

QUESTION 18/1

Domestic enforcement of laws, rules and regulations on telecommunications by national telecommunication regulatory authorities



ITU-D

STUDY GROUP I

3rd STUDY PERIOD (2002-2006)

Report on domestic enforcement of telecommunication laws: Guidelines for the international community

THE STUDY GROUPS OF ITU-D

The ITU-D Study Groups were set up in accordance with Resolutions 2 of the World Telecommunication Development Conference (WTDC) held in Buenos Aires, Argentina, in 1994. For the period 2002-2006, Study Group 1 is entrusted with the study of seven Questions in the field of telecommunication development strategies and policies. Study Group 2 is entrusted with the study of eleven Questions in the field of development and management of telecommunication services and networks. For this period, in order to respond as quickly as possible to the concerns of developing countries, instead of being approved during the WTDC, the output of each Question is published as and when it is ready.

For further information

Please contact:

Ms Alessandra PILERI
Telecommunication Development Bureau (BDT)
ITU
Place des Nations
CH-1211 GENEVA 20
Switzerland
Telephone: +41 22 730 6698
Fax: +41 22 730 5484
E-mail: alessandra.pileri@itu.int

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Report on domestic enforcement of telecommunications laws: Guidelines for the international community

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Abstract:

This paper examines methods used by National Regulatory Authorities (NRAs) to enforce domestic telecommunications laws. It presents nearly 60 guidelines in six broad categories: legislation, practice and procedure, independent decision-making, sanctions and penalties, gender, and organization and resources. It was produced by the Rapporteur Group's discussion and analysis of individual country experiences shared in written contributions, meetings, and seminars arranged by the ITU Development Bureau. These events brought together roughly 100 people from 70 countries to contribute their ideas and views. *A summary of all the Guidelines presented can be found in Annex A.*

A noteworthy finding of this study is that, while the world's NRAs play a central role in executing domestic communications policy, the means and power to enforce policy and regulation is not an end in itself. Rather, it is one of the critical ways for an NRA to achieve its chief goal: to facilitate universal access and service to its citizens by enabling industry growth and worldwide competitiveness.

The guidelines present a range of options that may be applied in diverse circumstances to assist ITU Member States enforce their domestic telecommunication laws. NRAs or other policy-makers are encouraged to review the guidelines and select for implementation those which may be useful given their domestic circumstances. Concepts of regulation that are inapplicable, or practices or solutions that are not suitable in one country may work well in another. We trust that this "menu" of choices will assist Member States as they facilitate delivery of a robust communications sector that is capable of providing benefits to all.

Nearly 50 countries from the around world are mentioned in this report; they are noted throughout the report and listed in Annex C. Finally, some information is also provided about common enforcement issues facing NRAs (interconnection, spectrum, Internet, consumer, network security and tariffs). This information can be found in Annex B.

Introduction

A decade ago there were very few telecommunication regulatory authorities in either developed or developing countries. In fact, in 1990 there were only thirteen.¹ Since that time, the number has roughly doubled every four to five years. As of mid-2004 for example, there were no less than one hundred thirty-two regulatory authorities – nearly ten times the number fifteen years ago.

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

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

It is equally important to emphasize that the authority and means to enforce policy and regulations is not an end in and of itself. Nor should it be viewed principally as a tool for punishment. Rather, the NRA's enforcement role is one of the many ways it achieves its chief goal: to facilitate universal access and service to its citizens by enabling industry growth and worldwide competitiveness.

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

¹ See "Trends in Telecommunication Reform 2003", International Telecommunication Union, page 15.

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

³ "Understanding Regulation: Theory, Strategy, and Practice", Robert Baldwin, Martin Cave, Oxford University Press, Inc., New York, 1999, page 96.

We also note the distinct challenges faced by many countries due to lack of resources and capacity,⁴ and here try to present guidelines that can also address these circumstances.

This report and set of guidelines are a product of the Rapporteur Group's analysis and discussion of individual country experiences shared in written contributions and in meetings and seminars arranged by the ITU Telecommunication Development Bureau (BDT). These events brought together roughly 100 people from 70 countries to contribute their ideas and views.

The guidelines presented suggest a range of options that may be applied in diverse circumstances to assist ITU Member States' efforts to enforce their domestic telecommunication laws. NRAs are encouraged to review the guidelines presented and select those which may be useful given their domestic circumstances. Those which are not suitable for one country may work well in another. We trust that this "menu" of choices will assist Member States as they facilitate delivery of a robust telecommunication sector that is capable of providing benefits to all.

⁴ See, for example "Domestic Enforcement of Telecom Laws and Regulations and Limits: **Uganda's** Experience" December 2002, Uganda Communications Commission contribution to ITU-D Question 18/1, pages 1-2. (UCC contribution to ITU-D Question 18/1, December 2002); "Effective Regulation: Case Study – **Morocco**", International Telecommunication Union, page 41.

1 Source of enforcement powers

1.1 Overview

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

1.2 Country Examples

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

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

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

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

⁸ See "Trends in Telecommunication Reform 2002", International Telecommunication Union, page 46.

⁹ See UCC contribution to ITU-D Question 18/1, December 2002, pages 1-2.

¹⁰ "Addendum to **Uganda**'s contribution on the Enforcement of Laws, Rules, and Regulations by National Telecommunication Regulatory Authorities", January 3, 2004, page 3 (Addendum to Uganda's contribution).

In **Brazil**, Law No. 9472 enacted on July 16, 1997 is known as the General Telecommunications Law. This law created ANATEL as a regulatory agency of the indirect Federal Public Administration, reporting to the Ministry of Communications. Under this law, ANATEL has authority to regulate, among other things, telecommunication service offerings, licensing, interconnection, use of radio frequency, use of orbital slots, universal access and quality-of-service obligations, unfair competition practices, ownership and corporate control of telecommunications operators, and to enforce associated regulations in these areas.¹¹ The Law gives ANATEL the power to request specific information, inspect operators' premises and, if warranted, search and seize telecom equipment or halt and seal unlicensed operation.¹² Article 19 of the General Law gives ANATEL the duty to "settle conflicts of interest among telecommunication service providers."¹³ ANATEL may also function as an arbitrator in order to settle conflicts among telecommunication operators and users. In this case, the parties must agree to submit their conflict to ANATEL and accept its decision in arbitration as final and binding.¹⁴ Together with the Administrative Council for Economic Defense (CADE), ANATEL is responsible for assuring a healthy competitive environment in the telecom sector, curbing unfair commercial and technical practices.¹⁵

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

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

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

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

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

¹⁴ ANATEL contribution to ITU-D Question 18/1, July 30, 2003, page 2.

¹⁵ *Id.*, page 5.

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

The **Bhutan** Telecommunications Act of 1999 established the Bhutan Communications Authority (BCA) within the Ministry of Information and Communications (then called the Ministry of Communications) on January 1, 2000, and on July 1, 2000, created Bhutan Telecom, formerly the Department of Telecom. BCA is responsible for regulating telecommunications and radio communications infrastructure and services, cable television, and postal communications. Among other things, the 1999 Act empowers BCA to regulate the price of telecom services; financial and technical aspects of interconnection; universal service; and the national numbering scheme. BCA may also issue licences for radio communications facilities and services, and to achieve interoperability, set technical standards for telecommunication systems and terminal equipment.¹⁷ The 1999 law also gives BCA the authority to conduct administrative hearings to resolve technological issues, disputes and complaints, and to make and enforce regulations and issue guidelines and codes of practice governing the telecom sector, particularly in the case of public telecommunication systems or services.

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

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

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

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

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

¹⁸ *Id.*, page 2.

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

²⁰ *Id.*

²¹ *Id.*

²² See generally *Id.*, page 3.

establish technical standards, identify non-competitive services, and require information necessary to fulfill its obligations.²³

The **Tanzania** Communications Act, the Communication Operator (Licensing) Regulations, and licences confer power upon the Tanzania Communications Regulatory Authority (TCRA) Commission to issue sanctions.²⁴

The **Sri Lanka** Telecommunications Act No. 25 of 1991, amended by Act No. 27 of 1996, governs telecommunications in Sri Lanka. Under Section 9 of the Act, the Telecommunications Regulatory Commission is given broad power to inquire into complaints. The Act also empowers the Commission to direct the service provider to rectify the cause of the complaint, including financial redress.²⁵

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

In **Burkina Faso**, Law 51/98 AN of December 4, 1998, governs the telecommunication sector. This law separated the regulatory and operating functions which formerly had been housed in ONATEL, the incumbent operator, and in Article 65 established the National Telecommunication Regulatory Authority (ARTEL). ARTEL is under the technical supervision of the Ministry of Telecommunications and the financial supervision of the Ministry of Finance. ARTEL's responsibilities include: enforcement, proposing licence grants and ensuring compliance with its terms, managing the radio-frequency spectrum, providing conciliation and dispute arbitration, and overseeing the exclusivity agreement with ONATEL.²⁸ Decisions made by ARTEL can be appealed to a competent administrative court. During the appeal, ARTEL's decision is not suspended. For an ARTEL decision to be executed, however, it must be supported by a writ of execution. In the absence of a writ, an operator can refuse to comply.²⁹

Law 51/98 AN gives exclusive rights to the incumbent operator, ONATEL, until December 31, 2005, to establish and operate national and international telecommunication networks, provide switched service between individual points, and establish international radio networks. Under the law, competition is allowed for cellular telephony service where, after a call for bids takes place, a licence containing specific terms and

²³ *Id.*, page 3.

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

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

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

²⁷ *Id.*

²⁸ See "Telecommunication Regulation in **Burkina Faso**", contribution of ONATEL to ITU-D Question 18/1, April 1, 2005, pages 2-4 (Contribution of ONATEL to ITU-D Question 18/1, April 1, 2005).

²⁹ *Id.* page 5

conditions regulating the licensee is issued. All value-added services are provided on a competitive basis; however, a declaration must be submitted to ARTEL.³⁰

The responsibilities of the Ministry of Posts and Telecommunications in **Burkina Faso** include issuing authorizations for public networks (on recommendation of ARTEL), suspending or revoking authorizations, and providing general instructions to ARTEL on broad policy.³¹

The “Agence des Télécommunications de Côte d’Ivoire” (ATCI) is responsible for telecommunication regulation in **Côte d’Ivoire**. ATCI derives its power to enforce the Law No. 95-526 of 7 July 1995 of the Telecommunication Code and its subsequent texts (Decree No. 97-173 of 19 March 1997).

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

Through the formal complaint process set forth in Section 208 of the Communications Act, the Commission decides formal complaints between private parties. As an adjunct to the formal complaint process, the Commission provides mediation assistance to litigants or potential litigants to help them reach a private settlement of their disputes. The Commission also conducts informal investigations pursuant to Sections 218, 403, and 503(b) of the Communications Act. These investigations may lead to monetary fines or consent decrees. Most consent decrees also include significant compliance plans.³²

New Zealand’s key competition statute is the Commerce Act of 1986. Legislation amending this statute was passed on May 26, 2001, and strengthened its core provisions as well as the enforcement powers and resources of New Zealand’s competition enforcement agency, the Commerce Commission. Key amendments include increasing the period for the statute of limitations, increasing the amount and range of sanctions that may be imposed, and empowering the Commission to impose a price control regime in certain circumstances.³³

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

- (i) The Authority examines, for the Minister of Telecommunications, requests for authorizations under Article L. 33-1 and L. 34-3.
- (ii) The Authority proposes the cost of universal service and the contributions of the operators to the Minister of Telecommunications, who then takes note of them.

³⁰ *Id.* page 2.

³¹ *Id.* page 3.

³² See “Domestic Enforcement of Telecommunications Laws, Rules, and Regulations by National Telecommunication Regulatory Authorities”, contribution of the **United States of America** to ITU-D Study Group Question 18/1, September 2002, page 1 (USA contribution to ITU-D Question 18/1, September 2002).

³³ See OECD report – “**New Zealand**: 1 September 2000-31 August 2001”, <http://www.oecd.org/docm00029000/m00029535.doc>, pages 2-3 (OECD Report).

- (iii) The Authority makes public France Telecom's proposed tariffs before their approval by the Ministers of Economy and Telecommunications; and
- (iv) Decisions of the Authority that are statutory in character are confirmed by the Minister (Art. L. 36-6).³⁴

On March 7, 2002, the Council of Ministers of the **European Union** and the European Parliament adopted four Directives and one Decision introducing far-reaching changes to the regulatory framework governing "electronic communications".³⁵ Key points in the new framework include establishing a harmonized regulatory framework for all electronic communications networks while maintaining separate arrangements for the services provided on those networks, establishing effective competition, and strengthening the role of regulatory authorities in implementing the directives and in their coordination with each other. The new framework does not cover content provided by communications networks or services, nor does it govern the distribution of audiovisual communications services, except in the case of conditional access services.³⁶

As the European Union increasingly takes on more important functions in issuing various Directives, individual regulatory authorities are obliged to incorporate and implement these directives at the national level.³⁷ With regard to enforcement matters, Articles 20 and 21 of the new European Framework Directive requires national regulatory authorities (NRAs) in EU Member States to resolve disputes within the shortest possible time frame and in any case within four months except in exceptional circumstances. The new directives entered into force on April 24, 2002, and were required to be implemented by Member States by midnight, July 24, 2003.

The Federal Office of Communications (OFCOM), the new regulator created in 2003 for the **United Kingdom's** communications industries, has responsibility for television, radio, telecommunications and wireless communications services. Section 3(1) of the Communications Act of 2003 outlines OFCOM's duties which include: (i) ensuring the optimal use of the electromagnetic spectrum; (2) ensuring that a wide range of electronic communications services – including high-speed data services – is available throughout the UK; and (iii) ensuring a wide range of TV and radio services of high quality and wide appeal.³⁸ In enforcing rules under its jurisdiction, OFCOM abides by the provisions and standards of the Enforcement Concordat drawn up by the Cabinet Office to provide guidance to central and local government when carrying out enforcement work.³⁹ That document requires OFCOM to: (i) have clear standards setting out the level of service and performance the public and business can expect to receive; (ii) provide clear information and advice on the rules that apply, and be open about how they do their work; (iii) provide a helpful service with a well-published and effective complaints procedure; (iv) minimize the costs of compliance for business by ensuring that any action taken is proportionate to the risks; and (v) carry out its duties in a fair, equitable, and consistent manner.⁴⁰

³⁴ See "Evolution of the Strengths of the Telecommunications Regulator: the Case of France", ART Contribution to ITU-D Question 18/1, January 2003, page 2 (ART Contribution to Question 18/1, January 2003).

³⁵ See "European Legal Framework for Electronic Communications", Contribution of **Thalès (France)** to ITU-D Question 18/1, November 8, 2002, page 2. (Thalès's (France) contribution to ITU-D Question 18/1, November 8, 2002.) The Council of Ministers of the European Union and its Parliament adopted: the Framework Directive (2002/21/EC), the Authorisation Directive (2002/20/EC), the Access Directive (2002/19/EC), the Universal Service Directive (2002/22/EC), and the Radio Spectrum Decision (676/2002/EC). *Id.*, pages 2-3.

³⁶ *Id.*, page 2.

³⁷ **France**, for example, reportedly will need to amend its Post and Telecommunications Code, and the amended Act of 30 September 1986 on freedom of communication in order to implement the new Directives. See Contribution by **Thalès (France)** to ITU-D Question 18/1, November 8, 2002, page 2.

³⁸ See generally, <http://www.ofcom.org.uk>

³⁹ *Id.*

⁴⁰ *Id.*

As OFCOM has assumed the duties of many of its predecessor agencies such as Oftel, it may investigate complaints about licence breaches and anti-competitive behaviour under the Telecommunications Act of 1984, consumer complaints about unfair contract terms, disputes, and where appropriate, initiates its own investigations.⁴¹ In addition, the United Kingdom Communications Bill seeks to direct resources at those issues where genuine difficulties exist, by permitting OFCOM to recover its costs from operators who abuse the right to bring a dispute by making frivolous or vexatious claims. The Bill also gives OFCOM the right to charge a fee for resolving investigations involving disputes about radio spectrum as they are likely to be very resource intensive (e.g., involving technical compatibility tests or monitoring).⁴²

The principal sources of authority for the Communications Regulatory Authority (CRA) of the Republic of **Lithuania** are the Law on Telecommunications and the Code of Administrative Offenses. Article 9 of the Law on Telecommunications – in force as of January 1, 2003 – provides that Lithuania’s CRA has the authority to control compliance with the law, regulations and other legal acts relative to telecommunication activity; to control equipment and devices according to the parameters of radio emission; to perform radio monitoring⁴³; and to receive information necessary to fulfill the above tasks.⁴⁴ Additionally, under Article 62, the CRA has authority to settle a number of disputes including those concerning the joint use of conduits, cable ducts, collectors, towers, masts, and for contractual conditions and charges. Dispute settlement proceedings are to be public in nature, unless a closed hearing is necessary to protect state, official, or commercial secrets or to ensure an individual’s right to privacy. Parties dissatisfied with a CRA decision may appeal to the courts.⁴⁵

Oman’s Telecommunication Regulatory Act was promulgated under Royal Decree No. 30/2002 on March 12, 2002. This Act created the Telecommunications Regulatory Authority (TRA) and vested it with powers to oversee enforcement of the Act and related Executive Regulations. The Act provides the TRA with authority to investigate complaints, hear cases and issue determinations. The TRA may also issue penalties for various telecommunication offences, including violations of a licence or of the Act.⁴⁶ The penalties the TRA can impose are specified in the licence and are supported by Executive Regulations. Breaches of a licence or a provision of the Act for which TRA Oman may issue penalties may be tried by the local courts and are also subject to prosecution through complaint procedures of the Public Prosecution

⁴¹ See “Dispute resolution under the new EU Directives – a statement by Oftel and the Radiocommunications Agency (Oftel/Radiocommunications Agency Final Statement) 28 February 2003, http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/eud0203.htm; “Dispute resolution under the new EU Directives – A consultation by Oftel and the Radiocommunications Agency”, (Oftel/Radiocommunications Agency Report), 4 November 2002, page 22.

⁴² See *Id.*, page 14.

⁴³ See also Articles 45 and 46 of the **Lithuania** Law on Telecommunications. Contribution from Lithuania to ITU-D Question 18/1, March 10, 2003, page 5.

⁴⁴ See *Id.*, pages 1-3.

⁴⁵ *Id.*, page 8.

⁴⁶ Contribution of the Telecommunications Regulatory Authority of **Oman** to ITU-D Question 18/1, (contribution of TRA **Oman** to ITU-D Question 18/1, August 16, 2004), page 2.

