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THE TDSAT REVISITED

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FOREWORD

Speaking at the inaugural session of the two-day seminar on the ART of Convergence, organised by the Telecom Disputes Settlement & Appellate Tribunal (TDSAT) in Delhi on 6 and 7 February, 2016, I tried to highlight the changes that had come in the working of the Tribunal since its inception in the year 2001. I referred to certain recent decisions of the Supreme Court that had greatly restricted the jurisdiction of TDSAT by putting any challenge to (I) the regulations framed by TRAI and (II) the conditions of the licence granted by the Government of India under Section 4 of the Indian Telegraph Act, 1885, beyond its purview. Coupled with the narrowing down of the jurisdiction, the working of TDSAT was materially changed by an amendment in the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) by which broadcasting services were made part of telecommunication services. In 2001, when TDSAT was established broadcasting was not part of telecommunication services. In 2004 broadcasting services were made part of telecommunication services and consequently disputes arising in the broadcasting sector also came within the purview of TDSAT. Since 2004, there has been a constant increase in the number of broadcasting cases coming to the Tribunal and in the year 2015 the number of broadcasting cases far exceeded the number of telecom cases. A very large number of the broadcasting

cases relate to recovery of dues or demand for supply of TV signals from broadcasters or some large distributors of TV channels. I tried to submit in the seminar that in the changed circumstances there was perhaps a need to make a review of the adjudicatory structure in the telecommunication and broadcasting sectors.

Mr. Jaitley, Finance Minister and Minister of Information and Broadcasting, Government of India, who was invited to formally inaugurate the seminar, in his speech, responded to the point sought to be made by me and said that if the Seminar was able to evolve certain recommendations for any alterations or changes that may lead to a more suitable mechanism for dispute resolution in the two services, those would receive due consideration from the Government.

The inaugural session was followed by the first working session on Adjudicatory Mechanism -- Issues and Way Forward, presided over by the Hon'ble Mr. Justice Sikri of the Supreme Court of India. In that session, issues concerning the need for specialised tribunals, their utility, their performance, with special reference to TDSAT, came under greater discussion with Mr. Venugopal, Senior Advocate, Mr. Ranjeet Kumar, the Solicitor General for India and Mr. Justice B.D. Ahmed of the Delhi High Court expressing their views on those questions.

After the seminar I strongly felt the need to test and verify the hypothesis I had ventured to make at the seminar on the basis of a

data-based analysis of the working of TDSAT. Around this time, I came across a report by Vidhi Centre for Legal Policy under the caption “State of the Nation’s Tribunals: Introduction and Part I: Telecom Disputes Settlement and Appellate Tribunal”. I regretted not having seen the report earlier and not getting Vidhi to participate in the seminar. But I had found the group I was looking for. On my request Dr. Arghya Sengupta, Research Director at Vidhi, gladly accepted the assignment and with the help and assistance of Sumathi Chandrashekar, Senior Resident Fellow and Medha Srivastava, Research Fellow at Vidhi, produced an independent report in the amazingly short time of three months.

Over the past eight to ten weeks I witnessed Arghya, Sumathi and Medha working hard and with dedication and commitment. I think this report will be of considerable help in any deliberations aimed at re-moulding the adjudicatory framework to provide for a more suitable and efficient resolution of disputes in the telecommunication and broadcasting sectors. Beyond this I refrain from making any observations on the quality of the study as any words of praise from me may evoke cynical comments. I leave the reader to form his/her own opinion in regard to the value of the report.

Aftab Alam,

Chairman, TDSAT

Dated: 14th June, 2016

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I. INTRODUCTION

A. Telecommunications Sector in the Indian Economy

Until 1991, telecommunications services were exclusively the mandate of the State.¹ After liberalisation, the need was felt for a shift in the ownership and structure in this sector to ensure greater efficiency in its functioning. Massive changes were proposed by the government, starting with privatisation and decentralisation.

In the telecommunications sector, the earliest of these privatisations was that of Videsh Sanchar Nigam Limited (VSNL), in 1991-92,² which successfully fended off a validity challenge in the Delhi High Court (which was eventually dismissed).³ By 1994, the telecom sector had three key players, i.e., the Department of Telecommunications (DoT), the Mahanagar Telephone Nigam Limited (MTNL) and VSNL. Of these, VSNL was the sole international service provider, MTNL operated in Bombay and New Delhi, and the DoT operated in the rest of India.⁴

With an objective of attracting foreign direct investment and stimulating domestic investment, the Government framed the National Telecom Policy in 1994.⁵ The policy also

¹ India's 9th Five-year Plan, (1999) Chapter 26 "Communications", Document of the Planning Commission, available at <planningcommission.nic.in/plans/mta/mta-9702/mta-ch26.pdf> accessed on 20.04.2016.

² A Case Study of Videsh Sanchar Nigam Limited, available at <etd.inflibnet.ac.in:8080/jspui/bitstream/10603/52933/12/12_chapter%205.pdf> accessed on 09.05.2016.

³ 'Privatisation of VSNL: Winners and losers', *The Times of India (Business)*, 25th February, 2003, available at <<http://timesofindia.indiatimes.com/business/india-business/Privatisation-of-VSNL-Winners-and-losers/articleshow/38311969.cms>> accessed on 09.05.2016.

⁴ Rekha Jain (2011), 'Comparison of Privatization Processes of Telecom Services in India and Brazil', Working Paper Series, IIM Ahmedabad, available at <www.iimahd.ernet.in/assets/snippets/workingpaperpdf/10922009422011-10-03.pdf> accessed on 09.05.2016.

⁵ The National Telecom Policy can be found at <http://www.trai.gov.in/Content/telecom_policy_1994.aspx> accessed on 20.04.2016.

sought to provide increased and easier access to telecommunication services throughout the country.⁶

While the policy conceded that private investments were necessary, policy implementation was not without its challenges.⁷ Some private players (including foreign ones) gradually became increasingly involved in the sector. The constitutional validity of the 1994 Telecom Policy also came under question, through a writ petition filed in the Supreme Court.⁸ The challenge in this case (“the Delhi Science Forum case”) was on the ground that telecommunications, being a sensitive service, should remain within the exclusive domain and control of the Government.⁹ Upholding the validity of the Telecom Policy, and citing practices followed in the United Kingdom, the Court said that almost all countries of the world which had privatised telecommunications (quoting further examples of Canada, Australia) had constituted regulatory authorities under different enactments.¹⁰ The Telecom Regulatory Authority Ordinance was promulgated after the hearing of these writ petitions, and thereafter, between 1994 and 1998, licenses for private provision of paging, cellular, and basic services were awarded.¹¹

⁶ See, for example, Harsha Vardhana Singh, Anita Soni, and Rajat Kathuria (2005), ‘Telecom Policy Reform in India’, from siteresources.worldbank.org, available at <siteresources.worldbank.org/INTRANETTRADE/Resources/Singh.pdf> accessed on 20.04.2016; and Snehashish Ghosh (2013), ‘National Telecom Policy, 1994’, available at <http://cis-india.org/telecom/resources/national-telecom-policy-1994>> accessed on 09.05.2016.

⁷ Vikram Raghavan, “Communications Law in India: Legal Aspects of Telecom, Broadcasting and Cable Services” (Lexis Nexis Butterworths, 2009)

⁸ *Delhi Science Forum v. Union of India* (1996) 2 SCC 405

⁹ Para 5, *Delhi Science Forum vs. Union of India* (1996) 2 SCC 405

¹⁰ See Para 28 of the Delhi Science Forum judgment, wherein the Supreme Court has briefly discussed the telecommunications sector in UK, US, Australia.

¹¹ ‘Project Appraisal Document on a Proposed Loan in the Amount of US \$62.0 Million to India for a Telecommunications Sector Reform Technical Assistance Project’ (11th May, 2000), *Document of the World Bank*, available at <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/06/10/000094946_00052005302162/Rendered/PDF/multi_page.pdf> accessed on 19.04.2016. See also, ‘Implementation Completion Report (Scl-45550) on a Loan in the Amount of \$62.0 Million to India for a Telecommunications Sector Reform Technical Assistance Project’, *Document of the World Bank*, available at <www-wds.worldbank.org/external/default/WDSContentServer/.../IB/.../36296.pdf> accessed on 13.05.2016.

B. The Telecom Regulatory Authority of India (TRAI)

The Telecom Regulatory Authority of India Bill (the TRAI Bill) was introduced in the 11th Lok Sabha on 23rd July, 1996. The Bill was a direct outcome of the National Telecom Policy, 1994, which allowed for private participation in the telecommunication sector, and a recognition that an independent statutory authority was needed for a competitive telecom market.¹²

The Bill created the Telecom Regulatory Authority of India (TRAI), to regulate telecom services, including fixation/revision of tariffs for telecom services which were earlier vested in the Central Government. The law was enacted in 1997, and the TRAI was established with a mission to create and nurture conditions for growth of telecommunications in the country in a manner and at a pace which will enable India to play a leading role in the emerging global information society.

As a furtherance of the developmental activities in the Telecom Sector, in 1997, commitments were made to the World Trade Organization (WTO), in respect of the agreement on basic telecommunications service.¹³ These included commitments to review, in 1999, the further opening of national long-distance service, and in 2004, of international services.¹⁴

By 1998, the Central Government had opened the sector to private Internet Service Providers (ISPs).¹⁵ As a step to further privatisation and investment in the telecom sector,

¹² 'The Telecom Regulatory Authority of India Act, 1997' (2013), *The Centre for Internet and Society*, available at <<http://cis-india.org/telecom/resources/trai-act-1997>> accessed on 20.04.2016.

¹³ See Kathuria, Rajat (2004), 'Trade in Telecommunication Services: Opportunities and Constraints', Working Paper 149, Indian Council for Research on International Economic Relations, available at <icrier.org/pdf/wp149.pdf> accessed on 04.05.2016.

¹⁴ See 'Highlights of the basic telecommunication commitments and exemptions', from the Official website of the World Trade Organization, available at <https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_highlights_commit_exempt_e.htm> accessed on 03.05.2016.

¹⁵ See 'Telecom at a glance' from the official website of the Department of Telecommunications, available at <<http://www.dot.gov.in/about-us/telecom-glance>> accessed on 20.04.2016.

the Government introduced the Telecom Policy of 1999.¹⁶ This new policy sought to increase competitiveness, efficiency and transparency in the telecommunications sector. This policy also addressed various aspects relating to the TRAI, such as its power to frame regulations and adjudicate disputes between service providers.¹⁷

C. The proposed Broadcasting Regulatory Authority of India (BRAI)

At around the same time as the TRAI was set up, a similar legislative proposal to create a regulatory body for the broadcasting sector was also made. In 1997, the Broadcasting Bill¹⁸ was introduced in Parliament, with the objective to enable licensing and regulation of broadcasting. The Bill sought to:

“establish an autonomous Broadcasting Authority for the purposes of facilitating and regulating broadcasting services in India so that they become competitive in terms of quality of services, cost of service and use of new technologies, apart from becoming a catalyst for social change, promotion of values of Indian culture and shaping of a modern vision.”¹⁹

The idea of creating a parallel regulatory mechanism for the broadcasting sector, alongside one for the telecom sector, therefore, emerged together. However, for various reasons, the proposal to create this independent broadcasting regulatory authority has never come to fruition. The 1997 Bill was referred onwards to a Joint Select Committee,²⁰

¹⁶ ‘New Telecom Policy 1999’, Press Release of the Government of India, available at <<http://pib.nic.in/focus/fomar99/fo3103991.html>> accessed on 20.04.2016. (31.03.1999)

¹⁷ To see the Parliamentary debate on the Telecom Policy on 1999 and the subsequently proposed changes, see the debates of the 13th Lok Sabha (in 2001). Available at <<http://164.100.47.192/Loksabha/Debates/Result13.aspx?dbsl=3258>> accessed on 27.04.2016.

