communications issues. In **Colombia** and **Brazil**'s ANATEL have also sponsored similar seminars for the judiciary. In 2003, **Mexico'**s COFETEL provided technical training for new judges on mobile quality regulations. Such outreach efforts serve to familiarize the judiciary with telecommunications issues, procedures, objectives, and personnel, and to expose the NRA to the court's procedures, objectives and views. As a result, inefficiencies are minimized, and the necessary coordination between these institutions on communications issues is optimized. *See* Rapporteur's Report: Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22 April 2004 (ITU-D/1/RGQ18/024(Rev.1)-E at 3.

- Develop and maintain a database or other appropriate record keeping system to track violators and violations for use in reporting to the government and the public, tracking industry trends, and in setting future penalties or sanctions.

IV. INDEPENDENT DECISION MAKING

A. Overview

Closely related to practice and procedure, indeed inherent therein, are the decision-making processes of the NRA. Because NRA-issued decisions that are considered to be independent are widely believed to be the most desirable, we discuss this element of enforcement practice and procedure separately in this section.

A key function of a regulatory authority is to make impartial and reasoned decisions for the benefit of the public. When an NRA has the freedom and ability to render a decision that: (i) is based on all relevant facts, (ii) applies and implements the appropriate law, policy, or regulation, and (iii) is free of undue pressure from political entities, powerful incumbents, or others having a stake in the outcome, it can be said that the decisions the NRA makes are independent. In short, an impartial decision is an independent decision.

Public awareness of the independent nature of NRA decisions bolsters both the NRA's credibility and the telecommunications sector as a whole. A pattern of independent decisions are highly likely to inspire confidence in the sector and therefore encourage private investment, both domestic and foreign. Public awareness that an NRA's decisions are independent may be attained by publishing decisions that clearly and succinctly describe the reasons for the outcome, including how the law, policy or regulation was applied to the facts or circumstances presented.

In the context of regulatory decision making procedures, a number of principles have been presented (and acknowledged in the statutes of many countries) that aim to promote predictability, clarity, and consistency.[89] Chief among these for purposes of facilitating independent decisions are the principles of transparency and public participation.

A transparent process is first of all, one that is open.[90] Fortunately, with the growing popularity of the Internet, many regulators now make their processes transparent by publishing public notices and consultation documents on their website. As a result, regulators are now better able to convey information on a proposed decision to all interested parties.[91]

Procedures that facilitate transparency also encourage public participation. By presenting a proposed rule to the public before it takes effect, and inviting open discussion and active participation in the decision-making process, public trust in the integrity of the decision is increased and valuable public input on challenging issues is obtained.[92] Public and private sector participation in the decision making process allows an opportunity for those who will be most

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89 *See e.g.,* Final Report on ITU-D Question 8/1: "Establishment of an independent regulatory body" Document 1/204(Rev.1)-E, [www.itu.int/ITU-D/study_groups/SGP_1998-2002/SG1/Documents/2001/204Rev1E.doc] November 7, 2001 at pp 16 - 17 discussing principles for regulatory decision making: transparency; timeliness; monitoring; private sector participation/public involvement.

90 *See Federal Communications Commission, Connecting the Globe: A Regulator's Guide to Building a Global Information Community,* [http://www.fcc.gov/connectglobe/sec1.html], June 1999 at I -2.

91 *See,* Final Report on ITU-D Question 8/1: "Establishment of an independent regulatory body" Document 1/204(Rev.1)-E, November 7, 2001 at 16.

92 *See Federal Communications Commission, Connecting the Globe: A Regulator's Guide to Building a Global Information Community,* [http://www.fcc.gov/connectglobe/sec1.html], June 1999 at I -3.

affected by the decision to assist in its formulation.[93] Transparent processes that involve the public and make them aware of the impartiality and of a decision facilitate independent decision by a NRA.

B. Country Examples

Bhutan's Telecommunications Act of 1999 explicitly states that "regulation of the …sector shall be carried out independently of the operation of telecommunication systems and the provision of telecommunication services." In addition, facilitating transparency, the Act also provides that any direction, regulation, guideline, or code of practice issued in accordance with the Act shall be: (i) adopted and published in such manner as the Director considers appropriate to inform the parties affected; and (ii) placed on the Register of Regulations, Licenses and Orders maintained by the BCA. The Act also gives BCA broad powers to establish advisory bodies to provide the Director with advice on exercise, performance and discharge of the Director's duties, functions and powers under the Act, thereby providing another avenue for receiving input from the public in addition to the administrative processes and hearing already specified in the law.[94]

Uganda's UCC has endeavored to increase public participation in the regulatory process through a series of workshops and seminars organized on various issues, and held during the formation stage of policies under consideration for adoption by the UCC.[95] This facilitates transparency and makes possible broad public input in advance of a policy decision by the UCC.

C. Challenges Identified

The following lists the general challenges to independent decision making reportedly faced by NRA's:

- Politicians, courts, and local administrative authorities sometimes take actions that affect or delay the NRA enforcement process.

- Although the NRA is required to consult with the public on significant issues, the Minister may issue directives without public consultation, which the NRA must then implement. In such cases, the value of public consultation may be lost.

D. Draft Guidelines: Independent Decision Making

- Design transparent procedures that enable the NRA to render and publish a decision that considers all relevant facts and law.
- Identify and institute internal and external procedures to facilitate impartial decision making.
- Revise current procedures, if necessary, to implement a process designed to reach impartial decisions that include public participation.

V. SANCTIONS and PENALTIES

A. Overview

Having established authority to act, determined culpability through a fair, expeditious, and transparent process, and rendered an independent decision on the matter, the regulatory authority is now in a position to impose a sanction. The issue is how to determine the appropriate penalty. In

93 *See,* Final Report on ITU-D Question 8/1: "Establishment of an independent regulatory body" Document 1/204(Rev.1)-E, November 7, 2001 at 16.

94 Contribution of Bhutan to ITU-D Question 18/1, April 2004 at 2 – 3.

95 Addendum to UCC Contribution to ITU-D Question 18/1 (January 2004) at 3.

this section, we will explore guidelines that may enable administrations to select sanctions that reflect their unique values and objectives.

As a general matter, people often obey laws that embody the social norms. Public law enforcement also may be able to reinforce social norms and thereby indirectly contribute to effective enforcement.[96] That said, however, there will be a critical gain above which individuals will commit a harmful act and below which they will be deterred. The critical gain is determined by the probability of detection, the level of sanctions, and the standard for imposing liability.[97]

Assuming an enforcement authority wishes to employ a fault-based standard for culpability (as opposed to strict liability) [98] it has been suggested that an optimal policy is to set the fault standard equal to the harm, and the fine at a level that achieves compliance with that standard.[99]

In determining the sanction to impose, a regulator should consider the severity of the harm, the cost of enforcement, the probability of detection, and whether the offender is risk-averse or risk neutral. In general, sanctions should rise with the actual or the expected level of severity of harm up to a maximum,[100] and should reflect enforcement costs. This is because when an individual or corporate entity commits a harmful act, society must not only bear the immediate harm…but also, if detected, the cost of imposing the fine. Costs associated with imposing a fine may include investigation and prosecution (at the end of which a fine is imposed only in some cases.) Together that is the expected total social cost of the act.[101]

When the probability of detection of a harmful act is not certain or is variable, high sanctions may be optimal. The optimal fine is the maximum in this circumstance if individuals are risk-neutral in wealth. When individuals are risk averse, however, the optimal sanction may be lower.[102] When the probability of detection of a harmful act is taken as fixed, the optimal fine is the harm divided by the probability of detection, because this results in an expected fine equal to the harm. Risk aversion of injurers should usually lower the level of the fine.[103]

It is also generally desirable for the structure of enforcement to encourage self-reporting. Self-reporting can be induced by lowering the sanction for violators who disclose their own infractions.

