

Legal and Institutional Aspects of Regulation

Global Symposium for Regulators
Executive Level Training for Regulators

Yasmine, Hammamet, Tunisia

13 November 2005

ENSURING TELECOMMUNICATIONS SUCCESS AROUND THE WORLD



Introduction

- One of a series of modules in the ICT Regulation toolkit developed in conjunction with *infoDev* and the ITU
- The objectives of this module are to:
 - address the importance of an appropriate legal, regulatory and institutional framework for effective regulation
 - provide regulators, policy makers, and stakeholders with best practice guidelines, examples and practical approaches to ICT regulation





Overview of Module

1. Introduction
2. Why regulate?
3. Legal context of regulatory reform
4. Impact of convergence on regulation
5. Elements for effective regulation
6. Organizational and institutional approaches to regulation
7. Functional aspects of regulation
8. Regulatory processes

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Online Module

Toolkit for regulators comprised of three primary tools:

- Main text divided into different chapters and subchapters as further described in the presentation
- Practices Notes consisting of case studies and summaries of additional materials related to the subject matter
- Reference Materials – hyperlinks to the resources used to prepare the study and module




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Overview of Module Online



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LEGAL AND INSTITUTIONAL ASPECTS OF REGULATION


The telecommunications sector has undergone extensive changes in the recent decades, from a monopoly structure to one of competition, motivated by the evolution of new technologies and services, the growing importance of telecommunications for national economies and the development of international trade in telecommunications services. This module provides an analysis of how countries have undertaken regulatory reform to adapt to these changes, and explores the legal and institutional framework necessary for effective regulation. The module is organized in eight chapters:

1. Introduction
The introduction provides a roadmap of the study and an overview of the objectives of the module.
2. Why regulate?
This chapter briefly discusses the need for regulation to ensure the market transition from monopoly to competition and to safeguard the public interest.
3. Legal context of regulatory reform
This chapter provides an overview of different factors that may impact regulation, such as: (i) the different legal and cultural traditions of each country; (ii) the national and international commitments undertaken by the government; (iii) the impact of other legislation that impact the sector; and (iv) level of maturity of the market.
4. Impact of convergence
This chapter examines the impact of convergence on regulation of the sector, analyzing how regulators have responded to convergence with more flexible and streamlined regulatory frameworks, and how ICT related laws have impacted the sector.
5. Elements of effective regulation
The objective of this chapter is to identify what it means to be an effective regulator and to highlight the importance of independence, predictability, accountability, transparency and public participation.
6. Organizational and institutional approaches to regulation
This chapter provides a detailed analysis of the organizational and institutional approaches to regulation, and discusses institutional design options, the separation of power and relationship of the regulator with other entities, the legal status of regulators, and their funding process.
7. Functional aspects of regulation
This chapter addresses the requirements for the successful management of the regulator, including the clear definition of the functions and competencies of the regulator, the implementation of staffing and remuneration practices and policies, and the application of an ethics regime that promotes public confidence in the regulatory functions.
8. Regulatory processes
This chapter focuses on the importance for an effective regulator to have an open and transparent regulatory processes as well as sufficient enforcement powers to ensure compliance with laws, regulations and licenses, and an efficient dispute resolution system for creating a favorable investment environment and promoting growth in the sector.

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Navigating the Toolkit

- Each chapter can be accessed through the Table of Contents bar on the left or through the hyperlinks on the main page
- The online toolkit follows the chapter divisions in the study
- Each chapter and subchapter contains practice notes and additional references
- Endnotes also include hyperlinks to additional reference material

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Example

Chapter 8: Regulatory Processes

- Decision-making process
- Accountability of regulators and consumer protection
- Dispute resolution and enforcement



Chapter 8: Introduction Page



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8 REGULATORY PROCESSES


In addition to establishing an institutional and organizational framework, effective regulation requires that the regulator adopt and implement procedures that are transparent and open to public participation and ensure accountability. These elements encourage public confidence in the regulator, compliance with regulatory decisions, laws and regulations, and create an enabling environment conducive to growth and development in the sector. This Chapter will provide an overview of such regulatory processes by focusing on three main issues: (i) ensuring an open participatory decision making process through public consultations, (ii) ensuring the accountability of regulator's activities to the state and to consumers, and (iii) ensuring regulatory efficiency and promoting growth and competition of the sector through dispute resolution and enforcement procedures.

- 8.1. Decision-Making Processes
- 8.2. Accountability of Regulators and Consumer Protection
- 8.3. Dispute Resolution and Enforcement




Chapter 8: Section 8.3

Dispute Resolution and Enforcement



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8.3 Dispute Resolution and Enforcement

In addition to having transparent, open and participatory procedures, an effective regulator needs the power to resolve disputes and enforce its decisions and laws. As the telecommunications sector develops and matures, the ability of the regulator to maintain order in the sector is paramount to promoting growth and attracting investment in the sector. The first part of this section describes the different resolution techniques that countries have engaged in to solve disputes in the sector. The second part describes the enforcement practices and procedures generally used to settle conflicts and enforce sector policy and regulation. As the telecommunications sector continues to develop, liberalization and new technologies are deployed, more regulators are encouraging parties to voluntarily resolve their disputes, and relying on alternative dispute resolution approaches. However, the regulator's involvement and intervention to resolve conflicts and to enforce compliance with decisions, rules, and regulations are still critical and necessary for maintaining an effective regulatory regime.