¹⁸ The text of the Broadcast Bill 1997 is available at <<http://www.indiantelevision.com/old-html/indianbroadcast/legalreso/broadcast.htm>>, accessed on 30.05.2016

¹⁹ The Broadcasting Bill 1997, available at <<http://pib.nic.in/focus/fomore/bbill.html>>, accessed on 30.05.2016

²⁰ The Broadcasting Bill 1997, available at <<http://pib.nic.in/focus/fomore/bbill.html>>, accessed on 30.05.2016

but it lapsed. Four years later, the Communication Convergence Bill 2001 was introduced but this too lapsed due to the dissolution of the 13th Lok Sabha.²¹

In 2006, the idea of a Broadcasting Services Regulation Bill was again floated,²² in pursuance of the original idea of creating a regulator for the broadcast industry.²³ The Broadcasting Services Regulation Bill, 2006, as drafted, provided for the establishment of a Broadcasting Regulatory Authority of India (or BRAI, under Section 12 of the Draft Bill). The consultation paper accompanying the draft bill stated that it proposed to set up BRAI on the lines of TRAI, with powers clearly delineated between the Central Government, the BRAI, licensing authorities and authorised officers.²⁴ Section 19 of the Draft Bill of 2006 provided for setting up of regional branches of the authority.²⁵ Section 20 gave the BRAI the power to make regulations relating to manner of appointment of members, delegations of powers and functions to the Chairman, manner in which broadcasters shall establish and operate the system of self-certification of broadcasting content etc.

Eventually, the BRAI Bill never saw the light of day, presumably due to concerns expressed by the industry of excessive regulation. As a result, a status quo was maintained, and the government did not press for the legislation, while the broadcast industry was expected to

²¹ Consultation Paper on the Broadcasting Services Regulation Bill, Consultation Paper of the Ministry of Broadcasting (www.mib.nic.in), available at <<http://www.mib.nic.in/WriteReadData/documents/ConsultationPapeRegulationBill.htm>> accessed on 16.05.2016.

²² Consultation Paper on the Broadcasting Services Regulation Bill, Consultation Paper of the Ministry of Broadcasting (www.mib.nic.in), available at <<http://www.mib.nic.in/WriteReadData/documents/ConsultationPapeRegulationBill.htm>> accessed on 16.05.2016.

²³ See 'Is it time for a new broadcasting regulator?' *The Hindu*, available at <<http://www.thehindu.com/news/national/is-it-time-for-a-new-broadcasting-regulator/article4630641.ece>> accessed on 16.05.2016. See also 'What is the Broadcasting Bill?' *The Indian Express*, 22nd September 2007, available at <<http://archive.indianexpress.com/news/what-is-the-broadcasting-bill--/219641/>> accessed on 16.05.2016.

²⁴ The Broadcasting Regulatory Authority of India Bill, 2006 is available at <http://www.prsindia.org/uploads/media/vikas_doc/docs/1241499767--A_DRAFT_OF_THE_PROPOSED_BROADCASTING_SERVICES_REGULATION_BILL2006.pdf> accessed on 16.05.2016.

²⁵ 19. Regional offices of the Authority: The Authority may, with the prior approval of the Central Government set up Regional Offices at Delhi, Chennai, Kolkata and Mumbai, and such other regional offices at places to be notified by the Govt., and to perform such functions and with such jurisdictions as may be prescribed. At each such Regional Offices there shall be one Regional Director to be appointed by the Central Government to discharge the functions delegated to him by the Authority.

come up with a system of self-regulation.²⁶ Thus, pursuant to failed attempts at the creation of a separate regulatory authority for the broadcasting sector; broadcasting continued to be regulated through rules and regulations framed for Cable TV Networks, Sports Broadcasting Signals, Prasar Bharti and CAS (Conditional Access Signals), under the TRAI Act as well as by the Ministry of Information and Broadcasting.²⁷ Further, telecommunication services now includes broadcasting services; as was notified by the Central Government in 2004.²⁸ This notification essentially brought broadcasting services under the definition of “telecommunication service”; and further entrusted the TRAI with powers to regulate broadcasting and cable services in India. The TRAI Act was subsequently amended to include “broadcasting services” within the ambit of “telecommunication services” as defined under Section 2(1)(k) of the TRAI Act. This will be discussed in detail subsequently, under the mandate of the TDSAT in Chapter IV, where the jurisdiction and functioning of the TDSAT is examined in detail.

²⁶ See Narrain, Siddharth (2008), ‘A Broad Overview of Broadcasting Legislation in India’, available at <http://indiatgether.org/uploads/document/document_upload/2139/blawbackgrounder.pdf>, accessed on 25.05.2016.

²⁷ The Broadcasting and Cable Services Division in the TRAI is responsible for advising the Authority, for laying down the overall regulatory framework for the broadcasting and cable TV sector encompassing the interconnection, quality of service and tariff aspects. See ‘Telecom Regulatory Authority of India MANUAL’ (Under Section 4(1) (b) of the Right to Information Act, 2005), available at <traigov.in/WriteReadData/userfiles/file/rTI/RTI-Act_TRAI-Website-06.03.13.pdf> accessed on 11.06.2016.

²⁸ See Notification No. 39 issued by Ministry of Communication and Information Technology dated 9 January 2004. S.O. No. 44(E) issued by TRAI, vide F. No. 13-1/2004. Available at <<http://tdsat.nic.in/books/3.4.doc>> accessed on 26.04.2016.

II. INSTITUTION AND EVOLUTION OF THE TDSAT

After 1991, the accelerated growth of telecommunications led to many changes in market structure in the sector and saw diverse categories of players enter the market. As discussed previously, these market changes led to the need, and subsequent creation of, a regulatory authority, i.e., the TRAI. The TRAI was vested with broad and varied powers, including but not limited to regulation. Crucially, besides being a regulatory body, TRAI was also entrusted with the responsibility of adjudicating disputes in the telecom sector (with the exception of certain categories of disputes which were explicitly excluded by the Act), as well as (originally) to arbitrate these disputes.

Initially, therefore, the TRAI was the dispute settlement body responsible for the cases that involved telecom service providers.²⁹ Officials of the Department of Telecom (DoT) were members of TRAI as well. While TRAI as an institution retained a regulatory and dispute resolution function, policy making and operations continued to remain with DoT. This situation inevitably led to a conflict of interest between the authority and the ministry, as well as concerns about TRAI's ability to be an independent and impartial adjudicating body.³⁰ In this background, the need for a separate body to adjudicate disputes in the telecommunications sector was felt. Instead of strengthening the independence of TRAI, the Government amended the TRAI Act in 2000 to establish the Telecom Disputes Settlement and Appellate Tribunal (TDSAT),³¹ which was vested with the

²⁹ Telecommunication Regulatory Authority of India Act, 1997 (TRAI Act) S. 11(l)(n).

³⁰ Jain, Rekha (2001), 'India Infrastructure Report, 2001. Chapter 8: The Telecom Sector'. Available at <www.iitk.ac.in/3inetwork/html/reports/IIR2001/iir8.pdf> accessed on 20.04.2016.

³¹ The Telecom Regulatory Authority of India (Amendment) Ordinance, 2000 (No. 2 of 2000, dated 24.01.2000), available at <<http://www.tra.gov.in/Content/Act2001.aspx>> accessed on 09.05.2016.

TRAI's powers to adjudicate disputes between licensors, licensees, service providers and consumers.³²

Commentators suggest that the TDSAT was conceptualised to address questions of the TRAI performing various functions together which potentially violated the principle of separation of powers.³³ The primary objective of the 2000 Amendment to the TRAI Act, which set up the TDSAT, was to separate adjudicatory functions of TRAI from its administrative and legislative functions and ward off the criticism that the one who is empowered to make regulations and issue directions or pass orders, is clothed with the power to decide their legality.³⁴

The TDSAT was set up under Section 14 of the TRAI (Amendment) Act, 2000, as an independent adjudicatory body,³⁵ to adjudicate disputes and dispose of appeals with a view to protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector.³⁶ This was an innovative step by the Indian government in the telecom sector, prompted by reasons including the technical nature of these disputes (and therefore, a specialized body to adjudicate disputes relating to them), the changes in the telecommunications market in India, as well as an unsatisfactory private investment environment in the sector.³⁷

³² Nehaluddin Ahmad (2008), 'The Commitments made by India under the GATS negotiations: A study of the Impact of these Commitments', *Communications of the IBIMA*, available at <www.ibimapublishing.com/journals/CIBIMA/volume4/v4n4.pdf> accessed on 09.05.2016.

³³"It may be questioned whether the combination in one body of the regulator's rule-making function (quasi-legislative), its monitoring and enforcement functions (quasi-executive) and its dispute resolution function (quasi-judicial) is at odds with the principle of separation of powers-a principle which has been an important feature of the liberal democratic tradition of government at least since Montesquieu." See Rory Macmillan, 'Reflections on Regulation and Dispute Resolution In the Indian Telecommunication Sector', available at <<https://www.itu.int/ITU-D/treg/Documentation/DispRes-India.PDF>> accessed on 19.04.2016.

³⁴ See Para 107, *BSNL v. Telecom Regulatory Authority of India* (2014) 3 SCC 222

³⁵ *BSNL v. Telecom Regulatory Authority of India* (2014) 3 SCC 222, Para 106.

³⁶ See "Profile" on the Official Website of the TDSAT, available at <<http://tdsat.nic.in/Profile2.htm>> accessed on 20.04.2016.

³⁷ Rory Macmillan (2005), 'Reflections on Regulation and Dispute Resolution in the Indian Telecommunication Sector', *Journal of the Indian Law Institute* (Vol. 47:1) available at <<https://www.itu.int/ITU-D/treg/Documentation/DispRes-India.PDF>> accessed on 19.04.2016. See also 'Project Appraisal Document on a Proposed Loan in the Amount Of Us\$62.0 Million to India for a Telecommunications Sector Reform Technical

It is interesting to note that the law envisioned that TDSAT should have more than one bench situated in cities other than Delhi. Member of Parliament, Pawan Kumar Bansal, in the parliamentary debates, is quoted as having said, *“The Bill as it stands now provides for not more than two whole-time members and at the same time it talks of Benches of the Appellate Tribunal which could be set up at many places besides Delhi and a Bench has necessarily got to be composed of one or two members.”*³⁸

Further, Section 14B of the TRAI Act, states that the Chairperson has the power to constitute a Bench with one or two Members of the Tribunal. While the Benches of the Appellate Tribunal are expected to ordinarily sit at New Delhi, the Central Government may, in consultation with the Chairperson, notify “such other places” for the Benches to sit.³⁹ However, as it was eventually established, the TDSAT operates with only one bench in Delhi.

