

# BUSINESS TRANSACTIONS AND DISPUTES

## International Telecommunications

KENT D. BRESSIE\*

Since its conclusion in 1997, the World Trade Organization (WTO) Basic Telecom Agreement<sup>1</sup> has unleashed a torrent of cross-border investment and fueled rapid growth in international telecommunications markets. These business developments, along with the ever-increasing frenzy of technological development—particularly the proliferation of Internet-protocol-based networks—left national regulators and international organizations struggling to keep up. These developments also left many international carriers with the equivalent of an investment hangover, groaning under enormous debt loads, and reconsidering various cross-border investments and alliances.

In 2000, telecommunications services and investment disputes effectively became a sub-discipline of the WTO's dispute settlement process. The long-simmering dispute between the United States and Mexico over Mexico's rules for international traffic and anticompetitive practices and interconnection arrangements of incumbent Telmex finally boiled over into the WTO, with the United States seeking consultations and filing panel request—subsequently blocked by Mexico—with the WTO's Dispute Settlement Body<sup>2</sup> alleging violation of Mexico's WTO commitments.<sup>3</sup> It remains to be seen in 2001 whether the United States will pursue a second panel request, which Mexico cannot block.<sup>4</sup>

The year 2000 saw the WTO and the International Telecommunications Union (ITU) vying for primacy in overseeing the Internet. The ITU took up the issue of Internet trans-

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\*Kent D. Bressie is a partner with the Washington, D.C. law firm of Harris, Wiltshire & Grannis LLP. An expert on submarine cables and fiber-optic networks, he practices in the areas of telecommunications and international trade.

1. See *FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES* (WTO 1997), reprinted in 36 I.L.M. 354, 366 (1997).

2. See *Mexico – Measures Affecting Telecommunications Services – Request for Consultations by the United States*, WTO Docs. WT/DS204/1 (Aug. 29, 2000), WT/DS204/2 (Nov. 6, 2000), and WT/DS204/1/Add.1 (Nov. 16, 2000).

3. See *Mexico, Schedule of Specific Commitments*, *FOURTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES* (WTO 1997), GATS/SC/56/Supp.2 (Apr. 11, 1997).

4. WorldCom's subsequent agreement with Telmex on settlement rates may nevertheless reduce the pressure on the U.S. Trade Representative to make a second panel request. See WorldCom's International Settlements Policy Modification for a Change in the Accounting Rate for International Message Telephone Service with Mexico, FCC File No. ARC-MOD-20010530-00123.

port charges—first raised in the Asia-Pacific region<sup>5</sup>—to consider whether or not to impose a settlement-rate-type regime in Internet protocol (IP)-based traffic.<sup>6</sup> In essence, the fairness issues raised by developing countries against the *Benchmarks Order*<sup>7</sup> of the U.S. Federal Communications Commission (FCC) in the late 1990s have morphed into arguments about the fairness of charges for reaching and transporting content over a U.S.-centric Internet. The WTO, for its part, continues to take a more market-oriented approach, partly out of necessity, as it grapples with issues such as how to rationalize taxes and customs duties between the traditional and e-commerce segments of cross-border trade.<sup>8</sup> In some ways, the competition among international organizations for primacy in Internet regulation<sup>9</sup>—characterized alternately as a natural extension of the organizations' expertise or a bureaucratic land-grab—does not bode well for a hands-off deregulatory approach to the Internet, as each tries to out do the other with more complex, bureaucratic, and intrusive regulatory proposals. It remains to be seen if technology will outpace the regulators' best efforts, or if the regulators will succeed to a degree that inhibits technological innovation.

In 2000, competition regulators took a harder look at proposed cross-border mergers of telecoms and media companies. The European Commission scuttled the merger of U.S. carriers WorldCom and Sprint<sup>10</sup> (although U.S. regulators also fretted that it would reduce competition in U.S. long-distance and Internet backbone markets), and altered the eventual merger between America Online and Time Warner.<sup>11</sup> By year-end, U.S. regulators were still considering the acquisition of U.S. wireless carriers Voicestream and Powertel by Deutsche Telekom (DT). The deal attracted the scrutiny of U.S. regulators and the U.S. Congress due to the German Government's sizeable stake in Deutsche Telekom,<sup>12</sup> and threatened to become a WTO dispute.<sup>13</sup> The issue of market access for government owned or controlled carriers is likely to remain a contentious one.

5. See Singapore Declaration, Third Asia-Pacific Economic Cooperation Ministerial Meeting on the Telecommunications and Information Industry (TELMIN 3), Program for Action, § 11(c) (June 1998).