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96 *See generally* "The Economic Theory of Public Enforcement of Law," Mitchell Polinsku, Steven Shavell, Working Paper 6993, National Bureau of Economic Research Cambridge, MA, March 1999 at 43.

97 *See Id*. at 7.

98 Fault-based liability may be preferable to strict liability when individuals are risk averse: fault-based liability can deter harm-creating conduct without imposing risk on risk-averse individuals, whereas under strict liability, all individuals who commit the harmful act bear the risk of being fined. *Id.* at 13. On the one hand, fault based liability is more difficult to administer. [T]o apply fault based liability, the enforcement authority must have more information than under strict liability: it must be able to calculate optimal behavior to determine the fault standard, and it must ascertain whether the fault standard was met. Under strict liability, the authority need only determine harm. Additionally, strict liability encourages better decisions by injurers regarding their level of participation in harm-creating activities. On the other hand, fault-based liability will result in fewer enforcement actions than strict liability and thereby save enforcement costs: injurers who clearly were not at fault presumably will not be prosecuted under fault-based liability, but they will be under strict liability. *Id*. An advantage of fault based liability over strict liability is that sanctions that are costly to impose are imposed less often. *Id*. at 42.

99 *Id* at 12.

100 *Id*. at pp 30 and 44.

101 See generally Id. at 22 - 23.

102 See *generally Id.* at 41.

103 *Id*.

Moreover, the reward for self-reporting can be made small enough (just below what it would be if not reported) that deterrence is only negligibly reduced. Self-reporting lowers enforcement costs, reduces the risk of harm, and may allow harm to be mitigated.[104]

Setting a fine that represents a percentage of the offending service provider's revenues may permit regulators to discipline market players without seriously undermining small, non-dominant operators.[105]

Some NRA's use revenues collected from sanctioned violators to advance universal access/service goals. In **Peru**, for example, fines collected for violations are deposited in OSIPTEL's universal service fund, where they are used to fund network development in rural areas.[106] The **Dominican Republic** also uses revenues obtained from fines for connectivity projects in communities with more than 200 inhabitants. Some of these projects use solar energy and include telemedicine and video conference applications. Other countries, e.g., **Ecuador**, invest revenues received from sanctions imposed in telecommunications equipment or disburse them to the police force to help defray the cost of investigations.[107]

B. Country Examples

In the **United States**, it is Congress' explicit intention that forfeitures (or fines) serve as a "meaningful sanction to the wrongdoers and an effective deterrent to others."[108] Accordingly, section 503 of the Communications Act sets forth maximum forfeiture amounts for violations by licensees or regulates in three categories: (1) broadcasters and cable operators, (2) common carriers, and (3) other licensees, entities and members of the public (not covered by the other categories). In addition, section 503 (b)(2) (D) of the Communications Act requires the FCC to take into account mitigating factors – "the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require."[109] The FCC therefore uses the adjustment factors to assess the forfeiture amount in light of all relevant facts.

The FCC's Forfeiture Policy Statement, CI Docket No 95-6, FCC 97-218 (July 1997) contains base amounts to guide the determinations of forfeiture liability amounts for specific violations of the Act and the Commission's rules. The base amount specified in the guidelines is the starting point in assessing a fine. That fine may be decreased below the base amount or increased to the statutory

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104 *Id*. at 35 – 36. In August 2000 for example, the **New Zealand** Commerce Commission released its new leniency policy in which the Commission, in its discretion, will be lenient if a party cooperates and provides information prior to an investigation being initiated. OECD Report at 5. In practice, a similar policy of leniency in such circumstances is also employed by the FCC in the **United States**.

105 See "Trends in Telecommunication Reform 2002," International Telecommunication Union at 49.

106 Rapporteur's Report: Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22 April 2004 (ITU-D/1/RGQ18/024(Rev.1)-E at 3.

107 Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22, April 2004 (Discussion); ANATEL/ITU BDT Seminar on Enforcement Practices, Rio de Janeiro, 19-20, April 2004. (Discussion).

108 *See In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Docket No. 95-6, FCC 97-218 at 11 *citing* Omnibus Budget Reconciliation Act of 1989, H.R. Conf. Rep. 386, 101st Cong. 1st Sess., 434 (1989). Furthermore, the Debt Collection Improvement Act of 1996 (DCIA) Pub. L. No 104-134, Section 31001, 110 Stat. 1321 (1996) requires that civil monetary penalties assessed by the federal government, whether set by statutory maxima or specific dollar amounts as provided by federal law, be adjusted for inflation based on the formula outlined in the DCIA.

109 *See* 47 U.S.C Section 503. There is an upward adjustment factor under this section for repeated or continuous violations.

maximum when the adjustment criteria described in section 503(b)(2) (D) are considered.[110] Uniform base amounts cannot be higher than the statutory maxima for any service.[111]

The forfeiture guidelines are intended to address frequently recurring violations. They are not intended to be a complete or exhaustive list of violations.[112] Violations that are not listed in the guidelines are *not* considered to be unimportant or nonexistent. The FCC retains the discretion to impose forfeitures, including forfeitures for new violations of existing laws or regulations, or violations that arise from the use of new technologies or services.[113]

The FCC set the base forfeiture amount for misrepresentation at the statutory maximum for the particular type of service provided by the violator. Regardless of the factual circumstances of each case, misrepresentation to the FCC is always considered an egregious violation. Any entity or individual that engages in this type of behavior should expect to pay the highest forfeiture available to the service at issue. Indeed, the revocation of the license may also result from misrepresentation.[114] Finally, under 18 United States Code Section 1001, a respondent who makes knowing and willful misrepresentations or omissions may be subject to possible criminal penalties.[115]

Currently, fines for certain service providers are $130,000 per violation or per day of a continuing violation, with the amount for a continuing violation not to exceed 1.325 million.[116] United States FCC Chairman Michael Powell supports changes to the Communications Act that would give the FCC authority to impose substantially greater fines for significant violations and other procedural changes that would enable the Commission to prosecute wrong doers for the benefit of consumers. Specifically, fines for certain service providers would increase ten-fold to $1 million for a single violation, or for continuing violations, $1million per day up to a maximum of $10 million.

Pursuant to the **Tanzania** Communications Act, the Communication Operator (Licensing) Regulations and licenses, the Tanzania Communications Commission has the power to issue the following sanctions:

(i) Suspension or cancellation of a license;

(ii) Monetary fine not exceeding 1% of a postal or telecom operator's gross annual revenue;

(iii) Public apology by the licensee at its own costs for its infraction in a newspaper of general circulation in the area of services;

(iv) Outage credits;

110 *Id*. at 15.

111 *Id* at 12.

112 *Id*. at 23.

113 *Id*. at 24.

114 *See Id*. at 12 *citing* 47 U.S.C. Section 312(a)(1). *See below* also, at page 16, an example of Sri Lanka's penalty for an operator that provided false information to the regulator.

115 *See* USA contribution to ITU-D Question 18/1, September 2002, at 8.