Department. Class one licences issued for basic telecommunications are issued by Royal Decree and thus have the force of law in their own right. Additionally, Article 28 of the Telecommunication Regulatory Act and Chapter 15 of the Executive Regulations provide for settlement of disputes between licensees via arbitration.⁴⁷

The State Council of **The People's Republic of China** promulgated the Regulation on Telecommunications of the People's Republic of China in September of 2000. This statute prescribes the rights and duties of the various actors in the telecommunication industry, enacts corresponding sanctions for violations, describes China's various telecommunication authorities, and defines the basic relationship between its telecom administrative authorities, users and service providers.⁴⁸ As of August 2005, China's Ministry of Information Industry (MII) reports that China's new draft Telecommunications Law has been sent by the State Council to the relevant government departments, the equipment manufacturers, and the telecommunications operators for advice. The main purposes of this law are to: (i) promote effective competition in the telecommunication market; (ii) reflect the trend of new technology; and (iii) promote the development of the telecommunication market and China's commitment to the World Trade Organization.⁴⁹

There are two levels of telecommunication administrative authorities in China: the central governmental authority – the Ministry of Information Industry of the People's Republic of China (MII) – and regional administrative authorities. China's Regulation on Telecommunications provides that the MII, under the State Council of the People's Republic of China, is responsible for nationwide supervision and administration of telecommunications. It is therefore the administrative authority in charge of telecommunications.⁵⁰ Regional administrative authorities of provinces, autonomous regions, and municipalities are directly under the central government. Under the leadership of MII, and in accordance with the Regulation on Telecommunications, these authorities supervise and administer telecommunications in their respective regions. As of August 2004, thirty-one regional telecom administrative authorities had been established.⁵¹

Key legislation governing the telecommunication industry in China includes:

- (i) the Regulation on Internet Information Service, promulgated by the State Council in September 2000, which, among other things, prescribes the rights and duties of Internet Service Providers;
- (ii) the Decision of the Standing Committee of the National People's Congress on Maintaining Security of the Internet issued December 28, 2000, which makes it “unlawful for any person to badly destroy a protected computer system or internet network, transmit information forbidden by law, or infringe rights of others”;⁵²
- (iii) the Regulation on the Administration of Business Sites of Internet Access Services promulgated in August 2002 which regulates the business actions of operators, “safeguards the legal rights and interests of the public”, and prescribes the procedure and liability to set up and operate business sites of Internet access services; and

⁴⁷ *Id.*

⁴⁸ “China's Legislative System and Administrative Authorities of Telecommunications”, Contribution to ITU-D Question 18/1, August 20, 2004, pages 2-3 (contribution of China to ITU-D Question 18/1, August 2004).

⁴⁹ See “An Overview of China's Latest Legislation of Telecommunication”, Contribution by **China** to ITU-D Question 18/1, August 30, 2005, page 3 (contribution of China to ITU-D Question 18/1, August 30, 2005).

⁵⁰ Contribution of **China** to ITU-D Question 18/1, August 2005.

⁵¹ *Id.*, page 3.

⁵² Further, “any person who violates the law may be punished according to ‘Criminal Act of the People's Republic of **China**’ and other related laws.” *Id.*

(iv) the Provision on the Administration of Foreign-Funded Telecommunications Enterprises, promulgated in December 2001, which prescribes the procedure and qualifications to set up a foreign-funded telecommunications enterprise.⁵³ Together with more than twenty regulations enacted by the MII to regulate the relationship between the telecommunication administrative authorities, these rules comprise China's legislative system of telecommunications.⁵⁴

The Framework Law on Telecommunications, introduced in 2002 by the Office of the Minister in the **Democratic Republic of Congo**, replaced an existing law that had been promulgated more than sixty years earlier.⁵⁵ The new legal framework was defined by Act No. 013/2002 (Framework Law on Telecommunications) and Act No. 014/2002 which established the regulatory authority.⁵⁶ Among other things, the law retained the Office of the Minister as responsible for general regulatory matters and policy, separated posts and telecoms, and specified a state-owned monopoly network to provide basic voice telephony service that could be entrusted to any operator in the sector. The law also specified two other networks: a licence-holder's network and an independent network. The law further established a universal service fund, the conditions for a new licence, and interconnection requirements, and as noted previously, the regulatory authority.⁵⁷

Democratic Republic of Congo's telecommunication regulatory authority, the Autorité de régulation de la poste et des télécommunications de la République Démocratique du Congo (ARPTC) was established by Article 1 of Act 014/2002 on October 16, 2002. ARPTC is governed by a college and an administration and enjoys financial autonomy.⁵⁸ The main responsibilities entrusted to ARPTC are to assign and manage the frequency spectrum, contribute to the definition and adaptation of the general legal framework for posts and telecommunications, contribute to the Congolese position in international negotiations and participate in representing the DRC in international organizations in the postal and telecommunication sectors.⁵⁹ Other important duties of the ARPTC include: issuing licences (with prior notice to the Minister and the public operator); monitoring licence compliance, imposing sanctions, periodically fixing the number of new operators eligible for a licence; defining interconnection and charging principles for the public postal and telecommunication services; ensuring that the universal service fund is used for its intended purpose.⁶⁰

⁵³ *Id.*, pages 2-3.

⁵⁴ *Id.*, page 2.

⁵⁵ Article 2 of Legislative Order No. 254/Telc of August 23, 1940, was the legal framework that governed **Congo's** telecom sector during the colonial period up until 2002. This statute gave the PTT Ministry direct control of, and a monopoly in, the telecom sector. It was followed in 1968 by Legislative Order No. 68-475 of December 13, 1968, which established the Office Congolais des Postes et Télécommunications (OCPT), a monopoly state enterprise for posts and telecommunications. "Obstacles Faced by the Regulatory Authority in Regard to Effective Control of the Postal and Telecommunication Sector", Contribution of the Democratic Republic of Congo to ITU-D Question 18/1, February 7, 2005), page 2.

⁵⁶ *Id.*, page 4.

⁵⁷ *Id.*

⁵⁸ *Id.*, page 5.

⁵⁹ *Id.*

⁶⁰ *Id.*, page 6.

1.3 Challenges Identified

The following lists those challenges that are related to legislation reportedly faced by NRAs as they attempt to enforce their domestic telecommunication laws:

- The law does not make clear nor reconcile seemingly conflicting laws specifying which governmental office has jurisdiction over the NRA (e.g., the President vs the Ministry).⁶¹
- The law does not provide for fiscal autonomy of the NRA;
- The law provides no description of appropriate fines;
- The law provides no authority to issue fines;
- The law lacks intermediate or mid-range economic penalties;
- The law does not provide statutory fines that are high enough to provide sufficient deterrence;
- The law does not provide for autonomy of the NRA;
- The law does not distinguish between complaints and dispute resolution and does not describe the mechanism to be used to handle each.
- The law does not provide jurisdiction over or recourse at the NRA for complaints of companies not subject to a NRA licence (e.g., ISPs);
- Courts sometimes issue preliminary injunctions that indefinitely suspend an NRA decision;
- Absence/delay in establishing a tribunal to handle communications disputes;
- The difficulty of accommodating the new European Directives into domestic legislation and procedures on a timely basis;
- The process to obtain an amendment to the law is too lengthy.

1.4 Guidelines: Source of Enforcement Powers

National Regulatory Authorities are encouraged to:

- As appropriate, NRAs should seek to provide written input to the law-making body on ways to improve the efficiency and substantive applicability of the law.
- Ensure harmony between the constitution, legislation, and administrative powers. Identify change as necessary.
- Ensure that the telecom law provides sufficient authority, independence, and financial resources for the NRA to gather information to impartially, swiftly, and transparently carry out the will of the legislature.
- Ensure that the telecom law provides sufficient authority, independence, and financial resources for the NRA to acquire the human and financial resources (via state budget, or NRA self-funding) to impartially, swiftly, and transparently carry out the will of the legislature.

⁶¹ In the **Democratic Republic of Congo**, for instance, one law indicates that ARPTC is subject to the President of the country; another indicates that it is subject to the Ministry. See Contribution of the Democratic Republic of Congo to ITU-D Question18/1, February 7, 2005, page 7, stating that the preamble to the Framework Law places ARPTC under the authority of the PTT Minister, while Article 2 of Act 014/2002 establishing ARPTC places it under the authority of the President of the Republic, and Article 10 of the same Act empowers the President of the Republic to appoint and dismiss the members of the ARPTC college.

- Ensure that the law contains clear and unambiguous language describing the jurisdiction of the NRA and, where appropriate, other interested state agencies. Where there is more than one entity with jurisdiction over telecommunication matters, provide for and describe a coordination mechanism between these entities.
- Ensure that the law promulgated is clear, transparent, and precise. Avoid technical terms that are not understandable by the public or that may be unclear before a reviewing court. Define terms as far as practicable.
- To the extent possible, promulgate laws that can address new technology and innovation; give broad powers to the NRA to adjust to changes in the industry.
- Describe the objectives and rationale of promulgated laws to induce enforcement and compliance by all parties, including enforcement agents of the state.
- Ensure that users/subscribers/consumers⁶², operators, and service providers have recourse at the regulatory agency.
- Ensure jurisdiction over service providers who may not be licensed.
- Ensure that the enabling law/legislation provides the NRA with a wide range of penalties to include those appropriate for minor, mid-range, and maximum offences.
- Ensure that all stakeholders are made aware of the law and the responsibility of the NRA to enforce the law. Conduct awareness-raising activities such as seminars, lectures, publication of short brochures, and training materials on the law for magistrates.

2 Enforcement practice and process; resolution of disputes

2.1 Overview

Second only in importance to a regulatory authority's enabling act or statute are the day-to-day practices and procedures it employs to implement its laws. In some cases enforcement procedures (or certain of their components) are specified in the enabling statute. Often the regulatory authority develops and publishes additional procedures on its own to carry out powers conferred upon it by statute. Regardless of the source, however, it is essential to have processes in place that enable swift and fair adjudication of violations and complaints. Swift decisions and timely penalties deter future violations.⁶³ Transparency in these procedures will facilitate compliance and is necessary for the decisions of the regulatory authority to gain public trust and withstand judicial, ministerial, or royal review.⁶⁴

⁶² The meaning of the terms user, subscriber, and consumer may differ from country to country. In this context, user/subscriber/consumer refers to each of these groups including the general public.

⁶³ See *Effective Compliance and Enforcement Guidelines and Practices*, Asia Pacific Economic Cooperation Telecommunications and Information Working Group (APEC TEL), April, 2005, page 14 (APEC TEL Report, April 2005), found at <http://www.apectelwg.org/admin/document/documents/LSG>.

⁶⁴ **Brazil's** Anatel, for example, has undertaken an initiative to promote enforcement consistency by developing a manual that dictates fixed methods for investigating companies and penalizing those that commit specific violations. See "Trends in Telecommunication Reform 2002", International Telecommunication Union, page 49. This initiative promotes transparency as well. Another illustration of transparency is **Oftel**, which publishes details of disputes and investigations in its quarterly Competition Bulletin. This publication gives details of new and closed cases. Under the new regime, Oftel will publish details of compliance cases as they are opened and closed. This information will only be published on Oftel's website. Oftel/Radiocommunications Agency Report, page 20. The **New Zealand** Commerce Commission's quarterly newsletter "Fair's Fair" provides information about recent and current work. This includes investigations, decisions, enforcement, education activities, and appointments of senior staff. OECD Report, page 9.

Some regulatory authorities have developed separate procedures for industry⁶⁵ violators and complaints by consumers/end users. In either case, as many of the following examples illustrate, enforcement procedures generally include: (i) providing notice of the alleged infraction; (ii) providing an opportunity to respond; (iii) issuing interim decisions or orders; and (iv) imposing sanctions.⁶⁶

Many regulators have the power to order operators to produce individual documents or records, and can enter an operator's premises and seize those documents if operators do not comply. Similarly, some regulators may conduct on-site tests in order to determine an operator's compliance with type approval, quality of service or radio communication non-interference requirements. Because these are fairly intrusive powers, agency officials – such as those in **Trinidad and Tobago** and in **Bolivia** – must often obtain judicial warrants before they exercise their search and seizure powers. In other countries, however, those powers are granted by statute and may require no judicial pre-clearance.⁶⁷

With regard to those enforcement processes and practices that aim to settle conflicts or disputes between parties, some NRAs have elected to employ less formal methods to assist with their workload. Commonly referred to as alternative dispute resolution (ADR), these less official techniques include negotiation and mediation (voluntary, flexible, and consensual) and arbitration (adjudicatory; awards usually enforceable via the courts)⁶⁸ and may be conducted by entities other than the NRA or a court.

Dispute resolution via alternative means in the telecom sector is at a relatively early stage and, like the telecommunication sector, is changing rapidly.⁶⁹ Some regulators, e.g. in the **United Kingdom**, take the position that ADR techniques can be employed where disputing parties have similar levels of market power, since in that case parties are more likely to negotiate solutions that meet their mutual or on-going needs. For those who favour the use of ADR techniques by NRAs, regulatory intervention is more often considered necessary where disparities of market power mean that one party effectively requires the protection of the official sector from abuse of process by the other.⁷⁰

Official dispute resolution mechanisms are important as a basic guarantee that sector policy will be implemented.⁷¹ Given that a significant portion of an NRA's enforcement practices are aimed at settling disputes – itself a basic function of the regulator – and the credibility derived by NRAs through exercising

⁶⁵ The term “industry” here refers broadly to operators, service providers and other players in the telecommunication market.

⁶⁶ “Trends in Telecommunication Reform 2002”, International Telecommunication Union, page 48. Some NRAs, e.g., **Zimbabwe**'s POTRAZ, and **Mexico**'s COFETEL, do not have the authority to levy fines. In the case of Zimbabwe, this is carried out by the courts. *See* Contribution of Zimbabwe to ITU-D Question 18/1 (January 2004), page 2. In Mexico's case, the Secretary of Communications and Transportation imposes a fine on the recommendation of the NRA, COFETEL.

⁶⁷ *See Id.*, page 47.

⁶⁸ *See generally* “Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions”, ITU and World Bank Discussion Paper, August 2004, <http://www.itu.int/itudoc/gs/promo/bdt/86215.html>, page 10.

⁶⁹ *See generally Id.*, pages 11-12.

⁷⁰ *Id.*, page 12.

⁷¹ *Id.*, page 14.

their statutory authority to adjudicate and enforce the law and NRA decisions – it is important to identify those circumstances in which ADR is appropriate. In certain circumstances, for example, an interconnection dispute may lend itself to ADR while in other cases official mechanisms may be preferable. Disputes involving spectrum may be less likely to be suitable for ADR techniques than conflicts involving some other matters.

Issues of sufficient jurisdiction, authority, and enforcement capabilities are additional considerations that arise when an entity other than the NRA or a court is employed to resolve a dispute. Further, a new NRA seeking to establish itself may wish to balance its need to conserve resources with its need to be taken seriously by those it regulates. Nevertheless, in appropriate circumstances, ADR can provide a useful means of augmenting an NRA's arsenal of enforcement practices. Indeed, in addition to ADR by outside entities, many NRAs (e.g., the U.S. Federal Communications Commission) conduct mediation as part of their own enforcement procedures. As noted recently by ITU and the World Bank, even in alternative dispute methods, the presence and participation of the regulator can help create incentives for improved behaviour on the part of the parties.⁷² The appropriate place for ADR in the regulated and fast-changing telecommunication industry is still evolving and its potential to assist NRA enforcement objectives will continue to be defined in the future.

A voluntary compliance framework featuring industry self-regulation is another potential tool for NRAs to employ in achieving their enforcement goals. Voluntary industry standards agreed to by carriers or other industry segments can establish requirements for industry to follow when providing services to industry or other users/consumers. While the NRA does oversee its implementation, this approach can minimize the need for intervention by the NRA, reduce the cost and administrative burden of government regulation for both government and industry, and reduce the risk of over-regulation. It is important for voluntary standards to reflect current government objectives, however, and industry self-regulation may not be appropriate for a sector where competition is in an early stage. In any event, such a regime is not a substitute for enforcement, but rather can complement a robust enforcement system.⁷³

2.2 Country Examples

In **Singapore**, IDA's code of practice for competition sets out the procedures and steps that must occur before IDA can impose a sanction. There are five steps: (1) IDA notifies the licensee in writing of its intent to take legal action. The notice specifies the time permitted for reply; (2) the licensee has 15 days to respond in writing (time can be extended at IDA's discretion); (3) IDA reviews the licensee's response and may issue a temporary cease and desist order; (4) if IDA determines that a violation of the Code of Practice for Competition has occurred, it may issue a warning, cease and desist order, or a directive to take remedial action; it may also impose a fine, suspend, cancel, or shorten the duration of all or part of the licence;

⁷² *Id.*, page 10.

⁷³ See APEC TEL Report, April 2005, pages 3-9.

(5) a licensee may appeal an IDA decision to modify its licence provided the appeal is filed within 14 days of the IDA decision. Pending the Minister's decision (and only in cases involving licence modifications), the IDA cannot enforce its decision. In situations other than licence modifications, IDA's decisions are generally enforceable pending appeal. The Ministry's ruling on the appeal is final.⁷⁴

In the **United States**, the FCC uses a variety of tools to investigate violations including letters of inquiry, field inspections and investigations, and administrative subpoenas. These tools are used to gather relevant information and form the basis for a decision to take further enforcement action or to conclude the matter. Once it has determined that a violation has occurred, the Commission and the Enforcement Bureau have several tools to address this circumstance: *Letter of Admonishment/Warning* (response not always necessary); a *Field Office Notice of Violation* (requires a response); *citation* for non licence es or others not usually before the FCC; a *Notice of Apparent Liability* ("NAL") and *monetary forfeiture* (fines) (see discussion below in "Sanctions"); *consent decrees* (used when a problem is admitted and a commitment is made to change behaviour); *Cease and Desist Order* following an *Order to Show Cause* why a cease/desist order should not be issued; *licence revocation* following an order to show cause why the licence should not be revoked; in coordination with the U.S. Department of Justice, *seizure of equipment*; *referral for criminal prosecution* to the U.S. Department of Justice (possibility of fines up to USD 10,000 and imprisonment of one year); and finally, *damages* in response to formal complaints.⁷⁵

The FCC also employs mediation in certain circumstances to facilitate an agreement between parties who are interested in resolving their dispute without the expense and time of litigation. The Market Disputes Resolution Division of the Enforcement Bureau⁷⁶ participates in negotiations (mediations) between carriers to facilitate settlement of disputes before complaints are filed.⁷⁷ Mediation is a corollary to the complaint process and can occur before or during the complaint process. It is a highly successful enforcement tool. Even an unsuccessful mediation is not a "failure" because parties will often narrow the issues in dispute.

