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**DISCUSSION PAPER ON THE USE OF ALTERNATIVE DISPUTE
RESOLUTION TECHNIQUES IN THE TELECOM SECTOR**

DRAFT FOR DISCUSSION PURPOSES ONLY

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Table of Contents

I.	Introduction.....	1
II.	New Institutional Architectures and Dispute Resolution Mechanisms: An Introduction.....	6
III.	ADR defined	9
IV.	Factors Favoring New Institutional Mechanisms in Developed Markets.....	19
	1. Flexibility to Deal with Range of Bodies of Law:.....	19
	2. Flexibility to Deal with Converging Industry Sectors and Broadening Spectrum of Issues	22
	3. Flexibility to Allow Rapidly Evolving Competitive Markets.....	25
V.	Factors Favoring New Institutional Mechanisms in Less Developed Institutional Settings.....	28
	1. Providing a Flexible Means of Introducing International Experience and Standards	28
	2. Access to Expertise and Know how.....	29
	3. Independence and Industry Orientation.....	30
	4. Competing Concerns Relating to Confidentiality and Transparency	31
	5. Opportunities to Create a “Virtual” Forum for Dispute Resolution and Consensus Building	32
	6. Creating “Case Studies” and a New Body of Jurisprudence	33
	7. Enhancing Institutional Credibility and Access to Capital Markets	34
	8. Facilitating Resolution of “Mixed Disputes” Involving and Commercial and Public Policy Dimensions	35
VI.	Incentives for Introducing Alternative Dispute Resolution Mechanisms	37
	1. Situations without Developed Regulatory Mechanisms	37
	2. Other Options for Providing Momentum to Alternative Dispute Resolution Techniques	41
VII.	Role of Governmental Authorities in Alternative Dispute Resolution Mechanisms	50
	1. Some Central Questions for Policymakers	50
	2. Institutional Architectures for Consensus Building and Dispute Resolution.....	52
	3. Creating New Consultative Mechanisms	54
	4. Some Relevant International Experience: India and Australia	55
	5. Viability and Enforceability of Outcomes of Private Dispute Resolution and Consensus Building Mechanisms	58
VIII.	Structure of the Process: Institutional Context	60
	1. Launching Institutional Reform.....	60
	2. Follow up Discussion Sessions in an Informal Setting.....	62
	3. Institutional Framework	62
	4. Access to Domestic and International Resources	63
	5. Partnering among Governmental Institutions and other Participants	64
	6. Focus on Process	66
IX.	Next Steps: Options for Moving Ahead with the Exploratory Process	66
X.	Conclusions	69

I. Introduction

The conventional wisdom has long been that the key to success in opening telecommunications markets to competition is to establish independent regulatory bodies along the lines of the Federal Communications Commission in the United States, Oftel (soon to be Ofcom) in the United Kingdom, the CRTC in Canada, and the *Autorité de Régulation des Télécommunications* in France. Determined efforts by international agencies like the ITU, the World Bank, and more recently the World Trade Organization have encouraged development of new administrative mechanisms to oversee an industry sector of global significance. Even though the industry is now in a period of consolidation and financial distress, reform in the sector is still relevant, perhaps even more so now than ever. The regulatory bodies established for the telecommunications sector are, moreover, rapidly evolving, as institutional mandates are widened and refocused to deal with the convergence of the telecommunications, media, and information services sectors, as well as with significant changes in competitive conditions in the industry. This may lead toward more emphasis on competition law and policy and a general focus on dispute resolution, rather than an *ex ante* telecom sector specific approach. In addition, there is increased attention focused on how regulation can create favorable conditions for, or potential serious impediments to, investment flows essential for the development of the sector. Thus, the attention of policymakers is being directed, with renewed vigor, at how regulatory mechanisms and regulatory policy might contribute toward revitalizing a sector gravely set back by extraordinarily adverse conditions in financial markets.

This discussion paper is not intended to challenge conventional wisdom about the benefits of independent regulatory agencies. Instead, it is intended to focus on the importance of using well tried flexible processes and procedures of private sector dispute resolution, as opposed to simply refining and replicating the traditional public law administrative model for dispute resolution. The traditional administrative model has many drawbacks and disadvantages that have long been clear in highly developed economic and institutional settings such as the United States, where lawyers and litigation before regulatory agencies and courts are hallmarks of the competitive landscape. Canada too has developed a telecom sector with many similar market characteristics, including a role for lawyers and regulatory specialists as a mandarin class. North America's preoccupation with formal administrative procedures and judicial entanglement in the regulatory process in an increasingly competitive sector seems to be gaining a foothold in parts of the European market—certainly in Brussels, the European capital of telecom regulation, and in Germany, where regulatory initiatives are increasingly tied up in extended administrative proceedings and review in the courts. But is it inevitable—or desirable—that the spread of new regulatory institutions should create greater opportunities for legal specialists in telecommunications law and generate an increasing volume of cases in the courts?

We think not. There are alternative dispute resolution procedures that can be used in both developed and developing markets and institutional settings. This paper is intended to start a discussion among key market participants and governmental decision makers. Its objective is not merely to describe new possibilities, but to

stimulate an exchange of ideas about new approaches as well as new dispute resolution and consensus building “undertakings”. A central thrust of this paper is to identify concrete steps and specific situations where new approaches and initiatives might be useful or promising.

We believe that this discussion about the use of private dispute resolution and consensus building mechanisms is relevant to policymakers in both developed and developing countries and in countries of markedly different sizes. In fact, it may be easier to introduce new and innovative administrative mechanisms where regulatory institutions are only at an early stage of development than where existing regulatory frameworks and the rules of engagement among industry participants and government authorities are well-established. Indeed, less developed markets may benefit particularly from private dispute resolution mechanisms and consensus building mechanisms since such countries tend also to have weak official mechanisms – particularly with respect to dispute resolution, since courts are often over-burdened, judges lack relevant experience and corruption may distort outcomes. In the case of more developed markets and regulatory regimes, it is likely to be a huge challenge to mobilize industry and political support for the idea that there are alternatives to competing in regulating markets without utilizing every opportunity to exhaust all available administrative and judicial procedures and remedies. The small size and limited resources of many countries is not likely to foreclose the use of new consultative procedures but may instead provide an impetus for sharing of resources and capabilities for dispute resolution and consensus building on a regional basis.

We recognize that effective steps toward increased reliance on private dispute resolution and consensus building require policymakers to pursue a radically different approach to regulation. They will need to focus on how policies can be structured to encourage voluntary compliance by industry participants and minimize direct intervention by government officials. It is axiomatic that the greater proclivity a regulator demonstrates to become involved in resolving industry controversies the more likely it will become that such a regulator will be asked to intervene. The regulators’ role becomes, in this sense, self-perpetuating each intervention justifying, and creating new demand for, future interventions.

Such new approaches to regulation are likely to depend critically on trying out some new ideas about “regulatory process” and on creating “virtual fora” that provide industry participants and government authorities with information, case studies, benchmarking experience, and other resources to facilitate a consultative process. We examine in this paper how such virtual fora --and information-related resources, case studies, a new “virtual jurisprudence-- might be developed. This process is likely to be long and raise numerous challenges. We envision this paper merely as a starting point for such a process of exploration.

This examination, undertaken with the support of the Office of General Counsel of the World Bank, is part of a wider effort to explore new institutional approaches and innovations in legal process that might have broader applicability. It is certainly likely that institutional and procedural mechanisms utilized in the

telecommunications sector could have relevance in other regulated industries or other fields of administrative decision making. Our focus here is on the telecommunications and related media and information services sectors. Our approach is to take as a starting point some specific institutional settings where new procedures and mechanisms might apply. In this respect, we are taking advantage of a concurrent undertaking with which we have been involved on behalf of the World Bank, that is intended to identify some of the key issues now facing the telecommunications sector in Russia. Importantly, we do not intend to limit our scope to the unique challenges of the Russian institutional and market setting. Instead, we draw on additional experience, including in some highly developed markets in the European Union to examine the prospects for a modern institutional framework for the future regulation of converging telecom, media, and Internet sectors. This would be based on new technological and competitive realities and on the potential to build “virtual institutions” that would not necessarily have specific geographic venues and which focus on “process innovation” rather than organigrams, staffing charts, and bricks and mortar.

II. New Institutional Architectures and Dispute Resolution Mechanisms: An Introduction

In general, we intend to delineate new procedures or mechanisms through which key industry participants could either seek consensus or agreement on new commercial or business arrangements, or could actually resolve specific disputes over an existing or new commercial arrangement. These mechanisms would involve direct structured negotiations among key parties, with assistance and involvement of outside mediators asked to facilitate consensus or agreement within the parameters determined in the legal framework. These outside participants might be government officials, or private entities designated by the parties involved, with or without participation by government officials.

These negotiations would not be in a formal sense part of a “governmental proceeding”, though they might take place within the context of such a proceeding. The outcome might, or might not, result in any specific agreements. It might only be possible to identify topics for discussion or agreed statements of fact. Agreements might be privately enforceable, though in certain circumstances agreements might be subject to review, adoption, and ultimately enforcement by governmental authorities. The range of potential cases to which this paper is addressed is potentially very diverse.

The scope of negotiations could concern commercial relationships among key industry players, such as agreements over interconnection of different types of networks. Others might include governmental authorities as participants, especially to the extent that the policies or positions of governmental authorities are relevant to a dispute among industry players. In some circumstances, a dispute might arise from the position, policies, or practices of governmental authorities.

Core issues for resolution might involve interpretation of existing bodies of regulation, proposals for modifications of such regulations, or for new regulations. The jurisdictional basis for discussions might be exclusively the legislative or regulatory framework for the telecommunications sector. Other bodies of legal precedent, *ie.* common law jurisprudence or provisions of various media laws or of competition law, might also be of relevance to the negotiations. Plainly, the jurisdictional scope of discussions is one of the important threshold topics to be addressed in structuring alternative decision-making mechanisms. Likewise, of potential importance is the experience and identity of individuals or institutions involved in the process as facilitators, as well as the availability of other resources or experts that might be brought to bear in the course of deliberations.

In short, many critical aspects of an alternative process would be established in the context of an institutional tabula rasa. Such a process would be shaped by and driven by its participants, *ie.* industry participants as well as by governmental authorities whose potential roles are discussed in further detail below. The proposed institutional mechanisms would involve a kind of “deconstruction” of conventional regulatory procedures and process. That, at least, is the starting point for this discussion. Inevitably, however, procedures and conventions for consensus building and dispute resolution will evolve into more concrete forms in particular institutional settings and in response to specific types of disputes.

III. ADR defined

Alternative dispute resolution or “ADR” may be defined as a range of procedures that serve as alternatives to litigation through the Courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party. In some definitions, and more commonly, it excludes not only litigation, but all forms of adjudication. Most practitioners, certainly in the common law world, would exclude arbitration from a strict definition of ADR, though some consider it an alternative in the sense that it is a system of adjudication according to law existing parallel to adjudication through the Courts. In some jurisdictions (for example in Western Europe) arbitration is of immense importance in the operation of the civil justice system. It has a very long history and for centuries has been widely used for the settlement of a variety of disputes between States, State entities and private parties, and between private parties. It is clear that since the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Agreements and Awards, there has been an unprecedented growth in the use of arbitration for the settlement of disputes in international trade and investment.

The sources of the law of arbitration in international commercial disputes are international conventions such as New York in 1958 and the European Convention of 1961, international model laws and model rules, institutional rules such as those of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) and municipal legislation, with some jurisdictions such as France, having separate statutes for international and domestic disputes. To those formal sources must be added an increasing body of academic writing including reports of

awards to which practitioners look for guidance though not for precedence. One development of particular importance is the use of arbitration in bilateral investment treaties. A decade or so ago, some five hundred such treaties had been concluded: today, the figure is nearer two thousand. These treaties usually provide for arbitration sometimes by reference to recognized institutions such as the ICC and International Center for the Settlement of Investment Disputes (ICSID), the latter established by the World Bank pursuant to the Washington Convention of 1965.