116 *See* Amendment of Section 1.80(b) of the Commission's Rules, June 2004. *See also* USA contribution to ITU-D Question 18/1, September 2002, at 2 *citing Forfeiture Guidelines Report and Order* http://www.fcc.gov/eb/Orders/fcc99407.html and *Forfeiture Guidelines Reconsideration Order* (http://www.fcc.gov/eb/Orders/fcc99407.html).

(v) Any other appropriate sanction, e.g., cease order.[117]

In **Uganda**, the UCC employs monetary fines, letters of warning (UCC has determined that a violation has occurred) noting the violation and requiring compliance. Subsequently, the UCC will monitor or inspect to ensure compliance. In cases where equipment is unlawfully possessed, installed, connected, or operated, or where a licensee's equipment operates outside the specified technical limits the Uganda Communications Act gives the UCC the power to confiscate the equipment/apparatus.

The UCC may revoke a license, though this is reserved for most serious cases involving failure to adhere to repeated warnings or continuous or repeated violations. The UCC is also authorized to arbitrate disputes between operators and between operators and consumers. The agency may also commence criminal proceedings against any person or operator who has violated the law or relevant UCC regulations.[118] It is noteworthy that the UCC obtained this latter privilege as a result of its own initiative because under the Uganda Communications Act, only the Director of Criminal Prosecutions may prosecute a criminal offense. Recognizing both the specialized nature of offenses under the Act, and the efficiencies that would be gained by having delegated authority to carry out such prosecutions, the UCC petitioned the Director of Criminal Prosecutions for authority for the UCC's Legal Officer to prosecute criminal offenses committed under the Act This authority was subsequently granted, and now significantly facilitates the UCCs abilities to enforce compliance with the Act and license provisions.

In **Brazil,** penalties may only be imposed upon conclusion of a PADO[119] during which the nature and seriousness of a violation will be evaluated, along with any previous delinquency or repeated offenses.[120] There are five main penalties that may imposed by ANATEL: (i) warning; (ii) fine (in which economic condition of the offender and seriousness of harm is considered) not to exceed R$ 50,000 000.00 for each violation[121]; (iii) license revocation[122]; (iv) temporary suspension of license; and (v) unsuitability to contract with the Public Administration. In extreme cases, ANATEL may intervene in a concession, or in other cases it may require a violating entity to directly redress its users for losses it has caused. For cases of interference, operation of the offending equipment may be interrupted.[123]

Formerly, the question of damages or compensation were not issues that the **United Kingdom's** Oftel considered when resolving a dispute but were issues that must be pursued by complainants through the courts.[124] Currently, Section 392 of the Communications Act of 2003 requires Ofcom to prepare and publish a statement containing the guidelines they propose to follow in determining

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[117] TCC Contribution to ITU-D Question 18/1, September 2002, at 2.

[118] UCC Contribution to ITU-D Question 18/1, December 2002, at 3 - 4.

[119] PADO: Procedure for Verification of Non Compliance with Obligation.

[120] ANATEL contribution to ITU-D Question 18/1, March 12, 2003, at 5.

[121] Fifty million Reais equals nearly $14 million U.S. dollars at an exchange rate of US $1/R $3.6. *See Id.* at 6.

[122] Revocation may be imposed in the case of: (i) failure to pay the concession service fee after the established term has lapsed; (ii) failure to comply with the coverage established in the concession contract; (iii) transfer of the concession without ANATEL's prior consent (where required) and (iv) service provision that is systematically inappropriate or deficient. ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, at 6.

[123] *Id*. at 5 – 6.

[124] *See* Oftel/Radiocommunication Report at 13.

the amount of penalties imposed. These guidelines can be found at http://www.ofcom.org.uk/codes_guidelines/penalty_guidelines/?a=87101.

With regard to penalties, Law 24-96, **Morocco's** Law on Telecommunications, does not allow ANRT any other option than to invoke article 30. This article states that if a license holder fails to abide by the license conditions, ANRT can put that license holder on notice and give it 30 days to comply. If compliance is not forthcoming within that time frame, the "appropriate government authority may, at the proposal of the ANRT Director General, totally or partially suspend the license, temporarily suspend the license for up to one year, or permanently withdraw the license."[125]

According to Article 60 of **Lithuania's** Law on Telecommunications, a number of factors are considered when determining the sanction to be imposed: the scope of damage caused by the violation; its duration; extenuating or aggravating circumstances; income received as a result of the violation; and, when several parties are involved, the extent of influence of each party in the commission of the violation.[126] Normally, fines imposed by the Communications Regulatory Authority (CRA) must be paid to the state budget within three months of receiving the decision. Upon the violator's request (including its reasons) and CRA's approval, however, payment may be deferred for up to six months in whole or in part.[127] If a party fails to pay a fine, the CRA's decision will be submitted for enforcement to a court bailiff who will follow procedures specified in the Code of Civil Procedure.[128]

A fine can be imposed on a natural person only, so where a company has violated a law or regulation, the fine is imposed on the Chief Executive Officer.[129] A fine of up to 3 per cent of the annual turnover of telecommunications activities, but not more than 300,000 LT (approximately 85,000 EUR) will be imposed for violating conditions associated with the following: use of radio frequencies, telephone numbers, consumer's rights, universal service obligations, technical rules associated with radio or telecommunications terminal equipment, or decisions of the CRA disposing of a dispute. For repeated violations, a fine of up to 5 per cent of annual turnover for telecommunications activities will be imposed. If a party fails to comply with an order of the Communications Regulatory Authority to terminate illegal activity or to provide information, a fine amounting to 5,000 LT (equivalent to approximately 1400 EUR) will be imposed for each day the violation is committed.[130]

Egypt's Law on Telecommunications contains specific sanctions for violating its provisions. License violations (*e.g.*, conditions, technical quality regulations, performance standard measurements) carry a fine of not less than LE 20,000 and not more than LE 200,000.[131] Similar but potentially more severe penalties can be incurred for assigning frequency bandwidth license to a third party without NTRA's prior consent. In this case, the license will be cancelled, the party will be imprisoned for a minimum of 3 months, and payment of a fine of not less than LE 20,000 and

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[125] *See* "Effective Regulation: Case Study - Morocco," International Telecommunication Union , 2001, at 40.

[126] Contribution from Lithuania to ITU-D Question 18/1, March 10, 2003 at 7.

[127] *Id*. at 7 – 8.

[128] *Id.* at 8.

[129] *See Id*. at 1

[130] Prior to enactment of the new Law on Telecommunications, fines imposed under the Lithuanian Code of Administrative Offenses were very low -- in fact, they could not exceed 10,000 LTL (approx. 2800 EUR). *Id.* at 1.