Countries across the world have varied frameworks and methods of resolving their telecommunication disputes, some of which include Appellate Tribunals empowered to hear telecom disputes. For instance, in Malaysia, it takes the form of an appellate tribunal, which is headed by a Judge as and when any party aggrieved by the decision of the Malaysian Communication and Multimedia Commission, seeks a review of the decision. The Malaysian Communication and Multimedia Commission, (MCMC) set up under the Communications and Multimedia Act 1998, has been assigned overall responsibility “to regulate the converging communications and multimedia industries”. Under Section 17 of

Assistance Project' (11th May, 2000), *Document of the World Bank*, available at <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2000/06/10/000094946_00052005302162/Rendered/PDF/multi_page.pdf> accessed on 19.04.2016.

³⁸ See the debate of 13.03.2000 of the 13th Lok Sabha (4th Session), on the setting up of an Appellate Tribunal by the Amending Act of 2000, available at <<http://164.100.47.192/Loksabha/Debates/Result13.aspx?dbsl=651>>, accessed on 27.04.2016.

³⁹ See Section 14B(3)(c) of the TRAI Act, 1997 which states as follows:

“the Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson of the Appellate Tribunal, notify;...”

this Act, there is a provision for the setting up of an appellate tribunal, which is to be established by the Minister to review particular matters under the Act or its subsidiary legislation.⁴⁰

In Australia, this function is performed by the Administrative Appeals Tribunal, which is not specific to the telecom sector but has a wide range of responsibilities. Further, the Telecom Industry Ombudsman is an independent authority which looks into consumer complaints on the various aspects of telecom service.⁴¹ In UK as well, the institution of Telecom Ombudsman is likely to be set up shortly.⁴²

The TDSAT is a unique institution, specific to telecom sector for settlement of disputes between licensor and licensee, between two or more service providers and a service provider and a group of consumers. The existence of such an institution not only affords an opportunity to service providers to seek a final settlement of issues involved, but also sanctifies various decisions taken by the regulator which sets the pace and tone for corporate governance and contributes to stability in the market.

⁴⁰ RUS Prasad (2008), 'Dispute Resolution Mechanisms in the Telecom Sector: Relating International Practices to Indian Experience', Working Paper 372, Stanford Centre for International Development, available at <<http://scid.stanford.edu/sites/default/files/publications/372wp.pdf>> accessed on 10.06.2016.

⁴¹ See "About us" in Telecom Industry Ombudsman (Official website) available at <<https://www.tio.com.au/about-us>>, accessed on 10.06.2016.

⁴² RUS Prasad (2008), 'Dispute Resolution Mechanisms in the Telecom Sector: Relating International Practices to Indian Experience', Working Paper 372, Stanford Centre for International Development, available at <<http://scid.stanford.edu/sites/default/files/publications/372wp.pdf>> accessed on 10.06.2016.

III. SCOPE OF THE STUDY

TDSAT was originally conceived as a body to deal with disputes in the telecom sector. Over time, however, this jurisdiction of TDSAT appears to have changed in scope: due to the absence of an equivalent adjudicatory authority in the broadcasting sector, and after a legislative amendment effecting such a change, the TDSAT also entertains a large number of broadcasting matters. As a result, the TDSAT adjudicates various types of disputes in both the telecom and broadcasting sectors.

This study seeks to investigate the extent to which the jurisdiction of the TDSAT has changed, and how it may have affected the functioning of the body itself. The discussion on the TDSAT's jurisdiction includes an analysis of the decisions of the Supreme Court dealing with this issue, which show, over time, how TDSAT's jurisdiction has been curtailed. Even as its jurisdiction has narrowed (for instance, by decisions which, as will be dealt with subsequently- restricted its power to review TRAI Regulations), the TDSAT has become heavily burdened with smaller recovery and contractual petitions, especially those emerging from the broadcasting industry. Further, the study focuses on data pertaining to cases brought before the TDSAT in the last three years of its functioning; following up on a previous study by us that looked at the first decade.⁴³ It studies various aspects of the institution, including its powers, its judicial functioning in the context of this data, and the administrative concerns in this period. On the basis of the analysis of the data available, the study concludes with a summary and recommendations of the functioning of the body in the years to come.

⁴³ Alok Prasanna Kumar, Rukmini Das, 'State of the Nations Tribunals, Introduction and Part 1: Telecom Disputes Settlement and Appellate Tribunal', Report of the Vidhi Centre for Legal Policy, pp. 27-28, available at

<http://vidhilegalpolicy.in/s/140618_State-of-the-Nations-Tribunals-TDSAT.pdf> accessed on 06.06.2016. The current study looks at data from June 2013 to March 2016.

IV. ANALYSIS AND FINDINGS

The following pages examine the data pertaining to the functioning of the TDSAT through various lenses, including its jurisdiction, mandate, powers and functioning.

A. Jurisdiction of the TDSAT

1. Jurisdiction under the TRAI Act

The provision that establishes the TDSAT, i.e., Section 14 of the TRAI Act, entrusts the tribunal with two types of functions. The first is to adjudicate disputes by way of original jurisdiction, and the second is by way of an appellate jurisdiction. Indeed, the appellate powers of the TDSAT are evident from the name of the body itself, which was envisioned as a telecom dispute settlement and *appellate* tribunal. This dual function has been acknowledged by the Supreme Court as well, which observed that the exercise of original jurisdiction by the TDSAT, is an original adjudicatory function whereas its appellate function is to hear appeal(s) against an order of TRAI which may or may not essentially be an adjudicatory one.⁴⁴

2. The evolving jurisdiction of TDSAT through case law

The Supreme Court has, in various judgments, examined and ruled on the jurisdiction of the TDSAT. As will be seen from the discussion below, the Supreme Court has, over time, gradually curtailed the jurisdiction of the TDSAT by placing restrictions on its functioning.

(a) *Cellular Operators Assn. of India v. Union of India*

In the past, disputes have been adjudicated by the TDSAT, the rulings on which then became the subject matters of appeal before the Supreme Court, particularly with reference to questions of law relating to the jurisdiction of the TDSAT. One such case,

⁴⁴ See Para 27, *Hotel & Restaurant Assn. v. Star India (P) Ltd.* (2006) 13 SCC 753

*Cellular Operators Assn. of India v. Union of India*⁴⁵ (“the COAI case”), dealt with the TDSAT’s jurisdiction to examine the validity of certain regulations. In this judgment, the Supreme Court held that the jurisdiction of the TDSAT was wider than that of the Supreme Court,⁴⁶ and observed:

*“As has been stated earlier, the jurisdiction of the Tribunal under Section 14 cannot be held to be a supervisory jurisdiction, in view of the language of the statute as well as the fact that it is the only forum for redressing the grievance of an aggrieved party inasmuch as the appellate jurisdiction to this Court is only on a substantial question of law and the jurisdiction of a civil court for filing a suit is also ousted.”*⁴⁷

It was argued that the jurisdiction of the TDSAT under the TRAI (Amendment) Act, 2000, empowered the Tribunal with both original and appellate jurisdiction. The Court observed that because the only appeal that lay from the order of the TDSAT was to the Supreme Court, it would be reasonable to hold that the Tribunal had unfettered jurisdiction to adjudicate the dispute raised, as well as decide the legality of an order of the Central Government or even an opinion of the TRAI or any other expert body. In this regard, the Court noted that the jurisdiction of the Tribunal is quite wide. The Court also held that the decisions of the Supreme Court dealing with the powers of a court exercising appellate power or original power would have no application in limiting the jurisdiction of the appellate tribunal under the Act. The Court further observed that the Tribunal had committed an error in holding that its jurisdiction could not be wider than that of the Supreme Court; and stated that a reading of Sections 14 and 18 of the TRAI Act also goes to illustrate that this was not the case.

⁴⁵ See *Cellular Operators Assn. of India v. Union of India* (2003) 3 SCC 186

⁴⁶ See Para 11, *Cellular Operators Assn. of India v. Union of India* (2003) 3 SCC 186

⁴⁷ See Para 11, *Cellular Operators Assn. of India v. Union of India* (2003) 3 SCC 186

This judgment thus held that the jurisdiction of the Tribunal was very wide, and stated that the Tribunal was an expert body that had powers wider than that of the Supreme Court. The dispute before the Supreme Court was, as a consequence, remitted back to the Tribunal for reconsideration of the materials. The Court also held that it had limited power under Section 18 of the TRAI Act, and as such it could not interfere with the findings of the Tribunal (particularly because the Tribunal had reached these conclusions after due consideration of all the relevant facts and technical materials). This case reflected a clear picture of the powers and jurisdiction of the TDSAT vis-a-vis that of the Supreme Court in reference to Sections 14 and 18 of the TRAI Act.

(b) Union of India vs. Association of Unified Telecom Service Providers of India

In 2011, the Supreme Court, in the judgment of *UOI vs. Association of Unified Telecom Service Providers of India*⁴⁸, imposed a limitation on the jurisdiction of the TDSAT in holding that the TDSAT did not have the jurisdiction to decide on the validity of the definition of "adjusted gross revenue" in the terms provided for in the license agreement between the parties. The Supreme Court, in doing so, also re-iterated its consistent view that once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court.

A substantial question of law before the Court in this matter was whether the licensee could challenge the computation of Adjusted Gross Revenue, and if so at what stage and on what grounds. The Court held that the TDSAT had the power to interpret the terms and conditions of the license agreement. However, in this case, the licensee had approached the Tribunal with a view to challenge the validity of the definition of the Adjusted Gross Revenue and the Tribunal had decided in its order as to what items of revenue would be part of Adjusted Gross Revenue and what items of revenue would not be part of Adjusted Gross Revenue; without going into the facts and materials relating to the demand on a

⁴⁸(2011) 10 SCC 543

particular licensee. The Court ultimately allowed the appeals filed and set aside the order of the Tribunal, stating that it lacked the jurisdiction to rule on the validity of the particular term contained in the license agreement. However, the Court's reasoning is circuitous and it appears to have conflated the right of the licensee in approaching the appropriate authority about the validity of license conditions after accepting them, with the authority of the Tribunal to hear such claims, as and when they might arise.