A separate, accelerated complaint process exists that requires parties to first attempt mediation. This is also very effective. Although participation is voluntary, pre-complaint meetings and mediation are encouraged; participation is voluntary. FCC staff finds mediation to be extremely successful because it promotes speedy resolution of the dispute, avoids the expense of litigation, helps to narrow the issues in dispute, and brings parties together to resolve matters that are not in posture for litigation.⁷⁸

Mediation also facilitates communication and the parties' assessment of their positions. Typically, pre-mediation statements are employed. There, the parties exchange positions regarding factual background and legal positions. These statements are destroyed at end of the session to maintain the off-the-record nature of mediation. In a mediation session, EB staff will usually meet with parties together and individually. The FCC

⁷⁴ Trends in Telecommunication Reform 2002, "International Telecommunication Union, page 48.

⁷⁵ See generally, USA contribution to ITU-D Question 18/1, September 2002, pages 8-10.

⁷⁶ The FCC's Market Disputes Resolution Division of the Enforcement Bureau is responsible for resolving complaints against common carriers (wireline, wireless, and international) by competitors and other carriers involving market issues as well as for pole attachment complaints. "Federal Communications Commission – Adjudication and Mediation", Tracey Bridgham, Esq., Market Disputes Resolution Division, September 2004.

⁷⁷ In the adjudication (complaint) process, an action is initiated against a carrier by a complaining party (consumer, company, or another carrier) rather than by the Commission. *Id.*, page 1.

⁷⁸ *Id.*

strongly encourages the attendance of business representatives who are integral to the dispute, not just legal counsel, because FCC staff has found that the direct involvement of relevant business representatives can produce a more clear understanding of the issues and increase the probability of a quick resolution. FCC staff gives each side an informal, off-the-record assessment of their arguments in the individual sessions. Subsequently, more information may be exchanged after the session with follow-up phone calls and possibly more in-person sessions.⁷⁹

While mediation may be ideal for settling private disputes, FCC staff has found that it is not the most advantageous for policy making because a negotiated result only applies to the negotiating parties even if there are similar disputes between other carriers. An additional difficulty is that disputes sometimes relate to ambiguous areas of the law that a Commission decision, rather than an off-the-record settlement, would clarify.⁸⁰

In **Uganda**, the UCC has the power to receive and investigate complaints by interested parties as well as on its own motion. Public petitions filed in response to licence applications that have been filed with the UCC and published permit the UCC to discover possible violations of the law. The UCC inspects licensed facilities and takes action where it discovers violations of rules, regulations, licence conditions etc. Letters of inquiry are issued by the UCC to obtain information from a licensee or other entity during the course of an on-going investigation or when following up a complaint.⁸¹

When a licensee breaches a licence condition or acts contrary to **Tanzania's** Act or regulations, a written notice may be issued specifying the breach and informing the licensee of the Tanzania Communications Regulatory Authority's intention to take legal action. The licensee is afforded time to rectify the breach and/or respond to the Commission's notice. Thereafter, if the licensee fails to provide an explanation the regulator may impose a sanction.⁸²

In **France**, ART's tools of regulation include but are not limited to: the ability to sanction for breaches of the rules, the ability to establish mediation, the possibility to manage investigations of the sector, and the ability to set up general rules of order framed by the approval of the Minister.⁸³ The legislature of 1996 endowed the ART with the ability to investigate. The two principal provisions of law that can serve as the foundation for the investigatory procedures are Articles L.32-4 and L.40 of the code of Posts and Telecommunications. Under Article L.32-4, ART can conduct a simple investigation of information or documents from the operators. If the operator refuses to defer to ART's request for this information, however, Article L.32-4 does not provide an ability to coerce compliance. In order to assure itself that its requests will be respected, ART can employ the combined provisions of Articles L.32-4 and L.40. The investigations effectuated under Article L.40 regard a regime that is one of judicial police operations and is framed on a procedural plan. The law also institutes a simple right of access, but does not provide the power to search.⁸⁴

In **France**, procedures for settling differences are at the centre of the mechanism of regulation and permit resolution in a brief time – three to six months – of differences between two parties in defining technical conditions and tariffs in lawsuits. In the current regulatory framework, ART is concerned with

⁷⁹ *Id.*, pages 2-3.

⁸⁰ *Id.*, page 3.

⁸¹ UCC Contribution to ITU-D Question 18/1, December 2002, page 2.

⁸² TCC Contribution to ITU-D Question 18/1, September 2002, page 2.

⁸³ *See* ART Contribution to ITU-D Question 18/1, January 2003, page 2.

⁸⁴ *See Id.*, page 6.

lawsuits/disputes on the following issues: access, interconnection, unbundling the local loop, placement of network cable for providing telecommunications services, dividing infrastructure, furnishing a list of subscribers for a universal directory or furnishing information on universal service. Currently, ART principally handles problems of interconnection access, and for the first time, the framework for placement of network cables. They have also rendered a decision settling differences about unbundling the local loop.⁸⁵

In **Brazil**, all of ANATEL'S bureaux (except for General Services) conduct enforcement activities for the services within their specific mandate.⁸⁶ After an inspection is performed, expert and other reports are issued, and if a violation of a regulation or licence condition is found, ANATEL may either (i) send an infraction notice to the offender describing the violation and giving time for the offender to provide an administrative defense, or (ii) send an Official Letter requesting additional information or clarification. Based on the inspection, ANATEL may also initiate a procedure for Verification of Non-Compliance with Obligation (PADO) to verify breach of a regulation. Following due process, an only upon conclusion of a PADO, a penalty may be established. This ruling may be appealed to a court. ANATEL may also initiate a PADO based on written complaints or those received by its call center from a customer or competitor of an operator.⁸⁷

During its five-year existence, ANATEL initiated 42,300 PADOs, the majority of which were related to non-compliance with its regulatory obligations established in the General Quality Plan for Fixed Telephony, rather than for consumer complaints.⁸⁸ Some 11% were dismissed with no penalty; in 19% fines were imposed, and in 4% a warning was issued.⁸⁹ The vast majority – 90.3% – were initiated by the Radiofrequency and Spectrum Bureau; 7.3% were brought by the Public Utility Service Bureau; 1.26% by the Mass Communications Service Bureau; 0.77% were brought by the Private Services Bureau; and 0.63% by the Universal Access Bureau. The total amount of fines issued for these PADOs total BRL 126.5 million. Due to pending appeals, however, this full amount has not been collected.⁹⁰ Further, though fines are imposed by ANATEL, they are reviewed by the courts, and only a court may collect the fine, execute a judgment, or confiscate property.

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

⁸⁵ *Id.*, page 3.

⁸⁶ *See* ANATEL Contribution to ITU-D Question 18/1, March 12, 2003, page 3. ANATEL has six bureaux: Public Utility Services; Mass Communications Service, Universal Access; Private Services; Radio Frequency and Inspection, and General Administration. ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, page 3.

⁸⁷ *Id.*, page 3. *See also* ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, page 5.

⁸⁸ Both incumbents and new entrants must comply with the General Quality Plan, which describe minimum access and quality of service obligations. *See* ANATEL Contribution to ITU-D Question 18/1, July 30, 2003, page 4.

⁸⁹ *Id.*, page 7.

⁹⁰ *Id.*

Lithuania's telecom laws are enforced primarily by the CRA's inspectors, who are appointed and dismissed by the Director of the CRA.⁹¹ Article 10 of the Law on Telecommunications provides that CRA inspectors have the authority to monitor compliance with the laws and regulations governing telecom networks and radio communication, radio equipment and telecom terminal equipment, issue records of administrative infringements, upon obtaining a warrant issued by the court inspect premises, vehicles or territories,⁹² and seize equipment and devices as provided for in the law.

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

Inspector's actions may be appealed to the Director of the CRA within 10 days of the action for which there is a complaint. The Director must issue a decision within 10 days after the appeal is filed, or the aggrieved party may appeal to the court. Parties disagreeing with the Director's decision may also appeal to the court, but such appeal does not suspend the decision of the CRA in the meantime.⁹³

Morocco's ANRT has the power to enjoin, to compel, and to launch public action. The power to enjoin allows ANRT to place an injunction on any licence-holder that fails to abide by the requirements imposed as a condition of the licence. The power to compel allows ANRT to suspend the licence and seize the equipment of anyone committing an offense. It also allows it to take the "necessary measures" to assure continuity of the service and protect users. If found guilty, a court may order the network to be confiscated or destroyed at ANRT's request.⁹⁴

ANRT's employees have the power to enter the premises of any company "acting improperly" and seize any documents that will support its case. ANRT may also press charges through its own duly sworn and commissioned officers, through officers of the judicial police, and through officers of the public forces. Charges are set forth in a written statement and forwarded to the Royal Prosecutor within five days. The statement of charges is taken as confirmation of wrongdoing until proven false.⁹⁵

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

⁹¹ The Director of the CRA is appointed by the President of the Republic on the recommendation of the Prime Minister. *See* Contribution of **Lithuania** to ITU-D Question 18/1, March 10, 2003, page 2.

⁹² To obtain a warrant to inspect a vehicle, premises, or territory, CRA inspectors must file an application for authorization with the Vilnius Regional Administrative Court, which must deliver a reasoned decision on the application within 72 hours. CRA inspectors can appeal denials of the application to the Supreme Administrative Court of **Lithuania** within 7 days. The Supreme Court must examine the appeal within 7 days. Its decision on the matter is final and is not subject to appeal. In urgent cases, CRA inspectors may take action on a decision of the Director of the CRA. In this case, an application for authorization must still be filed with the court within 24 hours of the Director's decision. If the court upon review denies the application, the inspection must be terminated and all information obtained destroyed. *Id.*, page 5.

⁹³ *Id.*, page 4.

⁹⁴ *See* "Effective Regulation: Case Study – **Morocco**", International Telecommunication Union, 2001, page 24.

⁹⁵ *Id.*

dispute and issue a decision. The decision must be supported by ANRT's Management Committee.⁹⁶ ANRT also has the power to revise interconnection agreements if it deems this necessary. To carry out its duty to regulate service quality, ANRT conducts technical inspections on both operators' premises and on its own premises. It engages the services of external experts and conducts user and operator surveys.⁹⁷ Operators and service providers may appeal ANRT's decisions before an administrative judge, who has the power to rescind them, but not amend them. A maximum period of two months is established to settle this appeal – which may be in or out of court – and the regulatory decision remains in force during this period.⁹⁸

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

- (i) failure to comply with installation and service requirements;
- (ii) partial or total interruption of the licensed services for a continuous period of 24 hours in Dar es Salaam and 48 hours in other areas; or
- (iii) failure of the licensee to provide information to the TCC.⁹⁹

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

Ofcom's predecessor, the **United Kingdom's** Oftel, generated investigations in the following ways: (i) by a complaint about anti-competitive behaviour; (ii) by a request for Oftel to resolve a dispute under the current interconnection Directive; or (iii) Oftel's own motion.¹⁰⁰

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

- (i) a full statement of the scope of the dispute;
- (ii) a description of the obligations to which the dispute relates, including a view on the relevant economic market;
- (iii) full details of the preferred remedy; and
- (iv) documentary evidence of commercial negotiations on all issues covered by the scope of the dispute.

⁹⁶ ANRT's Management Committee is chaired by the Prime Minister and has four representatives of the State: the Minister of the Interior, the Minister of Economic Affairs and Finance, the Secretary General of the Government, and the Minister of National Defense. These members are appointed by the ANRT Board of Directors for a five-year term. The Management Committee is charged with settling disputes between operators that are filed with ANRT. *See Id.* at 20. The Board of Directors is chaired by the Prime Minister or their delegate and consists of 9 representatives of the State: the secretary general of the government, ministers responsible for the interior, finance, higher education, commerce, economic development and privatization, telecommunications, communications, national defense, the Director General of ANRT, and five people from the public and private sectors appointed by the Prime Minister for a five-year term. *Id.*, page 18.

⁹⁷ *Id.*, pages 37-39.

⁹⁸ *Id.*, page 40.

⁹⁹ TCC Contribution to ITU-D Question 18/1, September 2002, page 1.

¹⁰⁰ Oftel/Radiocommunications Agency Report, page 11.

Additionally, to facilitate compliance with this proposed new requirement, and to assist in uniformity, Oftel prepared and published for comment its preferred format for such submissions.¹⁰¹

Oftel also proposed to allow five working days for representations to be made on the practicality of meeting a deadline for providing information it has requested under the Telecommunications Act of 1984, or a telecommunications licence. Oftel indicated that it would generally confirm or amend the information request within two working days, but “would not expect to agree to an extension to the deadline.”¹⁰²

The EU Directives allowed Oftel to decline to resolve a dispute where alternative mechanisms exist. Accordingly, Oftel maintained the view that Alternative Dispute Resolution should be used to resolve disputes between operators that are not dominant, as these would (in the absence of a regulator) be resolved through normal commercial negotiations. The exception is where a regulatory obligation (e.g., a general obligation about number portability) has been imposed on operators that are not dominant and the dispute refers directly to this obligation.¹⁰³

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

A hearing at which all affected operators were asked to comment concluded the paper investigation phase. As a result of its investigation and hearing, the RCSL determined that the incumbent’s tariffs for its leased circuits were discriminatory, did not take into account excess capacity available, and therefore were anti-competitive. The RCSL directed the incumbent to submit a proposed plan for providing access to the cable; as of June 2003, the RCSL will develop tariffs for competitive use of the cable system.¹⁰⁴

In **Burkina Faso**, ARTEL, the NRA, is competent to conduct both conciliation and arbitration. ARTEL is competent to conciliate or arbitrate between operators or between operators and their customers in the following circumstances: improper application of an operator’s licence agreement; licence terms and conditions; interconnection agreements; access to telecommunication networks; or infrastructure sharing. Before ARTEL can become involved, however, the disputing parties must have first attempted to amicably settle the matter.¹⁰⁵

Some regulatory authorities have instituted special measures to address the needs of consumers. **Uganda’s** UCC has established a Consumer Complaint desk along with procedures for handling complaints.¹⁰⁶ More recently, Uganda has developed a relationship with the Uganda Consumer Protection Association and has developed and published materials to increase consumer awareness of their rights and obligations.¹⁰⁷

¹⁰¹ See *Id.*, page 15.

¹⁰² *Id.*, page 19.

¹⁰³ *Id.*, page 16. Oftel believes that its role in dispute resolution is to address “problems that arise as the result of the particular nature of electronic communications, or ... disputes involving an operator with market power.” *Id.*

¹⁰⁴ Telecommunications Regulatory Authority of **Sri Lanka**, contribution to ITU-D Question 18/1, June 11, 2003, pages 1-3.

¹⁰⁵ Contribution of ONATEL to ITU-D Question 18/1, April 1, 2005, page 4.

¹⁰⁶ UCC contribution to ITU-D Question 18/1, page 2.

¹⁰⁷ Addendum to UCC contribution to ITU-D Question 18/1 (January 2004), page 3.

Similarly, **Brazil**'s ANATEL works closely with specialized consumer protection institutions and maintains a toll-free call centre to receive complaints from consumers. These complaints are processed by User Relations Assistance, which screens information and forwards it to the specific area for action.¹⁰⁸ A Committee has been appointed by the Telecommunications Commission of **Sri Lanka** to resolve disputes between consumers and the service providers "by following a transparent, non-discriminatory process encouraging public participation and open dialogue". The right to appeal is available to any person aggrieved with the decision of the Committee on a question of law.¹⁰⁹ In **South Africa**, to help ICASA monitor performance, licensees must publish statistics on consumer complaints every six months.¹¹⁰

It is not characteristic of **Moroccan** culture for associations to defend consumer's interests, or for written complaints to be submitted to the authorities. Nonetheless, due to the good reputation enjoyed by ANRT, reportedly individuals do approach them directly with complaints and requests for assistance.¹¹¹

2.3 Challenges Identified

The following lists those challenges to effective enforcement procedures and practice reportedly faced by NRAs:

- Absence/delay in finalizing NRA regulations that implement their enabling act.
- Duplication of jurisdiction over telecommunications with other state entities.
- It is often very expensive for the NRA to carry out its enforcement function, and it can be extremely time consuming.
- Often it is difficult for the NRA to obtain sufficient information to assist with investigations and compliance.
- NRAs are constituted as expert agencies with resources allocated to achieve efficiencies, yet are subject to the judiciary which largely has less expertise in communications matters and fewer resources dedicated to adjudicating those matters.
- Politicians, courts, and local administrative authorities sometimes take actions that affect or delay the NRA enforcement process.
- Preliminary injunctions issued by the courts that indefinitely suspend NRA decisions.
- Courts' unfamiliarity with telecommunication issues and consequent levying of fines not commensurate with the seriousness of the offence or the NRA's inspector's efforts.

¹⁰⁸ ANATEL contribution to ITU-D Question 18/1, March 12, 2003, page 5.

¹⁰⁹ **Sri Lanka** Regulatory Commission contribution to ITU-D Question 18/1, pages 1 and 3.

¹¹⁰ See "Trends in Telecommunication reform 2002", International Telecommunication Union, page 46.

¹¹¹ See "Effective Regulation: Case Study – **Morocco**", International Telecommunication Union, page 41.

- The existence of more than one authority involved in issuing a sanction (e.g., where the NRA recommends a sanction and another institution imposes the sanction) results in duplication of jurisdiction and procedures, and sometimes, conflicting recommendations.¹¹²
- Operators sometimes resist a new NRA's inspections and enforcement orders.
- New entrants are sometimes unaware of their obligations; new entrants and incumbents are sometimes unaware of the NRA's power or mandate.
- Consumers/users are sometimes unaware of their rights and of the authority, role, or in some cases existence of the NRA as a vehicle for recourse of grievances or complaints.
- Inability or difficulty keeping up with fast technological developments.
- Regulatory agencies' reliance on practices/methods used by developed countries which at times may not be suitable for developing countries' environment.
- Enforcement processes that require too much paperwork.

2.4 Guidelines: Enforcement Process and Practice; Resolution of Disputes

National Regulatory Authorities are encouraged to:

- Develop and publish procedures for the NRA's internal operations and its external public functions that reflect fairness, speed, efficiency, and transparency goals.
- Design and employ transparent procedures that enable the NRA to render and publish a decision that considers all relevant facts and law, including, as appropriate, the views of all stakeholders in the sector.
- Consult, as appropriate the different stakeholders in the sector, on issues involving decisions made by the regulator.
- Observe relevant legal precedent.
- Adopt procedures to protect confidential or commercially sensitive information provided by operators, service providers, or other licensees to facilitate the supply of information necessary to evaluate compliance with laws, policies or regulations.
- Identify areas where the actions of other interested public authorities (e.g., courts, local representatives, administrative authorities) frequently or significantly affect NRA enforcement processes. Where feasible and appropriate, develop a plan for communication, coordination, and cooperation with the goal of facilitating equitable and speedy resolution of violations.¹¹³

¹¹² Among several examples provided, the **Democratic Republic of Congo** is illustrative of this challenge. There, Article 50 of the Framework Law provides that the PTT Minister appoints officials authorized to act as judicial police officers (OPJ) that will seek out infringements within the sector. Article 6 of that same Law provides that the Minister shall ensure the surveillance and policing of the sector with the collaboration of the State services responsible for justice, home affairs and security. Article 4 of Act 014/2002 provides that ARPTC shall, within the framework of its sector monitoring activities, visit operators' installations and conduct investigations. *See*, Contribution of the Democratic Republic of Congo to ITU-D Question 18/1, February 7, 2005, page 7.