Arbitration has also assumed an important public law role in dispute resolution in North America by virtue of Chapter 11 of NAFTA (the North American Free Trade Agreement). There are many who believe that the essential character of commercial and civil arbitration is changing, becoming perhaps less a matter of private law than of public law. Be that as it may, it is plain that in many jurisdictions and internationally, arbitration is regarded as the primary means of dispute resolution for international trade, business and investment disputes. Plainly, it has an important role to play in the development of procedures for telecom industry dispute resolution.

There is no single philosophy underpinning ADR, though it may be said that all ADR practitioners would accept the proposition that it is more beneficial for parties to resolve their disputes by negotiated agreement rather than through contentious proceedings. It was a fundamental precept of Roman law that it was in the interests of the State to see an end to litigation. The common experience is that ADR processes preserve and enhance personal and business relationships that might otherwise be damaged by the adversarial process. However, ADR is not limited to disputes involving relationships, it being widely used for issues where there is no relationship between the parties at all.

Advocates of ADR contend that its primary function is to produce settlements and to save costs. Other practitioners see ADR as essentially an approach to problem solving in order to find a solution which conveys benefits on all parties. The procedures can stand in their own right as an alternative to adjudication; or they can compliment the procedures of litigation or arbitration by trying to produce settlements within those systems. But above all its advantage is flexibility. Diverse kinds of disputes involving varying circumstances and parties with a range of differing possible concerns and interests may well require different kinds of procedures and approaches. Simply being able to offer adjudication, frequently including explicit or implicit elements of contest and threat, is increasingly felt by many practitioners to be inadequate.

A convenient description of the advantages of ADR and its characteristics appears in a leading English textbook¹ on the subject:

¹ Brown and Marriott ADR Principles & Practice 2nd Edition Nov 1999, Sweet & Maxwell

“ADR compliments litigation and other adjudicatory forms, providing processes which can either stand in their own right or be used as an adjunct to adjudication. This enables practitioners to select procedures (adjudicatory or consensual) appropriate to individual disputes. ADR gives parties more power and greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance co-operation and to be conducive to the preservation of relationships. Effective impartial third party intercession can help to overcome blocks to settlement, and by expediting and facilitating resolution it can save costs and avoid the delays and risks of litigation. Sometimes, but not necessarily, it can help to heal or provide the conditions for healing underlying conflicts between parties. ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others.”

It is sometimes said that ADR procedures can be divided into three primary categories, negotiation, mediation and adjudication, but what is important is to view dispute resolution processes as a continuum. At the one end is negotiation, at the other end litigation. Each of the three primary processes of negotiation, mediation and adjudication can be used in its own right without adaptation. In addition, by drawing elements from any combination from the primary processes and tailoring them, an ADR practitioner can design a permutation of procedures and approaches which fits all the nuances of the parties’ needs and circumstances without being constrained by prescribed rules. For example, it may be appropriate for a practitioner to have informal discussions with the parties, arrange for certain factual or technical questions to be investigated, and then allow each of them to present their respective cases informally to one another before resuming further attempts at settlement through facilitative or evaluative mediation. Any permutation of requirements can be met by devising a sequence of procedures specifically designed for that dispute and those parties. Experience in the field of civil and commercial mediation in the last twenty years has produced various hybrid forms comprised of adjudicatory processes on the one hand, and consensual processes on the other.

But the fundamental key to all consensual ADR activity is negotiation, of which there are various theories. Important for the practitioner of ADR is the distinction between the problem solving approach to negotiation seeking to increase the gains for all parties, sometimes called “integrative” bargaining. The other approach is often described as “competitive” and sometimes called “positional” “distributive” or “distributional” bargaining where there are limited resources for distribution and the more that one party achieves, the less there will be for the other.

One very important example of the problem solving approach to negotiation is the concept of partnering which has developed in some areas, notably the construction industry. Partnering is a voluntary non-binding collaborative process which focuses on solving common problems between different groups, working on the same project or sharing a common purpose. This is done in various ways, such as by developing teams with common goals, establishing and implementing project action plans and establishing conflict resolution machinery. It is primarily a means of dispute prevention rather than dispute resolution. The results where partnering has been adopted within the construction industry have been quite dramatic, with a significant improvement in the implementation of major infrastructure projects and a marked reduction in the number of disputes.

The increasing use of mediation in civil and commercial disputes in many jurisdictions and also internationally, has led to an increasing number of dispute resolution institutions offering mediation and other forms of ADR as part of their services, both domestically and internationally. Certainly in the developed jurisdictions, both civil and common law, there is no shortage of experienced institutions and practitioners able to conduct ADR processes in a wide range of private and public law disputes. Some jurisdictions, such as the United States and Australia, have incorporated ADR procedures as part of public administration. Many jurisdictions when reforming their arbitration law or their systems of Court proceedings, have incorporated mediation and other forms of ADR. Perhaps the high water mark of this process has been reached in the United States with the enactment of the Alternative Dispute Resolution Act of 1998 which requires each Federal District Court to authorize the use of ADR in all civil cases and to establish its own ADR programme. In India, Australia, Hong Kong and Singapore, arbitration legislation also provides for the use of conciliation, all with the view to the promotion of settlement. It has long been standard practice in the Courts of many civil law jurisdictions such as, for example, Germany and Switzerland, for Judges to take an active role in trying to bring the parties to settlement, often by proposing terms which seem to the Judge appropriate. There is a long tradition in China of combining in one process, litigation (or arbitration) with the mediation of settlement.

It is clear that we live in a time of rapid change in our approach to civil and commercial dispute resolution. Thus, the commercial pressures which have promoted international commercial arbitration are as powerful now as at any time since the New York Convention in 1958; indeed, perhaps more so. The growth of trade in the single unified market of the European Union already outstrips the capacity of the Court systems within the Union to cope with commercial disputes, both domestic and international, and serves to emphasise the weakness of those jurisdictions which lack efficient and experienced Commercial Court arbitration systems. The extraordinary developments in Eastern Europe as countries seek to transfer from planned economies to market economies also increases the need for efficient resolution of domestic and international commercial dispute. Investment in emerging markets and the growth of bilateral investment treaties and trading blocs such as NAFTA, make it imperative to devise efficient and inexpensive dispute resolution systems for commercial disputes.

It is clear that practitioners will have to be prepared to embrace new ideas of procedure and practice if the proper objectives of the commercial community, both domestically and internationally are to be satisfied.

It is, we believe, clear that the rapid expansion of the global telecoms market with its emphasis on innovative and fast changing technology, needs to be accompanied by dispute resolution procedures which are fast and flexible and suited to the disputes which the global telecom industry will produce. Indeed, as emphasized above, we believe that adverse financial market conditions now facing the telecom sector provide impetus for a far-reaching reappraisal of current regulatory policies and arrangements in the sector.

We envisage that several broad categories of disputes could be addressed by private dispute resolution procedures:

- among key industry participants over terms and conditions of commercial relationships including interconnection of networks with involvement by government or regulatory officials;
- among telecom operators and a range of other service providers dependent on the telecom infrastructure including ISPs, information service providers, media companies, content providers, etc
- among one or more telecom operators and governmental authorities over the terms and conditions of licenses including any rights of exclusivity, obligations to provide services or infrastructure, policies with respect to pricing;
- among telecom operators or other service providers and governmental authorities at the local level responsible for access to rights of way and conduit as well as owners of real property where services are provided;
- among telecom operators and governmental and/or regulatory officials in one jurisdiction and their counterparts in other jurisdictions over any differences in regulatory treatment between or among jurisdictions, especially within a regional trading market such as the European Union
- among telecom operators and other service providers and the customers or users of such services.

These are merely some very general examples of potential disputes that might be resolved through the use of alternative dispute resolution procedures. Additional, more specific examples of potential dispute that might be subject to new dispute resolution procedures are woven throughout this discussion paper.

IV. Factors Favoring New Institutional Mechanisms in Developed Markets

As starting point for discussion, our focus will be on a generic and abstract model for consensus building procedures and alternative dispute resolution in order to identify some of the potential advantages of an unconventional approach to administrative decision making and adjudication. Some of the factors favoring novel mechanisms and approaches in developed markets are set forth below. Other factors that may have more significance in emerging markets are described in the next section of this discussion paper.

1. *Flexibility to Deal with Range of Bodies of Law:*

One of the potential advantages of informal consensus building and dispute resolution procedures is that the process can permit the consideration of a diverse range of applicable legal standards—both principles of telecommunications law and regulation as well as competition law. In some jurisdictions, the roles and responsibilities of regulatory bodies and competition authorities may be tightly compartmentalized. Industry players may be faced with the need to choose a regulatory as opposed to a competition law forum, or their choice of forum may be governed by relevant principles or procedures determining which forum must be accessed initially. These principles may determine whether relief must be sought first from a sector specific regulator or whether the jurisdiction of competition authorities is pre-empted altogether. Some regulatory bodies such as Ofcom have only recently been granted authority to apply or take into account the principles or criteria of competition law. Other agencies such as the FCC have long had a mandate to take into account relevant antitrust law principles and precedent even though such jurisdiction has seldom foreclosed an independent role and responsibilities for competition authorities. Nevertheless, jurisdictional disputes or concerns over overlapping jurisdiction have remained commonplace in the United States in cases involving mergers or acquisitions where the FCC and either the FTC or the Department of Justice have parallel jurisdictional claims. The Time Warner-AOL merger presented a significant case in which both the FCC and the FTC were required to confront whether the merged entity should provide third party access to high speed Internet access by means of cable modems. A controversy such as this provides a good example of a case where regulators and competition officials are required to address a common policy issue affecting not only the immediate parties to the merger, but a broader set of interested parties as well. It is, of course, far from clear that informal consultative procedures could have easily been utilized given that there is a well articulated legal framework involving divergent jurisdictional mandates of two regulatory agencies. Nevertheless, there were many common factual and policy issues facing the two agencies as well as the various parties interested in the impact and outcome of the merger. Thus, some initiatives cutting across the separate roles and responsibilities of the two concerned agencies might have identified some useful areas of consensus that might have expedited resolution of the issues presented by the merger.

One could also point to other controversies such as the decision by German competition authorities to block the acquisition of Deutsche Telekom's cable properties by Liberty Media. Such a controversy might have been addressed in a more

ad hoc, cross jurisdictional context and might have been resolved through a more open process of public consultation and tug and haul among interested parties. Such a process might have enabled policy makers to develop a more integrated perspective concerning how competition policy concerns relating to the acquisition might have better integrated with related regulatory concerns about how to reduce Deutsche Telekom's market power as a provider of broadband Internet access and encourage competition on a more sector-wide basis. A divestiture by Deutsche Telekom would have, in most any circumstances, had a favorable impact on the efforts of the German telecom regulator, RegTP, to promote competition and increase the availability of broadband services. However, it is not apparent to what extent these regulatory perspectives were taken into account by German competition authorities in their decision to disapprove the sale.

Undoubtedly there are other areas and issues where the intersection of regulatory and competition law concerns might be usefully integrated through an informal consultative mechanism. Not only may this be of advantage to the process of administrative and regulatory decision making, but such a mechanism may well relieve the tension between the proper role of the regulator and the resolution of disputes between private commercial concerns and Governments or Government Agencies.