[131] *See*, Arab Republic of Egypt, Law No. 10/2003 – Telecommunications Regulation, February 2003, Article 85.

not more than LE 100,000 will be required.[132] More severe penalties potentially apply in the case of causing interference, where the law proscribes imprisonment for a maximum of six months and payment of a fine of not less than LE 20,000 and not more than LE 50,000.[133] In general, the most severe penalties are provided for operating without a NTRA license (establishing infrastructure, operating a telecommunications network, providing telecom services, or transferring international calls in any way). For these violations, Egypt's new telecom law imposes a penalty of imprisonment between six months and five years, a fine of not less than LE 50,000 or more than LE 500,000, and confiscation of all equipment and connections used.[134]

In **Poland**, where an operator is violating the terms of its license, the regulator may levy a fine on the non compliant operator in an amount up to 3 percent of the operator's revenues for the past calendar year. The regulator may also fine the individual manager of the company an amount up to 300 percent of the manager's monthly salary.[135]

In **Portugal**, the regulator may impose fines on non-compliant operators of between 0.001 percent and 0.5 percent of the licensee's revenue in the prior year. In **Turkey**, non-compliant operators are subject to a fine of up to 3 percent of the operator's turnover.[136] The regulatory authority in **Kenya** can fine licensees a fine of KSHS 500,000 for each violation of the terms and conditions. This fine applies monthly until the violation ends.[137]

Descriptions of various infractions and the applicable sanctions can be found in **Bolivia**'s Regulations for Sanctions and Special Infraction of Regulatory Framework Procedures (D.S. 25950) and are adequately defined.[138] Bolivia also maintains a register of all those who have been sanctioned.[139]

In **Sri Lanka**, the telecommunication legislation and conditions in the licenses requires service providers to furnish information to the Telecommunications Regulatory Commission. The correct number of new connections, for example, must be reported by the Commission to the Parliament and the public. One landmark decision by the Sri Lankan Regulator required a service provider to pay compensation to the public for delayed telephone installations. Information provided to the regulator by the service provider in that instance was incorrect; moreover complaints from the public indicated that telephone connections claimed by the service provider were not actually in service. Therefore, Under Section 11 of the Sri Lanka Telecom Act of 1991 as amended by Act No. 27 of 1996, action was taken against a service provider for noncompliance with license conditions. The violator was ordered to pay 69 million Sri Lanka rupees to "the aggrieved public."[140]

C. Challenges Identified

The following lists generally those challenges reportedly faced by NRA's in the area of sanctions and penalties as they attempt to enforce their domestic telecommunications laws:

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[132] *Id.,* Article 74.

[133] *Id.,* Article 78.

[134] *Id.,* Article 72.

[135] *See* "Trends in Telecommunication Reform 2002" International Telecommunication Union, at 48, box 4.3.

[136] *Id*.

[137] *Id*. at 49.

[138] Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at p. 6.

[139] Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22, April 2004 (Discussion).

[140] Sri Lanka Regulatory Commission contribution to ITU-D Question 18/1(December 2002) at 2.

- No description of appropriate fines;

- Lack of intermediate or mid-range economic penalties;

- Statutory fines which are not high enough to provide sufficient deterrence.

- Infractions and applicable penalties are adequately identified in the law, however, difficulty is encountered in implementation, due to resistance to collaboration by judges and lack of support from law enforcement.

D. Draft Guidelines: Sanctions and Penalties

- Ensure that the NRA has authority to impose a wide range of penalties that include minor, mid range, and maximum.
- In determining a sanction, consider the severity of the harm, the probability of detection, the risk sensitivity of the offender, and the cost of enforcement.
- Risk aversion of injurers should usually lower the level of the fine.
- Establish and employ sanctions that are reasonable (proportional to the offense) and effective, but high enough to deter wrongdoing and achieve compliance with rules.
- Consider imposing a fine that exceeds the benefit the offender received from committing the offense.
- Considering the cost of enforcement, seek effective alternatives to fines (for example include specific requirements in license obligations)
- Consider providing a range of responses to violations including, *e.g.,* warning letters, fines, consent decrees, preventive cease and desist orders, license revocation, equipment seizure, damage awards, and referral for criminal prosecution.
- Consider employing the strictest penalties, including license revocation, for offenses involving misrepresentation.
- Consider developing, publishing, and employing specific but flexible guidelines for determining the severity of a sanction as these can deter violations of important rules and can assist the NRA in developing priorities among different violations.
- Consider encouraging self-reporting as this can lower enforcement costs, reduce the risk of harm, and may allow harm to be mitigated.
- Consider setting a fine that represents a percentage of the offender's revenues as this may permit regulators to discipline market players without seriously undermining small, non-dominant operators.
- Seek to minimize the cost of compliance with regulations for business users and consumers.

VI. GENDER and ENFORCEMENT

A. Overview

The ability to efficiently and adequately enforce domestic priorities may have the added benefit of favorably impacting certain segments of the population targeted by the state even more than others. For example, the ability to enforce universal service or rural connectivity goals may provide far reaching benefits to women in certain countries. Successfully enforcing rules that require delivery of communications services to rural communities can have a great impact on women in Africa, who for example, make up 70% of its rural population.[141]

Recognizing that the uneven distribution of technologies in societies - - the digital divide - - is reflected most sharply in the case of women, particularly in developing countries, and that this phenomenon is reinforced by socio-cultural, political, and economic systems, the failure to consider issues such as gender-based division of labor, cultural definitions of women's activities, women's paid and unpaid labor, and women's multiple roles from the early stages of technology diffusion may unwittingly generate unintended negative effects on women, and ICT may be developed and utilized in ways that do not reflect women's specific needs.[142]

Therefore, identifying and enforcing those domestic policies and rules that address women's access, use, and participation in information technology and communications can help reverse exiting inequalities to the benefit of the telecommunications sector and society as a whole.

For example, illiteracy limits women's access to text-based computer applications, because women make up nearly two-thirds of the 876 million people in the world who cannot read.[143] Enforcing universal access schemes that, for example, promote user-friendly technologies in the context of low literacy levels or for use by people who cannot read (e.g., human computer interfaces that are non-text based; "scribes" for dictation at telecenters) can address this disparity. An innovative example of this can be found in **Sri Lanka and Mongolia** where local populations have gained access to information on the Internet through community radio networks. The radio station uses facilitators to search the Internet for information sought by local communities, and broadcasts the information in their language.[144]

Enforcing gender aware policies to provide universal access, such as communications technology access points (e.g., telecenters, community centers, technology centers, etc) particularly those with access points located near places frequented by women (e.g., schools, markets, clinics) can have similar benefits.[145] Regulations that ensure that consumers, particularly women, (e.g., via consumer advocacy offices) are represented in the policy process, likewise can serve to facilitate gender balance.[146] Women's access to ICTs is also more dependent on the cost of telecommunications services. It is widely documented that there is a wage gap between women and men in most countries of the world.[147] Enforcing regulatory decisions that recognize wage/income gaps in terms of gender as well as geographic area can help implement domestic intentions to address this disparity.

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141 *Transforming Information & Communications Technologies for Gender Equality*, Gilliam M. Marcelle, Gender in Development Monograph Series # 9, May 2000 at 13.

142 *See, Is Information Technology Gender-Neutral?* Information and Communication Technologies for Development, an IDRC (Canada) Program Initiative, http://www.idrc.ca/pan/gender/ginftecgn.htm.

143 *See* "The Task Force on Gender Issues - A Catalyst for the Sustainable Development of Information and Communication Technologies (ICTs)" International Telecommunication Union Development Bureau (2001) at 4, *citing* United Nations, "The World's Women 2000, at 87 referencing UNESCO, Statistical Yearbook 1999. (Data refers to the population 15 years and over.)

144 *See Id* at 5 *citing* UNU/INTECH and UNIFEM and High Level Panel 2000; "Gender and Telecommunications: An Agenda for Policy" and at p. 26.