(c) *BSNL v. Telecom Regulatory Authority of India*

In a ruling in 2013 with pervasive practical impact, the Supreme Court limited the jurisdiction of the TDSAT, holding that it had no authority to rule on the validity of the regulations made by the TRAI. In the case of *BSNL vs. TRAI*,⁴⁹ BSNL approached the Supreme Court for relief against a decision of the TDSAT, where the Tribunal had ruled on certain regulations and orders framed by the TRAI. In its decision, the TDSAT had relied upon its powers contained in Section 14(b) of the TRAI Act, under which the Tribunal could “hear and dispose of appeal against any direction, decision or order of the Authority under this Act.” The Court's judgment focused on the scope of the jurisdiction of the TDSAT in the context of examining the TRAI regulations. The Court pointed out that the issue of whether the words “direction”, “decision” and “order” under Section 14(b) of the TRAI Act, as amended in 2000, included regulations, had not been previously examined. Quoting its own decision in *L. Chandra Kumar v. Union of India*,⁵⁰ the Court referred to the fact that while tribunals have the power to test the vires of subordinate legislation and

⁴⁹ *BSNL v. Telecom Regulatory Authority of India* (2014) 3 SCC 222, where the Court held that:

124. *In the result, the question framed by the Court is answered in the following terms: in exercise of the power vested in it under Section 14(b) of the TRAI Act, TDSAT does not have the jurisdiction to entertain the challenge to the regulations framed by TRAI under Section 36 of the TRAI Act.*

In the same judgment at Para 99, the Court observed as follows:

“...By virtue of Section 37, the regulations made under the TRAI Act are placed on a par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by TRAI can be made ineffective or modified by Parliament and by no other body.”

⁵⁰ *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261

rules, this power is subject to one important exception, i.e., the jurisdiction to look into any question regarding the vires of their parent statutes. In this case, the Court held that the TDSAT did not have the power to examine the validity of regulations made under Section 36 of the TRAI Act, and concluded that the High Court as well as the TDSAT had committed an error of law in this regard.

While the judgment seems to merely clarify a position of law that was placed before the Court, its consequences run deeper. By limiting the jurisdiction of the TDSAT, the Supreme Court also directly impacted the mandate of the Tribunal. What was originally meant to be a tribunal that exercised original as well as appellate jurisdiction, after this judgement, took on the role of a court mainly of original jurisdiction, hearing mostly disputes between licensors and licensees in the first instance. Weighty telecom matters instead were challenged in the High Court and subject to systemic delays and expected lack of specialisation.

This judgment also sought to limit the power of judicial review of the TDSAT. In doing so, the Supreme Court also relied on the principles enunciated in the matter of *PTC India Ltd. v. Central Electricity Regulatory Commission*,⁵¹ where the question of law pertained to the power of judicial review of the Appellate Tribunal of Electricity to examine the validity of the regulations framed by the Central Electricity Regulatory Commission.

The issue of whether tribunals, in general, ought to have the power of judicial review is a question that begs a much larger canvas, and has been debated on more than one occasion. It remains an open question as to whether tribunals ought to have such power, or whether writ courts are an effective check and balance on regulatory actions. In any

⁵¹ (2009) 5 SCC 466

event, this debate ought not to be restricted to the TDSAT alone and is consequently its resolution is beyond the remit of this report.⁵²

In TDSAT's case, though, even after the Supreme Court's decision in BSNL vs. TRAI, the Tribunal may have to deal with disputes that are linked to the validity of regulations framed by the TRAI. Very often questions of validity of regulations are intertwined with matters that fall within the jurisdiction of the TDSAT. Further, several regulations such as the recent Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 ("Call Drops Regulations") involve complex technical questions relating to Quality of Service standards, that were originally intended to be squarely within the jurisdiction of the TDSAT. However with the BSNL v. TRAI judgment, such matters can, and were only brought before the High Court in the first instance, bypassing the TDSAT entirely. Whether, keeping in mind the larger context of tribunals exercising powers of judicial review, a change in position is warranted; is a question that requires close consideration.

(d) Jurisdiction of the TDSAT vis-a-vis Consumer Forums

As the TDSAT is empowered to examine disputes between telecom service providers and consumers, the issue of jurisdiction of these consumer fora over the same matters also assumes significance. In a ruling on February 25, 2014, the Meghalaya State Consumer Disputes Redressal Commission (hereinafter referred to as "State Commission") held that telecom disputes could be adjudicated by consumer fora.⁵³ In this matter, the State Commission was approached by aggrieved parties against BSNL, a telecom service provider. The jurisdiction of the District Consumer fora was challenged, when it exercised

⁵² See, for example, Sundaresan, Somasekhar (2014), 'Some existential questions for Indian tribunals', Business Standard, July 27, available at <http://www.business-standard.com/article/opinion/some-existential-questions-for-indian-tribunals-114072700711_1.html> accessed on 10.06.2016

⁵³ There was a reference from the Department of Telecommunications to the Ministry of Consumer Affairs which states that the District Consumer Forums have authority to adjudicate matters between consumer and telecom service providers. See <http://www.dot.gov.in/sites/default/files/DOC030414-015.pdf> and <http://telecom.economictimes.indiatimes.com/news/3g-4g/sc-ruling-cannot-bar-consumer-for-from-deciding-on-telecom-disputes/31767592>. The order can be found at <http://164.100.72.12/ncdrcprep/judgement/300140626151523706dailyorder2014-03-28.html> (accessed on 15th May 2016).

jurisdiction over the complaints filed before them by consumers of those telecom services (in this case, nine appeals were filed by consumers in the district forum). The Commission in this case held that the consumers, if not allowed to approach the consumer fora; would be left with no method for redressal of their grievances. The State Commission therefore held that the district forum was right in exercising jurisdiction over the complaints filed by consumers of telecom.

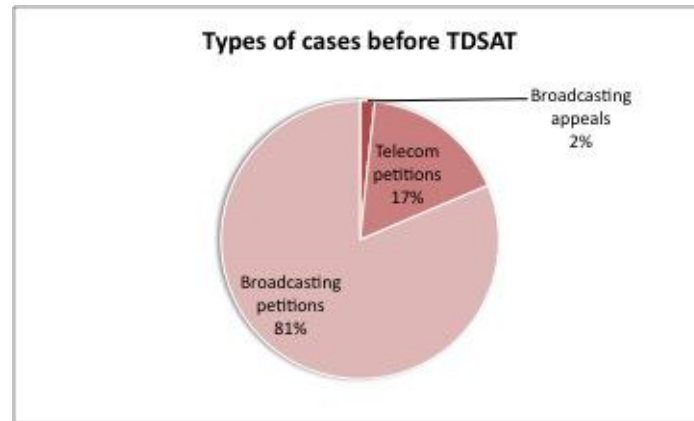
Subsequently, there was a reference from the Department of Telecommunications to the Ministry of Consumer Affairs stating that the District Consumer Forums have authority to adjudicate matters between consumer and telecom service providers.⁵⁴ This Notification also stated that under the National Telecom Policy of 2012, there was a proposal to amend the Indian Telegraph Act so as to bring disputes between telecom consumers and service providers within the jurisdiction of District Consumer Disputes Redressal Forums (established under the Consumer Protection Act, 1986). The Legal Advisor with the Department of Telecommunications (as he was at the time) however, stated that these forums already had jurisdiction over these disputes and there was no need for promulgation of an ordinance.⁵⁵ It is relevant to reiterate, in this context, that the powers of TDSAT extend to adjudicating disputes between a service provider and a “group of consumers”, but not individual consumers. Where a complaint of an individual consumer is maintainable before a Consumer Disputes Redressal Forum or Commission, established under the Consumer Protection Act, 1986, those complaints will be heard by such authority (under proviso (B) to Section 14(a) of the TRAI Act).

⁵⁴ See Office Memorandum, Ministry Communications and IT, Department of Telecommunications, No. 2-17/2013-Policy-1 (Policy-1 Section) dated 4th February, 2014, available at <consumeraffairs.nic.in/writereaddata/Jurisdiction-of-District-Fora.pdf> accessed on 26.04.2016.

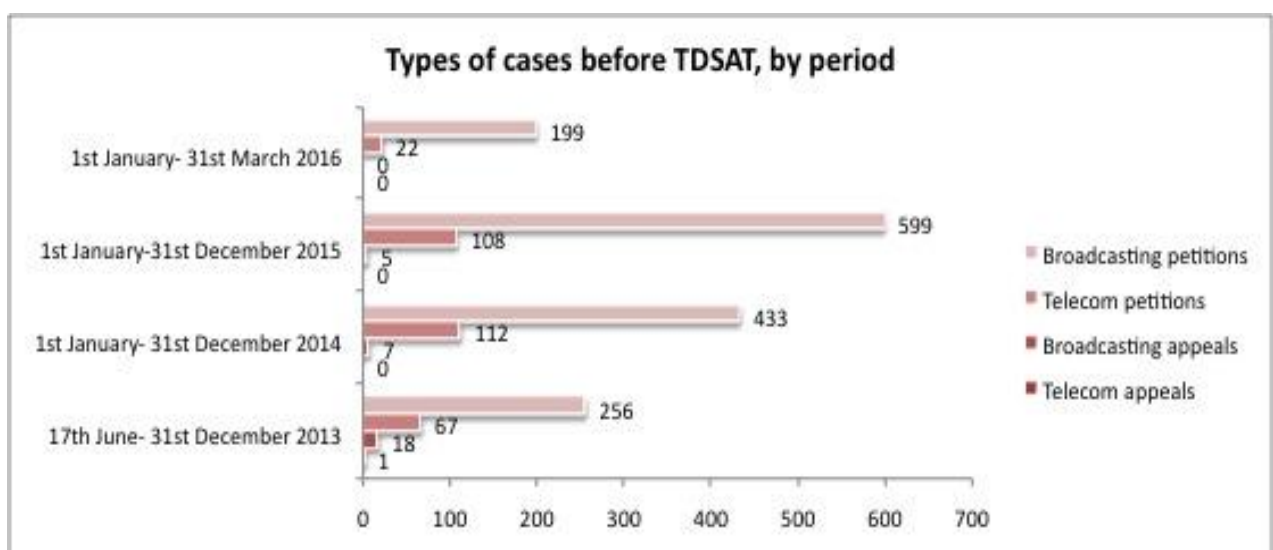
⁵⁵ See Office Memorandum, Ministry Communications and IT, Department of Telecommunications, No. 2-17/2013-Policy-1 (Policy-1 Section) dated 4th February, 2014, available at <consumeraffairs.nic.in/writereaddata/Jurisdiction-of-District-Fora.pdf> accessed on 26.04.2016.

3. Original and Appellate Powers of the TDSAT

In the context of the issues of the jurisdiction of the TDSAT, this study examines the extent to which the TDSAT has exercised original and appellate powers.



The data reveals that the TDSAT has been primarily exercising original jurisdiction, rather than appellate jurisdiction. Additionally, as in the case of the sector-wise distribution of petitions, appeals pertaining to the broadcasting sector outnumber the appeals pertaining to the telecom sector. In the period studied, only one telecom appeal was filed in 2013.



This data emphasises the importance of revisiting the objective of the TDSAT itself, and whether its present role in acting mainly as a court of first instance primarily for broadcasting petitions serves the original purpose with which it was set up.

Though the mandate of the TDSAT includes broadcasting (by the Notification of 2004), these broadcasting matters coming before the TDSAT are mostly smaller recovery matters (as will be seen in the subsequent sections of data); and the sheer volume of these recovery petitions being filed points to the increasing burden of the TDSAT. The time and resources of an expert tribunal (with a retired Supreme Court judge presiding over it) are thus spent largely on dealing with smaller matters, which need not necessarily be heard by an expert bench which is also dealing with important questions of law and technical issues in the field of telecom and broadcasting.