2. *Flexibility to Deal with Converging Industry Sectors and Broadening Spectrum of Issues*

An informal consensus oriented and dispute resolution process may also add flexibility to meet an increasing range of potential legal and policy concerns relating to the vertical integration and operations of traditional telecom sector firms. The rapid development of Internet-related services has resulted in the diversification of telecom sector firms into traditional media as well as information services and electronic commerce activities. Such diversification gives rise not only to concerns about the interconnection or other service relationships between traditional regulated activities of a telecom operator and its unregulated new businesses. It also raises potential legal and regulatory questions about the direct operations of these unregulated activities and their impact on their relevant market segments, eg, in areas such as setting standards or protocols in unregulated market segments. Many of the latter issues may be beyond the ordinary jurisdictional reach of telecom regulatory frameworks and may involve areas which are not significantly regulated by commercial codes or other bodies of law. In areas such as data protection policies or commercial practices relating to new electronic services, it may be very useful to develop institutional mechanisms or platforms where key industry players can resolve disputes or set industry standards. Many of the potential areas of concern may be within a domain of activities which have traditionally been addressed by industry self-regulation. Informal consultative mechanisms may, however, establish new "institutional spaces" or grey areas for dealing with activities traditionally subject to regulation and those that are addressed only by industry self-regulation.

A focus on new processes and consultative mechanisms may assist in building public confidence in the accountability of business or commercial practices involving new electronic services without extending the traditional reach of regulation into new territory where government has limited time and resources to set the “codes” and “protocols” for important new internet-based services. One recent insightful account of the regulatory challenges presented by the Internet contrasted the role, in American terminology, of “east coast” and “west coast regulation”—the juxtaposition of traditional administrative regulation with “regulation” embedded in the software and firmware deriving the basic functionality of many new Internet-related e-services. Given the increasing impact of more illusive and technologically oriented aspects of “west coast” regulation, it may be useful to explore how new institutional structures centered around key industry players, with some involvement of public officials, can be created to promote the core concerns about public accountability underlying traditional regulation with respect to new types of electronic services.

It should also not be understated how complex classic regulatory concerns with hooking two networks together can become once interconnectivity depends on the inter-operability of software driven systems and embedded “intelligence” in networks, rather than merely physical interconnection of cables. For example, the unbundling of local loops requires very sophisticated intervention by regulators with respect to the operational architectures of complex telecom networks. This is also the case with the intermeshing of complex logistical systems for billing and ordering facilities that are maintained by large telecom operators today. In short, there is a sophistication to emerging regulatory issues that defies the capabilities of traditional public utility commissions designed to oversee rail, power, and gas lines installed in the last two centuries. God truly lives in the details of contemporary high tech regulatory issues which are increasingly beyond the resources and capabilities of the last century’s regulatory institutions including the ability to resolve disputes involving new technologies and services.

3. *Flexibility to Allow Rapidly Evolving Competitive Markets*

Another of the major objectives of an informal dispute resolution procedure would be to create new and better conditions for the rapid resolution of complex interconnection issues involved in opening competition in the provision of broadband Internet access. Such competition can be achieved by a variety of different measures including either through the unbundling of the capabilities of the local loops or through flexible commercial arrangements that enable third parties to order on a wholesale basis access capabilities provided by local network operators. These various initiatives involve complex pricing and operational issues, many of which may well have been resolved in other markets already opened to competition. Thus, there may be substantial scope for market opening initiatives to be taken on the basis of commercial negotiations which take as points of departure operational procedures and documentation developed in other liberalized markets. There may be no need to reinvent regulatory wheels if key industry parties can make use of international experience and benchmarks drawn from other markets.

In addition to the efficiency related benefits of relying on experience from other markets, there are also significant benefits from procedures that reduce the likelihood of protracted administrative proceedings and judicial review of administrative orders. Incumbent carriers may often find it advantageous to take full advantage of all available administrative and judicial procedures as part of their overall response to competition. Reliance on administrative and judicial safeguards can often be reasonably viewed by all participants in a competitive market as the only effective way to protect basic economic and financial interests in a litigation-driven regulatory environment. As is the case in many competitive or combative situations, resort to administrative remedies, like resort to violence, begets responses in kind. Adversarial conduct feeds on itself and becomes a market norm. Reliance on administrative and judicial process may increase commensurately as it becomes more and more a modus operandi in certain market environments.

There is much to be said for new procedures for dispute resolution that are essentially an extension of commercial negotiations among market players. Such procedures may ultimately lay the groundwork for potentially far-reaching changes from sector specific, ex ante regulation to a future regulatory regime based on post hoc enforcement on the basis of competition law. For many incumbent operators, such a transition away from a traditional utility regulation model would have highly beneficial consequences. Traditional utility regulation may have a tendency to linger on through institutional inertia even though significant changes in the market structure for retail voice services, as a result of growing penetration of mobile telephony and substitutability of mobile and fixed line services, might point toward a much less regulated environment in the future. More flexibility, less onerous regulatory arrangements are inevitably likely to provide a more favorable environment for raising future investment, especially in the very adverse financial market environment now facing the telecom sector.

The real question is how much and how effectively alternative dispute resolution procedures might force competitors to collaborate to find solutions to disputes, among providers of basic infrastructure and those dependent on that infrastructure. We intend to examine below various situations where cooperative behavior among market participants can be reinforced and ways in which resort to litigious behavior may be deterred. An analysis of the incentives for the use of alternative dispute resolution capabilities as well as the means for deterring litigious behavior is a critical part of this exploratory undertaking.

V. Factors Favoring New Institutional Mechanisms in Less Developed Institutional Settings

Some of the factors discussed above would very clearly seem to favor the introduction of new institutional mechanisms in developed institutional settings. Most of these same factors might also make such new mechanisms interesting to implement in less developed institutional settings. However, we believe that there are a number of factors that might especially militate in favor of the use of consultative and dispute resolution procedures in less developed institutional settings.

1. *Providing a Flexible Means of Introducing International Experience and Standards*

One of the primary benefits of informal consultative procedures is that they may facilitate the introduction of international experience and know-how into regulatory processes in emerging markets. New regulatory institutions in emerging markets may have a tendency to follow the *dirigiste* traditions of the government ministries from which new bodies might have been spawned. The practice and inclinations of such regulators may be to provide guidance and direction based on primarily domestic political or bureaucratic criteria. It may not be easy, moreover, to ensure that government officials have access to relevant international experience and benchmarks. A consultative process, however, would depend heavily on the resources of industry participants who may have, through strategic partners or investors, access to data or information relating to regulatory environments in international markets. The active involvement of industry players in the development of policies and evolving regulatory frameworks is likely to make such information and perspectives more readily available to regulatory policymakers. In addition, a consultative process might result in the retention by industry players or parties to a dispute of international experts who can provide basic data and information as well as facilitate the resolution of disputes. An ad hoc process allows ad hoc provisioning of resources and capabilities for dispute resolution.

2. *Access to Expertise and Know how*

Participants in ad hoc consensus building and dispute resolution procedures can retain on a flexible basis the specialized legal, financial or technical know-how that might be required to resolve the particular type of dispute or issue in question. Such a flexible framework effectively permits a kind of outsourcing of necessary resources for dispute resolution bypassing constraints that might be imposed by civil service pay scales hiring constraints, or budgetary limits. It will be critically important to examine how new mechanisms might be financed on an ongoing basis, ie. whether certain institutional capabilities are retained for a fixed period of time or whether expertise is retained on a case by case basis.

3. *Independence and Industry Orientation*

How to ensure the independence and accountability of new consultative and dispute resolution procedures will be a matter of pressing concern. Such mechanisms could easily come under the sway of industry stakeholders. On the other hand, the reliance of new mechanisms on the know-how and experience of industry participants together with independent third party experts in dispute mediation could also provide a potential counter-weight to concerns about potential conflicts arising on the part of government officials with direct or indirect corporate governance responsibilities for government-owned industry players. Concerns about public accountability of the process can be addressed through delineating very specific roles and responsibilities for government officials as participants or overseers of the new mechanisms.

4. *Competing Concerns Relating to Confidentiality and Transparency*

Any new mechanisms will need to address the need for confidentiality in the dispute resolution process as well as for substantial degrees of transparency where matters of public interest are involved. Significant matters in dispute are likely to involve confidential operational or marketing information of concern only to the immediate parties to a dispute. In this respect, confidentiality concerns must be fully respected to ensure credibility for the dispute resolution forum. At the same time, many issues in dispute or of concern to a number of key industry players or an industry sector will be subjects of intense public interest particularly on the part of consumers or other affected parties.

This problem is not new and many jurisdictions have developed as part of arbitration laws and practice, confidentiality rules and exceptions for public interest cases. In mediation on the other hand, it is generally accepted that the process, if it is to work, must be confidential.

It will therefore be of critical importance for there to be effective management of restrictions or flows of information of interest and relevance to third parties particularly where the public interest is engaged. But there is no need to reinvent the wheel given the policies and practices now being tested conventional domestic and international commercial arbitration.

5. *Opportunities to Create a “Virtual” Forum for Dispute Resolution and Consensus Building*

One of the reasons that a new decision making forum could be usefully structured as a “virtual forum” relying on the resources of the Internet would be to ensure the widest possible accessibility of information about agendas, timetables, participants, and background information relating to the activities of the forum. A virtual forum can also permit both observers and participants from geographically dispersed locations. We have discussed in further detail in Section IX below some of the structural issues involved in establishing a virtual forum. Such issues are also being advanced by various arbitration and dispute resolution bodies which are establishing online facilities: see e.g., the WIPO Online Dispute Resolution resource. There are also moves afoot in India to establish a virtual arbitration and mediation centre for large investment and infrastructure disputes.

6. *Creating “Case Studies” and a New Body of Jurisprudence*

Transparency also implies a strong commitment to recording and codifying the results of proceedings. However, as is discussed in greater detail elsewhere, we would hope that a new type of jurisprudence emerges which recognizes fully that innovative methods of adjudication and mediation can produce solutions by fair and flexible procedures which more conventional systems of enquiry and adjudication cannot do. As Lord Wilberforce remarked during the debate in Parliament on what became the English Arbitration Act 1996, procedural freedom and party autonomy

ought to enable arbitrators to develop their own law; and so it should be in the realm of telecom disputes. Thus, one of the important keys to the success of new consultative mechanism would be to develop methodologies for creating “case studies” and records of proceedings or for cataloguing relevant experience for the benefit of future parties using the dispute resolution forum or similar fora in other jurisdictions. Transparency in this respect will depend upon creating “networks” of process-oriented precedent that becomes the grist for future consultations or other discussions in other venues. The process of managing this network and interfacing information among other consultative institutions is a role of absolutely vital importance since as we have emphasized, consultative mechanisms will have leverage, and have the ability to make an impact, at a national level because of their international orientation.

7. *Enhancing Institutional Credibility and Access to Capital Markets*

The transparency of a national regulatory framework can often have a significant bearing on the ability of telecommunications operators and service providers effectively to access domestic and international capital markets. For example, the prospects for expeditious resolution of disputes over interconnection are likely to have a major bearing on investors’ confidence in the ability of new entrants to gain a market foothold and not be disadvantaged by abuse of an incumbent’s dominant market position.

In market settings where a state-owned monopoly is being opened to competition or has undergone a complex restructuring process in larger markets such as those in China, India, Brazil, or Russia, there may be a very significant number of issues that need to be resolved as a part of the transition process in the sector. As we shall discuss, the Russian telecommunications sector provides numerous examples of the complex issues potentially requiring concurrent and rapid resolution. Often in these circumstances, traditional regulatory bodies may not have been formed or may share sector-related responsibilities with an array of other governmental authorities. Where there is no strong tradition of identifying, assembling, and expeditiously resolving a cluster of issues key to a major sector-related transition process, regulatory uncertainty can impose a particularly heavy penalty on efforts to raise significant amounts of capital that may be required to successfully implement a restructuring process. We believe that a flexible approach to identifying and resolving issues, which provides a clear role for key market participants, might well accelerate the pace of sector restructuring.