145 Id. at 21.

146 Id. at 25.

147 "Gender perspectives in Telecommunications Policy: A Curriculum Proposal", Sonia Nunes Jorge, ITU-BDT Task Force on Gender Issues, http://www.itu.int/ITU-D/gender/projects/GenderCurriculum.pdf (July 2000) at 4.

The World Bank has discovered that decreasing disparities between men and women results in faster economic growth.[148] The importance of ICT as a tool to promote the full participation of women in the information society has been widely recognized. As noted in the Declaration and Recommendations of the "The Forum on ICT and Gender: Optimizing Opportunities" (Kulala Lumper, Malaysia, 20-23 August 2003)[149] ICT offers immense possibilities to overcome women's isolation and enhance the participation of women in socio-economic and political development that will reduce poverty and improve the quality of life.[150] In some countries, women figure significantly in household spending providing an additional reason their inclusion in the information society will inure to the benefit of society as a whole. In the **United States** for example, women control a total of $5.2 trillion in spending (consumer and business) annually. Women purchase 83 percent of all household products and services, including cable and communications services. Women contribute and handle 75 percent of all household finances and make 53 percent of the investment decisions.[151] While these numbers may reflect significantly different economic circumstances, the role women play in household finances may be reflected proportionately elsewhere in the world.

B. Country Examples

In **South Africa**, the telecommunications legislation of 1996 includes provisions for the government to take steps to encourage the participation of women in all aspects of the industry.[152] Accordingly, the Department of Communications in South Africa has established tele-centers that are owned and managed by women, made Internet facilities available for women-based (and other) groups, and trained women's group's to use technologies, including ways to enhance their businesses and other activities. The Department also has committed to gender equality internally by developing a Gender Management System that sets targets for change in the Department and is lead by a gender specialist.[153]

In **Uganda's** rural areas, the majority of inhabitants are women. In 2001, the UCC adopted a Rural Communications Development Policy that broadly aims to support the development of communications infrastructure in rural Uganda while ensuring reasonable and affordable access to communication services to the public. Uganda's associated Rural Communications Development Fund has been used to establish access to basic communications services including "SMART" subsidies to private operators. Licenses issues by the UCC provide specific rollout obligations especially in rural areas. Additionally, the UCC has provided for gender equity and mainstreaming in its Strategic Plan.[154]

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[148] The Task Force on Gender Issues - - A Catalyst for the Sustainable Development of Information and Communication Technologies (ICTs) at 3.

[149] The Forum was hosted by the government of Malaysia, the Asia-Pacific Telecommunity (APT), the ITU, International Development Research Center (IDRC), the U.N. Educational Scientific, and Cultural Organization (UNESCO) and others.

[150] Contribution of Thales (France) to ITU-D Question 18/1 (October 20, 2003) at 1.

[151] *See, Catalyst Study on Women 2004* http://www.catalystwomen.org/publications/executive_summaries/financialperformance.pdf.

[152] *Id*. at 19.

[153] *See*, "The Task Force on Gender Issues - - A Catalyst for the Sustainable Development of Information and Communication Technologies (ICTs)," International Telecommunication Union Development Bureau, 2001 http://www.itu.int/ITU-D/gender/projects/reports/ICTReportSept3.pdf, at 7.

[154] Addendum to Contribution of Uganda to ITU-D Question 18/1 (January 2004) at 2.

Seventy nine percent of the people of **Bhutan** live in rural and remote areas. A priority of the Royal Government, Bhutan's rural access policy is aimed at encouraging access to the use of ICT by both genders, especially youth and women.[155]

C. Challenges identified

The following lists generally those challenges reportedly faced by NRA's in recognizing and enforcing telecom laws that impact gender:

- Low ICT literacy in women

- Lack of data to evaluate enforcement of telecom policy on gender: gender-disaggregated statistics on access and use, incomes, differential impact of costs and technology choice, and on employment and entrepreneurship.[156]

- Disparity in the distribution of ICT access facilities and services across the country;

- Assumptions that individuals from the public can or will benefit equally from policy decisions. (Policy decisions may have different impact on women and men.)

- Regulatory pricing policies usually consider affordable prices for services from a macro perspective, without noting the important micro-characteristics of the country.

D. Draft Guidelines: Gender and Enforcement

- Collect data to evaluate how enforcing telecom policy impacts gender: specifically, gender-disaggregated statistics on access and use, incomes, differential impact of costs and technology choice, and on employment and entrepreneurship.
- Identify those domestic policies and rules that, if enforced, would increase women's access, use, and participation in ICT and ICT services.
- Promote gender analysis as part of the policy process so that the policies described above can be identified.[157]
- Identify and enforce those policies and rules that are particularly geared toward the needs of women, e.g., rural build-out requirements, universal access targets, distance learning projects, reproductive health.

VII. ORGANIZATION AND RESOURCES

A. Overview

Regulators have generally found that a significant portion of their resources may be needed to support their enforcement efforts. To be sure, it is advisable for each NRA to be clear on its basic functions as determined by its national priorities and to assess and seek to attain the resources needed to adequately enforce regulations that implement those priorities.

Thus, at a minimum, it is advisable for the NRA's organizational structure to be configured so that it can support those basic functions that implement domestic priorities. By concentrating on creating an organizational structure and securing resources that enable the NRA to carry out those

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[155] Contribution of Bhutan to ITU-D Question 18/1, April 2004, at 4.

[156] See "Gender, Information technology and Developing Countries: An Analytic Study, Nancy Hafkin and Nancy Taggart, Academy for Educational Development (AED) for the USAID Office of Women in Development, Bureau for Global Programs, Field Support and Research" June 2001 at 72.

[157] International Telecommunication Union, "Gender Aware Guidelines for Policy making and Regulatory Agencies", http://www.itu.int/ITU-D/gender/projects/FinalGendAwrnGuidelns.pdf, at 2.

functions that implement what is most important in the domestic telecommunications sector, an NRA can allocate resources efficiently and accomplish important state goals.

In cases where resources are severely limited and do not cover all NRA functions implementing state priorities, such analysis can provide an objective basis for identifying which of an agency's remaining needs, given their relative importance, should be addressed by seeking additional resources. This information can form the basis for requesting additional allocations from state budgets or other sources.

B. Country Examples

Brazil's National Telecommunications Agency, ANATEL, is made up of a Board of Directors – its senior executive body, an Advisory Council, an Attorney-General Office, a Supervision Office, a Library, an Ombudsman, and six Technical Bureaus.[158] The general counsel for ANATEL is a member of the Federal Attorney's Office.[159] It is mainly funded by the Telecommunications Inspection Fund or FISTEL, and by payments made by operators for granting concessions and authorizations, and for using the radio frequency. ANATEL'S enforcement activities are performed by all of the agency's bureaus (except General Administration). Each Bureau is responsible for investigation and enforcement relative to services under its mandate. Additionally, the Radio Frequency and Inspection Bureau has regional units that conduct field investigation and enforcement activities. These agents carry out technical inspections either directly (on site) or indirectly (remote monitoring) of telecommunications, radio, and TV broadcasting stations.[160] ANATEL's staff was originally recruited from the ranks of the Telebrás System and the Ministry of Communications. Subsequently, it was completed with temporary employees hired for, at most, five years[161]. ANATEL spends almost half of its financial and human resources on monitoring and enforcement.[162]

In the **United States**, the FCC's Enforcement Bureau has four divisions and 25 field offices, with the following key responsibilities: Telecommunications Consumers; Market Disputes Resolution; Technical and Public Safety; Investigations and Hearings. Regional and Field Offices handle on-scene investigations, inspections and audits in response to complaints.