B. Mandate of the TDSAT

The purpose of setting up the TDSAT was to adjudicate “any dispute” between a licensor and licensee, two or more service providers, between a service provider and a group of consumers. Section 14 of the TRAI Act, as amended, which establishes the TDSAT, excludes from the purview of the tribunal, disputes pertaining to the Monopolies and Restrictive Trade Practices Act, consumer disputes which can be adjudicated by the consumer forums, disputes under Section 7B of the Indian Telegraph Act. The provision also empowers the TDSAT to hear and dispose of appeals against any direction, decision or order of the authority (TRAI) under the Act.⁵⁶

⁵⁶ TRAI Act, **Section 14. Establishment of Appellate Tribunal.** –The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-

(a) adjudicate any dispute-

- (i) between a licensor and a licensee;
- (ii) between two or more service providers;
- (iii) between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to-

Section 2(1)(k) of the TRAI Act defines ‘telecommunication services’. The proviso states that broadcasting services would be excluded from this definition unless the Central Government by notification brought broadcasting within the purview of telecommunication services.

It is relevant to recall that for many years, the government tried, but failed, to create a parallel, but separate, statutory regime for the broadcasting sector, through multiple draft bills, such as the 1997 draft Broadcasting Bill,⁵⁷ the 2001 draft Communication Convergence Bill,⁵⁸ and the 2006 Broadcasting Services Regulation Bill.⁵⁹ Sometime in 2004, the Department of Telecommunications (DoT) decided to include broadcasting within the purview of the TRAI Act, and issued a notification to the effect that broadcasting would be a part of “telecommunication services” under this law.⁶⁰ In 2007, the term “telecommunication service” became the subject matter of a litigation before the Delhi High Court,⁶¹ and issues that were brought before the court included the validity of the 2004 government notification, as well as the validity of the proviso to Section 2(1)(k) of the TRAI Act. The Court upheld both, while also observing that it was evident

-
- (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);
 - (B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);
 - (C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act 1885 (13 of 1885);
- (b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

⁵⁷ The Broadcasting Bill 1997, available at <<http://pib.nic.in/focus/fomore/bbill.html>>, accessed on 30.05.2016

⁵⁸ Consultation Paper on the Broadcasting Services Regulation Bill, Consultation Paper of the Ministry of Broadcasting (www.mib.nic.in), available at <<http://www.mib.nic.in/WriteReadData/documents/ConsultationPapeRegulationBill.htm>> accessed on 16.05.2016.

⁵⁹ Consultation Paper on the Broadcasting Services Regulation Bill, Consultation Paper of the Ministry of Broadcasting (www.mib.nic.in), available at <<http://www.mib.nic.in/WriteReadData/documents/ConsultationPapeRegulationBill.htm>> accessed on 16.05.2016. See also Chapter II, under “The Broadcasting Regulatory Authority of India”.

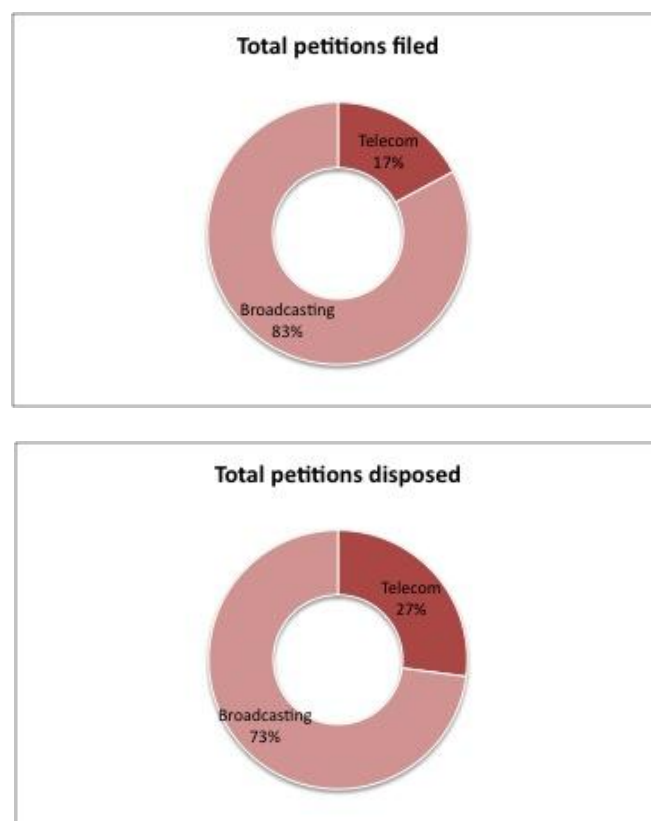
⁶⁰ See Notification No. 39 issued by Ministry of Communication and Information Technology dated 9 January 2004. S.O. No. 44(E) issued by TRAI, vide F. No. 13-1/2004. Available at <<http://tdsat.nic.in/books/3.4.doc>> accessed on 26.04.2016.

⁶¹ Star India P. Ltd. v. Telecom Regulatory Authority of India (2008) 146 DLT 455

that it had been the intention of the Legislature to monitor broadcasting under a distinct statute. The Court said:

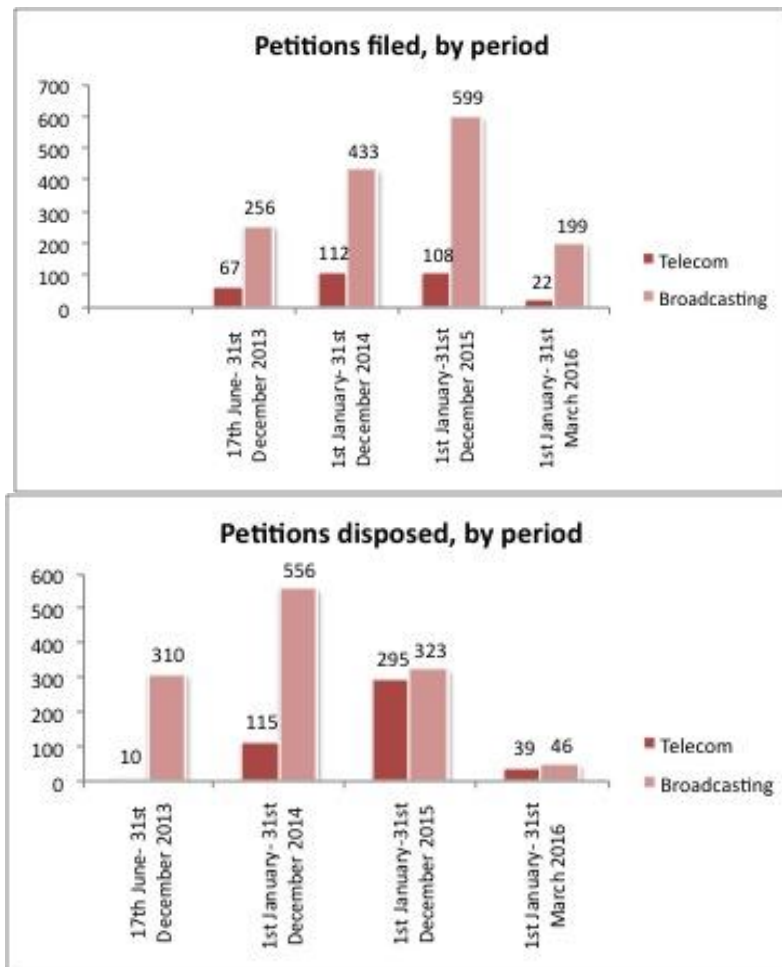
“The abiding and enduring intention of the Legislature is that Broadcasting should be monitored by a distinct statute and till such time as that does not happen the TRAI Act would regulate this activity, if the Government so desires. Broadcasting as also any other services could, by taking resort to a Notification, fall within the purview of the statute; and with equal case be taken out of it.”⁶²[emphasis added]

This decision to include broadcasting with telecommunication services under the law directly impacted the TDSAT in terms of the types of disputes it now heard. Until 2004, its mandate was restricted to telecom disputes alone. However, after 2004, the TDSAT was required to entertain broadcasting disputes as well.



⁶² Para 33, *Star India P. Ltd. v. Telecom Regulatory Authority of India* (2008) 146 DLT 455

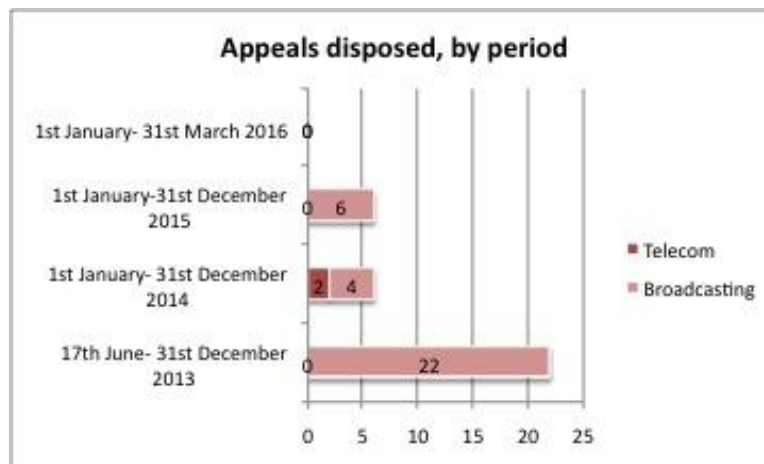
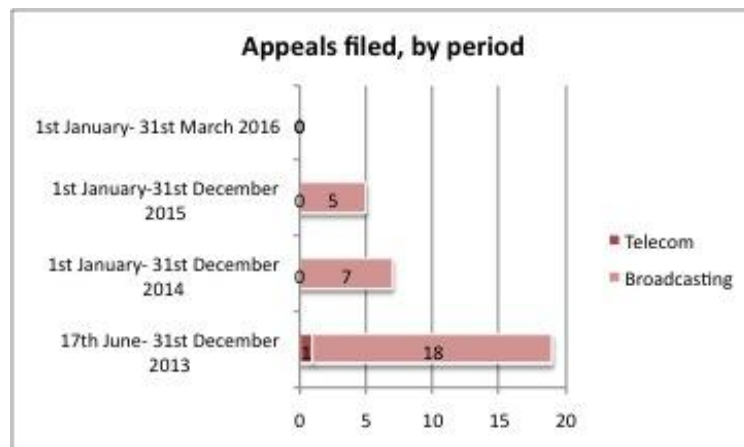
A study of the cases shows that TDSAT has dealt with mainly broadcasting petitions in the period studied: less than one-fifth of petitions filed before the TDSAT in the period under study pertain to telecom, whereas a little over a quarter of the total number of petitions disposed of by the TDSAT relate to telecom cases.



A disaggregated study of the petitions filed and disposed of by the TDSAT between 17 June 2013 and 31 March 2016 reveals that this trend of a higher number of broadcasting petitions is consistent over time.