8. *Facilitating Resolution of “Mixed Disputes” Involving and Commercial and Public Policy Dimensions*

Another potential advantage of a flexible and open-ended consultative process is that it might provide a framework for resolution of controversies including a mix of commercial or regulatory issues as well as politically sensitive or controversial issues. For example, there have been a number of situations where incumbent telecom operators have enjoyed exclusive rights conferred by longstanding concessions, but

where there are pressures to open markets consistent with international obligations relating to accession to the WTO or, in the case of some Central European countries, relating to accession to the European Union. A decision to shorten the duration of exclusive rights may have a wide range of regulatory repercussions including requirements to accelerate the rebalancing of historically distorted price structure or permit much more flexibility with respect to the regulation of local exchange prices. An incumbent operator, which may be required to face open competition more quickly than anticipated, may also seek relief from other existing regulatory obligations and arrangements including clarification of the government's rights and obligations as a shareholder. Many aspects of necessary changes in an overall legal and regulatory framework may have a very politically sensitive dimension. An informal dispute resolution process could permit the bundling of inter-related issues and the coordination of an overall package of proposals with expert input that could then be presented for high level political review and approval.

There are also many situations where a problem requiring an integrated approach to dispute resolution is made more difficult because of bureaucratic or jurisdictional divisions of responsibilities within a government. For example, proposals to introduce a new licensing regime for mobile services may be handled at cross purposes with efforts to resolve a closely related dispute between a current concession holder for mobile services for which new licenses are to be issued and the government as issuer of the licenses and concessions in question. Though there is no guarantee that flexible consultative and dispute resolution procedures could avoid potential jurisdictional clashes and poor coordination among disparate government ministries, it might be possible to use the flexibility inherent in new mechanisms to shape a process encompassing all affected interests and parties both in and outside of government.

VI. Incentives for Introducing Alternative Dispute Resolution Mechanisms

Whether or not new consensus building and dispute resolution mechanisms can be effectively established will depend on a complex array of factors relating to existing arrangements for handling disputes in the telecom sector. We discuss below situations where there is no established regulatory mechanism as well as those where there are highly developed institutional and regulatory environments. We have attempted to detail some initiatives that might be taken to encourage the adoption and more active utilization of new mechanisms in a variety of different settings.

1. Situations without Developed Regulatory Mechanisms

There may be significant potential to develop new regulatory mechanisms where there is no well developed regulatory infrastructure and no immediate prospect for establishing an independent regulatory agency. The current situation in Russia is an interesting case in point. At the present time, in Russia, responsibility for the telecommunications regulatory framework is essentially shared between the Ministry of Communications and the AntiMonopoly Commission which has exercised its authority primarily with respect to the oversight of pricing policies of fixed line

telephone companies and the review of the process of restructuring over eighty local operating companies into seven regional operating companies.

The current allocation of responsibilities between these two agencies would seem to militate against any immediate prospect for establishing a separate independent regulatory agency. Moreover, the relationship between the two agencies does not always appear to have been an easy one. One possible option open to Russian policymakers would thus be to encourage the negotiation of an inter-agency agreement that would establish an overall approach to dealing with a range of telecom sector regulatory issues. In this institutional context, it might prove to be very useful to have established an informal consultative and dispute resolution process with involvement of interested industry players. Both the Ministry of Communications and AntiMonopoly Commission could be involved in this dispute resolution process in addressing key sector issues.

Many of the key Russian industry players are well informed and actively involved in dealing with key operational issues relating to interconnection and other inter-carrier relationships. In Russia, a very dynamic relationship has evolved between the incumbent local telephone operating companies that are part of the Syvasinvest Group and a group of alternative service providers who with the backing of major Russian business and financial groups have been building overlay fixed line networks in the large metropolitan areas of Russia as well as extending mobile services on a nationwide basis. Increasingly, incumbent local telephone operating companies, which badly require new capital investment, and alternative service providers may find common ground as both competitors and collaborators. This web of potentially common and interwoven interests may contribute to an environment in which a wide spectrum of industry players is keen to have an opportunity to take a leading role in working out new business and operational relationships for the Russian telecom sector.

Thus, the combination of an institutional lacunae and potentially converging economic and business interests might well work in favor of new arrangements. In addition, the new mechanism might assist in making international experience and benchmarks more widely visible in the Russian market and in adding clarity and transparency for potential investors in the sector. The adoption of such mechanisms could also be assisted if such consensus building and dispute resolution mechanisms were deemed to be an important aspect of the process of accession to the WTO. Advocates of the WTO accession process in Russia could add their weight to the case for developing new institutional capabilities.

At the same time, any new dispute resolution mechanisms would significantly depend on the utilization of a Internet-based platform for a consensus building and dispute resolution process that could ensure access to key information-related resources and data bases as well as wide accessibility to the results of the process. The new mechanisms would thus be based on a new institutional framework, relying on Internet-related resources, that might well become an integral part of the Russian Government's overall E-Russia Program to modernize the Russian economy and

public sector. In addition, any new telecommunications legislation might provide a general mandate for the application of international experience and benchmarks relevant to the resolution of key issues facing the Russian telecom sector.

2. Other Options for Providing Momentum to Alternative Dispute Resolution Techniques

We understand that there are growing concerns in some EU countries including Germany about tendencies toward an increasingly litigious regulatory process. Regulatory and other officials concerned with economic and competition policy will, however, need to reach a consensus that increased reliance on private dispute resolution may be a better way to proceed than to accede to a proliferation of administrative and judicial litigation.

A number of initiatives might assist in building support for alternative approaches and mechanisms for dispute resolution.

First, national regulators may be able to take steps to establish new procedures that enable industry players to develop experience with consensus building and private dispute techniques. Areas or issues where new consultative mechanisms might be tried out on an experimental basis will need to be identified with some care. Experiments with new procedures can usefully be made visible to regulators and industry players in other countries; and successful efforts can be replicated. Indeed, initiatives in regulatory “greenfields” such as may be the case in Russia might prove to be of invaluable interest in countries relying on a conventional approach to regulation.

Thus, the flow of relevant experience and expertise may not always be one way from countries with developed regulatory traditions to those without them. Indeed, there might be great potential for “partnering” between regulatory agencies in the process of exploring new procedures and mechanisms. Established regulatory bodies may have a body of experience and benchmarks relevant to countries structuring new regulatory architectures which can in turn become laboratories for institutional innovation. It is possible, for example, to imagine that the RegTP in Germany might participate in an effort to establish a new regulatory mechanism in Russia by providing data and relevant experience and receiving in return valuable experience about innovative procedures and processes. It may also be potentially interesting and worthwhile for service providers and telecom operators from markets with “developed” regulatory frameworks to be involved in some aspects of evolving a new regulatory process in Russia. These service providers and telecom operators would add the benefit of their own operational experience to that of their Russian counterparts and might gain useful insights about the utility of new consensus building and dispute procedures and processes.

Partnering and resource sharing of this kind on the basis of mutual advantage may be a concept very worthwhile for the World Bank to advance. In the area of institutional innovation, the flows of benefits and experience might prove to be truly

two way in character and add new dynamism to future efforts to share institutional know-how and experience.

Resource sharing and exchange of know and experience will need to be very multi-lateral in scope. The challenge will be to establish “networks” among institutions engaged in process-related innovation. This will require a substantial effort to take full advantage of the potential of Internet-based platforms to share information about benchmarks and data as well as the benefits of procedural reform. The prospects for such exchanges are described more fully in Part below.

Regulators may be able to provide impetus to the use of new procedural reforms by encouraging regulated entities to introduce into their commercial agreements standard dispute resolution clauses which are tied into the development of new private dispute resolution capabilities on a sector-wide basis.

It may also be possible to introduce into standard form authorizations and licenses issued by a national regulator or licensing agency clauses that create obligations to make use of private dispute resolution mechanisms or to exhaust private dispute resolution capabilities before seeking formal regulatory relief.

Increasing reliance on private dispute resolution can, and should become a topic of prominence in ongoing policy discussions and as part of national debates about new telecom sector legislation. For example, a new package of regulatory initiatives has been adopted in the EU and must be incorporated into national law by July 2003. Though this legislative package does not explicitly address matters of procedural reform or process innovation, national discussions about new legislation could provide a timely forum for debate about the introduction of the new regulatory architectures as described in this paper. We have seen some evidence that discussions along these lines are beginning in Germany.

Among the options to be explored in the context of debates about new legislation might be the potential limitation of rights of judicial review of administrative action. New legislation might also include a mandate to explore ways to increase reliance upon consensus-building mechanisms and private dispute resolution. Such an initiative would be linked with a related effort to increase reliance upon relevant international experience and benchmarks. Industry parties would be encouraged to seek through good faith negotiated outcomes that were consistent with, or mirrored by, the results of similar market opening initiatives in other markets. Such broad guidelines would not provide detailed guidance with respect to specific regulatory outcomes and might reduce the likelihood that particular regulatory initiatives would become the subject of administrative or judicial review.

This type of general regulatory mandate might seem at first glance to favor the position of incumbent operators. There may, however, be ways to deter anticompetitive practices, and encourage more even handed behavior by incumbents, by imposing sanctions and penalties based on market participants’ behavior in the next consensus building and dispute resolution process. In other words, regulatory or

competition law-based monitoring of the consensus building or private dispute resolution process itself might be used to achieve fairer, more balanced outcomes. Regulation would focus on the conduct of the negotiation process itself. By influencing and shaping the process, regulation in broad terms would seek indirectly to influence outcomes. The leitmotif of “new style” regulation would be to proceed on the basis of the axiom that process can be outcome determinative. Instead of directing the order of play among industry players, regulators would act against process-related conduct and tactics impeding the free functioning of commercial negotiations. One of the key future roles of current regulatory officials may be to monitor the new “institutional space” created for negotiated dealings among industry players. Alternatively, the role of monitoring the conduct of the process could be shifted to competition authorities.

In the new institutional architecture, sanctions and penalties for abusive or domineering behavior in the conduct of consensus building or dispute resolution activities would be disproportionate to the economic or financial stakes involved in the course of commercial negotiations. One of the difficulties of the traditional regulatory process is that delay and misuse of administrative process can generate economic returns in excess of those generated by expeditious regulatory compliance or good faith commercial negotiations. Thus, one of the ways to deter abuse of administrative or judicial remedies is to raise the cost of resorting to such remedies. One option might be to impose disproportionate sanctions for what might be subsequently found to be abusive behavior. Far-reaching structural relief could be imposed. Civil or criminal sanctions might be imposed directly on responsible corporate officials and directors. Another remedy might be to impose on a losing party to an administrative appeal both the costs of the proceeding as well as an award of damages compensating the prevailing party for any economic benefits lost or deferred during the course of the proceeding. Regulation would, in short, focus on encouraging private dispute resolution and on deterring undue resort to litigation by identifying the economic costs or lost benefits resulting from the conduct of the litigation.

The foregoing discussion is based on the premise that industry participants are likely to have a surly and determined preference to continue in a thoroughly contentious and litigious regulatory environment.

However, the fact that weapons are available does not mean that they have to be utilized. The fact that regulatory lawyers are available for hire does not mean that they have to be retained. Decommissioning lawyers, and redirecting parties away from formal regulatory proceedings to informal dispute resolution procedures, can change the code of conduct and the behavior of players in the market. In this respect, the adoption of new process-related remedies should be viewed as more than an effort to supplement regulators’ powers. It should be pursued as part of a broader strategy to negotiate new codes of conduct for the market behavior.

The role of overseeing public officials might be focused less on intervening with respect to particular categories of expected regulatory behavior than on changing

the posture of industry players with respect to clusters of issues including, in particular, the use of regulatory process itself. Regulators might focus less on the need to intervene than on strategies that increase the likelihood that any need to intervene can be avoided.

Put in more general terms, the challenging public policy question is whether regulators, rule setters and law makers can find ways to behave that increase the likelihood that the application of regulation or legally enforceable norms will be unnecessary. As the tasks of the regulation become ever more complex and become, as we noted above, more closely intertwined with the design of codes and protocol beyond the easy grasp of regulators, legislators, or consumers, it may become ever more important to devise institutional structures and incentives that increase the likelihood that conduct that may not be required or compelled by government mandate will be “responsible” and “civil” conduct. It may ultimately be the case that important social and public interest goals can be better secured and protected through “responsible” or “good” behavior on the basis of expectations of collaboration with other participants in a market or a society, than on the basis of regulatory or legal compulsion.