When creating this bureau, it was determined that a mix of regulatory and litigation experience, a mix of FCC veterans and newcomers, would provide the optimal staff to accomplish its mission. Currently the Bureau has approximately 330 employees,[163] or roughly one-sixth of the Commission's 1900 employees. When combined with the staff in the Consumer and Governmental Affairs Bureau handling informal consumer complaints, the number of employees specifically working to enforce FCC rules increases to 410 or roughly 20 percent of the Commission's staff. Of

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158 *See* ANATEL contribution to ITU-D Question 18/1, March 12, 2003, at 3. The six bureaus are: Public Utility Services, Private Services, Mass Communication Services, Radio Frequency and Inspection, Universal Access, and General Administration. *Id.* 158 *See*, ANATEL Contribution to ITU-D Question 18/1, July 30, 2003 at 3.

159 *See* ANATEL Contribution to ITU-D Question 18/1, July 30, 2003 at 3.

160 *See Id*. at pp. 3-5.

161 See, ANATEL Contribution to ITU-D Question 18/1, July 30, 2003 at 3.

162 *See* "Trends in Telecommunication Reform 2002" International Telecommunication Union, at 46.

163 *See* USA Contribution to ITU-D Question 18/1, September 2002, at 4-5.

this number, roughly 80 are women.[164] A greater number may be engaged in handling informal, consumer complaints.

In **Lithuania**, approximately 56 people in several divisions of the Communications Regulatory Authority (CRA) are involved in enforcement: the Inspection Section which has 4 employees; the Market Supervision Department where 14 employees work, the Telecommunications Department which has 14 employees, and the Radio communications control department, with a total of 24 employees in offices in Lithuania's five main cities. The main source of funding for the CRA comes from industry.[165]

New Zealand's Competition Commission in 2000 – 2001 had a total of 40 FTE's: 4 lawyers, 3 economists, 22 other professionals and 12 support staff. Out of its total annual budget of NZ $8.64 million (US$ 3.77 million), well over two-thirds or NZ $5.098 million (US $ 2.22 million) was spent for enforcement. As of June 30, 2001, 19.5 FTE's work on enforcement against anticompetitive practices; 16 work on merger review and enforcement; 5 are engaged in advocacy.[166]

Morocco's ANRT consists of the Director General (appointed by the King via royal decree) and seven directorates (technical, regulatory, information technology, evaluation and competition, administrative and financial, management control and internal audit, and a training institute: The national Institute for Postal and Telecommunication Studies (INPT). ANRT's work is organized in groups, around specific projects. A multidisciplinary team is set up which brings together people from several different divisions/units, under the direction of one or more project heads. Thus staff competencies are continually being reinforced and interdisciplinary capabilities are swiftly being developed, something that is difficult to achieve by other means.[167]

In 2001, ANRT had a staff of 389, including 200 employed at INPT, ANRT's training institute. Women accounted for 33.2% of the staff. At that time, no women held posts at the director level, but were well represented at the senior professional level.

There, two women held *chargée de mission* posts, one woman was a project head, one was a division chief, and nine were heads of services.[168] Out of the total number of employees, 3.34% were professionals previously employed by the Ministry of Communications, 5.9% were professionals previously employed by other state agencies, 14% were professionals previously employed by the incumbent operator, and 9.8% came from the private sector. Overall, 93.8% were career staff, 5.4% were short term employees, and fewer that 1% were contractual staff. Engineers formed the largest group of specialists, representing 18.5% of the professional staff, followed by technicians (7.2%), commerce specialists (6%), and lawyers and economists (5.4% respectively). On average, senior professionals were between 42 and 50 years old, while mid-level professionals were between 25 – 30 years old. Many professional staff received their training at INPT, which is affiliated with ANRT. The main communication tool is the agency's intranet, which provides staff with easy, effective access to information on ANRT's projects.[169]

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164 Of these, roughly 7 have administrative management duties. Additionally, 29 women provide clerical support to the Enforcement Bureau.

165 *See* Contribution from Lithuania to ITU-D Question 18/1, March 10, 2003 at 2.

166 OEDC Report at 8-9.

167 *See* "Effective Regulation: Case Study - Morocco," International Telecommunication Union, 2001 at pp. 21 – 22.

168 *Id.* at 25 and note 16.

169 *Id.* at 26.

The **Bhutan** Communications Authority (BCA) is headed by a Director and is comprised of four sections: Telecommunications, Radio communications, Media and Post, and General Matters. All employees, including the Director, are civil servants. BCA receives its annual budget via an appropriation from the Ministry of Finance. The 1999 Telecommunications Act permits the use of fees and other charges payable to BCA for performing its functions under the Act for this purpose as well.[170]

Zimbabwe's POTRAZ, which became operational in 2001, is funded by the fees and charges from the licenses it issues. Most of its staff members began service in 2003

C. Challenges Identified

The following lists generally those organizational challenges reportedly faced by NRA's as they attempt to enforce their domestic telecommunications laws:

- Inadequate technical capacity;

- Insufficient number of staff responsible for enforcement and compliance;

- Lack of spectrum management and radio monitoring systems.

- Acquiring and maintaining sufficient personnel to monitor small operators' compliance with the radio frequency rules.

- Lack of a separate, specialized section for delivery of enforcement functions;

- Limited trained human resources, especially in economic and legal fields;

- High risk of losing trained and skilled employees.

- Multi-sectoral NRA's need to take into account other market sectors (e.g., water, electricity, gas) strains resources.

D. Draft Guidelines: Organization and Resources Required

- In devising its organizational structure to enforce telecom law and policy, it is advisable for an NRA to:

C. Know national and regional priorities;

D. Assess and seek resources needed to enforce regulations that implement national priorities; and

E. design the organization so that it can support activities that implement national priorities.

- The NRA is encouraged to seek human, technical and financial resources needed to enforce regulations that implement the country's national telecommunications priorities.
- Hire and retain multidisciplinary experts (legal, economic, technical).
    a. Employ interdisciplinary teams for competency reinforcement and skill development;
- Consider, if possible, allocating a significant portion of the NRA's resources to enforcement efforts.
- Consider dedicating separate staff for enforcement efforts.
- Target internal training to enhance the capacity of the authority's staff to address consumer, market competition, and technical issues.

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[170] Contribution of Bhutan to ITU-D Question 18/1, April 2004, at 1.

ANNEX A – SUMMARY OF GUIDELINES

I. ENFORCEMENT POWERS - LEGISLATION

- Ensure harmony between the constitution, legislation, and administrative powers. Identify change as necessary.
- Ensure that the telecom law provides sufficient power, authority, and financial resources to the NRA for it to impartially, swiftly, and transparently carry out the will of the legislature.
- Ensure that the law contains clear and unambiguous language describing the jurisdiction of the NRA and, where appropriate, other interested state agencies
- Ensure that the law is promulgated clearly, transparently, and precisely. Avoid technical terms that are not understandable by the public or that may be unclear before a reviewing court.
- Describe the objectives and rationale of promulgated laws to induce enforcement and compliance by all parties, including enforcement agents of the state.
- Ensure that consumers, operators, and service providers have recourse at the regulatory agency.
- Ensure jurisdiction over service providers who may not be licensed (e.g., ISPs)
- Ensure that the enabling law/telecom legislation provides the NRA with a wide range of penalties to include those appropriate for minor, mid range, and maximum offenses.