The appeals filed as well as disposed of for the same period display a similar trend, with the telecom disputes being a small percentage of them (less than 10 per cent of the total appeals filed and less than 5 per cent of the total appeals disposed of). The appeals filed and disposed of by period also show that the broadcasting appeals are increasing exponentially in the TDSAT.



C. Powers of the Chairperson of the TDSAT

The Chairperson of the TDSAT has various powers relating to the functioning and procedure of the TDSAT under the sections incorporated post-amendment of the TRAI Act in 2000. Under Section 14B (3)(b), the Chairperson has the authority to constitute a bench as he/she thinks fit.⁶³ Further, under Section 14I, the Chairperson is responsible for the distribution of business between the different benches.⁶⁴ Under Section 14J, the Chairperson has the power to transfer pending cases.⁶⁵

Certain critical functions, however, do not vest with the Chairperson. For example, although the Chairperson has powers which are supervisory in nature (such as allocation and division of matters amongst the benches), the Chairperson lacks the power to create or sanction the creation of posts in the Tribunal. This power lies only with the Central Government, and more specifically with the Department of Telecommunications.⁶⁶ Section 14H of the TRAI Act gives the power to the Central Government to provide the Appellate Tribunal with staff, as it deems fit. A reading of Sections 14F, 14G and 14H illustrates that

⁶³**14B. Composition of Appellate Tribunal.**—(1) The Appellate Tribunal shall consist of a Chairperson and not more than two Members to be appointed, by notification, by the Central Government.

(2) The selection of Chairperson and Members of the Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India.

(3) Subject to the provisions of this Act—

(a) the jurisdiction of the Appellate Tribunal may be exercised by the benches thereof;

(b) a Bench may be constituted by the Chairperson of the Appellate Tribunal with one or two Members of such Tribunal as the Chairperson may deem fit;

⁶⁴**14I. Distribution of business among Benches.**—Where Benches are constituted, the Chairperson of the Appellate Tribunal may, from time to time, by notification, make provisions as to the distribution of the business of the Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with by each Bench.

⁶⁵**14J. Power of Chairperson to transfer cases.**—On the application of any of the parties and after notice to the parties, and after hearing such of them as he may desire to be heard, or on his own motion without such notice, the Chairperson of the Appellate Tribunal may transfer any case pending before one Bench, for disposal to any other Bench.

⁶⁶ See **Section 14B** of the TRAI Act which states that the The selection of Chairperson and Members of the Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India. Further, Section 14B(3)(c) states: “*the Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson of the Appellate Tribunal, notify*”.

the creation of posts, filling of vacancies, appointment and providing of staff to the Tribunal is entirely within the purview of the Central Government's discretion.⁶⁷ This shows that the lack of administrative autonomy has led to a situation where the staffing of the TDSAT is out of the control of the Chairperson. Even as the number of cases that the TDSAT handles has exponentially increased over time, the staff deputed to manage the tribunal has remained unchanged.⁶⁸ As a result, the tribunal has had to operate with a limited number of administrative personnel, who are faced with increasing workload over time.

This imbalance could cause serious threats to the smooth functioning of the TDSAT in the future. Although the mandate and scope of the jurisdiction of the TDSAT has changed, the staff strength to handle the incoming litigation has remained the same.

D. Functioning of the TDSAT

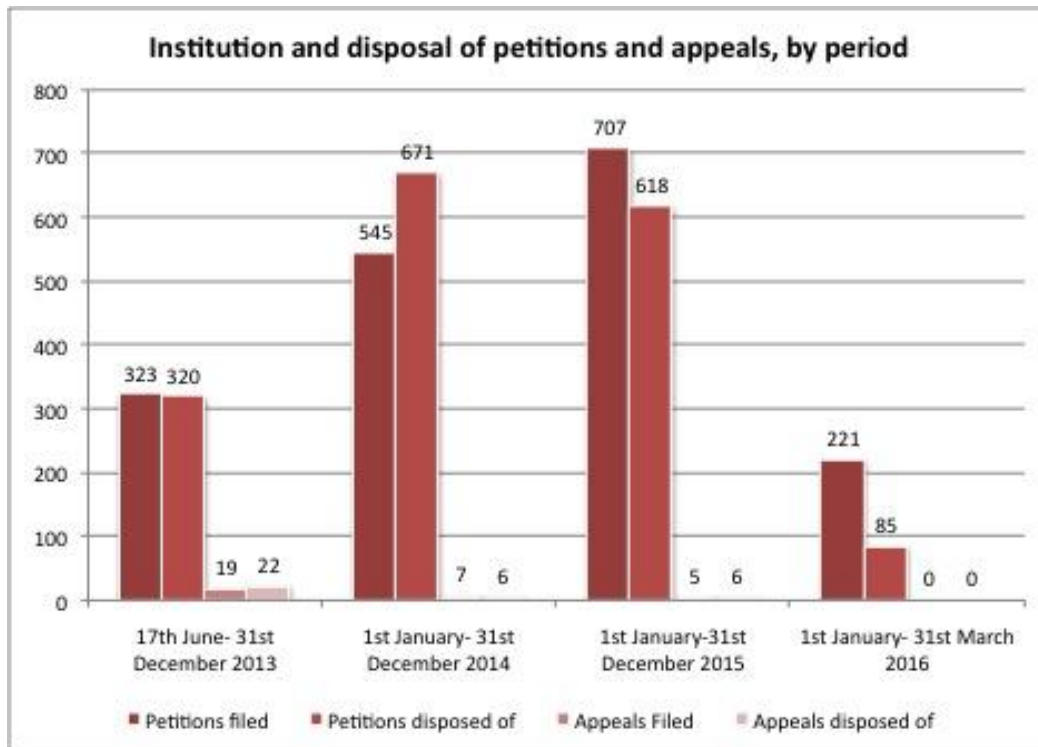
Even as the TDSAT has been faced with a changing mandate, a diminishing appellate jurisdiction, a disproportionately large number of broadcasting cases, and limited human resources, the functioning of the authority stands out in at least two respects, disposal rate and alternate dispute resolution mechanisms.

1. Institution and Disposal of Cases

The disposal rate of the tribunal can be seen from the data pertaining to institution and disposal. As can be seen, the rate of disposal of cases compared with institution of cases is fairly healthy.

⁶⁷ See Section 14H of the TRAI act, 1997.

⁶⁸ As per the Schedule to the the Telecom Disputes Settlement and Appellate Tribunal (Salary, Allowances and other Conditions of Service of the Officers and Employees) Rules, 2001, there are 22 sanctioned posts for officers and employees at the TDSAT, which has remained unchanged since. The rules are available here: <http://www.dot.gov.in/sites/default/files/1.doc> accessed on 06.06.2016.



A study carried out previously by Vidhi Centre for Legal Policy on various tribunals across the country also reflected the efficient disposal rate of the TDSAT. From 2001-2013, the data collected from the website of the TDSAT demonstrated an excellent disposal rate, which was almost a hundred percent.⁶⁹ The only year when there was a deviation from the same was in 2012, where there was a sharp increase in the number of petitions filed in the TDSAT. This was possibly owing to the large number of petitions filed due to cancellation of several 2G spectrum licenses by the Government, as a result of a judgment of the Supreme Court.⁷⁰

2. Alternate Dispute Resolution

The TDSAT has also established an alternate dispute resolution mechanism in the form of mediation, which has positively affected litigation patterns before the tribunal.

⁶⁹ Alok Prasanna Kumar, Rukmini Das, 'State of the Nations Tribunals, Introduction and Part 1: Telecom Disputes Settlement and Appellate Tribunal', Report of the Vidhi Centre for Legal Policy, pp. 27-28, available at

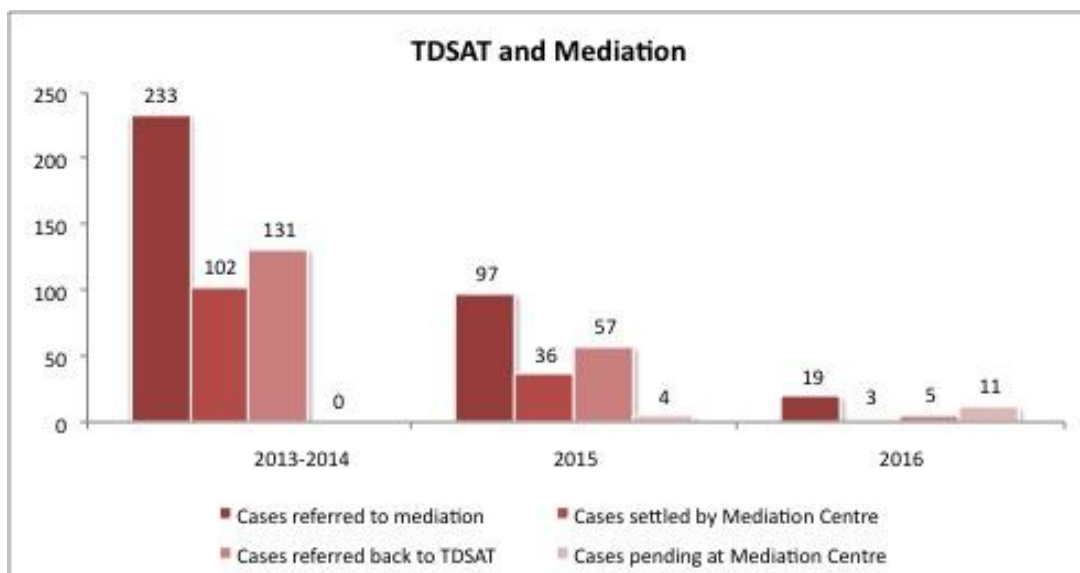
<http://vidhilegalpolicy.in/reports-newsletters/> accessed on 06.06.2016.

⁷⁰ Centre for Public Interest Litigation v Union of India, (2012) 3 SCC 1. See 'The State of the Nation's Tribunals' p. 28.

Increasingly, early indications suggest that parties appear to be inclined to pursue mediation before venturing into litigation.

The tribunal set up a Mediation Centre for speedy settlement of disputes between the parties, which started functioning with effect from 29.7.2013. In less than 18 months of its institution, by 13.01.2015, the Centre had successfully helped in the settlement of 86 cases.⁷¹

Since its establishment, the Mediation Centre dealt with and disposed of a large number of cases, thus avoiding the need for these matters to enter the litigation route before the TDSAT (some cases, though, have been referred back to the Tribunal as well).



The procedure for mediation was inserted by way of an amendment to the Rules of Procedure, 2005.⁷² The tribunal has also notified the process of pre-litigation mediation, particularly in the light of the fact that the kind of issues that exist in the telecom and broadcasting industry can be settled amicably between the parties through mediation. The fees for this process is nominal (a sum of Rupees 1000/-) and also protects the privacy of

⁷¹ Annual Report of the Department of Telecommunications, 2014-15 p. 96, available at <www.dot.gov.in/sites/default/files/u10/English%20AR%202015.pdf> accessed on 26.05.2015.

