

# Modern Law for Global Commerce

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## **Public Procurement, long-term government contracts and dispute settlement**

*The need for national systems to prevent and resolve disputes between  
regulators and private operators of infrastructure and providers of public  
services*

Don Wallace, Jr., July 12, 2007

In its breadth the subject of this paper extends to many economic sectors, including power, water, transportation's many aspects and telecommunications, and to matters of privatization, competition policy, capital markets, investment and permits, tariff rates, safety, environmental and other standards, and contract performance. In its depth, it extends to prophylactic measures: the conditions for rulemaking, the conduct of ongoing relations between regulators and operators (whether they have concessions or not, and whether domestic or foreign), ensuring compliance with laws and regulations and contracts; and the mechanisms in place for the resolution of disputes. Within these regulated areas, many disputes arise between operators themselves (eg over connectivity issues) and with consumers of services, as well as disputes involving lenders and many others. My focus however will not be on these, but rather exclusively on disputes between the government regulator and concessionaires and other operators. The subject may possibly also cover disputes between government as market participant and private parties (the operators) in such regulated areas.

One or two preliminary points are in order. Private participation in the provision of public services, also called, inter alia, BOT, privately financed infrastructure<sup>1</sup>, and public-private partnerships in its various forms, is here to stay. I have elsewhere called it "inevitable and difficult"<sup>2</sup>. There is an obvious problem for governments. By and large they increasingly realize that do not have the skills to manage industries, factories and the like well. On the other hand they feel responsibility to see that basic services are delivered. The evolving solution: privatization of what have been public services and regulation. The imperatives of economic development, and the limited sources of capital for government in many countries, seem to leave little alternative; and these realities trump resistance to privatization and nationalism in many countries.

Does the inability of a country to properly handle the disputes arising from regulation of increasingly privatized sectors of the economy, once thought to be core responsibilities of government, discourage private investment in those sectors? Studies in fact suggest this to be the case<sup>3</sup>.

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<sup>1</sup>UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects (2001)

<sup>2</sup> Don Wallace Jr., *Private Participation in Infrastructure and and the Provision of Public Services-Inevitable and Difficult*, (Symposium: Markets in Transition: Reconstruction and Development, University of the Pacific McGeorge School of Law, Sacramento, California, February 20-21, 2004), in: *Transatlantic Law*, 2004/18, p. 117.

<sup>3</sup> E.g. Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions (International Telecommunication Union and World bank, 2004)

## An international prism

The next two panels deal with the subject of international arbitration, including in one case investment arbitration. UNCITRAL is currently undertaking a revision of its arbitration rules, and there is some controversy as to whether investment arbitrations deserve special treatment, i.e. greater transparency because of their effect on issues of “public policy”<sup>4</sup>. It is that growing<sup>5</sup> phenomenon of international investment arbitration through which we may initially examine our subject. Most of you will know something about international investment arbitration, have heard of the growth of the ICSID case load<sup>6</sup>, possibly have witnessed the raft of claims brought against Argentina in recent years, or been bemused by the contradictory arbitral awards in the matter of Ronald Lauder’s investment in Czech media, at the end of which the Czech Republic was ordered to pay Mr. Lauder more than 300 million euros. In one way or another all these proceedings reflect on the inner workings of the respondent governments. In many cases the claims are grounded in allegations of improper administration, and indeed improper handling of disputes by the governments<sup>7</sup>. Possibly the clearest window into these phenomena is the rapid growth of the jurisprudence of the denial of “fair and equitable” treatment-FET<sup>8</sup>. Possibly the most sweeping statement of the concept can be found in the award in *TECMED v Mexico*<sup>9</sup>, where in paragraph 154, it is stated:

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor’s ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance

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<sup>4</sup> A/CN.9/WG. II/WP. 145, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules(2007), [www.uncitral.org](http://www.uncitral.org)

<sup>5</sup> Luiz Fernando Guilherme da Silva Jr. “*Arbitration and the International Trade field*” (2006) Rio de Janeiro, Brazil, available at [http://www.consulegis.com/download/download/dr\\_t\\_m\\_award\\_LF\\_G\\_daSilva.pdf](http://www.consulegis.com/download/download/dr_t_m_award_LF_G_daSilva.pdf).