II. ENFORCEMENT PRACTICE & PROCESS

- Develop and publish procedures for the NRA's internal operations and its external public functions that reflect fairness, speed, efficiency and transparency goals
- Design transparent procedures that enable the NRA to render and publish a decision that considers all relevant facts and law.
- Follow rules and laws; observe precedent.
- Include the consumer/user point of view in NRA deliberations and decisions.
- To assist in obtaining information necessary to evaluate compliance with laws, policies or regulations, adopt procedures for treating confidential or commercially sensitive information provided by operators, service providers, or other licensees that will protect the sensitive nature of the information.
- Identify areas where the actions of other interested state authorities (e.g., courts, local representatives, administrative authorities) frequently or significantly affect NRA enforcement processes. Where feasible and appropriate, develop a plan for communication, coordination, and cooperation with the goal of facilitating equitable and speedy resolution of violations.[171]

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[171] Good examples of this approach include actions taken by **Uganda**, **Peru**, **Brazil, Mexico, and Colombia.** Noting that under the law only the Director of Criminal Prosecutions could prosecute criminal offenses under the Communications Act, and wishing to minimize any potential administrative delay or other inefficiencies, **Uganda's** NRA, UCC, petitioned the Director of Criminal Prosecutions for authority to prosecute criminal offenses under the Communications Act and won this authority. As a result, UCC compliance efforts in this area are less complex.

- Consider employing a variety of tools for investigation to include letters of inquiry, on-site inspections, and subpoenas.
- Insofar as possible, use technology to facilitate speedy but deliberative decision-making, and subsequent publication of these decisions.
- Place decisions and comments on the web.
- To compensate for limited staff and resources, consider placing the burden to produce information needed by the NRA upon service providers/licensees. Make this information public so that competitors and consumers can notify the NRA if they believe the information is inaccurate or otherwise flawed.
- To assist the NRA in gathering information from regulatees and for receiving complaints from consumers, consider publishing a standard format for each.
- To assist the NRA in gathering information to render a decision on r license applications or other line processing work, prepare a standardized work sheet for staff to ensure that all issues have been reviewed and relevant rules complied with.
- Develop and maintain a database or other appropriate record keeping system to track violators and violations for use in reporting to the government and the public, tracking industry trends, and in setting future penalties or sanctions.

III. INDEPENDENT DECISION MAKING

- Design transparent procedures that enable the NRA to render and publish a decision that considers all relevant facts and law.
- Identify and institute internal and external procedures to facilitate impartial decision making.
- Revise current procedures, if necessary, to implement a process designed to reach impartial decisions that include public participation.

IV. SANCTIONS and PENALTIES

- Ensure that the NRA has authority to impose a wide range of penalties that include minor, mid range, and maximum.
- In determining a sanction, consider the severity of the harm, the probability of detection, the risk sensitivity of the offender, and the cost of enforcement.
- Risk aversion of injurers should usually lower the level of the fine.
- Establish and employ sanctions that are reasonable (proportional to the offense) and effective, but high enough to deter wrongdoing and achieve compliance with rules.

Recognizing that coordination with the judiciary is essential to successful enforcement of its telecom policies and laws, **Peru's** NRA, OSIPTEL, sponsored a 1-week training course in Lima for 30 – 40 judges at the end of 2003 covering highly specialized communications issues. In **Colombia** and **Brazil**'s ANATEL have also sponsored similar seminars for the judiciary. In 2003, **Mexico's** COFETEL provided technical training for new judges on mobile quality regulations. Such outreach efforts serve to familiarize the judiciary with telecommunications issues, procedures, objectives, and personnel, and to expose the NRA to the court's procedures, objectives and views. As a result, inefficiencies are minimized, and the necessary coordination between these institutions on communications issues is optimized. *See* Rapporteur's Report: Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22 April 2004 (ITU-D/1/RGQ18/024(Rev.1)-E at 3.

- Consider imposing a fine that exceeds the benefit the offender received from committing the offense.
- Considering the cost of enforcement, seek effective alternatives to fines (for example include specific requirements in license obligations)
- Consider providing a range of responses to violations including, *e.g.,* warning letters, fines, consent decrees, preventive cease and desist orders, license revocation, equipment seizure, damage awards, and referral for criminal prosecution.
- Consider employing the strictest penalties, including license revocation, for offenses involving misrepresentation.
- Consider developing, publishing, and employing specific but flexible guidelines for determining the severity of a sanction as these can deter violations of important rules and can assist the NRA in developing priorities among different violations.
- Consider encouraging self-reporting as this can lower enforcement costs, reduce the risk of harm, and may allow harm to be mitigated.
- Consider setting a fine that represents a percentage of the offender's revenues as this may permit regulators to discipline market players without seriously undermining small, non-dominant operators.
- Seek to minimize the cost of compliance with regulations for business users and consumers.

V. GENDER AND ENFORCEMENT

- Collect data to evaluate how enforcing telecom policy impacts gender: specifically, gender-disaggregated statistics on access and use, incomes, differential impact of costs and technology choice, and on employment and entrepreneurship.
- Identify those domestic policies and rules that, if enforced, would increase women's access, use, and participation in ICT and ICT services.
- Promote gender analysis as part of the policy process so that the policies described above can be identified.[172]
- Identify and enforce those policies and rules that are particularly geared toward the needs of women, e.g., rural build-out requirements, universal access targets, distance learning projects, reproductive health.

VI ORGANIZATION AND RESOURCES

- In devising its organizational structure to enforce telecom law and policy, it is advisable for an NRA to:

F. Know national and regional priorities;

G. Assess and seek resources needed to enforce regulations that implement national priorities; and

H. design the organization so that it can support activities that implement national priorities.

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[172] International Telecommunication Union, "Gender Aware Guidelines for Policy making and Regulatory Agencies", http://www.itu.int/ITU-D/gender/projects/FinalGendAwrnGuidelns.pdf, at 2.

- The NRA is encouraged to seek human, technical and financial resources needed to enforce regulations that implement the country's national telecommunications priorities.
- Hire and retain multidisciplinary experts (legal, economic, technical).
  b. Employ interdisciplinary teams for competency reinforcement and skill development;
- Consider, if possible, allocating a significant portion of the NRA's resources to enforcement efforts.
- Consider dedicating separate staff for enforcement efforts.
- Target internal training to enhance the capacity of the authority's staff to address consumer, market competition, and technical issues.

ANNEX B - COMMON ENFORCEMENT CHALLENGES

Among the possible range of issues that represent challenges for an NRA to enforce, a number stand out as recurring: interconnection, spectrum issues, internet issues, consumer/user and privacy issues, network quality and security issues, and tariffs. While we do not attempt in this paper to offer guidelines on these issues, here we summarize the information provided by Member States regarding challenges faced and solutions successfully implemented in these areas by their NRA's. Solutions are italicized and appear in bold type. Contributions for this section were provided by Bahamas, Bolivia, and Côte d'Ivoire.

A. Interconnection

Bolivia:

- Operators of established networks resist facilitating access to disaggregated elements of the network, specifically access to the local loop. There are no specific "norms" that define the conditions for immediate and opportune access to the local loop.

- It is not possible to reliably determine the price or costs associated with support services for disaggregated elements of the network.