⁷² Notification of the TDSAT, Notification No. Misc./1/2005/Judl. Dated 24.11.2014, available at <<http://tdsat.nic.in/Amendment%20of%20TDSAT%20Mediation%20Procedures.pdf>> accessed on 30.05.2016.

the parties (the proceedings and orders are not made public). Further, it has the added benefit of not taking away the right of the parties to approach the court, should they feel the need to do so. The normal time taken for resolution of such disputes is only 60 days.⁷³

3. Ex Parte Orders

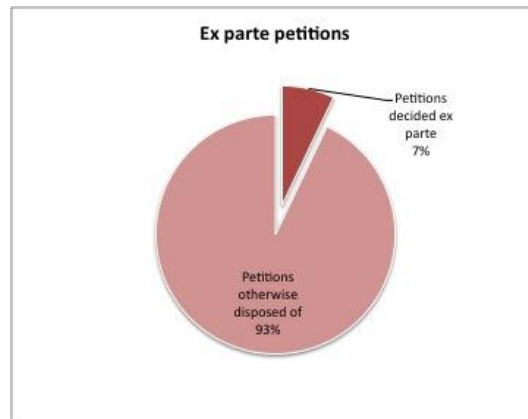
The TDSAT is empowered, in certain cases, to hear petitions/applications/appeal in the absence of the parties. Procedure 13 of the Rules of Procedure of the TDSAT state that *“Where on the day fixed for hearing of the petition/appeal/ misc. application or on any other day to which the hearing is adjourned the petitioner/appellant/applicant appears and the respondent does not appear when the petition/appeal/misc. application is called on for hearing, the Tribunal may hear and decide the petition/appeal/misc. application ex parte.”*⁷⁴

The TDSAT decides the matter ex-parte usually when despite serving notice, the parties are not present at the hearing. This practice is reflected in its orders as follows: *“Despite service of notice, the respondent did not appear and consequently the petition has proceeded ex parte.”*⁷⁵ In such a case, therefore, the Tribunal decides the matter in the absence of a party who has not appeared (despite serving of the notice).

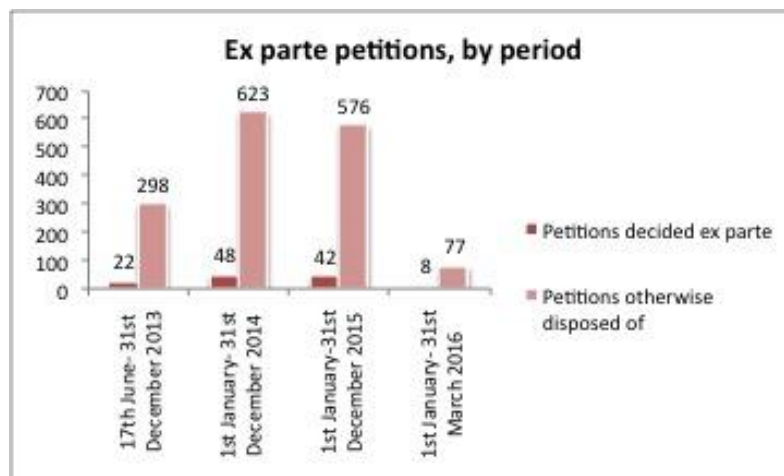
⁷³ See “Mediation Centre of the TDSAT”, public document available on the official website of the TDSAT at <<http://tdsat.nic.in/NOTICE%20FOR%20PRE-LITIGATION%20HAS%20BEEN%20STARTED.pdf>> accessed on 31.05.2016.

⁷⁴ Telecom Disputes Settlement & Appellate Tribunal Procedure, 2005, available at <<http://www.tdsat.nic.in/Procedures,2005.htm>> accessed on 30.05.2016.

⁷⁵ For example, see MSM Discovery Pvt. Ltd. vs. S.R. Cable TV Pvt. Ltd. Petition No. 22(C) of 2014 (Pg. 2); India Cast UTV Media Distribution Pvt. Ltd. vs. S.R. Cable TV Pvt. Ltd. Petition No. 349(C) of 2014 (Pg. 2).



In the period studied, the TDSAT has disposed of at least seven percent petitions ex-parte, i.e., without hearing at least one of the parties.

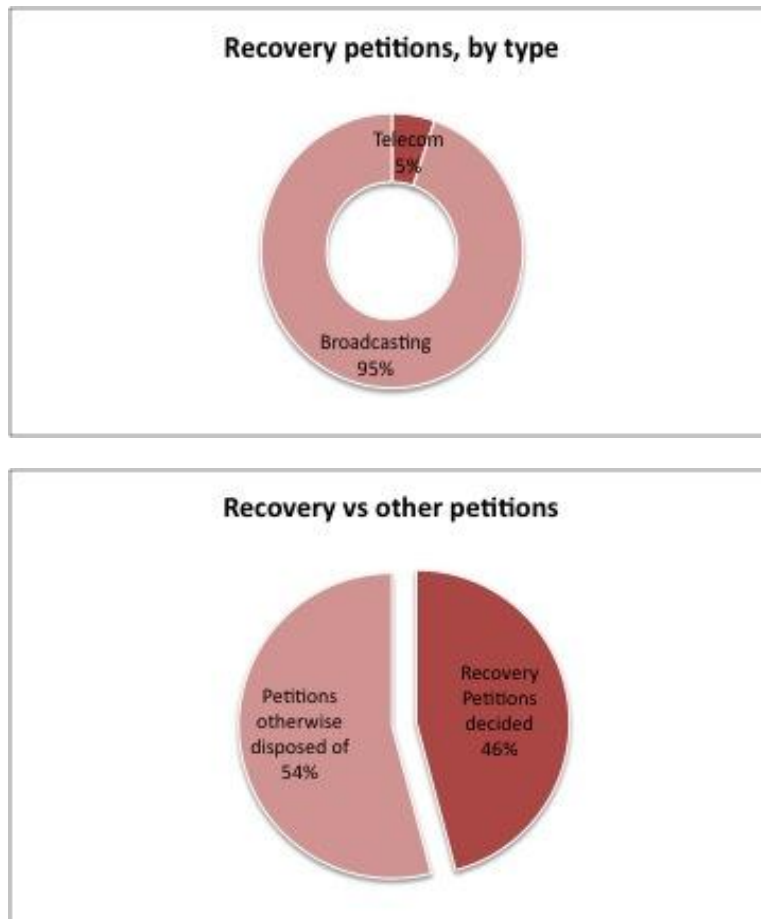


A review of the ex-parte petitions over separate periods reveals that this is fairly consistent over time. One reason for a number of petitions being disposed of ex-parte could be that the location of the TDSAT makes it difficult for parties to travel all the way to New Delhi to make their case heard, in terms of time, money and other resources spent for such hearings.

4. Recovery Petitions

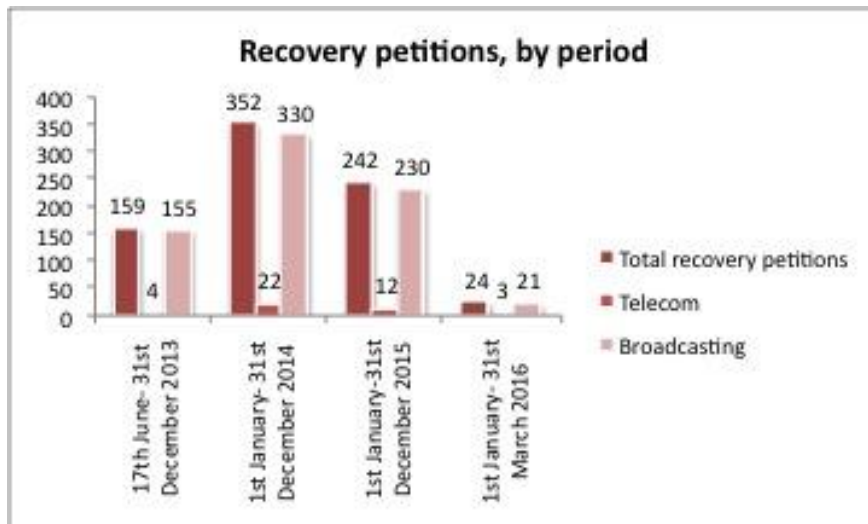
A significant proportion of petitions being heard by the TDSAT are recovery petitions. According to data from the study period, nearly half of the total number of petitions disposed of by the TDSAT are recovery petitions. Recovery petitions are not defined explicitly under the Rules of Procedure of the TDSAT. However, Procedure 4, which was

later amended (by the Amendment Act of 2006) mentions recovery petitions and describes them as “*petitions/claims/suits in the nature of recovery of money or an outstanding amount.*”⁷⁶



The data pertaining to recovery petitions decided by the TDSAT also show an imbalance between the telecom and broadcasting recovery petitions, with broadcasting recovery petitions forming a large proportion of the total.

⁷⁶ See Telecom Disputes Settlement and Appellate Tribunal Procedures 2005 (Amendment 1 of 2006) available at <<http://www.tdsat.nic.in/Procedures,2005.htm>> accessed on 30.05.2016.



The data also sheds light on the types of petitions that are coming to the TDSAT. If nearly half of the petitions are for recovery, it would appear that the TDSAT is likely to be spending only about half of its resources discussing substantive issues pertaining to its subject matter of jurisdiction. This prompts a rethink of the very objective of setting up the TDSAT as a specialised adjudicatory body, and whether it continues to serve the purpose it was originally created to serve.

5. Ad-valorem Fees no longer imposed for Recovery Petitions

In 2006, the TDSAT by a notification had decided to impose court fees on petitions relating to claims for compensation or recovery of money.⁷⁷ The court fee so imposed ranged between an ad-valorem rate of 1.5 per cent of the amount being claimed and 0.5 per cent depending on the compensation awarded to the petitioner.⁷⁸ However, in *Tata Teleservices (Maharashtra) Ltd. vs. Union of India*,⁷⁹ the Tribunal had to examine the contention of the Union of India that the Tribunal had no jurisdiction to levy any court

⁷⁷ See 'Notification of the TDSAT, Misc./1/2005/Judicial, Dated: 23rd May, 2006', available at <<http://tdsat.nic.in/proforma/procedure%20Rule.htm>> accessed on 06.06.2016.

⁷⁸ 'TDSAT to impose fees on monetary claims petitions', The Hindu Businessline, 3rd June, 2006. Available at <<http://www.thehindubusinessline.com/todays-paper/tp-info-tech/tdsat-to-impose-fees-on-monetary-claims-petitions/article1735747.ece>>, accessed on 06.06.2016.

⁷⁹ M.A. No. 33 of 2010 in Petition no. 12 OF 2002. Available at <<http://tdsat.nic.in/07.10.2010/PNo.12%20of02.htm>> accessed on 06.06.2016.

fees in an original petition. The main relief prayed for before the Tribunal in this matter was the compensation of the total amount of court fees that has been paid to the Tribunal, to the petitioners. The Tribunal, holding that such a Court fee could not be levied by it, stated that levy of court fee came within the domain of the Legislature and can only be exercised by the Executive Government or any other Statutory Authority/ Tribunal if it was so delegated by the Legislature.⁸⁰

The Tribunal, ruling on its own jurisdiction to impose such fees, held as follows, in Paragraph 35 of its judgment:

“35. This Tribunal has no rule making power. It cannot regulate and/or implement the provisions of the Act. It can only regulate its procedure.