When the resort to legal process becomes, as is the case in so many jurisdictions, counter-productive, unduly costly, impracticable, or simply no real guarantee of important values usually embedded in government-mandated rules or legislation, it then becomes of imperative importance to seek other more effective means of achieving such values. There are many who consider that to find alternative methods is now urgent and we believe that there are methods available which both safeguard the public interest and encourage acceptable modes of behavior in a market or a society thereby changing traditional patterns of conduct.

It may well be the case that new approaches to regulatory process have to be compelled through the structured use of incentives to adopt new initiatives and to move away from traditional regulatory conduct. However, it may equally be the case that parties can be convinced that there are mutual benefits in new codes of conduct with in greater reliance on self-restraints than on restraints imposed by the force of law or regulation. The acceptance of this view is not necessarily likely to be quick or self-evident to hardened warriors of today’s Hobbesian regulatory landscape. But a fresh approach to a “new civil order” in the field of regulation might generate its own appeal. Nevertheless, such an approach could only originate from far-reaching consultative discussions about future regulatory policies.

Such discussions would have to focus not merely on the mechanisms of the dispute resolution procedures themselves or the institutional architectures in which they might fit. They would have to address more basic reasons for new arrangements and examine fundamentally the role of legal process and legal institutions. Such an inquiry on basic questions could have potentially very intriguing implications that would make this exploratory exercise relevant to a wide range of other domains of legal relationships and frameworks.

VII. Role of Governmental Authorities in Alternative Dispute Resolution Mechanisms

1. Some Central Questions for Policymakers

A central question for policymakers concerns what role governmental authorities should have in structuring, conducting, or overseeing alternative dispute resolution. There are clearly issues of public policy involved to ensure that policies laid down by Government are followed, that consumers are protected and that safeguards are in place to ensure that the charlatan and the incompetent are kept at a distance. These problems are not new. They have arisen, for example, whenever private sector dispute processes have been allowed to function independently of the Courts and also, for that matter, as adjunct to them. Various solutions have been adopted in different jurisdictions. Thus, some jurisdictions have embraced self-regulation, leaving it to professional organizations to educate, control and discipline their members who offer dispute resolution services. Other jurisdictions have vested ultimate supervisory power in the Courts as, for example, in the vetting of the procedural conduct of arbitrations and the setting aside or remission of arbitral awards. Plainly, questions of jurisdiction, competence, experience and ethical standards, have to be addressed, but there is ample experience upon which to base workable solutions

The problems have also arisen in the context of investment in emerging countries, in order to develop major economic and natural resources. Regimes for regulation and protection of foreign investment have of necessity involved striking the balance between private and public interest, and delineating the powers and functions of regulators, the courts and private consensual dispute resolution. Solutions are emerging from which lessons can already be learned which are of significance for telecom regulation and development.

2. Institutional Architectures for Consensus Building and Dispute Resolution

The basic institutional architecture of new consensus building and dispute resolution procedures, and especially the relationship of such processes with the traditional roles of regulators are matters of fundamental importance. However, the exact role of public authorities in any new institutional arrangements could take many different forms and requires careful assessment.

In some situations, as suggested above, government authorities may be direct participants in consultative discussions or a dispute resolution process as a direct player or party. At other times, the role may be as an occasional onlooker or monitor of the process of dealings among private parties. As we have indicated, there are important policy issues to be addressed in ensuring the integrity of the decision making process itself.

The basic venue for private dispute resolution does not necessarily have to be a public sector institution or be a formal part of a regulatory proceeding. Discussions could be conducted entirely under the auspices of arbitral institutions such as international organizations in the public sector (such as the ITU, WIPO, the WTO, or even the ICSID) or the private sector (such as the Center for Dispute Resolution or the ICC). There is no shortage of experienced and well regarded organizations offering dispute resolution services nor of individuals, certainly in those jurisdictions with a long tradition and history of private sector dispute resolution. Thus, in countries such as the United States, in Western Europe, the common law world generally, and in civil law jurisdictions as well there has long been recognition as a matter of policy of the importance of arbitration and ADR as an essential part, not only of a domestic civil justice system, but international trade, commerce and investment. Predictably, institutions have responded to a growing demand, particularly since the Second World War and we believe that existing institutions and those offering services as individuals, are generally well placed to meet the challenges of providing dispute resolution services to a global telecoms industry.

There may well be a need in some emerging markets, perhaps those viewed traditionally as hostile to international arbitration, though not necessarily to consensual methods of dispute resolution, or where, for example, corruption, of existing dispute resolution systems is endemic, to develop new national organizations.

3. *Creating New Consultative Mechanisms*

One option that might be worthy of further exploration in some institutional setting might be the creation of an entirely new international institution—a nonprofit entity established by key industry participants as well as by government participants. Such an institution might have many advantages to the extent it was free of restrictions imposed by civil service staffing requirements, pay scales, or procurement procedures and by governmental funding constraints. It might be based on a combination of public funding and payments by users of the forum. Another option might be the creation of an entirely private international institution without any formal role in the direct management of the forum other than potentially a role as overseer and regulatory of the decision making process itself. But, we would prefer to see whether, as we believe, the existing institutions can respond satisfactorily before creating new ones.

Whatever the institutional structure, there is a need to assemble a critical mass of resources necessary to give credibility to any new dispute resolution and consultative mechanisms. As we have stressed elsewhere, these resources include sector-related information, case studies, background materials, benchmarking data—all of which will be needed to facilitate interexchanges among key industry players and governmental officials. In the final section of this discussion paper, we will return to highlight steps necessary to create resources that are likely to be widely used on a cross border basis.

4. *Some Relevant International Experience: India and Australia*

Another interesting model is the newly chartered Telecommunications Disputes Settlement and Appellate Tribunal (TDSAT) in India. This institution consists of a panel of three members, all of whom have served either at the highest levels of the Indian judicial and civil service system. TDSAT is an example of a traditional governmental structure that has been devised to facilitate the resolution of disputes in the complex Indian telecommunications sector. It exists in very interesting juxtaposition with the Telecommunications Regulatory Authority of India (TRAI), which had previously been set up as a sector specific regulatory body. TDSAT will have apparently two major roles: one as a specialized appellate body and the other as a dispute resolution institution of first instance.

One of the major reasons for the creation of TDSAT was to bring additional order and discipline to the process of judicial review of decisions of TRAI which might otherwise result in proceedings in a myriad of first instance appellate courts across India. These courts may not have the experience or expertise to deal with complicated matters involving the telecommunications sector. Moreover, the pace of decision making might not be rapid enough for a dynamic, rapidly changing sector. Decisions from a diverse range of courts might lack the consistency and uniformity necessary to provide coherence to an importance national scheme of regulation. TDSAT's role as a venue in the first instance for telecom sector disputes is potentially more problematical. It is not clear whether the new dispute resolution body will have the staff or resources to initiate and monitor dispute resolution procedures throughout the Indian telecom sector. Nor is it evident what role the TRAI is intended to play in the broader institutional scheme of regulatory arrangements in India. TRAI might well find itself squeezed between the roles of TDSAT as appellate body and as initiator in the first instance of settlement proceedings.

The Australian Communications Industry Forum (ACIF) is yet another model for establishing industry consensus building and dispute resolution procedures. The ACIF is a grouping of Australian industry representatives headed by an independent chairman which provides input and advice to the Australian Communications Agency (ACA), the Australia telecom regulator, on matters of industry codes, standards, and practices. As is well illustrated by the ACIF's Work Programme which is attached as an annex hereto, the ACIF has issued documentation relating to issues ranging from interconnection, number portability, implementation of Internet services as well as more technical matters relating to codes and standards. The ACIF has entered into a Memorandum of Understanding with the ACA setting out the basic roles of both institutions. This memorandum is also attached as an annex hereto. More recently, the ACIF has been examining various ways that the work of consumer groups can be taken into account in its activities.

The ACIF functions in a developed institutional environment which includes an independent regulatory body as well as the Australian Communications Competition Authority. In this respect, the role of the ACIF can easily be focused on issues of implementation of policies established by governmental authorities. It also has a highly "corporatist" orientation and has generated significant detailed

documentation. In addition, the ACIF has established procedures through which industry participants can seek dispute resolution services under its auspices.

Whatever institutional arrangements or structures there might be, it will be necessary for regulators or governmental officials to determine the jurisdictional scope and role of an alternative dispute resolution or arbitral process. At some stage, potential conflicts will arise between the outcome and results of a private dispute resolution process and the apparent or actual decision making authority of regulatory officials.

An example of the problems which arise when public and private interest conflict, is the crisis in the power generation sector in India. This has arisen as a consequence of the dispute between Dabhol and the State of Maharashtra and the collapse of Enron, the principal shareholder in Dabhol. A myriad of proceedings both in litigation and in arbitration, has been started including a number of public interest suits in the Bombay High Court, but perhaps of greater significance for this paper is the decision of the Bombay High Court to the effect that the regulatory agency established by the State of Maharashtra, takes precedence and priority over private consensual dispute resolution arrangements made between investors and the Government.

5. *Viability and Enforceability of Outcomes of Private Dispute Resolution and Consensus Building Mechanisms*

If the outcome of a privately negotiated proceeding is at odds with government regulation or policy, will the contrary governmental regulation or policy always prevail? Ultimately, the viability and enforceability of outcomes of private consensus building or dispute resolution will depend on the willingness of government officials to implement privately reached agreements or settlements. Otherwise, the results of private proceedings will represent only recommendations that have no impact on market conduct. The willingness of contesting parties to utilize and respect private proceedings will be entirely dependent on whether and how public authorities exercise their responsibilities to implement the results of such proceedings. Non-respect for the results of private proceedings will surely result in their evisceration and ultimate marginalization.

Government officials thus must be prepared to enforce and give binding effect to the results of privately negotiated proceedings. But whether private proceedings can be respected and enforced gives rise to basic concerns about whether governmental authorities have been impermissibly delegated to private parties. However, there may be mechanisms that will, consistent with national legal requirements, ensure the enforceability of private proceedings through some procedure by which legal basis for the private proceeding can be confirmed and verified without initiating a de novo proceeding. Additionally, there may be as well a contractual means by which parties can agree to engage in private dispute resolution procedures and not to challenge their outcome except in very unusual or uniquely specified circumstances.

VIII. Structure of the Process: Institutional Context

We believe that a number of different aspects of a consensus building and dispute resolution capability need to be addressed in any process of institutional innovation and reform that might be initiated in a national setting. The example of Russia might be a useful starting point for considering both national and international reform.

1. Launching Institutional Reform

A process of institutional innovation and reform requires that a constituency of interested parties be established among industry players governmental authorities and the existing institutions which provide dispute resolution services. All parties need to be convinced that a potentially time consuming and complex undertaking should be initiated. One way to initiate such preliminary discussions would be on the basis of a discussion paper, such as this one, about potential process-related innovations. At the same time, we believe that it is also important to focus on the substantive aspects of a range of regulatory and policy issues that might be addressed within the scope of any new process. For this reason, we believe that it would be worthwhile to link discussion of this process-oriented paper with a discussion of a parallel study undertaken with the World Bank of key policy issues facing the Russian telecom sector (“the Russian Policy Options Paper”). As emphasized, in Part VII above, the scope and structure of any consensus building or dispute resolution process needs to be related to a specific agenda of issues that key parties agree needs further discussion.

It is intended that the Russian Policy Options Paper will be the subject of a roundtable discussion with key industry and governmental parties. One of the key issues likely to be raised in that roundtable discussion concerns institutional innovation and reform. The structuring and organization of the initial roundtable discussion on the Russian Policy Options Paper might be a first step in a process to explore the potential for further follow-up discussions. For example, during the initial roundtable session it might be agreed that it would be useful to organize follow up sessions focusing in greater detail on the various topics addressed in the Russian Policy Options Paper. It is likely to be useful and necessary to consult with key government and private sector parties both before and after the initial roundtable session to assess the feasibility of advancing further with the project.