6. See Council of the International Telecommunications Union, Decision 498 (Geneva, July 28, 2000) (convening the Third World Telecommunication Policy Forum for March 2001 to discuss technical and policy aspects of Internet telephony).

7. See *International Settlement Rates, Report and Order*, 12 FCC Rcd. 19,806 (1997) ("*Benchmarks Order*"); *Report and Order on Reconsideration and Order Lifting Stay*, 14 FCC Rcd. 9256 (1999), *aff'd* Cable & Wireless plc v. FCC, 166 F.3d 1224 (D.C. Cir 1999).

8. See Overview of Developments in the International Trading Environment, WTO Trade Policy Review Body, Annual Report of the Director-General (Nov. 22, 2000).

9. See, e.g., Agreement Between the International Telecommunications Union and the World Trade Organization, WTO Doc. S/C/11, Annex I (Sept. 21, 2000) (granting, following protracted negotiations, a technical consultative role and observer status in some WTO meetings).

10. See European Commission Decision of 28 June 2000 (COMP/M.1741 – MCI WorldCom/Sprint).

11. See European Commission Decision of 11 October 2000 (COMP/M.1845 – AOL/Time Warner).

12. See Letter from the Honorable Ernest F. Hollings, Ranking Democrat, Committee on Commerce, Science and Transportation, U.S. Senate, to William E. Kennard, Chairman, Federal Communications Commission, IB Docket No. 00-187 (filed Nov. 30, 2000).

13. The merger was subsequently approved by U.S. regulators. See *In the Matter of Applications of Voicestream Wireless Corporation et al., Memorandum Opinion and Order*, FCC No. 01-142 (rel. Apr. 27, 2001) (granting FCC consent for license transfers); Letter from Robert Raben, Assistant Attorney General, U.S. Department of Justice to the Honorable Billy Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives (Sept. 14, 2000) (expressing approval of the merger by the U.S. Department of Justice).

While international expansion continued unabated, international joint ventures and alliances remained precarious vehicles for doing so. Most notably, France Telecom opted to buy out the shares of its partners DT and Sprint in the troubled Global One alliance, brought to the brink of collapse when DT made an ultimately unsuccessful bid for Telecom Italia.<sup>14</sup> Global One now joins a long list of failed joint ventures and alliances, including Unisource (AT&T's loosely knit venture with a number of European carriers) and the original Concert (envisioned at one time as an MCI-BT-Telefonica venture). Concert has since been revived as a joint venture between AT&T and British Telecom (BT).<sup>15</sup>

The year 2000 was also the year in which the debt load of global carriers grew exponentially. AT&T, BT, and other carriers struggled to revamp and restructure their operations in the face of enormous debt loads as they sought to diversify into new platforms, including cable and wireless services. After paying top dollar for third-generation wireless licenses in Britain and Germany, many carriers retreated to consider whether they had overpaid, dashing the hopes of many governments that saw further auctions of such licenses as a revenue bonanza.

The past year also saw a boom in bandwidth on international routes—so much so that analysts and carriers alike began to consider whether a bandwidth glut was on the horizon.<sup>16</sup> Such fears, however, have not dampened investor enthusiasm for submarine cables,<sup>17</sup> which are increasingly built by carriers such as TyCom, Global Crossing, and Level 3, rather than by carrier consortia.<sup>18</sup> The year 2000 also saw the deployment of new cross-border networks in Europe, with both submarine and terrestrial fiber-optic cables serving an increasingly integrated communications market in Europe.

The year 2000 was one of commercial woe for non-geostationary satellite systems. Big LEOs Iridium and ICO filed for bankruptcy, and Loral indicated that it was no longer willing to fund huge losses at Globalstar. While Globalstar continues to operate, Iridium ceased commercial service. While many expect that the U.S. Department of Defense will not allow Iridium to fail, the ultimate fate of Iridium's 66-satellite constellation remains unclear.<sup>19</sup> Meanwhile, ICO has retrenched following the unsuccessful launch of its first satellite and a retooling of its business plan following ICO's acquisition by satellite pioneer and Teledesic backer Craig McCaw.<sup>20</sup>

There is a growing realization that many of these non-geostationary satellite systems were based on a voice-traffic paradigm, when in fact the high-growth segment of the world's international communications traffic is data, which can easily be carried by geostationary satellites, as the half-second delay in transmission matters less for users. As a result, there is a renewed focus among the non-geostationary satellite operators in having a solid ter-

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14. See *A Tangled Web of Global Wireless Alliances*, available at <http://www.thestreet.com/pf/int/euomarkets/991782.html>.