Its jurisdiction, therefore, is confined only to the procedural aspect of the matter and not the substantive aspect of the matter which interferes with the right of a litigant to approach this Tribunal. Once it is held that levy of court fee on ad-valorem basis is exclusively within the domain of the legislature, in our considered opinion, the Tribunal could not have levied any court fee, in absence of any provision for levying fee on the original petitions, although, such a provision exists in regard to filing of an appeal in the light of Section 35(ii)(bd) of the Act.”

The imposition of ad-valorem fees was an experiment at reducing frivolous litigation in the TDSAT, but with its invalidity, there is now an increased burden on the Tribunal as a result

⁸⁰ See Para 26 of Tata Teleservices (Maharashtra) Ltd. vs. Union of India, which states as follows:

26. Levy of court fee, therefore, comes within the domain of the legislature. It is possible only for the Legislature to delegate its powers on the Executive Government or any other Statutory Authority/ Tribunal in relation thereto. There cannot, however, be any doubt or dispute that in absence of any such power no court fee can be levied.

The levy of court fee although is necessary for different purpose, the same creates a hurdle on the litigant’s right to approach the court directly. Having regard to the doctrine of ‘Access of Justice’, therefore, the common litigant should not be asked to pay a very heavy price by way of court. In Gujarat State Financial Corpn. v. Natson Mfg. Co. (P) Ltd., reported in (1979) 1 SCC 193, the law was laid down in the following terms:

“15. When dealing with a question of court fee, the perspective should be informed by the spirit of the magna carta and of equal access to justice which suggests that a heavy price tag on relief in Court should be regarded as unpalatable.”

of parties filing petitions incessantly, for interim relief. In what appears to be another method of tackling this issue of frivolous litigation, the TDSAT by notification provided that costs imposed by its various orders in ex-parte matters would be payable to the TDSAT Employees Welfare Society.⁸¹

6. Grouping of Petitions filed by LCOs (Local Cable Operators)

Another important aspect of the mandate of the TDSAT is that, of late, a large number of petitions coming before the TDSAT from the broadcasting sector were found to be filed by Associations/Unions/Federations representing a number of local cable operators (commonly referred to as “LCOs”). As a way of solving the problem of a large number of petitions being filed (which were essentially pertaining to same agreement/contract/license), the TDSAT by notification provided that such petitions from the broadcasting sector would only be entertained when all the LCOs represented by the Petitioner body were clearly identifiable. The Notification also stated that these operators must give an undertaking to the Tribunal to this extent.⁸²

⁸¹ TDSAT Notification No. 1/Judicial/Misc./TDSAT/2012 dated 6th January, 2016, available at <<http://tdsat.nic.in/Notice%20Dated%2006.01.2016.pdf>> accessed on 06.06.2016.

⁸² Notification of the TDSAT, Notification No.1/2008/Judicial/TDSAT dated 9th October, 2015, available at <<http://tdsat.nic.in/Notice%20dated%2009.10.2015.pdf>> accessed on 06.06.2016.

V. RECOMMENDATIONS

The two studies of TDSAT done by us offer some indicators of the present functioning of the tribunal, and possible ways in which it may evolve in the future.

1. The role of the TDSAT as a dispute resolution and appellate body

As we have seen through the analysis of data particularly in recent times, the matters coming before the TDSAT for adjudication pertain mainly to broadcasting; further, nearly half of all petitions filed before the TDSAT are for recovery. In addition, the appellate jurisdiction of the TDSAT remains practically unused, with an insignificant number of appeals coming before the body. The Tribunal is staffed with highly experienced members (headed by a retired judge of the Supreme Court or a former Chief Justice of a High Court, as well as members with technical expertise). In such a scenario, it becomes important to introspect about the mismatch between the current mandate and functioning and the expertise of the members of the Tribunal. The Government can either decide to continue with the extant jurisdiction of the TDSAT, in which case it needs to change the composition and resources spent on such a body; on the contrary, if it decides to restore the TDSAT to the role that was envisaged in operating as an independent and specialised tribunal dealing with weighty telecom matters, legal and administrative changes are required. Some of them are suggested below.

2. Creating Benches of the Tribunal

Drawing from a study of the jurisdiction and powers of the TDSAT as well an analysis of the data regarding appeals, and case institution, it is evident that the TDSAT has to deal with a disproportionately large volume of broadcasting disputes. This may have implications on the ability of the TDSAT to function optimally. This is exacerbated by two factors. The first is that even though the mandate of the TDSAT was amended to include

broadcasting disputes, the qualifications to become a member of the Tribunal do not anticipate broadcasting as a relevant area of expertise (Section 14C requires that a member should be, among other things, a person who is well versed in the field of technology, telecommunication, industry, commerce or administration). The absence of technical expertise required to understand broadcasting disputes may affect the ability of the TDSAT to adjudicate upon such matters. Secondly, the changed mandate has resulted in an exponential increase in the number of cases that are being handled by the TDSAT, but the staffing of the body remains the same as it was when it was first created in 2000. There is bound to be an impact of the efficiency of the functioning of a body where limited resources are expected to cater to an ever-expanding volume of responsibilities.

There is no impact on the efficiency of the TDSAT at present owing to such cases, also because a large number of matters are recovery matters and these are decided at a faster rate than matters whose merits have to be gone into and have technical aspects. If the number of cases being filed increase however, efficiency is bound to be affected.

If the TDSAT is expected to continue hearing broadcasting disputes, the Tribunal's functioning can be addressed in multiple ways. To begin with, the government could require that technical members well-versed in broadcasting, as an industry and a discipline, be appointed to the Tribunal. Section 14B of the TRAI Act allows the Chairperson to constitute multiple Benches, comprising one or two members of the Tribunal, which power could be exercised to deal especially with broadcasting disputes, or disputes of a particular nature. A full bench of the tribunal may be required to sit in session only with respect to certain types of cases, which could be identified in advance. Further, if a large number of cases appear to emerge from particular parts of the country, *ad hoc* benches could be constituted in relevant cities other than Delhi, to deal with such cases. This reassignment of cases to various benches of the tribunal, however, is not likely to be successful without adequate administrative support, for which government approval would be required.

3. Clarify the distinction in the jurisdiction of the TDSAT and Consumer Fora

With reference to the 2014 judgment of the Meghalaya Consumer Commission, it is evident that there has been acceptance of the jurisdiction of the consumer fora over telecom and broadcasting disputes. In a scenario where the TDSAT is burdened with broadcasting disputes from all parts of the country, particularly disputes with smaller recovery amounts, it would be prudent to divert these matters to the consumer courts. This would be particularly beneficial for the litigants as they would be spared of the travel and litigation costs of coming to New Delhi, which may not be a practical option for smaller players in the telecom and broadcasting sector.

4. Increasing the institutional autonomy of the TDSAT

As discussed earlier, an issue plaguing the administration of the TDSAT is the fact that the Tribunal is understaffed. An exponential increase in litigation in the TDSAT has not been met by a proportional increase in the staff strength of the Tribunal. To rectify the same, the powers of the Tribunal may be broadened in their scope. The Tribunal, acting through the Chairperson can be given the power to increase the staff strength through an order in consultation with the Central Government.

In the Draft Broadcasting Services Regulation Bill Of 2006, the Chairperson of the BRAI was given certain administrative powers to regulate the conditions of service etc. of the Authority. Although the Bill did not become law, some provisions of the Draft Bill would be useful as a reference point to make amendments to the existing provisions relating to the administrative autonomy of the TDSAT.⁸³

⁸³ At the time, in response to the Bill, in a representation submitted to government, ASSOCHAM (the Associated Chambers of Industry) suggested that the broadcasting regulator should not be formed along the lines of TRAI, as both sectors were different in their basic nature; instead, the proposed authority should have representation from chambers, broadcasters, cable operators, consumer groups, lawyers and retired judges, apart from Ministers. This goes to demonstrate the attention paid to the technical expertise required in such areas of dispute resolution and regulation. See 'BRAI to Act as Independent Body: ASSOCHAM' *Live Mint (E-Paper)*, 8th August, 2007, available at <<http://www.livemint.com/Politics/GUGY2baTvKdpdjxsioFTLI/BRAI-to-act-as-an-independent-body-Assocham.html>> accessed on 18.05.2016.

5. Measures to reduce frivolous litigation in the TDSAT

The TDSAT briefly imposed ad valorem fees on the cases being instituted before the Tribunal. However, the order imposing the same was overturned subsequently. The possibility of reviving the provisions for imposition of ad-valorem fees, subject to appropriate scrutiny, could be considered, in order to address the problem of frivolous litigation, for instance, parties filing matters in the TDSAT simply to obtain an interim order before withdrawing their petition(s). This can be done through legislative amendment in the TRAI Act empowering the TDSAT to notify the same.

6. Encouraging use of mediation as a dispute settlement mechanism

As seen from the data pertaining to, and the working of the mediation centre, alternate dispute resolution mechanisms are an increasingly popular way of resolving telecom and broadcasting disputes. This trend must continue, as a large number of matters that come before the tribunal are recovery matters, the litigants in which are usually small and medium-sized players in the broadcasting industry, and are likely to benefit from the speed and economic viability of such procedures.

Encouraging dispute resolution through mediation will go a long way in reducing the burden on the tribunal of smaller matters; as well as ensure more amicable and less time consuming techniques of dispute resolution for the litigants.

VI. CONCLUSION

From a perusal of the data and analysis of the working of the TDSAT, it can be seen that the mandate of the TDSAT has undergone many changes since the time of its inception. A marked characteristic of the Tribunal's changing mandate has been that recent times have seen an acute rise in the number of original broadcasting petitions coming before the TDSAT.

Two issues seem to arise from this change in the TDSAT's mandate- first, with regard to the recovery matters coming before the Tribunal; which do not require technical expertise, and secondly, with regard to broadcasting matters, as opposed to telecom disputes (which was what the TDSAT was originally meant to adjudicate upon). In this scenario, specialised members in the field of broadcasting can be given the power to hear these broadcasting disputes. Further, as set forth in the recommendations, a separate bench may be formed (with due administrative support) which deals with the smaller recovery matters in the Tribunal or the matters may be diverted to consumer fora.

At the same time, the experience of the working of the TDSAT points to the need for greater administrative autonomy as well as structural changes in the budget allocated to the Tribunal to ensure that it continues to function with the same efficiency. The powers of the Tribunal and Chairman, therefore, may need some re-thinking. One of the ways that this can be done is an amendment to the Sections of the TRAI Act dealing with the powers and functions of the TDSAT. In any event the conclusion is inescapable that the functioning of the TDSAT now needs government attention, considering the rapidly changing mandate and growth of disputes in the telecom and broadcasting sectors.

The TDSAT has commonly been regarded as one of the most efficient tribunals in the country. In order for this distinction to be maintained, the TDSAT, along with the government, must ensure that it continues to function in an efficient and healthy fashion,

offering adequate remedies to disputing parties, in a speedy and effective manner. This study of the functioning of the TDSAT has revealed many ways in which this can be done.



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