¹¹³ Good examples of this approach include actions taken by **Uganda, Peru, Brazil, Mexico, and Colombia**. Noting that under the law only the Director of Criminal Prosecutions could prosecute criminal offences under the Communications Act, and wishing to minimize any potential administrative delay or other inefficiencies, **Uganda's** NRA, UCC, petitioned the Director of Criminal Prosecutions for authority to prosecute criminal offences under the Communications Act and won this authority. As a result, UCC compliance efforts in this area are less complex.

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

- Consider employing a variety of tools for investigation to include letters of inquiry, on-site inspections, subpoenas, or summons.
- Insofar as possible, use technology to facilitate speedy but deliberative decision-making, and subsequent publication of these decisions.
- Place decisions and comments on the web.
- Consider placing the burden to produce information needed by the NRA upon service providers/licences to compensate for limited staff and resources. Make this information public so that competitors and consumers can notify the NRA if they believe the information is inaccurate or otherwise flawed.
- Consider publishing a standard format for gathering information from regulatees and for receiving complaints from consumers.
- Prepare internal, standardized work sheets, in electronic format if possible, for NRA staff to gather information from regulatees, render a decision on licence applications or other line processing work, and review complaints from consumers to assist the NRA in ensuring that all issues have been reviewed and relevant rules have been complied with.
- Consider encouraging self-reporting by regulatees; this can lower enforcement costs, reduce the risk of harm, or mitigate harm.
- When establishing penalties, seek to minimize the cost of compliance with regulations for business users and consumers.
- Develop and maintain a database or other appropriate record-keeping system to track violators and violations for use in reporting to the government and the public, tracking industry trends, and in setting future penalties or sanctions.
- Consider employing a voluntary compliance scheme featuring industry¹¹⁴ self-regulation as a low-cost, potentially low-risk alternative to, or supplement for, formal enforcement processes. Such rules can either be operational or consumer focused, and though developed by industry, should reflect current government objectives.
- Information about which companies have agreed to follow voluntary standards or rules should be made publicly available.

¹¹⁴ The term “industry” here refers broadly to operators, service providers and other players in the telecommunication market.

3 Independent decision-making

3.1 Overview

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

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

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

In the context of regulatory decision-making procedures, a number of principles have been presented (and acknowledged in the statutes of many countries) that aim to promote predictability, clarity, and consistency.¹¹⁵ Chief among these for purposes of facilitating independent decisions are the principles of transparency and public participation.

A transparent process is, first of all, one that is open.¹¹⁶ Fortunately, with the growing popularity of the Internet, many regulators now make their processes transparent by publishing public notices and consultation documents on their website. As a result, regulators are now better able to convey information on a proposed decision to all interested parties.¹¹⁷

Procedures that facilitate transparency also encourage public participation. By presenting a proposed rule to the public before it takes effect, and inviting open discussion and active participation in the decision-making process, public trust in the integrity of the decision is increased and valuable public input on challenging issues is obtained.¹¹⁸ Public and private sector participation in the decision-making process allows an

¹¹⁵ See e.g., Final Report on ITU-D Question 8/1: "Establishment of an independent regulatory body" Document 1/204(Rev.1)-E [www.itu.int/ITU-D/study_groups/SGP_1998-2002/SG1/Documents/2001/204Rev1E.doc], November 7, 2001, pages 16-17 discussing principles for regulatory decision-making: transparency; timeliness; monitoring; private sector participation/public involvement.

¹¹⁶ See Federal Communications Commission, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community* [<http://www.fcc.gov/connectglobe/sec1.html>], June 1999, page I -2.

¹¹⁷ See, Final Report on ITU-D Question 8/1: "Establishment of an independent regulatory body" Document 1/204(Rev.1)-E, November 7, 2001, page 16.

¹¹⁸ See Federal Communications Commission, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community*, [<http://www.fcc.gov/connectglobe/sec1.html>], June 1999, page I -3.

opportunity for those who will be most affected by the decision to assist in its formulation.¹¹⁹ Transparent processes that involve the public and make them aware of the impartiality and of a decision facilitate independent decision by an NRA.

3.2 Country Examples

Bhutan's Telecommunications Act of 1999 explicitly states that "regulation of the ...sector shall be carried out independently of the operation of telecommunication systems and the provision of telecommunication services". In addition, facilitating transparency, the Act also provides that any direction, regulation, guideline, or code of practice issued in accordance with the Act shall be: (i) adopted and published in such manner as the Director considers appropriate to inform the parties affected; and (ii) placed on the Register of Regulations, Licences and Orders maintained by the BCA. The Act also gives the BCA broad powers to establish advisory bodies to provide the Director with advice on exercise, performance and discharge of the Director's duties, functions and powers under the Act, thereby providing another avenue for receiving input from the public in addition to the administrative processes and hearing already specified in the law.¹²⁰

Uganda's UCC has endeavoured to increase public participation in the regulatory process through a series of workshops and seminars organized on various issues, and held during the formation stage of policies under consideration for adoption by the UCC.¹²¹ This facilitates transparency and makes possible broad public input in advance of a policy decision by the UCC.

3.3 Challenges Identified

The following lists the general challenges to independent decision-making reportedly faced by NRAs:

- Undue political interventions and measures taken by courts and local administrative authorities may affect or delay the NRA enforcement process.
- Although the NRA is required to consult with the public on significant issues, the Minister may issue directives without public consultation, which the NRA must then implement. In such cases, the value of public consultation may be lost.

3.4 Guidelines: Independent Decision-Making

National Regulatory Authorities are encouraged to:

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

¹¹⁹ See, Final Report on ITU-D Question 8/1: "Establishment of an independent regulatory body" Document 1/204(Rev.1)-E, November 7, 2001, page 16.

¹²⁰ Contribution of **Bhutan** to ITU-D Question 18/1, April 2004, pages 2-3.

¹²¹ Addendum to UCC contribution to ITU-D Question 18/1 (January 2004), page 3.

4 Sanctions and penalties

4.1 Overview

Having established authority to act, determined culpability through a fair, expeditious, and transparent process, and rendered an independent decision on the matter, the regulatory authority is now in a position to impose a sanction. The issue is how to determine the appropriate penalty. In this section, we will explore guidelines that may enable administrations to select sanctions that reflect their unique values and objectives.

As a general matter, people often obey laws that embody the social norms. Public law enforcement also may be able to reinforce social norms and thereby indirectly contribute to effective enforcement.¹²² That said, however, there will be a critical gain above which individuals will commit a harmful act and below which they will be deterred. The critical gain is determined by the probability of detection, the level of sanctions, and the standard for imposing liability.¹²³

Assuming an enforcement authority wishes to employ a fault-based standard for culpability (as opposed to strict liability),¹²⁴ it has been suggested that an optimal policy is to set the fault standard equal to the harm, and the fine at a level that achieves compliance with that standard.¹²⁵

In determining the sanction to impose, a regulator should consider the severity of the harm, the cost of enforcement, the probability of detection, and whether the offender is risk-averse or risk-neutral. In general, sanctions should rise with the actual or the expected level of severity of harm up to a maximum,¹²⁶ and should reflect enforcement costs. This is because when an individual or corporate entity commits a harmful act, society must not only bear the immediate harm...but also, if detected, the cost of imposing the fine. Costs associated with imposing a fine may include investigation and prosecution (at the end of which a fine is imposed only in some cases). Together, that is the expected total social cost of the act.¹²⁷

¹²² See generally “The Economic Theory of Public Enforcement of Law”, Mitchell Polinsky, Steven Shavell, Working Paper 6993, National Bureau of Economic Research Cambridge, MA, March 1999, page 43.

¹²³ See *Id.*, page 7.

¹²⁴ Fault-based liability may be preferable to strict liability when individuals are risk-averse: fault-based liability can deter harm-creating conduct without imposing risk on risk-averse individuals, whereas under strict liability, all individuals who commit the harmful act bear the risk of being fined. *Id.*, page 13. On the one hand, fault-based liability is more difficult to administer. To apply fault-based liability, the enforcement authority must have more information than under strict liability: it must be able to calculate optimal behaviour to determine the fault standard, and it must ascertain whether the fault standard was met. Under strict liability, the authority need only determine harm. Additionally, strict liability encourages better decisions by injurers regarding their level of participation in harm-creating activities. On the other hand, fault-based liability will result in fewer enforcement actions than strict liability and thereby save enforcement costs: injurers who clearly were not at fault presumably will not be prosecuted under fault-based liability, but they will be under strict liability. *Id.* An advantage of fault-based liability over strict liability is that sanctions that are costly to impose are imposed less often. *Id.*, page 42.

¹²⁵ *Id.*, page 12.

¹²⁶ *Id.*, pages 30 and 44.

¹²⁷ See generally *Id.*, pages 22-23.

When the probability of detection of a harmful act is not certain or is variable, high sanctions may be optimal. The optimal fine is the maximum in this circumstance if individuals are risk-neutral in wealth. When individuals are risk-averse, however, the optimal sanction may be lower.¹²⁸ When the probability of detection of a harmful act is taken as fixed, the optimal fine is the harm divided by the probability of detection, because this results in an expected fine equal to the harm. Risk aversion of injurers should usually lower the level of the fine.¹²⁹

It is also generally desirable for the structure of enforcement to encourage self-reporting. Self-reporting can be induced by lowering the sanction for violators who disclose their own infractions. Moreover, the reward for self-reporting can be made small enough (just below what it would be if not reported) that deterrence is only negligibly reduced. Self-reporting lowers enforcement costs, reduces the risk of harm, and may allow harm to be mitigated.¹³⁰

Setting a fine that represents a percentage of the offending service provider's revenues may permit regulators to discipline market players without seriously undermining small, non-dominant operators.¹³¹

Some NRAs use revenues collected from sanctioned violators to advance universal access/service goals. In **Peru**, for example, fines collected for violations are deposited in OSIPTEL's universal service fund, where they are used to fund network development in rural areas.¹³² The **Dominican Republic** also uses revenues obtained from fines for connectivity projects in communities with more than 200 inhabitants. Some of these projects use solar energy and include telemedicine and videoconference applications. Other countries, for example, **Ecuador**, invest revenues received from sanctions imposed in telecommunication equipment or disburse them to the police force to help defray the cost of investigations.¹³³

4.2 Country Examples

In the **United States**, it is Congress's explicit intention that forfeitures (or fines) serve as a "meaningful sanction to the wrongdoers and an effective deterrent to others".¹³⁴ Accordingly, section 503 of the Communications Act sets forth maximum forfeiture amounts for violations by licensees or regulates in three

¹²⁸ See generally *Id.*, page 41.

¹²⁹ *Id.*

¹³⁰ *Id.*, pages 35-36. In August 2000 for example, the **New Zealand** Commerce Commission released its new leniency policy in which the Commission, in its discretion, will be lenient if a party cooperates and provides information prior to an investigation being initiated. OECD Report, page 5. In practice, a similar policy of leniency in such circumstances is also employed by the FCC in the **United States**.

¹³¹ See "Trends in Telecommunication Reform 2002", International Telecommunication Union, page 49.

¹³² Rapporteur's Report: Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22 April 2004 (ITU-D/1/RGQ18/024(Rev.1)-E, page 3.

¹³³ Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22 April 2004 (Discussion); ANATEL/ITU BDT Seminar on Enforcement Practices, Rio de Janeiro, 19-20 April 2004 (Discussion).

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

categories: (1) broadcasters and cable operators, (2) common carriers, and (3) other licensees, entities and members of the public (not covered by the other categories). In addition, section 503 (b)(2) (D) of the Communications Act requires the FCC to take into account mitigating factors – “the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offences, ability to pay, and other such matters as justice may require”.¹³⁵ The FCC therefore uses the adjustment factors to assess the forfeiture amount in light of all relevant facts.

The FCC’s *Forfeiture Policy Statement*, CI Docket No. 95-6, FCC 97-218 (July 1997), contains base amounts to guide the determinations of forfeiture liability amounts for specific violations of the Act and the Commission’s rules. The base amount specified in the guidelines is the starting point in assessing a fine. That fine may be decreased below the base amount or increased to the statutory maximum when the adjustment criteria described in section 503(b)(2) (D) are considered.¹³⁶ Uniform base amounts cannot be higher than the statutory maxima for any service.¹³⁷

The forfeiture guidelines are intended to address frequently recurring violations. They are not intended to be a complete or exhaustive list of violations.¹³⁸ Violations that are not listed in the guidelines are *not* considered to be unimportant or non-existent. The FCC retains the discretion to impose forfeitures, including forfeitures for new violations of existing laws or regulations, or violations that arise from the use of new technologies or services.¹³⁹

The FCC set the base forfeiture amount for misrepresentation at the statutory maximum for the particular type of service provided by the violator. Regardless of the factual circumstances of each case, misrepresentation to the FCC is always considered an egregious violation. Any entity or individual that engages in this type of behaviour should expect to pay the highest forfeiture available to the service at issue. Indeed, the revocation of the licence may also result from misrepresentation.¹⁴⁰ Finally, under 18 United States Code Section 1001, a respondent who makes knowing and willful misrepresentations or omissions may be subject to possible criminal penalties.¹⁴¹

Currently, fines for certain service providers are USD 130,000 per violation or per day of a continuing violation, with the amount for a continuing violation not to exceed USD 1.325 million.¹⁴² Former United States FCC Chairman Michael Powell supported changes to the Communications Act that would give the FCC authority to impose substantially greater fines for significant violations and other procedural changes

¹³⁵ See 47 U.S.C. Section 503. There is an upward adjustment factor under this section for repeated or continuous violations.

¹³⁶ *Id.*, page 15.

¹³⁷ *Id.*, page 12.

¹³⁸ *Id.*, page 23.

¹³⁹ *Id.*, page 24.

¹⁴⁰ See *Id.*, page 12, citing 47 U.S.C. Section 312(a)(1). See below also, page 40, an example of **Sri Lanka**’s penalty for an operator that provided false information to the regulator.

¹⁴¹ See **USA** contribution to ITU-D Question 18/1, September 2002, page 8.

¹⁴² See Amendment of Section 1.80(b) of the Commission’s Rules, June 2004. See also **USA** contribution to ITU-D Question 18/1, September 2002, page 2, citing *Forfeiture Guidelines Report and Order* (<http://www.fcc.gov/eb/Orders/fcc99407.html>) and *Forfeiture Guidelines Reconsideration Order* (<http://www.fcc.gov/eb/Orders/fcc99407.html>).

that would enable the Commission to prosecute wrongdoers for the benefit of consumers. Specifically, under his proposal, fines for certain service providers would have increased ten-fold to USD 1 million for a single violation, or for continuing violations, USD 1 million per day up to a maximum of USD 10 million.

Pursuant to the **Tanzania** Communications Act, the Communication Operator (Licensing) Regulations and licences, the Tanzania Communications Regulatory Authority (TCRA) has the power to issue the following sanctions:

- (i) Suspension or cancellation of a licence;
- (ii) Monetary fine not exceeding 1% of a postal or telecom operator's gross annual revenue;
- (iii) Public apology by the licensee at its own costs for its infraction in a newspaper of general circulation in the area of services;
- (iv) Outage credits;
- (v) Any other appropriate sanction, e.g., cease order.¹⁴³

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

The UCC may revoke a licence, though this is reserved for most serious cases involving failure to adhere to repeated warnings or continuous or repeated violations. The UCC is also authorized to arbitrate disputes between operators and between operators and consumers. The agency may also commence criminal proceedings against any person or operator who has violated the law or relevant UCC regulations.¹⁴⁴ It is noteworthy that the UCC obtained this latter privilege as a result of its own initiative because under the Constitution of Uganda, only the Director of Criminal Prosecutions may prosecute a criminal offence. Recognizing both the specialized nature of offences under the Act, and the efficiencies that would be gained by having delegated authority to carry out such prosecutions, the UCC petitioned the Director of Criminal Prosecutions for authority for the UCC's Legal Officer to prosecute criminal offences committed under the Act. This authority was subsequently granted, and now significantly facilitates the UCC's abilities to enforce compliance with the Act and licence provisions.

In **Brazil**, penalties may only be imposed upon conclusion of a PADO¹⁴⁵ during which the nature and seriousness of a violation will be evaluated, along with any previous delinquency or repeated offences.¹⁴⁶ There are five main penalties that may be imposed by ANATEL: (i) warning; (ii) fine (in which economic condition of the offender and seriousness of harm is considered) not to exceed BRL 50,000,000.00 for each violation¹⁴⁷; (iii) licence revocation¹⁴⁸; (iv) temporary suspension of licence; and (v) unsuitability to contract

¹⁴³ TCC contribution to ITU-D Question 18/1, September 2002, page 2.

¹⁴⁴ UCC contribution to ITU-D Question 18/1, December 2002, pages 3-4.

¹⁴⁵ PADO: Procedure for Verification of Non-Compliance with Obligation.

¹⁴⁶ ANATEL contribution to ITU-D Question 18/1, March 12, 2003, page 5.

¹⁴⁷ Fifty million Reals (BRL) equals nearly 14 million U.S. dollars at an exchange rate of USD 1/BRL 3.6. *See Id.*, page 6.

¹⁴⁸ Revocation may be imposed in the case of: (i) failure to pay the concession service fee after the established term has lapsed; (ii) failure to comply with the coverage established in the concession contract; (iii) transfer of the concession without ANATEL's prior consent (where required); and (iv) service provision that is systematically inappropriate or deficient. ANATEL contribution to ITU-D Question 18/1, July 30, 2003, page 6.

with the Public Administration. In extreme cases, ANATEL may intervene in a concession, or in other cases it may require a violating entity to directly redress its users for losses it has caused. For cases of interference, operation of the offending equipment may be interrupted.¹⁴⁹

The law in **Burkina Faso** provides for two types of sanctions – administrative and criminal. Administrative sanctions range from 100,000 to 1,000,000 francs for failure to comply with an ARTEL order. If an order is not complied with after thirty days from its notification, an authorization can be suspended for a maximum of one month or its duration can be shortened for up to one year. In the event of a failure to comply within three months, an authorization is revoked. Administrative fines may be issued by ARTEL or by the Ministry; the Ministry may revoke or suspend a licence on the advice of ARTEL. Decisions imposing sanctions can be appealed to the courts. Criminal sanctions, whether fines or imprisonment, are imposed by criminal courts after referral thereto.¹⁵⁰

Formerly, the question of damages or compensation were not issues that the **United Kingdom's** Ofcom considered when resolving a dispute but were issues that must be pursued by complainants through the courts.¹⁵¹ Currently, Section 392 of the Communications Act of 2003 requires Ofcom to prepare and publish a statement containing the guidelines they propose to follow in determining the amount of penalties imposed. These guidelines can be found at http://www.ofcom.org.uk/codes_guidelines/penalty_guidelines/?a=87101.