- Interconnection charges in the operator's offers are high for the fixed network and low in the mobile network compared with international levels. ***To solve this problem, the Superintendence has attempted to use the initial interconnection charges established in the concession contracts when the regulatory system first began.***[173]

- in some cases, operators do not pay interconnection charges to each other according to schedule. Rules or other requirements governing this circumstance are not required to be contained in the interconnection agreements or in the basic interconnection proposals. ***To address this situation, on request of the operators, the Superintendence established an alternative procedure called "Avenimiento" or "Goodwill agreements." Currently, however, some object to this intervention and the Superintendence is working on modifications to the interconnection regulations to address the objections***[174]

Bahamas:

- Although the Telecommunications Act and the license issued requires unbundling, these provisions have not yet been invoked. The dominant provider's network is not unbundled.

- Cost information is lacking.

- There is no competition in voice telephony services.[175]

Côte d'Ivoire:

- Law No. 95-526 (July 7, 1995) of the telecommunications code contains no provisions on interconnection. Issues of interconnection regulation, particularly disputes related to rates must be sought in the Licensing Agreement and specifications signed by the State of Cote d'Ivoire and Cote d'Ivoire Telecom on February 3, 1997. ***As of May 28, 2004 a bill to amend the above law with an enforcement decree on interconnection is under consideration.***

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[173] Contribution of Bolivia to ITU-D question 18/1, May 4, 2004 at p. 3.

[174] Id. at 4.

[175] Contribution of Bahamas to ITU-D Question 18/1, May 4, 2004 at p. 2.

B. Spectrum Issues

Bolivia:

- Illegal use of electromagnetic spectrum has become an important problem especially in the case of private networks and radio transmitter services. ***In response, spectrum monitoring is performed along with suspension of unauthorized emissions and seizure of equipment, if warranted. Additionally, at the Superintendence's proposal, Law No. 2342 was approved which requires that financial resources needed for covering spectrum monitoring and control costs be taken from what is collected for assignment and use of the electromagnetic frequencies.***[176]

Bahamas:

- The dominant telephony provider was also the spectrum regulator.

- There are no records of assignments or spectrum use for the dominant provider. Smaller communities (w/ high concentration of transient boaters) use marine frequencies for non-marine use.[177]

Côte d'Ivoire:

- The regulator's monitoring personnel are unable to obtain access to international institutions' premises.

- Lack of appropriate or modern equipment to monitor interference. Tenders have been issued to acquire the necessary equipment.[178]

C. Internet Issues

Bolivia:

- The main problem faced is voice traffic over ISP provided cyber cafes without concessions for providing long distance services to the public.[179]

- The regime in which Internet Services are provided does not establish service quality levels, in spite of the general principle established by "norms" that services must be provided punctually, efficiently, and with good quality. ***Consultants have been contracted to define quality standards for Internet services. The regulator is also working on modifying the telecommunications law and Internet use regulations as the general rules of the Internet are considered to be insufficient.***[180]

Bahamas:

- It is difficult for ISPs to obtain competitive rates because telecom operators also provide internet access along with their telecom or broadcasting services - - and so are competitors with the ISPs. (There is no competition in voice telephony services in the Bahamas.)[181]

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176 Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at p. 4.

177 Contribution of Bahamas to ITU-D Question 18/1, May 4, 2004 at p. 2.

178 Contribution of Côte d'Ivoire to ITU-D Question 18/1, May 28, 2004 at 2.

179 Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at pp. 4-5.

180 Id. at 5.

181 Contribution of Bahamas to ITU-D Question 18/1, May 4, 2004 at p. 2.

Côte d'Ivoire:

- Two challenges identified: regulating IP telephony services and monitoring internet telephony [used] for business purposes.

D. Consumer Issues

Bolivia:

- Though Public service providers are obliged to publish their rates for the services they offer, this practice is insufficient because "providers lack a client-oriented culture which translates into insufficient information dissemination both for normal [standard] rates and for promotions. Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at p. 5

-The lack of consumer education about rights and privileges is also noted as a challenge, as well as lack of understanding of a consumer culture in competitive markets with free and unrestricted access to services. ***Consumer [second-stage] complaints[182] have become one of the Superintendence's priorities. Accordingly, the unit of consumer protection and defense has been reinforced; the Superintendence has prepared guidelines for operator's promotions and publicity which will be submitted for public consultation; it also launched a consumer information campaign, and they also employ the good will agreement as an informal means of addressing complaints. Formerly submission of the complaint to the Superintendence would have resulted in untimely delays, but this problem has been addressed by the goodwill agreement method as part of an informal, conciliation process.[183]***

Bahamas:

- Laws are targeted to business interests, not to consumers. There is no cohesive or strong consumer advocacy voice in the country.[184]

Côte d'Ivoire:

- Côte d'Ivoire notes that challenges reside in both the consumer-regulator relationship and in the consumer-operator relationship. Generally consumer's complaints are about operators who are slow to process requests, about rates and invoices, vague clauses in contracts, and lack of consumer information on how the services provided function.

Côte d'Ivoire's regulatory authority made consumer protection a part of telecommunications regulation by establishing a consumer relations organization (the complaints and disputes service) and (ii) a dispute settlement procedure and arbitration board.[185] Under the rules of procedures for the settlement of disputes, the complaints and disputes service investigates complaints and requests that users address to the regulator. Among other things, it examines the contracts operators offer to consumers and the procedures set up to handle complaints with a view to proposing any changes required.[186] The regulator also provides assistance and

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182 Customers must deal with the operators first, and only if the customer is unsatisfied with the outcome may a complaint be presented to the Telecommunications Superintendence.

183 Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at p. 5

184 Contribution of Bahamas to ITU-D Question 18/1, May 4, 2004 at p. 2.

185 Contribution of Côte d'Ivoire to ITU-D Question 18/1, May 28, 2004 at 2.

186 Id. at 2-3.

advice to consumer groups to help them carry out consumer protection activities.[187] The country reports that both operator/consumer and regulator/consumer relations have improved.

D. Network Security Issues

Bolivia:

- Oversight costs are excessively high. ***There are general principles regarding protection of communications privacy in the norms for voice communications network security, and operators are obliged to report annually the measures they are adopting to ensure network security. Security measures related to data networks are being prepared in the context of a project on Internet regulation.***[188]

F. Tariffs

Bolivia:

- price cap regulation is employed. Challenges include defining the initial price cap or limit, including determining the productivity factor. ***Benchmarking was used to determine the above and they are working on preparing systems that will allow the regulator to capture the necessary information for this purpose in the future.***[189]

Bahamas:

- Only telecommunications licensees declared to be dominant in certain markets are subject to tariff controls. The licensees are not accustomed to cost-based accounting. Cross-subsidization of services may be occurring.[190]

Côte d'Ivoire:

- interconnection rates between operators and for certain services such as Internet access are challenges. ***In arbitrating disputes relating to tariff issues, ATCI enforces the provisions of the operator's terms of reference. Decisions of ATCI, the regulator, may be appealed to the Conseil des Télécommunications de Côte d'Ivoire (CTCI).***[191]

[187] Id. at 3.

[188] Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004 at 5.

[189] Id. at 6.

[190] Contribution of Bahamas to ITU-D Question 18/1, May 4, 2004 at p. 2.

[191] Contribution of Côte d'Ivoire to ITU-D Question 18/1, May 28, 2004 at 3.

ANNEX C - INDEX OF COUNTRY EXAMPLES

PAGE

{Based on original, English version: will be added later}