15. Even the revamped Concert has fallen on hard times, with speculation that it will be reabsorbed into AT&T and/or BT. See *Investors Start Calling for Changes at British Telecom*, N.Y. TIMES (Apr. 13, 2001).

16. See *International Bandwidth 2000* (Telegeography, April 2000).

17. See, e.g., Press Release, Yankee Group, *The Yankee Group Predicts Massive Demand for Undersea Cable Connectivity in Latin America* (Sept. 11, 2000).

18. This investor enthusiasm would later cool considerably in 2001 with respect to many of these international network companies. See, e.g., *Once-Bright Future of Optical Fiber Dims*, N.Y. TIMES (June 18, 2001).

19. Iridium's assets have since been bought by other investors, who intend to resume a scaled-back commercial service. See *Iridium Satellite System Is About to Be Revived*, N.Y. TIMES (Mar. 28, 2001).

20. See *Can Craig McCaw Keep His Satellites From Crashing?*, N.Y. TIMES (June 4, 2000).

restrial network component to their systems.<sup>21</sup> In any event, the commercial failure of the Big LEOs has made it much more difficult for all satellite ventures to obtain financing.

The satellite operators' difficulties have also presented regulators with a challenge, as demand for commercial radio spectrum remains very strong. Terrestrial wireless operators continue to clamor for the spectrum sought or held by satellite interests, much of which is not yet in commercial use due to long design cycles and a souring investment climate for commercial satellite systems. This phenomenon was evidenced by the focus of the ITU 2000 World Radio Communications Conference on terrestrial wireless issues.<sup>22</sup> After previous conferences in 1995 and 1997, which focused on allocation of swaths of spectrum for satellite systems, the 2000 conference focused largely on allocations for next-generation wireless systems, IMT-2000, and satellite-terrestrial sharing.<sup>23</sup>

In spite of the Big LEOs' woes, the outlook for the commercial satellite industry remains relatively strong—strong enough that Intelsat's 144 member governments were willing to approve the privatization of Intelsat,<sup>24</sup> an organization created to share the risks and costs of a global satellite network whose commercial viability was in doubt in the 1960s when it was established by treaty.<sup>25</sup> In 2001, these governments will become initial investors in Bermuda-based Intelsat Ltd., which is contemplating an initial public offering in the near future. (The satellites, satellite applications themselves, and the licenses will be divided between Delaware and U.K. subsidiaries.) The privatization of Intelsat was forced in some respects by the passage of the Open-Market Reorganization for the Betterment of International Telecommunications (ORBIT) Act by the U.S. Congress.<sup>26</sup> The ORBIT Act also sought to ensure the pro-competitive privatization of Inmarsat (which had already commenced),<sup>27</sup> and permitted Lockheed Martin to buy control of Comsat, the U.S. signatory to Intelsat.<sup>28</sup> While displeased with the ORBIT Act, Intelsat did not make good on its threats to move its headquarters from Washington, D.C. or to kick the United States out of Intelsat altogether. Pursuant to the ORBIT Act, the FCC concluded that U.S. users and service providers lacked adequate access to space segment capacity on Intelsat satellites, and threatened to impose a regulatory solution in the event that negotiations between Comsat and other users and service providers did not produce a commercial solution.<sup>29</sup>

21. See, e.g., Letter from Lawrence H. Williams, New ICO Global Communications (Holdings) Ltd., et al. to FCC Chairman Michael K. Powell, IB Docket No. 99-81 (Mar. 8, 2001) (outlining an "ancillary terrestrial component" for ICO's MSS business).

22. See Council of the International Telecommunications Union, Resolution 1130 (setting forth the agenda for the World Radiocommunication Conference 2000 (WRC-2000)).

23. See *id.*

24. Agreement Relating to the International Telecommunications Satellite Organization, "INTELSAT," 23 U.S.T. 3813; T.I.A.S. No. 7532 (Feb. 12, 1973).

25. See *In the Matter of the Applications of INTELSAT LLC for Authority to Operate, and to Further Construct, Launch, and Operate C-band and Ku-band Satellites That Form a Global Communications System in Geostationary Orbit*, 15 FCC Rcd. 15,460 (2000).

26. See Open-Market Reorganization for the Betterment of International Telecommunications Act (ORBIT Act), Pub. L. No. 106-180, 114 Stat. 48 (2000).

27. See *id.*

28. See *id.*

29. See *In the Matter of Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking To Access INTELSAT Directly, Report and Order*, 15 FCC Rcd. 19,160 (2000).