With regard to penalties, Law 24-96, **Morocco's** Law on Telecommunications, does not allow ANRT any other option than to invoke article 30. This article states that if a licence holder fails to abide by the licence conditions, ANRT can serve notice on that licence holder and give it 30 days to comply. If compliance is not forthcoming within that time frame, the “appropriate government authority may, at the proposal of the ANRT Director General, totally or partially suspend the licence, temporarily suspend the licence for up to one year, or permanently withdraw the licence”.¹⁵²

According to Article 60 of **Lithuania's** Law on Telecommunications, a number of factors are considered when determining the sanction to be imposed: the scope of damage caused by the violation; its duration; extenuating or aggravating circumstances; income received as a result of the violation; and, when several parties are involved, the extent of influence of each party in the commission of the violation.¹⁵³ Normally, fines imposed by the Communications Regulatory Authority (CRA) must be paid to the State budget within three months of receiving the decision. Upon the violator's request (including its reasons) and CRA's approval, however, payment may be deferred for up to six months in whole or in part.¹⁵⁴ If a party fails to pay a fine, the CRA's decision will be submitted for enforcement to a court bailiff who will follow procedures specified in the Code of Civil Procedure.¹⁵⁵

¹⁴⁹ *Id.*, pages 5-6.

¹⁵⁰ Contribution of ONATEL to ITU-D Question 18/1, April 1, 2005, page 5.

¹⁵¹ See Ofcom/Radiocommunication Report, page 13.

¹⁵² See “Effective Regulation: Case Study – **Morocco**”, International Telecommunication Union, 2001, page 40.

¹⁵³ Contribution from **Lithuania** to ITU-D Question 18/1, March 10, 2003, page 7.

¹⁵⁴ *Id.*, pages 7-8.

¹⁵⁵ *Id.*, page 8.

A fine can be imposed on a natural person only, so where a company has violated a law or regulation, the fine is imposed on the Chief Executive Officer.¹⁵⁶ A fine of up to 3 per cent of the annual turnover of telecommunication activities, but not more than LTL 300,000 (approximately EUR 85,000) will be imposed for violating conditions associated with the following: use of radio frequencies, telephone numbers, consumer's rights, universal service obligations, technical rules associated with radio or telecommunication terminal equipment, or decisions of the CRA disposing of a dispute. For repeated violations, a fine of up to 5 per cent of annual turnover for telecommunication activities will be imposed. If a party fails to comply with an order of the Communications Regulatory Authority to terminate illegal activity or to provide information, a fine amounting to LTL 5,000 (equivalent to approximately EUR 1,400) will be imposed for each day the violation is committed.¹⁵⁷

Egypt's Law on Telecommunications contains specific sanctions for violating its provisions. Licence violations (e.g., conditions, technical quality regulations, performance standard measurements) carry a fine of not less than LE 20,000 and not more than LE 200,000.¹⁵⁸ Similar but potentially more severe penalties can be incurred for assigning a frequency bandwidth licence to a third party without NTRAs prior consent. In this case, the licence will be cancelled, the party will be imprisoned for a minimum of 3 months, and payment of a fine of not less than LE 20,000 and not more than LE 100,000 will be required.¹⁵⁹ More severe penalties potentially apply in the case of causing interference, where the law proscribes imprisonment for a maximum of six months and payment of a fine of not less than LE 20,000 and not more than LE 50,000.¹⁶⁰ In general, the most severe penalties are provided for operating without a NTRA licence (establishing infrastructure, operating a telecommunication network, providing telecom services, or transferring international calls in any way). For these violations, Egypt's new telecom law imposes a penalty of imprisonment between six months and five years, a fine of not less than LE 50,000 or more than LE 500,000, and confiscation of all equipment and connections used.¹⁶¹

China also prescribes criminal penalties in some cases. For example, on December 30, 2004, China's Supreme People's Court enacted a judicial interpretation declaring that destroying a telecom establishment through non-physical means such as tampering with software or other important data now bears criminal liability. Prior to this decision, criminal penalty covered only the physical destruction of a telecom establishment.¹⁶²

In **Canada**, decisions of the Canadian Radio-Television and Telecommunications Commission (CRTC) can be made orders of the Federal Court of Canada or of the Superior Courts of the provinces and can be enforced using the courts. Violators of the Act or CRTC decisions may be liable for a fine of up to CAD 5000 for a person and CAD 50,000 for a corporation for a first offence. These amounts double for

¹⁵⁶ See *Id.*, page 1

¹⁵⁷ Prior to enactment of the new Law on Telecommunications, fines imposed under the Lithuanian Code of Administrative Offences were very low – in fact, they could not exceed LTL 10,000 (approx. EUR 2,800). *Id.*, page 1.

¹⁵⁸ See, Arab Republic of **Egypt**, Law No. 10/2003 – Telecommunications Regulation, February 2003, Article 85.

¹⁵⁹ *Id.*, Article 74.

¹⁶⁰ *Id.*, Article 78.

¹⁶¹ *Id.*, Article 72.

¹⁶² Contribution of **China** to ITU-D Question 18/1, August 30, 2005, page 2.

subsequent offences. Prosecution requires the consent of the CRTC and must be completed within two years of the offence. If the offence continues for more than one day, the offender is liable for a separate offence for each day on which the offence is committed.¹⁶³

In **Poland**, where an operator is violating the terms of its licence, the regulator may levy a fine on the non-compliant operator in an amount up to 3 per cent of the operator's revenues for the past calendar year. The regulator may also fine the individual manager of the company an amount up to 300 per cent of the manager's monthly salary.¹⁶⁴

In **Portugal**, the regulator may impose fines on non-compliant operators of between 0.001 per cent and 0.5 per cent of the licensee's revenue in the prior year. In **Turkey**, non-compliant operators are subject to a fine of up to two per cent of the operator's turnover.¹⁶⁵ The regulatory authority in **Kenya** can fine licencees a fine of KES 500,000 for each violation of the terms and conditions. This fine applies monthly until the violation ends.¹⁶⁶

Descriptions of various infractions and the applicable sanctions can be found in **Bolivia's** Regulations for Sanctions and Special Infraction of Regulatory Framework (D.S. 25950) and are adequately defined.¹⁶⁷ Bolivia also maintains a register of all those who have been sanctioned.¹⁶⁸

In **Sri Lanka**, the telecommunication legislation and conditions in the licences requires service providers to furnish information to the Telecommunications Regulatory Commission. The correct number of new connections, for example, must be reported by the Commission to the Parliament and the public. One landmark decision by the Sri Lankan Regulator required a service provider to pay compensation to the public for delayed telephone installations. Information provided to the regulator by the service provider in that instance was incorrect; moreover, complaints from the public indicated that telephone connections claimed by the service provider were not actually in service. Therefore, Under Section 11 of the Sri Lanka Telecom Act of 1991 as amended by Act No. 27 of 1996, action was taken against a service provider for non-compliance with licence conditions. The violator was ordered to pay 69 million Sri Lanka rupees to "the aggrieved public".¹⁶⁹

4.3 Challenges Identified

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

- No description of appropriate fines.
- Lack of intermediate or mid-range economic penalties.
- Statutory fines which are not high enough to provide sufficient deterrence.
- Infractions and applicable penalties are adequately identified in the law; however, challenges are encountered in the implementation, due to difficulties with the judicial process and lack of support from law enforcement.

¹⁶³ See APEC TEL Report, April 2005, page 35.

¹⁶⁴ See "Trends in Telecommunication Reform 2002" International Telecommunication Union, page 48, box 4.3.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*, page 49.

¹⁶⁷ Contribution of **Bolivia** to ITU-D Question 18/1, May 4, 2004, page 6.

¹⁶⁸ Meeting of the Rapporteur's Group on ITU-D Question 18/1, Rio de Janeiro, 21-22 April 2004 (Discussion).

¹⁶⁹ **Sri Lanka** Regulatory Commission contribution to ITU-D Question 18/1(December 2002), page 2.

4.4 Guidelines: Sanctions and Penalties

National Regulatory Authorities are encouraged to:

- Ensure that the NRA has authority to impose a wide range of penalties that include minor, mid-range, and maximum.
- In determining a sanction, consider the severity of the harm, the probability of detection, the risk sensitivity of the offender, and the cost of enforcement.
- Establish and employ sanctions that are reasonable (proportional to the offence) and effective, but high enough to deter wrongdoing and achieve compliance with rules.
- Consider imposing a fine that exceeds the benefit the offender received from committing the offence.
- Considering the cost of enforcement, seek effective alternatives to fines (for example, employ voluntary industry compliance schemes, or include specific requirements in licence obligations).
- Decrease the penalties when there are other deterrents that encourage compliance.
- Consider providing a range of responses to violations including, e.g., warning letters, fines, consent decrees, preventive cease and desist orders, licence revocation, equipment seizure, damage awards, and referral for criminal prosecution.
- Consider developing, publishing, and employing specific but flexible guidelines for determining the severity of a sanction as these can deter violations of important rules and can assist the NRA in developing priorities among different violations.
- Consider setting a fine that represents a percentage of the offender's revenues as this may permit regulators to discipline market players without seriously undermining small, non-dominant operators.
- Consider employing the strictest penalties available to the NRA for offences involving misrepresentation.

5 Gender and enforcement

5.1 Overview

The ability to efficiently and adequately enforce domestic priorities may have the added benefit of favourably impacting certain segments of the population targeted by the state even more than others. For example, the ability to enforce universal service or rural connectivity goals may provide far-reaching benefits to women in certain countries. Successfully enforcing rules that require delivery of communications services to rural communities can have a great impact on women in Africa who, for example, make up 70% of its rural population.¹⁷⁰

Recognizing that the uneven distribution of technologies in societies – the digital divide – is reflected most sharply in the case of women, particularly in developing countries, and that this phenomenon is reinforced by socio-cultural, political, and economic systems, the failure to consider issues such as gender-based division

¹⁷⁰ *Transforming Information and Communications Technologies for Gender Equality*, Gillian M. Marcelle, Gender in Development Monograph Series # 9, May 2000, page 13.

of labour, cultural definitions of women's activities, women's paid and unpaid labour, and women's multiple roles from the early stages of technology diffusion may unwittingly generate unintended negative effects on women, and ICT may be developed and utilized in ways that do not reflect women's specific needs.¹⁷¹

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

For example, illiteracy limits women's access to text-based computer applications, because women make up nearly two-thirds of the 876 million people in the world who cannot read.¹⁷² Enforcing universal access schemes that, for example, promote user-friendly technologies in the context of low literacy or illiteracy levels (e.g., human computer interfaces that are non-text based; "scribes" for dictation at telecentres) can address this disparity. An innovative example of this can be found in **Sri Lanka** and **Mongolia** where local populations have gained access to information on the Internet through community radio networks. The radio station uses facilitators to search the Internet for information sought by local communities, and broadcasts the information in their language.¹⁷³ In **South Africa**, Women'sNet is developing a Women's Online Resource Centre (WORC) 2, an information community building project. WORC2 is intended to serve as an online clearinghouse for gender-aware training materials, including ICT training. WORC's goal is to promote inclusion of gender analysis in ICT and other areas of training, with a view towards enhancing the quality of training and support of gender justice available at global, regional, and local levels.¹⁷⁴

Enforcing gender-aware policies to provide universal access, such as communications technology access points (e.g., telecentres, community centres, technology centres, etc.), particularly those with access points located near places frequented by women (e.g., schools, markets, clinics), can have similar benefits.¹⁷⁵ ITU has instituted one such project. In partial fulfilment of the commitment to the Plan of Action made at Phase One of the United Nations World Summit on the Information Society (WSIS), ITU launched an initiative to establish at least 100 Multipurpose Community Telecentres for women in 20 African countries. As of January 2005, in cooperation with African ministries of communication, four such telecentres had been established in Tanzania and in Guinea-Bissau.¹⁷⁶ Regulations that ensure that consumers, particularly women

¹⁷¹ See *Is Information Technology Gender-Neutral?* Information and Communication Technologies for Development, an IDRC (Canada) Program Initiative, <http://www.idrc.ca/pan/gender/ginftecgn.htm>.

¹⁷² See "The Task Force on Gender Issues – A Catalyst for the Sustainable Development of Information and Communication Technologies (ICTs)", International Telecommunication Union, Telecommunication Development Bureau (2001), page 4, citing United Nations, "The World's Women 2000, page 87, referencing UNESCO, Statistical Yearbook 1999. (Data refers to the population 15 years and over.)

¹⁷³ See *Id.*, page 5, citing UNU/INTECH and UNIFEM and High Level Panel 2000; "Gender and Telecommunications: An Agenda for Policy" and page 26.

¹⁷⁴ Further information on Women'sNet can be found at <http://www.womensnet.org.za>, contribution of **Thales (France)** to ITU-D Question 18/1, March 18, 2005.

¹⁷⁵ *Id.*, page 21.

¹⁷⁶ Contribution of **Thalès (France)** to ITU-D Question 18/1, January 20, 2005, citing ITU News Release January 10, 2005, "ITU Launches Multipurpose Telecentre Initiative in Africa: 20 African Countries to be Focus of Project that will Empower Women".

(e.g., via consumer advocacy offices), are represented in the policy process, likewise can serve to facilitate gender balance.¹⁷⁷ Women's access to ICTs is also more dependent on the cost of telecommunication services. It is widely documented that there is a wage gap between women and men in most countries of the world.¹⁷⁸ Enforcing regulatory decisions that recognize wage/income gaps in terms of gender as well as geographic area can help implement domestic intentions to address this disparity.

The World Bank has discovered that decreasing disparities between men and women will result in faster economic growth.¹⁷⁹ The importance of ICTs as a tool to promote the full participation of women in the information society has been widely recognized. As noted in the Declaration and Recommendations of the "The Forum on ICT and Gender: Optimizing Opportunities" (Kuala Lumpur, **Malaysia**, 20-23 August 2003),¹⁸⁰ ICT offers immense possibilities to overcome women's isolation and enhance the participation of women in socio-economic and political development that will reduce poverty and improve the quality of life.¹⁸¹ In some countries, women figure significantly in household spending, providing an additional reason that their inclusion in the information society will be to the benefit of society as a whole. In the **United States** for example, women control a total of USD 5.2 trillion in spending (consumer and business) annually. Women purchase 83 per cent of all household products and services, including cable and communications services. Women contribute and handle 75 per cent of all household finances and make 53 per cent of the investment decisions.¹⁸² While these numbers may reflect significantly different economic circumstances, the role women play in household finances may be reflected proportionately elsewhere in the world.

Gender-disaggregated ICT usage statistics are collected by the **United States, Canada, Hong Kong, Thailand, Iceland, Sweden, Chile, Singapore, Finland, Ireland and Denmark**.¹⁸³ And since the first quarter of 2000, the **Korean** Network Information Center (KRNIC) has undertaken and published quarterly surveys of Internet use, averaging 5700 users. These data present some 20 categories of data collected and disaggregated by gender and, in most cases, age.¹⁸⁴

Finally, seeking the involvement and input of women regulators and policy-makers in analyzing and resolving the impact certain regulations may have on gender would be useful. As of 2001, slightly more than

¹⁷⁷ *Id.*, page 25.

¹⁷⁸ "Gender perspectives in Telecommunications Policy: A Curriculum Proposal", Sonia Nunes Jorge, ITU-BDT Task Force on Gender Issues, <http://www.itu.int/ITU-D/gender/projects/GenderCurriculum.pdf> (July 2000), page 4.

¹⁷⁹ The Task Force on Gender Issues – A Catalyst for the Sustainable Development of Information and Communication Technologies (ICTs), page 3.

¹⁸⁰ The Forum was hosted by the government of **Malaysia**, the Asia-Pacific Telecommunity (APT), ITU, the International Development Research Center (IDRC), the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and others.

¹⁸¹ Contribution of **Thalès (France)** to ITU-D Question 18/1 (October 20, 2003), page 1.

¹⁸² See, *Catalyst Study on Women 2004*
http://www.catalystwomen.org/publications/executive_summaries/financialperformance.pdf

¹⁸³ In these countries, as of 2003 for example, the percentage of female Internet users as a percentage of total Internet users was 45 per cent or more. See Gender Issues in ICT Statistics and Indicators, with Particular Emphasis on Developing Countries, Joint NECE/UNCTAD/UIS/ITU/OECD/EUROSTAT Statistical Workshop: Monitoring the Information Society: Data, Measurement and Methods (Geneva, 8-9 December 2003).

¹⁸⁴ <http://www.krnic.or.kr>

25% of NRAs had women in senior leadership, either as a single head of the agency or as a member of a collegial board or commission. At that time, NRAs in **Botswana**, **Canada** and the **Philippines** had more women than men in their collegial leadership bodies.¹⁸⁵

5.2 Country Examples

In **South Africa**, the telecommunication legislation of 1996 includes provisions for the government to take steps to encourage the participation of women in all aspects of the industry.¹⁸⁶ Accordingly, the Department of Communications in South Africa has established tele-centres that are owned and managed by women, made Internet facilities available for women-based (and other) groups, and trained women's groups to use technologies, including ways to enhance their businesses and other activities. The Department also has committed to gender equality internally by developing a Gender Management System that sets targets for change in the Department and is led by a gender specialist.¹⁸⁷

In **Uganda's** rural areas, the majority of inhabitants are women. In 2001, the UCC adopted a Rural Communications Development Policy that broadly aims to support the development of communications infrastructure in rural Uganda while ensuring reasonable and affordable access to communication services to the public. Uganda's associated Rural Communications Development Fund has been used to establish access to basic communications services including "SMART" subsidies to private operators. Licences issued by the UCC provide specific rollout obligations, especially in rural areas. Additionally, the UCC has provided for gender equity and mainstreaming in its Strategic Plan, and in 2004 adopted a Gender Policy that it is in the process of implementing.¹⁸⁸

Seventy-nine per cent of the people of **Bhutan** live in rural and remote areas. A priority of the Royal Government, Bhutan's rural access policy is aimed at encouraging access to the use of ICTs by both genders, especially youth and women.¹⁸⁹

5.3 Challenges Identified

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

- Low ICT literacy in women.
- Lack of data to evaluate enforcement of telecom policy on gender: gender-disaggregated statistics on access and use, incomes, differential impact of costs and technology choice, and on employment and entrepreneurship.¹⁹⁰

¹⁸⁵ See, "ITU Trends in Telecommunication Reform 2002", page 130.

¹⁸⁶ *Id.*, page 19.