2. Follow up Discussion Sessions in an Informal Setting

It may be necessary to allow the idea of further round table sessions to gain support and momentum without pressing too quickly to formalize a new consultative process. There will inevitably be concerns about what direction consultative discussions might take or what the practical consequences would be of institutionalizing new mechanisms. At the same time, it might still be worthwhile to begin addressing a range or organizational and structural issues involved in putting new consultative mechanisms on a more permanent footing.

3. *Institutional Framework*

As discussed elsewhere, there may be a range of different institutional frameworks suitable for use in Russia ranging from one that is clearly established in the public sector (such as is the case with the Telecom Disputes Settlement and Appellate Tribunal) to one that is private sector-based (such as is the case with the Australian Communications Industry Forum). An interesting alternative might involve the creation of a new institution with involvement both by government authorities and private sector participants. Whether such a structure would have the necessary credibility with, and support of, public and private sector participants would have to be assessed as a threshold matter. In the Russian Policy Options Paper, we have proposed for discussion the idea that as part of the Russian Government's commitment to the E-Russia Program there might be latitude for institutional innovation around a nonprofit institution that might become a point of focus and convergence for public and private sector participants. Such a new entity would also be a vehicle facilitating access to international sources of information and expertise.

Close attention would have to be given to defining the relationship between this new institution and government entities with formal responsibilities for oversight of the telecommunications sector, the Ministry of Communications and the AntiMonopoly Commission. As noted elsewhere, a Memorandum of Understanding has been drafted between the Australian Communications Agency and the Australian Communications Industry Forum. In Russia, the negotiation of a similar basic agreement would be of immeasurable utility in defining the future scope of activities for a new consensus building and dispute resolution process.

4. *Access to Domestic and International Resources*

Any new mechanism in Russia will require staff resources to coordinate work and provide substantive input into discussions. Staff resources might be seconded from both industry and government with the idea that the new consultative mechanism would provide a melting pot for experts with experience both in business and government. Later, the institution might take on its own staff.

Since one of the objectives of the new process would be to provide increased access to a body of international experience and benchmarks, it is likely to be useful to identify some international source of know how and expertise with experience in advising regulatory bodies and governmental entities as well as private sector entities in the telecom sector. Such an advisor might be paired with a counterpart domestic advisory firm with the idea that the domestic advisory firm would take over from an international advisor once its role in pump priming a new consultative process had been completed.

5. *Partnering among Governmental Institutions and other Participants*

Another useful step in launching a new process would be to establish a partnering arrangement among Russian regulatory authorities and their counterparts in

other countries. There might be mutual benefits, for example, for the German regulatory agency, RegTP, to take part in an effort to establish a new consultative process that might have potential applicability in Germany. The German regulatory agency could bring its institutional experience and know how to the new process. In a similar way, industry participants from the Federal Republic of Germany might find it interesting and useful to learn from a new undertaking—an institutional experiment in dispute resolution as well as share operational know and experience with their Russian counterparts.

The support for such an innovative undertaking might not come only from a single regulatory agency, however. In the EU, the Independent Regulators Group (IRG) has become increasingly active sharing national experiences on a cross border basis. The IRG would bring a broad and diverse array of experience to the undertaking.

Careful thought will be required about how information exchanges should be structured and organized. If new mechanisms are to facilitate more effective private resolution of disputes, “a new case law” will be needed to document not only the substantive outcomes of national regulatory proceedings but also process-related experience in different jurisdictions involved in addressing a common set of policy issues.

6. *Focus on Process*

A key to the success of new mechanism will be a strong focus on the mechanics of the consultative process. There may be ways to open the process to a wide range of participants and observers—to consumer groups and potentially even those interested in investment in the sector. By focusing on building a “virtual organization” using the platform provided by the Internet, it may be possible to create an open and participative process.

IX. Next Steps: Options for Moving Ahead with the Exploratory Process

Summarized below are some preliminary ideas concerning how this initial exploratory effort could be extended in scope. Some initial ideas are set forth below without further elaboration:

1. *Use the draft discussion paper to provide impetus to an institutional reform initiative in Russia.*
2. *Identify potential interested participants in such an institutional reform initiative including the German Ministry of Economic Affairs, the RegTP, as well as potential advisors such as WIK.*
3. *Based on initial rounds of consultative interviews with the Indian Telecommunications Disputes Settlement and Appellate Tribunal (TDSAT), the Danish regulatory agency Telestyrelsen, RegTP (Germany), Anacom (Portugal), ART*

(France), France Telecom, establish a “network” of parties interested in consensus building and alternative dispute resolution procedures. See Annex 2 which includes further information on various meetings held, and contacts made, in connection with the preparation of this discussion paper.

4. Use this network to collect relevant precedent and background materials on alternative dispute resolution and share this material by means of an Internet-related web site (potentially on the World Bank web site.)

5. Organize small roundtable seminars as well as seminars with option for “on line” participation.

6. Study ways and means of developing “new case law” focused on procedures for handling various types of telecom disputes. Develop some representative examples of such case studies for inclusion on the web sites of regulator agencies. Work with IRG to ensure more rapid adoption of this new type of case law. Further develop contacts with the European Commission concerning its involvement with, and interest in, the use of alternative dispute resolution techniques as well as its interest in developing data base resources for utilization in dispute resolution and consensus building mechanisms including information, case studies, and benchmarking materials.

7. Work with the IRG, EU, and the ITU to standardize types and formats of information included in regulatory web sites.

8. Begin work to apply methodologies developed for the telecom sector to other regulatory sectors. Use the work product and work methodologies used in the telecom sector-specific work, together with regulatory officials dealing with electric power or gas utilities.

9. Identify ways to apply consensus-building and dispute resolution methodologies to the activities of other public sector institutions with rule setting responsibilities.

10. Identify the potential applicability of dispute resolution and consensus building activities to broader concerns of the World Bank with respect to law reform and developing legal process.

11. Identify various professional development and training activities including various publications and reference materials necessary to ensure broader utilization of alternative dispute resolution techniques. Assess how Internet resources can be utilized in dissemination of relevant information and materials.

12. Establish lines of communication and coordination with various private and public sector organizations concerned with private dispute resolution.

X. Conclusions

As the telecom, media, and Internet-related markets continue to develop and converge, there is clearly a need for more efficient and flexible ways of building consensus about important public policy concerns and resolving disputes. There are many drawbacks to current regulatory and dispute resolution arrangements—too much lawyering, too many contested administrative proceedings, overly rigid procedures for coping with increasingly complex issues, too heavy involvement of the Courts, and too little flexibility and room for creativity in structuring solutions for issues of great public concern.

Many of these problems have been visible for a long time in North America—for such a long time in fact that the prospects for radical reform are effectively discounted by key industry participants and regulatory officials. However, in Europe and other countries where regulatory institutions are of newer origin and regulatory traditions are less well developed, there is growing concern about whether a slow descent into a black hole of increasing litigation and regulatory uncertainty can be avoided. In countries without developed regulatory institutions there is at least good reason to examine whether there might be new regulatory architectures for consensus building and dispute resolution to avoid future pitfalls and problems now besetting regulatory decision making in many developed economies.

We believe that an intensive review of alternative approaches is timely and necessary and hope that this discussion paper will contribute to a far reaching and open exploration of new options and institutional mechanisms for dispute resolution in the public sector. We believe that there is real scope for very reciprocal cooperation and exchange of information among regulators about the use of international benchmarks as well as new consultative and dispute resolution mechanisms.

In the domain of private dispute resolution, there has been significant development of procedures for resolving all sorts of disputes as complex as any facing the converging telecom, media, and Internet sectors. Private dispute resolution procedures are widely utilized in connection with huge construction projects, development projects for the oil and natural gas as well as for other natural resource sectors. There are well established mechanisms for dealing with bilateral investment disputes as well as settling controversies within the scope of international trade treaties. The techniques of mediation and arbitration are not perfect but are a well developed resource that represents a wealth of experience useful to government officials concerned with dispute resolution in the public sector.

These techniques may assist in building greater confidence on the part of investors in the integrity and effectiveness of regulatory frameworks and the ability of private enterprises subject to regulation to generate necessary returns on investment. They offer a range of possibilities for involving experts in private dispute resolution in resolving important public policy concerns through reliance on new or existing institutional arrangements as well as ad hoc procedures. Procedural arrangements can be tailored to fit the nature of matters in dispute and the parties involved—public and private sector. Balances can be struck between concerns with confidentiality and

transparency of process. A new jurisprudence can develop that creates “case studies” and catalogues relevant experience for the benefit of future parties using consensus building and dispute resolution mechanisms. There are existing mechanisms for recognizing judgments internationally and for dealing with controversies of varying scale and geographic scope.

There is no need to reinvent any wheels with respect to dispute resolution procedures and techniques. The real challenge for policymakers in the public sector and for private sector experts in dispute resolution is, we firmly believe, how best to adapt the wealth of experience with private dispute resolution to issues of public importance and concern and how to create new and more effective incentives for cooperative behavior among market participants

BIOGRAPHICAL INFORMATION

Arthur Marriott QC

Born Blantyre, Scotland 1943. College of Law (London) '66. Solicitor of the Supreme Court of England and Wales and of the Supreme Court of Hong Kong. 1976; Crown Court Recorder. President of Mental Health Review Tribunals; Queens Counsel 1997 . Deputy High Court Judge 1997; Member Departmental Advisory Committee on Arbitration; Member Council of International Council for Commercial Arbitration; Hong Kong International Arbitration Centre (Board of Directors); London Court of International Arbitration (Board of Directors); Chartered Institute of Arbitrators (Fellow); Chartered Arbitrator; Co-author, *ADR Principles and Practice*, (2nd ed. 1999) with Henry Brown; co-editor, *Handbook of Arbitration Practice* (3d ed. 1997); author of numerous articles on arbitration and mediation.

Robert R. Bruce

Born Mt. Kisco, New York 1944. Harvard B.A. '66, Government; Harvard J.D./M.P.A. '70. Admitted to the bar in the District of Columbia 1972; admitted to appear before U.S. Supreme Court, Fourth Circuit, D.C. Circuit. Hogan & Hartson 1972-77; General Counsel, Federal Communications Commission 1977-81; Leva, Hawes, Symington, Martin & Oppenheimer 1981-83; D&P since 1983 (Washington, D.C. 1983-93, London 1993-). Director of Communications Planning, Public Broadcasting Service 1970-72. Co-author: *From Telecommunications to Electronic Services: A Global Spectrum of Definitions, Boundary Lines, and Structures*, Butterworths (1986), with Jeffrey P. Cunard and Mark D. Director; *The Telecom Mosaic: Assembling the New International Structure*, Butterworths (1988), with Jeffrey P. Cunard and Mark D. Director; and other presentations and publications in the field of telecommunications law and policy.

Annex 1

Consensus Building and Alternative Dispute Resolution in Concrete Setting: Case Study of Russia

There is unlikely to be a single institutional blueprint for consensus building and dispute resolution procedures. Indeed, the shape of new institutional arrangements will depend significantly on the current structure of institutional and industry relationships in any particular national telecom sector. The Indian and Australian approaches to informal consensus building and dispute resolution differ in important respects in spite of the fact there are common elements to both approaches.

In this annex, we have focused attention on a number of key issues that require resolution in the current transition process now underway in the Russian telecom sector. We described these because they illustrate many of the issues which our proposals address and provide relevant examples of how efficient regulation can be aided by the use of collaborative techniques such as we have been describing. In Russia, there is currently no independent regulatory body. Instead the Ministry of Communications and the AntiMonopoly Commission share responsibilities for overseeing a very complex process of change in Russia. The Syvasinvest Group that was a holding company for almost ninety local telephone companies is being reorganized into seven regional operators and a separate long distance and international company, Rostelecom. At the same time, a substantial number of alternative private operators are establishing overlay networks for business users in major metropolitan areas in Russia. In addition, mobile services are being built out in the major cities. In Moscow there are more mobile than fixed lines while in St. Petersburg the number of fixed and mobile lines will soon be substantially equivalent. There is substantial potential for joint ventures and partnerships between new and established operators as well as possibilities for larger scale mergers and restructuring following the completion of the current Syvasinvest restructuring process.