8.3.1. Dispute Resolution

8.3.2. Enforcement


RELATED REFERENCE DOCUMENTS

- UNCTRAL Model Law on International Commercial Conciliation (49 KB PDF)
- Telecommunications and the WTO -- The Case of Mexico (192 KB PDF)
- Japan -- Fair Settlement of Disputes -- Part II Chapter 3 (116 KB PDF)
- Ray Shrivastava Reflections on Regulation and Dispute Resolution in India 3 (1,42 MB PDF)
- Singapore Contribution ITU Question 18-1 (113 KB DOC)
- Japan -- Fair Settlement of Disputes -- Part I Chapter 3 (87 KB PDF)
- Japan -- Fair Settlement of Disputes -- Part II Chapter 3 (243 KB PDF)
- Japan -- Fair Settlement of Disputes -- Part II Chapter 2 (48 KB PDF)
- Japan -- Fair Settlement of Disputes -- Part I Chapter 1 (157 KB PDF)
- Japan -- Fair Settlement of Disputes -- Part I Chapter 2 (82 KB PDF)
- Japan -- Fair Settlement of Disputes -- Opening Remarks (14 KB PDF)
- Nigeria Enforcement Regulations (204 KB DOC)
- Ofcom Dispute resolution under the new EU Directives (121 KB PDF)
- ITU_WB_Dispute_Resolution_Report (3,07 MB PDF)
- Luke Eric Peterson Bilateral investment treaties and development policy (246 KB PDF)
- Luke Eric Peterson Investor Looking Beyond ICSID (48 KB PDF)
- Luke Eric Peterson Investor looking beyond ICSID in dispute with Hungary (64 KB PDF)
- Luke Eric Peterson Telekom Malaysia and Ghana look to settle UNCTRAL arbitration (47 KB PDF)
- ITU India Mini Case Study Interconnection (1,89 MB PDF)
- Japan -- Fair Settlement of Disputes -- In the beginning (62 KB PDF)
- ITU Botswana Mini case study Interconnection (676 KB PDF)
- Final ITU Report on Enforcement (364 KB DOC)
- Japan -- Fair Settlement of Disputes -- Forum (32 KB PDF)
- Japan -- Fair Settlement of Dispute -- Appendix Reference Materials (8 KB PDF)
- APEC Effective Compliance and Enforcement (200 KB DOC)
- Brazil Contribution ITU Question 1-18 (95 KB DOC)
- Burkina Faso Contribution ITU Question 18-1 (80 KB DOC)
- AAA Wireless Industry Arbitration Rules (137 KB DOC)

Related Reference Documents

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Chapter 8, Section 8.3, Subsection 8.3.1

Dispute Resolution



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8.3.1. Dispute Resolution

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

The following sections review the various dispute resolution mechanisms employed in the telecommunications sector, with particular emphasis on regulatory adjudications and the various mechanisms of alternative dispute resolution. In addition, Section 8.3.2 tracks the systems of dispute resolution available to foreign telecommunications operators, mainly international investment dispute and trade disputes arbitrations.

Overview of the main types of disputes in the telecommunications sector

Disputes in the telecommunications sector generally arise out of various circumstances. However, generally the disputes which have the greatest impact on telecommunications investment and growth relate to: (i) interconnection, (ii) relations between service providers and with consumers, (iii) liberalization, (iv) foreign investment and trade, and (v) radio frequency use.

Interconnection disputes are the most prevalent type of disputes between service providers, as operators of all different types of access networks (e.g., fixed-mobile, wire-line/wireless) must be able to interconnect with one another. (See Box 8-5.) Many aspects of the interconnection relationship involve key policy considerations for the telecommunications sector, therefore most regulators consider it important to maintain some form of regulatory oversight of the negotiation and implementation of interconnection arrangements. In recent years, for example, there has been an increasing issue with regard to mobile interconnection and the often high rates charged by mobile providers to terminate traffic on their networks. As a result, many regulators have made determinations that mobile providers have a monopoly over their networks and should be regulated. Regulators have opted between various mechanisms in order to strike an appropriate balance between the need to protect the interests of new market entrants while also leaving room for parties to negotiate agreements on their own. Among such approaches are: (i) prescribing interconnection arrangements on an ex ante basis; (ii) establishing interconnection guidelines; (iii) approving reference interconnection offers (RICO) or model interconnection agreements; (iv) policing operators with significant market power; and (v) generally overseeing the interconnection process.