¹⁸⁷ See, "The Task Force on Gender Issues – A Catalyst for the Sustainable Development of Information and Communication Technologies (ICTs)", International Telecommunication Union, Telecommunication Development Bureau, 2001 <http://www.itu.int/ITU-D/gender/projects/reports/ICTReportSept3.pdf>, page 7.

¹⁸⁸ Addendum to Contribution of **Uganda** to ITU-D Question 18/1 (January 2004), page 2.

¹⁸⁹ Contribution of **Bhutan** to ITU-D Question 18/1, April 2004, page 4.

¹⁹⁰ See "Gender, Information Technology and Developing Countries: An Analytic Study, Nancy Hafkin and Nancy Taggart, Academy for Educational Development (AED) for the USAID Office of Women in Development, Bureau for Global Programs, Field Support and Research", June 2001, page 72.

- Disparity in the distribution of ICT access facilities and services across the country.
- Assumptions that individuals from the public can or will benefit equally from policy decisions. (Policy decisions may have different impact on women and men.)
- Regulatory pricing policies usually consider affordable prices for services from a macro perspective, without noting the important micro-characteristics of the country.

5.4 Guidelines: Gender and Enforcement

National Regulatory Authorities are encouraged to:

- Adopt and promote a formal commitment to gender equality.
- Develop and maintain an awareness of the data available that reflect how enforcing telecom policy can impact gender. For example, gender-disaggregated statistics on access and use, incomes, differential impact of costs and technology choice, and on employment and entrepreneurship. If possible, collect such data for the NRA's domestic market.
- Identify, support and enforce those domestic policies and rules that would increase women's access, use, and participation in ICTs and ICT services, e.g., rural build-out requirements, universal access targets, distance learning projects for women.
- Promote gender analysis as part of the policy process so that the policies described above can be identified.¹⁹¹
- Involve women in the consultative process leading to the development of domestic telecommunication policies.
- Involve women, as regulators and policy-makers, in analyzing and resolving the impact certain regulations may have on gender, including proposing ways to achieve balance.
- Create, support and enforce internal NRA procedures that encourage gender equality.

6 Organization and resources

6.1 Overview

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

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

¹⁹¹ International Telecommunication Union, "Gender Aware Guidelines for Policy-making and Regulatory Agencies", <http://www.itu.int/ITU-D/gender/projects/FinalGendAwrnGuidelns.pdf>, page 2.

organizational structure and securing resources that enable the NRA to carry out those functions that implement what is most important in the domestic telecommunication sector, an NRA can allocate resources efficiently and accomplish important state goals.

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

6.2 Country Examples

Brazil's National Telecommunications Agency, ANATEL, is made up of a Board of Directors – its senior executive body, an Advisory Council, an Attorney-General Office, a Supervision Office, a Library, an Ombudsman, and six Technical Bureaux.¹⁹² The general counsel for ANATEL is a member of the Federal Attorney's Office.¹⁹³ It is mainly funded by the Telecommunications Inspection Fund or FISTEL, and by payments made by operators for granting concessions and authorizations, and for using the radio frequency. ANATEL's enforcement activities are performed by all of the agency's bureaux (except General Administration). Each bureau is responsible for investigation and enforcement relative to services under its mandate. Additionally, the Radio Frequency and Inspection Bureau has regional units that conduct field investigation and enforcement activities. These agents carry out technical inspections either directly (on site) or indirectly (remote monitoring) of telecommunications, radio, and TV broadcasting stations.¹⁹⁴ ANATEL's staff was originally recruited from the ranks of the Telebrás System and the Ministry of Communications. Subsequently, it was completed with temporary employees hired for, at most, five years¹⁹⁵. ANATEL spends almost half of its financial and human resources on monitoring and enforcement.¹⁹⁶

In the **United States**, the FCC's Enforcement Bureau has four divisions with three Regional Offices, sixteen District Offices, and nine Resident Agent Offices. The Bureau has the following key responsibilities: Telecommunications Consumers; Market Disputes Resolution; Spectrum Enforcement; and Investigations and Hearings. Regional and Field Offices handle on-scene investigations, inspections and audits in response to complaints and provide immediate response to safety-of-life issues.

When creating this bureau, it was determined that a mix of regulatory and litigation experience, and a mix of FCC veterans and newcomers would provide the optimal staff to accomplish its mission. One year after this Bureau was created it had approximately 330 employees,¹⁹⁷ or roughly one-sixth of the Commission's 1900 employees. When combined with the staff in the Consumer and Governmental Affairs Bureau handling

¹⁹² See ANATEL contribution to ITU-D Question 18/1, March 12, 2003, page 3. The six bureaux are: Public Utility Services, Private Services, Mass Communication Services, Radio Frequency and Inspection, Universal Access, and General Administration.

¹⁹³ See ANATEL contribution to ITU-D Question 18/1, July 30, 2003, page 3.

¹⁹⁴ See *Id.*, pages 3-5.

¹⁹⁵ See, ANATEL contribution to ITU-D Question 18/1, July 30, 2003, page 3.

¹⁹⁶ See "Trends in Telecommunication Reform 2002", International Telecommunication Union, page 46.

¹⁹⁷ See **USA** contribution to ITU-D Question 18/1, September 2002, pages 4-5.

informal consumer complaints, the number of employees specifically working to enforce FCC rules increased to 410 or roughly 20 per cent of the Commission's staff. Of this number, roughly 80 were women.¹⁹⁸ An additional number is engaged in handling informal, consumer complaints.

In **Lithuania**, approximately 56 people in several divisions of the Communications Regulatory Authority (CRA) are involved in enforcement: the Inspection Section which has 4 employees; the Market Supervision Department where 14 employees work, the Telecommunications Department which has 14 employees, and the Radiocommunications Control Department, with a total of 24 employees in offices in Lithuania's five main cities. The main source of funding for the CRA comes from industry.¹⁹⁹

New Zealand's Competition Commission in 2000-2001 had a total of 40 full-time employees (FTEs): 4 lawyers, 3 economists, 22 other professionals and 12 support staff. Out of its total annual budget of NZD 8.64 million (USD 3.77 million), well over two-thirds or NZD 5.098 million (USD 2.22 million) was spent for enforcement. As of June 30, 2001, 19.5 FTEs work on enforcement against anticompetitive practices; 16 work on merger review and enforcement; 5 are engaged in advocacy.²⁰⁰

Morocco's ANRT consists of the Director General (appointed by the King via royal decree) and seven directorates (technical, regulatory, information technology, evaluation and competition, administrative and financial, management control and internal audit, and a training institute: The National Institute for Postal and Telecommunication Studies (INPT). ANRT's work is organized in groups, around specific projects. A multidisciplinary team is set up which brings together people from several different divisions/units, under the direction of one or more project heads. Thus staff competencies are continually being reinforced and interdisciplinary capabilities are swiftly being developed, something that is difficult to achieve by other means.²⁰¹

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

There, two women held *chargée de mission* posts, one woman was a project head, one was a division chief, and nine were heads of services.²⁰² Out of the total number of employees, 3.34% were professionals previously employed by the Ministry of Communications, 5.9% were professionals previously employed by other state agencies, 14% were professionals previously employed by the incumbent operator, and 9.8% came from the private sector. Overall, 93.8% were career staff, 5.4% were short-term employees, and fewer than 1% were contractual staff. Engineers formed the largest group of specialists, representing 18.5% of the professional staff, followed by technicians (7.2%), commerce specialists (6%), and lawyers and economists (5.4% respectively). On average, senior professionals were between 42 and 50 years old, while mid-level professionals were between 25 and 30 years old. Many professional staff received their training at INPT, which is affiliated with ANRT. The main communication tool is the agency's intranet, which provides staff with easy, effective access to information on ANRT's projects.²⁰³

¹⁹⁸ Of these, roughly 7 have administrative management duties. Additionally, 29 women provide clerical support to the Enforcement Bureau.

¹⁹⁹ See Contribution from **Lithuania** to ITU-D Question 18/1, March 10, 2003, page 2.

²⁰⁰ OECD Report, pages 8-9.

²⁰¹ See "Effective Regulation: Case Study – **Morocco**", International Telecommunication Union, 2001, pages 21-22.

²⁰² *Id.*, page 25 and note 16.

²⁰³ *Id.*, page 26.

The **Bhutan** Communications Authority (BCA) is headed by a Director and is comprised of four sections: Telecommunications, Radiocommunications, Media and Post, and General Matters. All employees, including the Director, are civil servants. BCA receives its annual budget via an appropriation from the Ministry of Finance. The 1999 Telecommunications Act permits the use of fees and other charges payable to BCA for performing its functions under the Act for this purpose as well.²⁰⁴

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

TRA **Oman** reports that, as a new regulator in the process of building staff and capacity, as of August 2004, there was no enforcement staff, and it had not yet had occasion to enforce laws or regulations. Any such issue with the incumbent operator has thus far been handled through [official and administrative] channels. TRA Oman intends to acquire enforcement personnel in the future.²⁰⁵

6.3 Challenges Identified

The following lists generally those organizational challenges reportedly faced by NRAs as they attempt to enforce their domestic telecommunication laws:

- Inadequate technical capacity;
- Insufficient number of staff responsible for enforcement and compliance;
- Lack of spectrum management and radio monitoring systems;
- Acquiring and maintaining sufficient personnel to monitor small operators' compliance with the radio-frequency rules;
- Lack of a separate, specialized section for delivery of enforcement functions;
- Limited trained human resources, especially in economic and legal fields;
- High risk of losing trained and skilled employees;
- Multi-sectoral NRAs need to take into account other market sectors' (e.g., water, electricity, gas) strained resources.

6.4 Guidelines: Organization and Resources

National Regulatory Authorities are encouraged to:

- In devising its organizational structure to enforce telecom law and policy:
 - Know national, regional and other relevant priorities;
 - Assess and seek resources needed to enforce regulations that implement national priorities;

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

- Seek human and technical resources needed to enforce regulations that implement the country's national telecommunication priorities.

²⁰⁴ Contribution of **Bhutan** to ITU-D Question 18/1, April 2004, page 1.

²⁰⁵ Contribution of TRA **Oman** to ITU-D Question 18/1, August 16, 2004, page 2.

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

Annex A

Summary of Guidelines

National Regulatory Authorities (NRAs) play a central role in executing domestic communications policy. The means and power to enforce those regulations, however, is not an end in itself. It is one of the critical ways for an NRA to achieve its chief goal: facilitate universal access and service to its citizens by enabling industry growth and worldwide competitiveness.

The following guidelines suggest a range of options that may be applied in diverse circumstances to assist ITU Member States' efforts to enforce their domestic telecommunication laws. NRAs are encouraged to review the guidelines and select those which will be useful in their domestic circumstances. Concepts of regulation that are inapplicable, or practices or solutions that are not suitable in one country may work well in another. We trust that this "menu" of choices will assist Member States as they facilitate delivery of a robust communications sector that is capable of providing benefits to all.

I. Source of enforcement powers

Most regulatory authorities derive their power to enforce regulation from their domestic enabling legislation. Many also promulgate rules and regulations of their own that carry out the legislature's stated goals. Some place conditions for enforcement or even enforcement mechanisms themselves in the licences they issue. Regardless of the source, it is clear that without the proper authority for an NRA to enforce laws, a regulatory regime is likely to fail to achieve its policy objectives – promote competition, innovation, growth, and investment in the sector for the benefit of users and consumers. Accordingly, NRAs are encouraged to:

- As appropriate, seek to provide written input to the law-making body on ways to improve the efficiency and substantive applicability of the law.
- Ensure harmony between the constitution, legislation, and administrative powers. Identify change as necessary.
- Ensure that the telecom law provides sufficient authority, independence and financial resources for the NRA to gather information to impartially, swiftly and transparently carry out the will of the legislature.
- Ensure that the telecom law provides sufficient authority, independence and financial resources for the NRA to acquire the human and financial resources (via state budget, or NRA self-funding) to impartially, swiftly and transparently carry out the will of the legislature.
- Ensure that the law contains clear and unambiguous language describing the jurisdiction of the NRA and, where appropriate, other interested state agencies.
- Where there is more than one entity with jurisdiction over telecommunication matters, provide for and describe a coordination mechanism between these entities.
- Ensure that the law promulgated is clear, transparent and precise. Avoid technical terms that are not understandable by the public or that may be unclear before a reviewing court. Define terms as far as practicable.
- In preparing legislation, gather the opinions of primary stakeholders. Organize meetings to review and discuss draft legislation before it is submitted for adoption.

- To the extent possible, promulgate laws that can address new technology and innovation; give broad powers to the NRA to adjust to changes in the industry.
- Describe the objectives and rationale of promulgated laws to induce enforcement and compliance by all parties, including enforcement agents of the state.
- Ensure that users/subscribers/consumers²⁰⁶, operators and service providers have recourse at the regulatory agency.
- Ensure jurisdiction over service providers who may not be licensed (e.g., ISPs).
- Ensure that the enabling law/legislation provides the NRA with a wide range of penalties to include those appropriate for minor, mid-range, and maximum offences.
- Ensure that all stakeholders are made aware of the law and the responsibility of the NRA to enforce the law. Conduct awareness-raising activities such as seminars, lectures, publication of short brochures, and training materials on the law for magistrates.

II. Enforcement practice and process; resolution of disputes

Second only in importance to an NRA's enabling act or statute are the day-to-day practices and procedures it employs to implement the law. It is essential to have processes in place that enable swift and fair adjudication of violations and complaints. Transparency in these procedures will facilitate compliance and is necessary for NRA decisions to gain public trust and withstand judicial, ministerial or royal review. Accordingly, NRAs are encouraged to:

- Develop and publish procedures for the NRA's internal operations and its external public functions that reflect fairness, speed, efficiency and transparency goals.
- Design and employ transparent procedures that enable the NRA to render and publish a decision that considers all relevant facts and law, including, as appropriate, the views of all different stakeholders in the sector.
- Consult, as appropriate the different stakeholders in the sector, on issues involving decisions made by the regulator.
- Observe relevant legal precedent.
- Adopt procedures to protect confidential or commercially sensitive information provided by operators, service providers or other licensees to facilitate the supply of information necessary to evaluate compliance with laws, policies or regulations.
- Identify areas where the actions of other interested public authorities (e.g., courts, local representatives, administrative authorities) frequently or significantly affect NRA enforcement processes. Where feasible and appropriate, develop a plan for communication, coordination, and cooperation with the goal of facilitating equitable and speedy resolution of violations.²⁰⁷

²⁰⁶ The meaning of the terms user, subscriber and consumer may differ from country to country. In this context, user/subscriber/consumer refers to each of these groups including the general public.

²⁰⁷ Good examples of this approach include actions taken by **Uganda, Peru, Brazil, Mexico, and Colombia**. Noting that under the law only the Director of Criminal Prosecutions could prosecute criminal offences under the Communications Act, and wishing to minimize any potential administrative delay or other inefficiencies, **Uganda's** NRA, UCC, petitioned the Director of Criminal Prosecutions for authority to prosecute criminal offences under the Communications Act and won this authority. As a result, UCC compliance efforts in this area are less complex.

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

- Consider employing a variety of tools for investigation to include letters of inquiry, on-site inspections, subpoenas, or summons.
- Insofar as possible, use technology to facilitate speedy but deliberative decision-making, and subsequent publication of these decisions.
- Place decisions and comments on the web.
- Consider placing the burden to produce information needed by the NRA upon service providers/licensees to compensate for limited staff and resources. Make this information public so that competitors and consumers can notify the NRA if they believe the information is inaccurate or otherwise flawed.
- Consider publishing a standard format for gathering information from regulatees and for receiving complaints from consumers.
- Prepare internal, standardized work sheets, in electronic format if possible, for NRA staff to gather information from regulatees, render a decision on licence applications or other line processing work, and review complaints from consumers to assist the NRA in ensuring that all issues have been reviewed and relevant rules have been complied with.
- Consider encouraging self-reporting by regulatees; this can lower enforcement costs, reduce the risk of harm, or mitigate harm.
- When establishing penalties, seek to minimize the cost of compliance with regulations for business users and consumers.
- Develop and maintain a database or other appropriate record-keeping system to track violators and violations for use in reporting to the government and the public, tracking industry trends, and in setting future penalties or sanctions.
- Consider employing a voluntary compliance scheme featuring industry²⁰⁸ self-regulation as a low-cost, potentially low-risk alternative to, or supplement for, formal enforcement processes. Such rules can either be operational or consumer focused, and though developed by industry, should reflect current government objectives.
- Information about which companies have agreed to follow voluntary standards or rules should be made publicly available.

III. Independent decision-making

NRA-issued decisions that are considered to be independent are widely believed to be the most desirable and widely respected. When an NRA has the authority and freedom to render a decision that: (i) is based on all relevant facts; (ii) applies and implements the appropriate law, policy, or regulation; and (iii) is free of undue pressure from political entities, powerful incumbents, or others having a stake in the outcome, it can be said that its decisions are independent. In short, an impartial NRA decision is an independent decision. Accordingly, NRAs are encouraged to:

²⁰⁸ The term “industry” here refers broadly to operators, service providers and other players in the telecommunication market.

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

IV. Sanctions and penalties

Having established that the NRA: (i) has the authority to act; (ii) has determined culpability of a violator through a fair, expeditious and transparent process; and (iii) rendered an independent decision on the matter, the NRA is now prepared to impose sanctions. Accordingly, NRAs are encouraged to:

- Ensure that the NRA has authority to impose a wide range of penalties that include minor, mid-range, and maximum.
- In determining a sanction, consider the severity of the harm, the probability of detection, the risk sensitivity of the offender, and the cost of enforcement.
- Establish and employ sanctions that are reasonable (proportional to the offence) and effective, but high enough to deter wrongdoing and achieve compliance with rules.
- Consider imposing a fine that exceeds the benefit the offender received from committing the offence.
- Considering the cost of enforcement, seek effective alternatives to fines (for example employ voluntary industry compliance schemes, or include specific requirements in licence obligations).
- Decrease the penalties when there are other deterrents that encourage compliance.
- Consider providing a range of responses to violations including, e.g., warning letters, fines, consent decrees, preventive cease and desist orders, licence revocation, equipment seizure, damage awards, and referral for criminal prosecution.
- Consider developing, publishing, and employing specific but flexible guidelines for determining the severity of a sanction as these can deter violations of important rules and can assist the NRA in developing priorities among different violations.
- Consider setting a fine that represents a per centage of the offender's revenues as this may permit regulators to discipline market players without seriously undermining small, non-dominant operators.
- Consider employing the strictest penalties available to the NRA for offences involving misrepresentation.