Against this background, the Russian Government is weighing the option of accession to the WTO which will result in the performance of the Russian economy and Russian companies being increasingly measured against international benchmarks. Substantial capital will be required to develop the Russian telecom infrastructure and enable it to become an engine for the modernization of the Russian public and private sector by making more widely accessible Internet and information-related services.

The following section provides some examples of key issues facing the sector and how new mechanisms might be useful in this process:

1. *Restructuring the Relationship between Rostelecom and Regional Operators*

Currently, the financial relationship between Rostelecom and the new regional operators is based on a division of revenues from international and domestic long

distance services. Regional operators are currently not compensated for traffic terminating on their networks. However, they retain fixed percentages of the revenues paid by their subscribers in connection with the origination of domestic and international services. Such a revenue division model has many parallels with revenue settlement mechanisms in place in the United States prior to the AT&T divestiture and in Brazil prior to the restructuring of the Telebras Group. A revenue division model, however, is entirely different in structure and its impact on overall sector arrangements than an interconnection based model which establishes the rates paid to the local fixed line operator for both the origination and termination of long distance traffic. A transition to an interconnection model is, in all likelihood, a prerequisite to any opening of competition in the provision of long distance and international services in Russia.

The first step in any restructuring process would be the negotiation among the various regional operating companies and Rostelecom of a set of interconnection tariffs. Such tariffs might be based on the structure of comparable tariffs from a wide range of countries in the European Union, North America, Latin America, and Asia. The pricing for the new tariffs could be based not only in relationship to existing settlement rates but to a basket of international interconnection offerings. Discussions about new interconnection arrangements could be centered within the scope of a new consultative process. Resources and input for the decision making process could be provided through information on international benchmarks provided utilizing resources available through the Internet as well as the experience and resources of international advisors.

2. Structuring New Relationships between Regional Operating Companies and Smaller Alternative Private Telephone Companies

There are many smaller alternative private telephone companies operating within the territories of the newly formed regional operating companies. These companies were established to serve new residential complexes or villages not reached by the Svyasinvest local operating companies. With the formation of larger regional entities, the financial relationships of the regional companies and smaller local operating companies are being restructured on the basis of more uniform revenue sharing agreements. These agreements often do not provide for any direct operational relationship between these small local companies and Rostelecom as provider of international and long distance service. Currently, there do not appear to be readily available mechanisms for resolution of potential disputes over interconnection. A dispute resolution process could provide a forum for region-wide or nation-wide discussions about the nature of these inter-carrier agreements. It could make available for consideration by the parties various benchmark agreements from other countries.

3. Mobile Interconnection Agreements

Although there are existing interconnection agreements between mobile operators and regional telephone operators, these agreements are likely to be modified

to reflect changes in the structure of local fixed line telephone services. These tariffs have not typically provided for any per minute usage charges. Thus, as per minute billing is introduced into local tariff structures, there is likely to be a need to adapt mobile-fixed line interconnection tariff arrangements accordingly. These changes in tariff structure are ones that can be based on international benchmarks and comparable tariff practices.

4. *ISP-Local Line Connections*

Changes in local fixed line tariff structures will also affect the financial relationship between local fixed line exchange companies and Internet Service Providers (ISPs). Under current tariff structures the only way that a local operator can benefit from growing Internet traffic is by direct participation in ISP revenues. This may create an incentive fixed line operators to favor an affiliated ISP. In order to stimulate the further expansion of Internet services in Russia, it may be important to establish operational and financial relationships in line with those in countries that have successfully structured tariff and business relationships between ISPs and local telephone companies to promote the growth of Internet traffic.

5. *Disputes with Third Parties over Access to Business and Residential Complexes or Cable and Conduits of Incumbent Telecom Operators*

Disputes between telecom operators and owners of residential and business complexes over the terms and conditions of access to subscribers' premises are likely to have a significant impact on the scope of competition that develops in the Russian telecom sector. In the absence of detailed legislative or regulatory requirements, such discussions are likely to be conducted in an entirely commercial context. It may be useful, nevertheless, to focus additional attention on how such access issues are approached in other market settings. In addition, there may be some benefit in collecting precedents that might provide guidance to property owners and telecom operators. An informal dispute resolution forum might provide useful assistance in facilitating agreements relating to access to buildings.

Likewise, there may be a range of potential concerns and disputes that arise over access by new telecom operators to public rights of way or to various types of conduits maintained by municipal authorities or other utilities and are important to the efficient deployment of new infrastructure. Significant conduit and ductwork are also maintained by incumbent telecom operators both for backbone network facilities and access to residential and business complexes. A body of international precedent and practice may provide useful guidance to telecom operators and government authorities in resolving concerns that arise over access to infrastructure necessary to expand current networking capacities available in Russia.

As is the case with respect to access to buildings, disputes over access to conduit may not be directly within the competence of traditional regulatory authorities. Government officials at the local and federal level are likely to have a keen interest in how access to rights of way and conduit is addressed and paid for.

However, the underlying issue has a considerable impact on the provision of telecommunications services to the public. Flexible procedures for dealing with access to basic infrastructure may enable the key players to enter into focused discussions with a range of different parties including municipal authorities and may expedite resolution of controversies without resort to the courts or to other informal means of dispute resolution.

6. *Disputes Involving Government Authorities*

A number of the issues discussed above involve a mix of commercial negotiations and regulatory concerns. Interconnection agreements involve a complex array of operational and technical concerns that have to be resolved by the parties to the agreement. Many of these concerns have broader industry-wide implications and thus have an important public policy dimension. Matters involving pricing of interconnection services also have a public policy dimension, especially to the extent that one of the parties to an interconnection agreement has significant market power or dominance in a particular market segment. Pricing policies could have a significant impact on consumers as well as on the overall evolution of competition in particular market segments. Informal consultative or dispute resolution procedures may provide a flexible framework for resolving such a mix of commercial and public policy concerns. A willingness of government policymakers to rely on international benchmarks for interconnection tariffs, or for ratios of retail and wholesale tariffs, may encourage parties to such agreements to look to international experience in conducting commercial negotiations.

Other controversies involving government policymakers might also be usefully dealt with in the context of a consultative mechanism. For example, there may concerns about the policies and practices of government officials with responsibility for spectrum allocation and licensing that relate to the issuance of new licenses, especially a third or fourth license before minimum levels of market penetration have been achieved by holders of earlier issued licenses. An open forum may be helpful in resolving potential conflicts also over the use of spectrum for commercial as opposed to governmental purposes.

There may be other opportunities for sector-wide consultations relating to policies and practices with respect to the issuance of various types of licenses required to build out new infrastructure. The general terms and conditions applicable to different types of licenses could be made a subject of industry-wide consultation drawing on experience from other countries.

7. *General Consultations Among Industry Participants and Government Officials*

In addition, informal consultative mechanisms may also prove to be useful as part of a general process of informing industry officials about general trends and developments within a fast changing sector. Individual policy makers will certainly always have options to hear the perspectives of representatives of individual

companies and interest groups. Often there may be benefits in hearing a confluence of perspectives on a concurrent basis with opportunity for debate and exchange of views. Such general consultations might sometimes be usefully augmented through the presence of international observers—either representatives of other regulatory bodies or industry participants from other countries.

In Russia, such far-reaching discussions might focus on potential changes in industry structure including further consolidation of regional operators or joint ventures between regional operators and alternative service providers. In addition, it might be very useful to initiate very focused discussions concerning how services might be extended to rural areas or within metropolitan areas utilizing new technological or business models based on IP telephony technology.

Annex 2

Meetings Held, Contacts Made, and Other Follow-up in Connection with Preparation of Discussion Paper

During the process of drafting the attached discussion paper and thereafter, a number of meetings were held, and contacts made, with industry executives and telecom regulators to explore opportunities for increasing reliance on private dispute resolution and informal consensus building in the telecommunications sector.

As described in the discussion paper, one of the key objectives of the undertaking was to identify a range of parties with an interest in the future development of the telecommunications sector who might have an interest in encouraging ongoing discussions of new and innovative approaches to regulation and, in particular, to new roles for private sector participants and regulators in the regulatory process. We have briefly identified below a number of the meetings held and contacts made.

This paper is, in a significant respect, part of an ongoing process. It was significantly influenced by our involvement, together with the German economic research institute, WIK, in preparing a brief overview of key issues facing the Russian telecommunications sector. This overview addresses a number of important issues concerning how regulatory arrangements and institutions might evolve in Russia.

The paper has, in turn, been further developed in a discussion paper prepared under the auspices of the International Telecommunications Union (ITU) in connection with a World Telecommunications Regulatory Forum to be held by the ITU in December 2002 in Hong Kong. This discussion paper is focused on potential regulatory impediments to investment in the telecommunications sector and has been prepared through a process of consultations with a number of investment bankers, investment analysts, and other financial advisors who primarily work in the telecommunications sector. It focuses, in particular, on a number of specific circumstances in which informal consultative procedures or increased reliance on new institutional mechanisms may create a more favorable and open climate for investment. In this respect, this paper for the ITU World Telecom Regulatory Forum illustrates and expands the more general and briefer discussion in this paper concerning the ways that informal consultative mechanisms might contribute toward facilitating a better flow of information from the financial community to regulators as well as from regulators to the financial community about current and expected regulatory environments. We have attached a draft of this discussion paper hereto as Annex 3.

In this respect, we hope that the three discussion papers together—the overview of Russian telecom sector issues, this paper, and the paper for the ITU forum in December—will assist in building momentum for a process of rethinking and reassessing much conventional wisdom concerning regulatory institutions and process as well as substantive regulatory policies. We believe that such a process is

very current and timely given the very difficult conditions in today's financial markets which are now adversely affecting prospects for the future expansion of today's telecom infrastructure and for the emergence of vibrant, competitive markets.

Set forth below is a brief account of some of the meetings held in connection with the preparation of the discussion paper:

Meeting with Jean-Paul Simon, Senior Vice President, International Regulatory Strategy, France Telecom

The meeting, one of the first held following the preparation of a preliminary discussion draft, was focused on outlining the case for increased use for private dispute resolution and consensus building mechanisms in the context of a well developed regulatory framework. France Telecom and other operators are actively exploring, in conjunction with the European Commission, the uses of alternative dispute resolution to resolve controversies between service providers and consumers.

It appears likely that without a significant effort to build support among operators at the national level or among operators within the European Union the most likely uses of alternative dispute resolution will be limited to service provider-user disputes. Moreover, while there are a limited number of potential controversies that arise in a cross-border context, the most significant range of disputes among operators arise in a national context. Nevertheless, the European Commission has shown interest in the use of private dispute resolution as a general matter.

Among the areas where increased reliance on consensus building initiatives may be promising concerns the steps required to facilitate the provision of unbundled access to local loop facilities. There may be a strong interest in encouraging consistent cross-border approaches to local loop unbundling as well as sharing of information with respect to pricing in different jurisdictions. Likewise, current initiatives by European competition authorities to investigate pricing practices with respect to mobile termination and roaming charges might well benefit from increased reliance on informal consultations among industry and government officials. Such consultations might assist in ensuring that investigations into specific pricing practices are addressed in a broader industry context taking into account the overall development of the market and regulatory framework for mobile operators.

The new European regulatory framework seems likely to shift the division of jurisdictional responsibilities between the European Commission and independent regulators in EU Member States. It was pointed out that in the view of some observers these shifts in jurisdictional roles may result in increased regulatory uncertainty that does not contribute to the ability of industry participants to meet future financing requirements on favorable terms. It was suggested during the discussion that introducing increased reliance on private dispute resolution and more consultative mechanisms for addressing potential jurisdictional conflicts between the European Commission and Member States might increase the confidence of investors in the predictability of new regulatory arrangements.