Disputes between service providers and consumers are also common and occur in every jurisdiction. These conflicts principally stem from the consumer's lack of bargaining power or the absence of competitive options to the incumbent operator. The main type of disputes arising between consumers and service providers derive from the following issues: (i) service charges; (ii) billing; (iii) payment of charges; (iv) "flaming"; (v) quality and terms of service; (vi) violation of privacy; and (vii) false or deceptive advertising.[3] To ensure effective resolution of consumer disputes, regulators are using a variety of mechanisms that range from requiring service providers and consumers to initially resolve disputes themselves (the case of the United States and Botswana), using ombudsman-type institutions (as the telecommunications industry ombudsman in Australia), and even employing the broadcast media (as in the case of the Nigerian "Consumer Parliament" evidence). For a further description of these mechanisms see section 8.1.

In addition, disputes may also arise as a consequence of introducing competition into the telecommunications market. The liberalization process often undermines the established financial and business interests of incumbent network operators. These liberalization-related disputes generally derive from the incumbent's desire to protect and maintain its dominant position in the market. Similarly, investment and trade disputes often occur where regulatory reforms or actions diminish the value of private-sector interests. These types of disputes have the potential to internationalize disputes which arise between regulators and foreign investors in the telecommunications sector. Investment disputes typically stem from complaints by investors, operators, and service providers about early termination of exclusive

Related Practice Notes

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Practice Note: Adjudication in India

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Adjudication in India

Separating adjudication from the regulatory agency: The case of India^[1]

An interesting and apparently unique case of allocating dispute resolution powers is that of India. In 2000, legislative amendments were introduced to institutionally separate the function of regulating the telecommunications market and the function of resolving disputes within the sector. Hence, adjudicative authority that previously resided in the Telecommunications Regulatory Authority of India (TRAI) was diverted and assigned to the newly created Telecommunications Dispute Settlement and Appellate Tribunal (TDSAT).^[2] Commentators have been put forward several reasons to explain this legislative decision, among them: (i) concerns about the principle of separation of powers;^[3] and (ii) concerns of conflicts of interest with the licensing functions of the TRAI.^[4]

The TDSAT is empowered to adjudicate disputes between parties and to hear appeals of TRAI decisions. Thus, disputes between the regulator and licensed telecommunications service providers; among service providers themselves; or between service providers and groups of consumers, all fall within TDSAT jurisdiction.^[5] Despite the broad nature of this mandate, TDSAT may not intervene in matters relating to individual consumer complaints handled by various consumer commissions (e.g., the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission); or in competition law disputes handled by the Monopolies and Restrictive Trade Practices Commission.^[6]

It is relevant to mention that TDSAT jurisdiction for judicial review of TRAI decisions is exclusive, as no civil court may entertain any suit or proceeding or grant any injunction where TDSAT has jurisdiction.^[7]

In addition, to ensure that TDSAT has sufficient powers to examine evidence and to establish facts, it has been granted the same powers vested in civil courts in India. These include, among others: (i) summoning and enforcing the attendance of any person and examining him on oath; (ii) requiring the discovery and production of documents; (iii) receiving evidence on affidavits; (iv) issuing commissions for the examination of witnesses or documents; reviewing its decisions; (v) dismissing an application for default or deciding it ex parte; and (vi) setting aside any order of dismissal of any application for default or any order passed by it ex parte.^[8]

With respect to enforceability, every order issued by TDSAT is deemed to be a decree of the civil court and shall be executable in the same manner as a decree of that court.^[9] Willful non-compliance with such orders is punishable by fines.^[10] TDSAT decisions are of course subject to appeal before the Supreme Court on the same grounds usually applicable to appeal appellate decrees, i.e., on a substantial question of law.^[11]

ENDNOTES

[1] In general, see Robert Bruce and Rory Macmillan, India Mini-Case Study 2003, Dealing with Interconnection and Access Deficit: Contributions in a Multi-Carrier Environment, ITU, available at www.itu.int/ITU-D/Reg/Cases_Studies/Eng/Resolution/India.pdf; Rory Macmillan, Reflections on Regulation and Dispute Resolution in Indian Telecommunications Sector, Journal of the Indian Law Institute, Vol. 47:1 (2005), at p.29.

[2] Telecommunications Regulatory Authority of India (Amendment) Act of 2000 amended the Telecommunications Regulatory Authority of India Act of 1997. It should be noted, that the imminent enactment of the Indian Communications Convergence Bill does not affect or alter this INSTITUTIONAL structure.

[3] Rory Macmillan, Reflections on Regulation and Dispute Resolution in Indian Telecommunications Sector, at p. 31.

[4] Ann Buckingham, Camilla Bustani, David Satola, and Tim Schwarz, Telecommunications Reform in Developing Countries, Telecommunications Law and Regulation (Ed. Ian Walden and John Angel), Oxford, 2005, at p. 618.

[5] TRAI Act, Section 14 (3), as amended.

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Additional Information


For additional information on this module, there will be a presentation and further discussion of specific aspects of the contents of the module during the Breakout Sessions on Monday, November 14.

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 The Regulatory Toolkit is found at:

Interim URL
<http://icttoolkitdev.forumone.com>

Regular URL
www.ictregulationtoolkit.org
(Available After WSIS)

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Thank You

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