V. Gender and enforcement

The importance of ICTs as a tool to promote the full participation of women in the information society has been widely recognized. Identifying and enforcing those domestic communications policies and rules that address women's access, use and participation in ICTs can help implement domestic objectives that can reverse existing inequalities for the benefit of the communications sector and society as a whole. Accordingly, NRAs are encouraged to:

- Adopt and promote a formal commitment to gender equality.
- Develop and maintain an awareness of the data available that reflect how enforcing telecom policy can impact gender – for example, gender-disaggregated statistics on access and use, incomes, differential impact of costs and technology choice, and on employment and entrepreneurship. If possible, collect such data for the NRA’s domestic market.
- Identify, support, and enforce those domestic policies and rules that would increase women’s access, use and participation in ICTs and ICT services (e.g., rural build-out requirements, universal access targets or other connectivity schemes, particularly those that promote user-friendly technologies for low literacy/illiteracy levels, technology access points located near places frequented by women, or low-cost technology recognizing disparities in wages).
- Promote gender analysis as part of the policy process so that the policies described above can be identified.²⁰⁹
- Involve women in the consultative process leading to the development of domestic telecommunication policies.
- Involve women, as regulators and policy-makers, in analyzing and resolving the impact certain regulations may have on gender including proposing ways to achieve balance.
- Create, support and enforce internal NRA procedures that encourage gender equality.

VI. Organization and resources

It is advisable for an NRA to understand its national telecommunication priorities so that it can configure and maintain an organizational structure to accomplish important state goals. Where staff and other resources are limited to meet this minimum aim, an objective basis exists for reallocating existing resources or seeking additional support, e.g., regulatory fees, additional allocations from state budgets, or other sources.

It is advisable for an NRA to:

- In devising its organizational structure to enforce telecom law and policy:
 - Know national, regional and other relevant priorities;
 - Assess and seek resources needed to enforce regulations that implement national priorities;
 - Design the organization so that it can support activities that implement national priorities.
- Seek human and technical resources needed to enforce regulations that implement the country’s national telecommunication priorities.
- Seek financial resources needed to enforce regulations that implement the country’s national telecommunication priorities.
- Hire and retain multidisciplinary experts (legal, economic, technical).
- Employ interdisciplinary teams for competency reinforcement and skill development.

²⁰⁹ International Telecommunication Union, “Gender Aware Guidelines for Policy making and Regulatory Agencies”, <http://www.itu.int/ITU-D/gender/projects/FinalGendAwrnGuidelns.pdf>, page 2.

- Consider, if possible, allocating a significant portion of the NRA's resources, as appropriate, to enforcement efforts.
- Consider dedicating separate staff for enforcement efforts.
- Target internal training to enhance the capacity of the authority's staff to address consumer, market competition, and technical issues.

Annex B

Common enforcement challenges

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

A. Interconnection

Bolivia:

- Operators of established networks resist facilitating access to disaggregated elements of the network, specifically access to the local loop. There are no specific “norms” that define the conditions for immediate and opportune access to the local loop.
- It is not possible to reliably determine the price or costs associated with support services for disaggregated elements of the network.
- For some operators, interconnection charges in the operator’s offers are high for the fixed network and low in the mobile network compared with international levels. *Initially, to solve this problem, the Superintendence has attempted to use the initial interconnection charges established in the concession contracts when the regulatory system first began.*²¹⁰
- In some cases, operators do not pay interconnection charges to each other according to schedule. Rules or other requirements governing this circumstance are not required to be contained in the interconnection agreements or in the basic interconnection proposals. *To address this situation, in accordance with the law, the Superintendence applied an alternative procedure called “Avenimiento” or “Goodwill agreements”. Currently, however, some object to this intervention and the Superintendence is working on proposed modifications to the interconnection regulations to address the objections.*²¹¹

Bahamas:

- Although the Telecommunications Act and the licence issued requires unbundling, these provisions have not yet been invoked. The dominant provider’s network is not unbundled.
- Cost information is lacking.
- There is no competition in voice telephony services.²¹²

²¹⁰ Contribution of **Bolivia** to ITU-D question 18/1, May 4, 2004, page 3.

²¹¹ *Id.*, page 4.

²¹² Contribution of **Bahamas** to ITU-D Question 18/1, May 4, 2004, page 2.

Côte d'Ivoire:

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

European Union:

Access Directive Article 4(1), 5(1) requires that all public communications networks must interconnect with one another, and all access providers must connect with other networks in order to ensure the provision of a single, interoperable network.

United States:

Pursuant to 47 U.S.C. § 252(a)(1), interconnection terms and conditions are decided in private agreements between individual carriers. Statutory obligations created by the Act include a duty to: (i) negotiate in good faith in accordance with Section 252 of the Act (§ 251(c)(1)); (ii) provide for the facilities and equipment of any requesting telecommunication carrier (§ 251(c)(2)); (iii) provide non-discriminatory access to network elements on an unbundled basis at any technically feasible point (§ 251(c)(3)); (iv) provide resale (§ 251(c)(4)); (v) provide reasonable public notice of network changes (§ 251(c)(5)); and (vi) provide for physical collocation of equipment necessary for interconnection or access to unbundled networks elements (§ 251(c)(6)).

Any negotiated or arbitrated interconnection agreement must be approved by a state commission. A state commission may reject any agreement that discriminates against a carrier not a party to the agreement or that is not consistent with the public interest, convenience and necessity. It may also reject the agreement if it does not meet the requirements of Section 251 of the Communications Act. Once a state arbitration has been concluded and an order issued, either party can petition for review of that decision by a United States federal district court (47 U.S.C. § 252(e)(6)).

Compulsory arbitration is held before state commissions and can be requested five months after a carrier first requests negotiation. All parties have an opportunity to participate, and must resolve all issues raised within nine months of the date of the initial request for access. The refusal of any other party to the negotiation to participate further in the negotiations or to cooperate with the state commission is considered to be a failure to negotiate in good faith (47 U.S.C. § 252(b)(5)). The state commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement the agreement (47 U.S.C. § 252(b)(4)(C)). In the absence of mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding (47 U.S.C. § 252(b)(1)).

Hong Kong, China:

The Office of the Telecommunications Authority (OFTA) in Hong Kong has adopted a light-handed regulatory approach to interconnection and encourages operators to settle interconnection issues through commercial negotiations. If commercial negotiations fail, either party can request that OFTA determine the terms and conditions of interconnection under Section 36A of the Telecommunications Ordinance, or if OFTA believes it is in the public interest, it may make this determination on its own.²¹³ In either case, OFTA may ask the disputing parties to state in writing, within one month, their respective preferred terms and

²¹³ See, APEC TEL Report, April 2005, page 31.

conditions, including applicable financial or technical information substantiating the claim. The parties will also be asked to indicate whether any part of their submission should be considered confidential and therefore not disclosed to the opponent or published for the public. Reasons for confidential treatment should be supplied.²¹⁴

If either party fails to comply with OFTA's decision, OFTA can issue an order under Section 36B of the Telecommunication Ordinance directing compliance. If the party still fails to comply, OFTA may assess a fine specified in a notice issued under Section 36C. Such fines may not exceed HKD 200,000 for the first occasion on which a penalty is imposed, HKD 500,000 for the second occasion, and HKD 1,000,000 for any subsequent occasion.²¹⁵

Canada:

Under Section 29 of Canada's 1993 Telecommunications Act, parties are free to negotiate interconnection agreements which subsequently are subject to CRTC approval. In cases where negotiations fail or disputes arise, parties can request CRTC intervention to ensure access by competitive long-distance providers, LECs, and wireless service providers. Pursuant to Section 27 of the Act, major suppliers have an obligation to provide interconnection under non-discriminatory and transparent terms and conditions, including technical standards and specifications. Interconnection agreements are publicly available (sometimes in the form of published tariffs); many are available on the CRTC's website (www.crtc.gc.ca).²¹⁶

Chinese Taipei:

Article 16 of the Telecommunications Act § provides that an agreement shall be reached within three months from the date one party requested network interconnection. If an agreement cannot be reached within this time frame, the Directorate General Telecommunications (DGT) will arbitrate the matter upon receipt of arbitration application or by its official authority.²¹⁷

Some countries have established mechanisms to build consensus among market players rather than wait until issues escalate into protracted litigation. **Canada** and **Malaysia** have established working groups to agree on a range of interconnection issues (prices, points of interconnection, access rights and technical issues) in the spirit of industry self-regulation.²¹⁸

B. Spectrum Issues

Bolivia:

- Illegal use of electromagnetic spectrum has become an important problem especially in the case of private networks and broadcasting. *In response, spectrum monitoring is performed along with suspension of unauthorized emissions and seizure of equipment, if warranted. Additionally, at the Superintendence's proposal, Law No. 2342 was approved which requires that financial resources*

²¹⁴ *Id.*, page 32.

²¹⁵ *Id.*, pages 32-33.

²¹⁶ *Id.*, page 35.

²¹⁷ *Id.*, page 34.

²¹⁸ Trends in Telecommunication Reform 2004/1005, International Telecommunication Union, page 19.

*needed for covering spectrum monitoring and control costs be taken from what is collected for assignment and use of the electromagnetic frequencies.*²¹⁹

Bahamas:

- The dominant telephony provider was also the spectrum regulator.
- There are no records of assignments or spectrum use for the dominant provider. Smaller communities (with a high concentration of transient boaters) use marine frequencies for non-marine use.²²⁰

Côte d’Ivoire:

- The regulator’s monitoring personnel are unable to obtain access to international institutions’ premises.
- Lack of appropriate or modern equipment to monitor interference. Tenders have been issued to acquire the necessary equipment.²²¹

ITU-R Spectrum Management Best Practices:

With due regard to the ITU Constitution and Convention, the following best practices for national spectrum management activities are taken from the ITU-R Spectrum Management Handbook, 2005 Edition. They are included here to highlight and inform the reader about important work that has gone forward in this area.²²²

Practices:

1. Establishing and maintaining a national spectrum management organization, either independent or part of the telecommunication regulatory authority responsible for managing the radio spectrum in the public interest.
2. Promoting transparent, fair, economically efficient, and effective spectrum management policies, i.e., regulating the efficient and adequate use of the spectrum, taking into due account the need to avoid harmful interference and the possibility of imposing technical restrictions in order to safeguard the public interest.
3. Making public, wherever practicable, national frequency allocation plans and frequency assignment data to encourage openness, and to facilitate development of new radio systems, i.e., carrying out public consultations on proposed changes to national frequency allocation plans and on spectrum management decisions likely to affect service providers, to allow interested parties to participate in the decision-making process.
4. Maintaining a stable decision-making process that permits consideration of the public interest in managing the radio-frequency spectrum, i.e., providing legal certainty by having fair and transparent processes for granting licences for the use of spectrum, using competitive mechanisms, when necessary.

²¹⁹ Contribution of **Bolivia** to ITU-D Question 18/1, May 4, 2004, page 4.

²²⁰ Contribution of **Bahamas** to ITU-D Question 18/1, May 4, 2004, page 2.

²²¹ Contribution of **Côte d’Ivoire** to ITU-D Question 18/1, May 28, 2004, page 2.

²²² International practices are not included. Some of the best practices presented above are intended to interface with, or transition to, international practices, e.g., those relating either to collaboration with colleagues in other countries, or to coordination, as would occur at a bilateral or multilateral consultation preceding a World Radiocommunication Conference, or an international satellite coordination meeting. These practices are also intended to harmonize global spectrum management policies, to the extent practicable, by harmonizing practices among national administrations. Contribution of **Thalès (France)** to ITU-D Question 18/1, April 14, 2004.

5. Providing in the national process, in special cases where adequately justified, for exceptions or waivers to spectrum management decisions.
6. Having a process for reconsideration of spectrum management decisions.
7. Minimizing unnecessary regulations.
8. Encouraging radiocommunication policies that lead to flexible spectrum use, to the extent practicable, so as to allow for the evolution of services and technologies using clearly-defined methods, i.e., (a) eliminating regulatory barriers and allocating frequencies in a manner to facilitate entry into the market of new competitors, (b) encouraging efficiency in the use of spectrum by reducing or removing unnecessary restrictions on spectrum use, thereby encouraging competition and bringing benefits to consumers, and (c) promoting innovation and the introduction of new radio applications and technologies.
9. Assuring open and fair competition in the marketplaces for equipment and services, and removing any barriers that arise to open and fair competition.
10. Harmonizing, as far as practicable, effective domestic and international spectrum policies, including of radio-frequency use and, for space services, for any associated orbital position in the geostationary-satellite orbit or of any associated characteristics of satellites in other orbits.
11. Working in collaboration with regional and other international colleagues to develop coordinated regulatory practices, i.e., working in collaboration with regulatory authorities of other regions and countries to avoid harmful interference.
12. Removing any regulatory barriers to free circulation and global roaming of mobile terminals and similar radiocommunication equipment.
13. Using internationally recommended data formats and data elements for exchange of data and coordination purposes, e.g., as in the Radio Regulations Appendix 4, and in the ITU Radiocommunication Data Dictionary (Recommendation ITU-R SM.1413).
14. Using “milestone” management steps and phases to monitor and control lengthy radiocommunication system implementation.
15. Adopting decisions that are technologically neutral and which allow for evolution to new radio applications.
16. Facilitating timely introduction of appropriate new applications and technology while protecting existing services from harmful interference including, when appropriate, the provision of a mechanism to allow compensation for systems that must redevelop for new spectrum needs.
17. Considering effective policies to mitigate harm to users of existing services when reallocating spectrum.
18. Where spectrum is scarce, promoting spectrum sharing using available techniques (frequency, temporal, spatial, modulation coding, processing, etc.), including using interference mitigation techniques and economic incentives, to the extent practicable.
19. Using enforcement mechanisms, as appropriate, i.e., applying sanctions for non-compliance with obligations and for inefficient use of radio-frequency spectrum under relevant appeal processes.
20. Utilizing regional and international standards whenever possible, and where appropriate, reflecting them in national standards.
21. Relying to the extent possible on industry standards, including those that are included in ITU Recommendations, or in lieu of national regulations.

C. Internet Issues

Bolivia:

- The main problem faced is voice traffic over ISP-provided cybercafes without concessions for providing long-distance services to the public.²²³
- The regime in which Internet Services are provided does not establish service quality levels, in spite of the general principle established by “norms” that services must be provided punctually, efficiently, and with good quality. *Consultants have been contracted to define quality standards for Internet services. The regulator is also working on modifying the telecommunication law and Internet use regulations as the general rules of the Internet are considered to be insufficient.*²²⁴

People's Republic of China:

In accord with the “Regulation on Internet Information Services of the **People's Republic of China**, MII enacted a rule to regulate non-profitable Internet information service providers. Under this rule, such ISPs must put certain required information on record before entering the non-profitable Internet content provider (ICP) market. This requirement is considered an access requirement, and covered ISPs may provide this information electronically. Additionally, those obtaining an IP address from the Asia Pacific Network Information Centre (APNIC) or other international organizations, and those who distribute IP addresses should file the IP address with the telecom administrative authorities.²²⁵

Bahamas:

- It is difficult for ISPs to obtain competitive rates because telecom operators also provide Internet access along with their telecom or broadcasting services – and so are competitors with the ISPs. (There is no competition in voice telephony services in the Bahamas.)²²⁶

Côte d’Ivoire:

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

D. Consumer Issues

Bolivia:

- Though public service providers are obliged to publish their rates for the services they offer, this practice is insufficient because they do not provide sufficient information for normal standard rates and for promotions. Contribution of Bolivia to ITU-D Question 18/1, May 4, 2004, page 5.

²²³ Contribution of **Bolivia** to ITU-D Question 18/1, May 4, 2004, pages 4-5.

²²⁴ *Id.*, page 5.

²²⁵ Contribution of **China** to ITU-D Question 18/1, August 30, 2005, page 2.

²²⁶ Contribution of **Bahamas** to ITU-D Question 18/1, May 4, 2004, page 2.

- The lack of consumer education about rights and privileges is also noted as a challenge, as well as lack of understanding of a consumer culture in competitive markets with free and unrestricted access to services. *Consumer [second-stage] complaints²²⁷ have become one of the Superintendence's priorities. Accordingly, the unit of consumer protection and defence has been reinforced; the Superintendence has prepared guidelines for operators' promotions and publicity; it also launched a consumer information campaign, which in 2005 will include operators. They also employ the goodwill agreement as an informal means of addressing complaints. Formerly submission of the complaint to the Superintendence would have resulted in untimely delays, but this problem has been addressed by the goodwill agreement method as part of an informal, conciliation process.*²²⁸

Bahamas:

- Laws are targeted to business interests, not to consumers. There is no cohesive or strong consumer advocacy voice in the country.²²⁹

Côte d'Ivoire:

- Côte d'Ivoire notes that challenges reside in both the consumer-regulator relationship and in the consumer-operator relationship. Generally, consumers' complaints are about operators who are slow to process requests, about rates and invoices, vague clauses in contracts, and lack of consumer information on how the services provided function.
- Côte d'Ivoire's regulatory authority made consumer protection a part of telecommunication regulation by establishing a consumer relations organization (the complaints and disputes service) and a dispute settlement procedure and arbitration board.²³⁰ Under the rules of procedures for the settlement of disputes, the complaints and disputes service investigates complaints and requests that users address to the regulator. Among other things, it examines the contracts operators offer to consumers and the procedures set up to handle complaints with a view to proposing any changes required.²³¹ The regulator also provides assistance and advice to consumer groups to help them carry out consumer protection activities.²³² The country reports that both operator/consumer and regulator/consumer relations have improved.

The United States:

- The FCC's Consumer and Governmental Affairs Bureau (CGB) responds directly to consumer inquiries and complaints, and conducts information and education campaigns. The Bureau is responsible for enhancing the public's understanding of the FCC's work and building the FCC's relationship with other governmental agencies. More specifically, CGB distributes information to help consumers make wise choices and find the best rates for communications services and products; conducts consumer-related rulemakings and orders; interacts with the public, federal, state, local, tribal and other governmental

²²⁷ Customers must deal with the operators first, and only if the customer is unsatisfied with the outcome may a complaint be presented to the Telecommunications Superintendence.

²²⁸ Contribution of **Bolivia** to ITU-D Question 18/1, May 4, 2004, page 5.

²²⁹ Contribution of **Bahamas** to ITU-D Question 18/1, May 4, 2004, page 2.

²³⁰ Contribution of **Côte d'Ivoire** to ITU-D Question 18/1, May 28, 2004, page 2.

²³¹ *Id.*, pages 2-3.

²³² *Id.*, page 3.

agencies; handles informal wireless and wireline phone billing and cable-related complaints; and assists people with hearing, visual, speech and other disabilities so that they can participate in Commission actions and ensure their opportunity to communicate.