This meeting served primarily to introduce the basic issues addressed in the discussion paper to a major European telecom operator and identify the potential for widening the scope of discussions with other telecom operators, independent regulators, and the European Commission.

Meeting with Finn Pedersen, Deputy Director, National IT and Telecom Agency, Copenhagen, Denmark

During this meeting there was a far-reaching exploration of the Danish experience with the use of mediation among telecommunications operators in resolving differences over interconnection arrangements. The Deputy Director has had a particularly active role in overseeing meetings among industry parties and has successfully assisted Danish telecom operators in reaching negotiated outcomes to controversies over interconnection arrangements. One of the reasons for the success of Danish regulator in its mediation role was the threat that failure to reach agreement could result in much more favorable outcomes imposed by legislative intervention.

Deputy Director Pedersen described in some detail efforts in Denmark to arrange for industry funding of ADR resolution of disputes between telecom operators and consumers. He also outlined the expanded role of his agency in dealing with all issues relating to the implementation of an e-Denmark initiative.

There was considerable discussion of a proposed approach to increasing reliance on private dispute resolution and consensus building in Russia and of the potential relevance of Danish experience in developing new institutional arrangements in Russia as well as in promoting the overall objectives of the e-Russia initiative. The Danish approach is highly flexible and innovative and provides an excellent case study that might be very useful in developing new techniques for informal consultations among industry participants with respect to a wide spectrum of issues relating to traditional telecom regulatory issues as well as policies issues involved in the expansion of Internet-related services.

Meeting with Joerg Sander, Vice President, Regulatory Authority for Telecommunications and Post (RegTp), Bonn, Germany

The meeting with the Vice President of the German independent telecom regulator focused on RegTp's extensive experience in providing technical assistance to evolving regulatory institutions in the countries expected soon to join the European Union. There was a far-reaching discussion of the potential applicability of informal consultative and consensus building mechanisms in differing institutional settings—those with currently well-developed regulatory frameworks as well other situations where regulatory institutions are still evolving. The Vice President raised a very basic concern about how a scheme based on informal consultations could be reconciled with the formal legal requirements under which RegTp operates. This issue was highlighted as requiring significant further analysis although there are circumstances

in which the German regulator has sought to encourage informal agreements among industry participants.

It is very evident that any step to introduce new innovative procedures into highly developed telecom regulatory environment would require significant across-the-board commitments from a wide spectrum of telecom operators in the market. There was considerable discussion relating to whether the involvement of a well-established regulatory body in an effort to introduce new consultative arrangements in a regulatory environment still in transition might actually result in useful experience for both regulators and industry participants from a well-developed market setting. This would involve a significant flow of know how and experience on a bilateral basis—not merely a one way flow of technical assistance.

Vice President Sander articulated a strong interest of the RegTp and its President Mattias Kurth in facilitating the flow of relevant information and benchmark-related information that would be of critical importance in creating effective consultative mechanisms. It was emphasized, however, that often effective consultations depend on active involvement of very senior officials involved in ongoing regulatory responsibilities. In addition, there are practical problems of ensuring adequate financing for know-how transfer projects notwithstanding the strategic importance that the RegTp as well as its overseeing ministry, the German Ministry of Economics, attach to bilateral and multilateral contacts among German, EU, Russian, and other international officials.

Meeting with Anatoly A. Plekhanov, Adviser to Minister, Ministry for Communications and Informatization of the Russian Federation

A meeting was held with senior officials of the Russian Ministry of Communications following a World Bank-sponsored seminar in which many of the core ideas in this discussion paper were presented to a wide range of industry participants in the Russian telecommunications sector. A substantial number of such participants commented favorably on the potential benefits of informal consultative mechanisms in the Russian telecom sector and interesting parallels were drawn between consultative mechanisms that had been put in place in the Russian securities industry in cooperation with the Russian securities regulatory agency. Officials in the Russian Ministry of Communications emphasized that there were already in place various mechanisms for seeking the views of industry participants. Questions were also raised concerning how the new institutional mechanisms could be integrated into the existing legal framework and how Russian authorities would exercise their institutional and legal prerogatives within any new framework. The discussion also focused in significant respects on emerging issues relating to the effective integration of competition and telecom sector law and policy in Russia. As set forth in the attached paper, the new mechanisms may provide an opportunity to address longstanding and important jurisdictional conflicts and differences in policy perspective.

Meeting with Jose Confraria, member of Anacom, the Portuguese independent telecom sector regulator, Lisbon

A meeting was held in Lisbon with Jose Confraria, then a member of the Portuguese independent regular primarily about his experience with the European Independent Regulators Group as well as in Portugal. There was considerable discussion of the efforts of the IRG to develop best practice and related experience that could be shared among regulators in the European Union and beyond. These efforts at building a common body of relevant sector specific information and case experience are still at a very early stage. The IRG is clearly an important focal point for any ongoing efforts to continue a dialogue about the increased use of private dispute resolution mechanisms.

It was emphasized, on the basis of institutional and personal experience, that mediation and private consensus building are most effective in an environment in which the consequences of resorting to formal procedures are anticipated as being more adverse to the interests of all parties than cooperative initiatives. Private consensus building cannot be developed in an institutional vacuum without regard for changing the basic attitudes and incentives of industry participants concerning the use of traditional regulatory mechanisms.

It also emerged during the discussion that a posture of regulatory activism can create expectancies on the part of the industry participants that only reliance on formal regulatory procedures can achieve definitive outcomes. Indeed, part of an effective strategy of encouraging reliance on private dispute resolution may be to lower expectations about the willingness of regulators to intervene. Such a policy of regulatory restraint may be contrary to well established and conventional views about the roles of government. Public policy may have to attach increased focus on what set of policies and initiatives may be most likely to encourage voluntary compliance with key public policy objectives with minimum need for direct regulatory intervention.

Meeting with Officials of the European Commission from DG Information Society and DG Competition during DG Competition-sponsored Roundtable Table on Local Loop Unbundling

During an EU-wide meeting in Brussels relating to local loop unbundling, there were brief informal meetings with certain officials of the European Commission concerned with telecommunications and competition policies relating to the potential use of informal consultative mechanisms in dealing with the key issues raised by the Brussels roundtable. This roundtable was essentially a fact gathering process but assembled on the same panels representatives from diverse industry participants from certain key EU countries.

Though there was not substantial opportunity to pursue how some of the ideas in the discussion paper might be further developed, it would appear to be very promising to continue to develop contacts with various participants from the European Commission and the European telecom sector at the roundtable gathering.

It might be worthwhile for the World Bank to seek to encourage such contacts and dialogue given the potential useful implications of increased consultative dialogue and exchange of benchmark information among EU regulators and industry participants. Such a process would provide an important engine to develop the informational data base and other resources necessary to the future credibility of efforts to develop new innovative regulatory mechanisms.

Meeting with Telecommunications Disputes Settlement and Appellate Tribunal (TDSAT) in India

At the initial stages of the preparation of this discussion paper, there was a most useful and thought provoking discussion with representatives of the Telecom Dispute and Appellate Tribunal who were involved in a fact finding mission in London as well as in other countries. The Indian perspective and experience is summarized in brief in the discussion paper and should provide insight on an ongoing basis to efforts to develop new institutional mechanisms. India is an emerging telecommunications market of enormous size and potential and hence the steps taken to develop the respective roles of Indian telecom regulator, TRAI, and [TDAT] will provide an important case study for other similar efforts.

Other Informal Contacts Made

As part of the overall undertaking, there was an effort during the process of drafting this discussion paper both to prepare a discussion paper as a starting point for discussion and to start a dialogue. In furtherance of this objective, the draft discussion paper was distributed to numerous individuals involved in the telecom sector with whom there was not an opportunity to meet and discuss the draft. Some of these contacts may provide a basis for developing a contact list of parties interested in alternative dispute resolution and for developing a virtual forum dealing with this topic. It may also be useful to assemble a critical mass of individuals interested in smaller face-to-face discussion sessions.

The discussion paper was distributed, among others, to:

Gitte Forsberg, General Counsel, TeleDanmark

Hans Willi Hekfekauser, Senior Vice President for Regulation and Public Affairs, Deutsche Telekom

Manfred Balz, General Counsel, Deutsche Telekom

Peter Rodford, DG XIII, European Commission

Christian Hocspied, DG IV, European Commission

Susan Schorr, ITU Telecommunications Regulatory Unit

Nancy Sundberg, ITU Telecommunications Regulatory Unit

Izzet Guney, Director, Telecommunications, European Bank for Reconstruction and Development

Dmitri Rozanov, JP Morgan

Mr. V. Blokh, Strategic Development Director, Sovintel, Golden Telecom

Mr. A.N. Golomolzin, Deputy Minister, Antimonopoly Ministry of the Russian Federation

Mr. Kenneth M. Griffin, Deputy General Director, TeleRoss (Golden Telecom)

Mr. Sergey A. Gribov, Assistant Minister of Property of the RF

Ms. G.M. Zhigulskaya, Antimonopoly Ministry of the Russian Federation

Mr. V. Zaitsev, Association of Telephone Communication Companies

Mr. P. Kulikov, Alfa-Eco Telecom, Moscow

Mr. I.P. Kournosov, Deputy Head of Information Department Ministry of Communication and Information of the Russian Federation

Mr. B. Lastovich, Center Telecom

Mr. David Lee, Deputy General Director, Comstar Telecommunications

Mr. A.M. Pankratov, Head of Information Department Ministry of Communication and Information of the Russian Federation

Mr. A.A. Plekhanov, Minister Counsel, Ministry of Communication and Information of the Russian Federation

Ms. T. Prokhorova, Equant Russia

Mr. N. Pryanishnikov, Vimpelcom, Moscow

Mr. D. Rozanov, J.P. Morgan Chase & Co.

Mr. Mark Sanor, Partner, Head of Technology, Communication & Entertainment

Mr. V. Sidorov, Sistema Telecom

Mr. K.B. Smirnov, Counsel of Department of Corporate Management and New Economy Ministry of Economic Development and Trade of the Russian Federation

Mr. Lee Sparkman, Vice President, Deutsche Telecom

Dr. Hans-Peter Schulz, Vice President, Deutsche Telecom

Mr. A. Filimonov, Central Europe Trust Company Ltd

Mr. I.N. Zadirako, Deputy Head of Department of Corporate Management and New Economy Ministry of Economic Development and Trade of the Russian Federation

Mr. S. Chernogorodsky, Svyazinvest

Mr. David Waterhouse, Vice President, Northern Europe, Cable & Wireless

Charles Butterworth, Vodafone Group Services

Michael Armitage

Gerry Spring, N M Rothschild & Sons Limited

Carl Tack, Deutsche Bank

James Sawtell, Goldman Sachs

James Golob, Partner, Goldman Sachs

Mathew Bloxham, Goldman Sachs

Michael Phair, Bear Stearns International Limited

Teofilo Masera, Morgan Stanley

Jerker Johansson, Morgan Stanley

Piers Hartland-Swann, Bear Stearns Asia Limited

Eduardo Centola, Goldman Sachs & Co.

Shakhaf Wine, Merrill Lynch Europe plc
Herve Letalenet, Paribas, Paris
David Satola, The World Bank Group
Gareth Locksley, The World Bank Group
Svet Tintchev, The World Bank Group
Bahram Zia, European Bank for Reconstruction and Development
Dmitri Rozanov, J.P. Morgan plc
Martin O'Neil, Telegraph Hill Communications Partners
Michael Patton, Deutsche Bank
Igor Simonov, JP Morgan plc
Roy Merritt, Deutsche Bank
Daniel Newman, Deutsche Bank Hong Kong
David J. Clark, Deutsche Bank AG, Tokyo
James Douglas, Deutsche Bank AG
Ian Logan, Deutsche Bank AG
Alex Wright, UBS Warburg
Sean Callahan, UBS Warburg