- The FCC also maintains on its website a great deal of information to assist consumers and address a wide range of topics that are of interest to the general public including public safety, privacy, and indecency. “Parent’s place” (<http://www.fcc.gov/parents>) for example, provides information helpful to parents as they seek to guide their children’s media or Internet viewing habits, and “Get Connected” (<http://www.fcc.gov/cgb/getconnected>) informs low-income consumers about available assistance to obtain telephone service through universal service programmes.
- In 2003 the Telephone Consumer Protection Act (TCPA) was amended to include a National Do-Not-Call Registry.²³³ Consumers who do not wish to be called by telemarketers place their name on the registry for a one-step option to prohibit unwanted telephone solicitations. Telemarketers who violate the Do-Not-Call-Registry are subject to a maximum monetary forfeiture of USD 11,000 per violation. Recently the FCC fined a telemarketer USD 770,000 for repeated violations of the Do-Not-Call rules (USD 11,000 times 70 violations).²³⁴
- The TCPA also protects business and residential consumers from bearing the cost of receiving unsolicited facsimile advertisements.²³⁵ After receiving complaints about receiving unsolicited faxes, the FCC issued citations to the violator. Due to continued violations, the company was ordered to pay USD 11,000 for each of 489 violations for a total of USD 5,379,000.²³⁶
- The FCC has rules to protect consumers who suffer with hearing disabilities because television plays such a large role in disseminating emergency information.²³⁷ Programming that contains emergency information in the audio portion must therefore be made accessible to those who suffer from hearing disabilities using closed captioning or an alternative method of visual presentation. After receiving a complaint that a TV station failed to adequately provide information for the hearing disabled, the Enforcement Bureau began an investigation. Because the station failed to provide emergency information to the hearing disabled until two and half hours after it was communicated in the programme’s audio portion, the station was fined USD 8,000.²³⁸

E. Network Security Issues

Bolivia:

- Oversight costs are excessively high. *There are general principles regarding protection of communications privacy in the norms for voice communications network security, and operators are*

²³³ See 47 C.F.R. § 64.1200.

²³⁴ See *In the Matter of Dynasty Mortgage, L.L.C. Apparent Liability for Forfeiture*, File No. EB-03-TC-100, February 28, 2005 (<http://www.fcc.gov/eb/Orders/2005/FCC-05-47A1.html>).

²³⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12405 (1995) (1995 TCPA Reconsideration Order) (citing H.R. Rep. No. 317, 102nd Cong., 1st Sess. 25 (1991)). See also 47 U.S.C. 227(b)(1)(C).

²³⁶ See *In the Matter of Fax.com, Inc. Apparent Liability for Forfeiture*, File No. EB-02-TC-120, January 5, 2004 (http://www.fcc.gov/eb/News_Releases/DOC-242654A1.html).

²³⁷ See 47 C.F.R. § 79.2(b)(1)(i).

²³⁸ See *In the Matter of ACC Licensee, Inc. Licensee of WJLA-TV Washington, D.C. Apparent Liability for Forfeiture*, May 25, 2005, File No. EB-04-TC-100 (<http://www.fcc.gov/eb/Orders/2005/DA-05-1511A1.html>).

*obliged to report annually the measures they are adopting to ensure network security. Security measures related to data networks are being prepared in the context of a project on Internet regulation.*²³⁹

The United States:

The FCC addresses network security issues through the following three organizations:

(i) The National Communications System (NCS) which seeks to improve emergency communications through the Telecommunications Service Priority (TSP), the Government Emergency Telecommunications System (GETS) and Wireless Priority Access (WPAS) programmes; (ii) the Media Security and Reliability Council (MSRC), a federal advisory committee created in March 2002 to address broadcast, cable and satellite homeland security issues; and (iii) the Network Reliability and Interoperability Council (NRIC VII) with members from a broad cross-section of industry. NRIC focuses on development and deployment of industry best practices to promote network reliability and interoperability, and address external threats to communications infrastructure.

F. Tariffs

Bolivia:

- Price cap regulation is employed. Challenges include defining the initial price cap or limit, including determining the productivity factor. *Benchmarking was used to determine the above and they are working on preparing systems that will allow the Superintendence to capture the necessary information for this purpose in the future.*²⁴⁰

Bahamas:

- Only telecommunication licensees declared to be dominant in certain markets are subject to tariff controls. The licensees are not accustomed to cost-based accounting. Cross-subsidization of services may be occurring.²⁴¹

Côte d'Ivoire:

- Interconnection rates between operators and for certain services such as Internet access are challenges. *In arbitrating disputes relating to tariff issues, ATCI enforces the provisions of the operator's terms of reference. Decisions of ATCI, the regulator, may be appealed to the Conseil des Télécommunications de Côte d'Ivoire (CTCI).*²⁴²

²³⁹ Contribution of **Bolivia** to ITU-D Question 18/1, May 4, 2004, page 5.

²⁴⁰ *Id.*, page 6.

²⁴¹ Contribution of **Bahamas** to ITU-D Question 18/1, May 4, 2004, page 2.

²⁴² Contribution of **Côte d'Ivoire** to ITU-D Question 18/1, May 28, 2004, page 3.

Annex C

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Annex D

Case Studies, Best Practices, Guidelines

- Annex D-1** Best Practices for National Spectrum Management
- Annex D-2** Best Practice Guidelines for the Promotion of Low-Cost Broadband and Internet Connectivity
- Annex D-3** How to Combat SPAM
- Annex D-4** VoIP in the World – Case Studies

Annex D-1

Best Practices for National Spectrum Management

Introduction: *With due regard to the ITU Constitution and Convention, this Annex addresses best practices for national spectrum management activities. International practices are not included. However, some of the best practices contained below are intended to interface with, or transition to, international practices, e.g., those relating either to collaboration with colleagues in other countries, or to coordination, such as that which would occur at a bilateral or multilateral consultation preceding a World Radiocommunication Conference, or at an international satellite coordination meeting. These practices are further intended to harmonize global spectrum management policies, to the extent practicable, by harmonizing practices among national administrations.*

Practices:

1. Establishing and maintaining a national spectrum management organization, either independent or part of the telecommunication regulatory authority responsible for managing the radio spectrum in the public interest.
2. Promoting transparent, fair, economically efficient, and effective spectrum management policies, i.e., regulating the efficient and adequate use of the spectrum, taking into due account the need to avoid harmful interference and the possibility of imposing technical restrictions in order to safeguard the public interest.
3. Making public, wherever practicable, national frequency allocation plans and frequency assignment data to encourage openness, and to facilitate development of new radio systems, i.e., carrying out public consultations on proposed changes to national frequency allocation plans and on spectrum management decisions likely to affect service providers, to allow interested parties to participate in the decision-making process.
4. Maintaining a stable decision-making process that permits consideration of the public interest in managing the radio-frequency spectrum, i.e., providing legal certainty by having fair and transparent processes for granting licences for the use of spectrum, using competitive mechanisms, when necessary.
5. Providing in the national process, in special cases where adequately justified, for exceptions or waivers to spectrum management decisions.
6. Having a process for reconsideration of spectrum management decisions.

7. Minimizing unnecessary regulations.
8. Encouraging radiocommunication policies that lead to flexible spectrum use, to the extent practicable, so as to allow for the evolution of services and technologies using clearly-defined methods, i.e., (a) eliminating regulatory barriers and allocating frequencies in a manner to facilitate entry into the market of new competitors, (b) encouraging efficiency in the use of spectrum by reducing or removing unnecessary restrictions on spectrum use, thereby encouraging competition and bringing benefits to consumers, and (c) promoting innovation and the introduction of new radio applications and technologies.
9. Assuring open and fair competition in the marketplaces for equipment and services, and removing any barriers that arise to open and fair competition.
10. Harmonizing, as far as practicable, effective domestic and international spectrum policies, including of radio-frequency use and, for space services, for any associated orbital position in the geostationary-satellite orbit or of any associated characteristics of satellites in other orbits.
11. Working in collaboration with regional and other international colleagues to develop coordinated regulatory practices, i.e., working in collaboration with regulatory authorities of other regions and countries to avoid harmful interference.
12. Removing any regulatory barriers to free circulation and global roaming of mobile terminals and similar radiocommunication equipment.
13. Using internationally recommended data formats and data elements for exchange of data and coordination purposes, e.g., as in the Radio Regulations Appendix 4, and in the ITU Radiocommunication Data Dictionary (Recommendation ITU-R SM.1413).
14. Using “milestone” management steps and phases to monitor and control lengthy radiocommunication system implementation.
15. Adopting decisions that are technologically neutral and which allow for evolution to new radio applications.
16. Facilitating timely introduction of appropriate new applications and technology while protecting existing services from harmful interference including, when appropriate, the provision of a mechanism to allow compensation for systems that must redeploy for new spectrum needs.
17. Considering effective policies to mitigate harm to users of existing services when reallocating spectrum.
18. Where spectrum is scarce, promoting spectrum sharing using available techniques (frequency, temporal, spatial, modulation coding, processing, etc.), including using interference mitigation techniques and economic incentives, to the extent practicable.
19. Using enforcement mechanisms, as appropriate, i.e., applying sanctions for non-compliance with obligations and for inefficient use of radio-frequency spectrum under relevant appeal processes.
20. Utilizing regional and international standards whenever possible, and where appropriate, reflecting them in national standards.
21. Relying to the extent possible on industry standards, including those that are included in ITU Recommendations of in lieu of national regulations.

(Source: ITU-R Spectrum Management Handbook, Edition 2005.)

Annex D-2**Best Practice Guidelines for the Promotion of Low-Cost Broadband and Internet Connectivity**

The regulators participating in the 2004 Global Symposium for Regulators have identified and proposed best practice guidelines to achieve low-cost broadband and Internet connectivity. Our goal is the creation of national regulatory frameworks that are flexible and enable competition between various service providers using multiple transport and technology options. We believe the best practices outlined below will help bring social and economic benefits to the world's citizens.

An enabling regulatory regime that encourages broadband deployment and Internet connectivity

1. We encourage political support at the highest government levels, with such support expressed in national or regional policy goals. These include an effective regulator separated from the operator and insulated from political interference, a transparent regulatory process, and adoption and enforcement of clear rules.
2. We believe that competition in as many areas of the value chain as possible provides the strongest basis for ensuring maximum innovation in products and prices and for driving efficiency.
3. We encourage regulators to set policies to stimulate competition among various technologies and industry segments that will lead to the development and deployment of broadband capacity. This includes addressing barriers or bottlenecks that may exist with regard to access to essential facilities on a non-discriminatory basis.
4. We believe that the primary objective of regulation should be to secure fair and reasonable access for competitive broadband services, including Internet connectivity.
5. We encourage the maintenance of transparent, non-discriminatory market policies in order to attract investment.
6. We encourage regulators to adopt policies that are technology neutral and do not favour one technology over another.
7. We encourage regulators to take into consideration the convergence of platforms and services and that they regularly reassess regulatory regimes to ensure consistency and to eliminate unfair market advantages or unnecessary regulatory burdens.
8. We encourage regulators to allocate adequate spectrum to facilitate the use of modern, cost-effective broadband radiocommunications technologies. We further encourage innovative approaches to managing the spectrum resource such as the ability to share spectrum or allocating on a licence-exempt non-interference basis.
9. We urge regulators to conduct periodic public consultations with stakeholders to inform the regulatory decision-making process.
10. We recommend that regulators carefully consider how to minimize licensing hurdles.
11. We encourage the development of a regulatory framework that permits ISPs and broadband providers to set up their own last mile.
12. We encourage regulators to provide a clear regulatory strategy for the private sector in order to reduce uncertainty and risk, and remove any disincentives to investment.

Innovative Regulatory Policies Must Be Developed To Promote Universal Access

1. We recommend that the promotion of access to low-cost broadband interconnectivity should be integrated from “grass-roots” efforts to identify local needs all the way through the “tree-tops” of international law. Governments, business and non-governmental organizations should be involved.
2. We recommend that regulators adopt regulatory frameworks that support applications such as e-education and e-government.
3. We encourage each country to adopt policies to increase access to the Internet and broadband services based on their own market structure and that such policies reflect diversity in culture, language and social interests.
4. We encourage regulators to work with stakeholders to expand coverage and use of broadband through multi-stakeholder partnerships. In addition, complementary government initiatives that promote financially sustainable programmes may also be appropriate, especially in filling in the market gap that may exist in some countries.
5. We encourage regulators to adopt regulatory regimes that facilitate the use of all transport mechanisms, whether wireline, power line, cable, wireless, including Wi-Fi, or satellite.
6. We encourage regulators to explore programmes that encourage public access to broadband and Internet services to schools, libraries and other community centres.
7. We encourage regulators to implement harmonized spectrum allocations consistent with the outcome of the ITU Radiocommunication Conference process and each country’s national interest. Participation in this well-established framework will facilitate low-cost deployment of equipment internationally and promote low-cost broadband and Internet connectivity through economies of scale and competition among broadband vendors and service providers.

Broadband is an Enabler

1. Regulation should be directed at improving the long-term interests of citizens. Broadband can contribute to this by improving and enabling education, information and increased efficiency. It can reduce costs, overcome distance, open up markets, enhance understanding and create employment.
2. We encourage regulators to educate and inform consumers about the services that are available to them and how to utilize them so that the entire population benefits.
3. We urge regulators to work with other government entities, industry, consumer groups, and other stakeholders to ensure consumers have access to the information they need about broadband and Internet services.

Annex D-3

How to Combat Spam

During the ITU fifth annual Global Symposium for Regulators (GSR) in Geneva (8-10 December 2004), a discussion panel focused on spam questions such as the baseline needs of regulators, cooperative action, and the role of parties involved, including ITU. It was advanced that legal certainty in the market place would be a good starting point for implementation of a multi-pronged approach. The need for legislation that includes enforcement capability was questioned by a number of developing countries, given that they were not the source of spam, whilst other developing countries recognized a need for some legal basis for local ISPs to take action. There was a common recognition in developing countries of the need for technical support, and cooperative assistance with consumer information and industry guidance.

The conclusions were as follows:

- A multi-pronged approach to dealing with spam was appropriate;
- Some level of legislation was relevant for all countries but its form and extent would depend on the circumstances and degree of enforcement necessary;
- Cooperation could include action on complaints from one regulator to another, together with appropriate sharing of information;
- Cooperation should also involve industry (direct marketers and ISPs), other forums and regional groupings as necessary;
- Public education and the concerns of civil society were important elements of a strategy;
- It was essential to have international cooperation arrangements in place;
- ITU offered the only “family gathering” which accounted for all developing and developed countries and was well placed to raise awareness;
- A living model for international cooperation was needed urgently, and this could be developed as a special focus at the next GSR, perhaps with a virtual conference in the lead-up. If the latter was held prior to WSIS, then it might produce the basis for input to WSIS deliberations. The form of cooperative model was not specified at this stage.

Source:

<http://www.itu.int/ITU-D/treg/Events/Seminars/2004/GSR04/documents/SPAMBreakoutSessionSummary.pdf>

NOTE: The site www.itu.int/ITU-D/treg gives information about anti-spam legislation in particular countries and regions.

Annex D-4**VoIP in the world**

(Selected Case Studies)

- **Americas**

Canada draws a distinction between data transmission applications over the Internet, which are not subject to any regulation, and Internet applications offering an alternative to public switched telephone services, which are. IP calls between telephones are thus regulated. Its suppliers are treated like any other telephone service provider and have to contribute to financing the universal service fund.

Other countries such as the United States are grappling with the question of whether VoIP is a telecommunication service or an “information service”, in which case it would escape telecommunication regulation. The issue is still unresolved, even in the United States. The Federal Communications Commission (FCC) and many state regulatory authorities are in disagreement on this issue. For example, the Minnesota State Commission has been battling with a VoIP service provider. The two parties disagree on the category in which the service provider should be placed. The State of Minnesota considers that the company falls under its jurisdiction as a telecommunication service provider, whereas the company claims that it is an information service provider and thus not subject to any regulation by the state. In a decree on VoIP dated November 2004, FCC has stipulated that it is up to FCC and not state commissions to decide whether particular regulatory provisions apply to services using the Internet Protocol.

The Ministry of Transport and Telecommunications of Peru, on the other hand, considers VoIP as a value-added service, and therefore does not subject it to regulation under the Peruvian Telecommunication Act.

- **Africa**

South Africa announced partial liberalization of VoIP in 2004 in underserved areas, as part of its overall market reform, prior to the introduction of a second national fixed network operator. Mauritius authorizes “network application service providers” to take out a licence to provide Internet telephony services on condition that no VoIP call is terminated on a conventional fixed or mobile telephone in Mauritius. Egypt has granted Telecom Egypt monopoly rights for the provision of IP telephony services. Algeria is also working on legislation covering VoIP.

- **Europe**

The European Commission has established that telephone services over the Internet do not constitute voice telephony unless:

- they are made available to the public on a commercial basis and separately from telephone services;
- they are set up from and to terminals on the PSTN;
- they are offered in real time with the same level of telephone quality and reliability as services offered by telephone companies over the PSTN.

The European Union is of the opinion that VoIP does not fall within the definition of telecommunications, since it does not involve direct transport of speech in real time. The European Commission may, however, review its position in the light of recent progress in regard to the quality of service and growth of the European VoIP market.

In Switzerland, VoIP is not currently regulated. The decisive criterion for determining whether or not a particular type of IP telephony constitutes a public telephone service is whether the service is “transmitted with direct transport and switching of speech in real time”. At present, VoIP services are not deemed to involve real-time transmissions.

In Hungary, IP telephony is authorized, on condition that the delay is greater than 250 milliseconds and packet loss is over 1 per cent. Hungary's policy is to impose limits on sound quality to avoid IP telephony being a perfect substitute for the telephone service over the PSTN. Bosnia and Herzegovina plans to liberalize VoIP in 2005.

- **Asia**

In the Republic of Korea, telecommunication services are divided into basic services over existing infrastructures and value-added services, such as for example services between computers, or bidirectional IP telephony services. The Korean authorities regulate VoIP very lightly, on the basis of a functional equivalent in relation to conventional telephone services. In Indonesia the Government has granted five licences authorizing “Internet telephony for public services”, under a pilot project with a view to setting the regulatory framework for Internet telephony. The Communication Authority of Thailand (CAT) has a monopoly over the allocation of licences to Internet service providers. CAT is the only authority to use VoIP, which it now exploits for its international and long-distance communications. In India, VoIP is authorized, but only for communications between computers. Indeed, India deregulated IP Telephony on 1 April 2002 following the ITU World Telecommunication Policy Forum (WTPF) on IP Telephony in 2001. The draft law on a unified licence currently under consideration in India would, however, impose no restriction on IP telephony or other services using the Internet protocol, as long as they are proposed by operators holding a unified licence who have paid all the requisite registration fees. Viet Nam authorizes “outgoing” Internet-based calls, between one computer and another, and between a computer and a telephone, but prohibits “incoming” Internet telephone communications.

Source: ITU Report “Trends in telecommunication reform 2004/2005”.

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Photo credits: ITU Photo Library