<sup>6</sup> The total number of conciliation and arbitration proceedings registered with ICSID rose to 236 in 2006, according to ICSID 2006 Annual Report, available at [http://www.worldbank.org/icsid/pubs/1998ar/ICSID\\_AR\\_06\\_ENG\\_CRA2.pdf](http://www.worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf). In 2006, the number of ICSID pending cases reached 118 ICSID 2006 Annual Report, available at [http://www.worldbank.org/icsid/pubs/1998ar/ICSID\\_AR\\_06\\_ENG\\_CRA2.pdf](http://www.worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf).

<sup>7</sup> The Argentine cases typically arose from another cause, namely the consequence of de-linking the Argentine peso and the US dollar the latter provided for in many affected concession agreements, (e.g. *see* *Natural Gas SDG, S.A. v. Argentina*, ICSID case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction (2005) and *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (2006); however such cases as *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 clearly arose from allegations of the inadequate administration of regulations and/or the inadequate resolution of disputes.

<sup>8</sup> To be sure this development is not without controversy. For a detailed discussion of this issue *see* Noah Rubins, *Loewen v. United States: the Burial of an Investor-State Claim*, 21(1) ARB. INT’L L (2005).

<sup>9</sup> *TECMED v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award (2003), para. 154.

by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized "...by any reasonable and impartial man," or, although not in violation of specific regulations, as being contrary to the law because it shocks, or at least surprises, a sense of juridical propriety.

The quoted language posits an almost flawless administration of a country's laws. Unhappily, the instances of governments contravening their own laws, and failing their administrative and constitutional norms, are legion<sup>10</sup>. Against this test, I would submit no country is immune from failing to satisfy international judgment; and TECMED is by no means unique<sup>11</sup>. Some have celebrated this fact, announcing that these international arbitration cases are the means to ensure "good governance" in the delinquent respondent countries<sup>12</sup>. It is not clear that this is the principal, or indeed any, purpose of such arbitrations<sup>13</sup>. But even if it were, it strikes me that it would be quite futile, for a number of reasons: governments will not see the awards in such a way<sup>14</sup>, and then there is the sheer vastness of government regulation and administration. The relatively few international investment arbitrations touch only the tips of vast icebergs. Of course what is really needed is domestic reform, preventative of international disputes, in the case of each, indeed of every, country. In my view, "a ton of prevention is worth an ounce of cure", that is to say the sort of cure prescribed by my friend Thomas Walde<sup>15</sup>.

A bit more discussion of the international level. A lawyer, Professor Benedict Kingsbury, suggests that the evolution of administrative regularity at the municipal level is now so great that an international administrative law to govern international organizations, based on general principles, may be developing<sup>16</sup>. If this were the case it might be expected to loop back through Professor Walde's prescriptions to provide international legal discipline to nations-of this I am a skeptic at this time. Indeed, Professor Louis Wells, of the Harvard Business School, not a lawyer, is very critical of the ability of the usual international legal efforts, embodied, for example, in bilateral investment treaties (BITs) and international investment arbitrations, to manage effectively disputes of the kind we are dealing with

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<sup>10</sup> E.g. Philip Gray and Timothy Irwin, *Exchange Rate Risk: Reviewing the Record for Private Infrastructure Contracts*, WB Public Policy Journal, June 2003, available at <http://rru.worldbank.org/Documents/PublicPolicyJournal/262Gray-062703.pdf>

<sup>11</sup> *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL Arbitration, (Partial Award, 17 March 2006), available at <http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf>

<sup>12</sup> Thomas Walde, *Current Issues in Investment Disputes: Comment*, available at [http://www.dundee.ac.uk/cepmlp/journal/html/forum\\_8.html](http://www.dundee.ac.uk/cepmlp/journal/html/forum_8.html): "The reference in modern treaties to "fair and equitable treatment" and to international law (as now evidenced by modern state practice of economic regulation in domestic law and multilateral/bilateral treaties) are the gateway for defining what good governance in economic regulation is." There are many weak, indeed even "failed" states, see Christopher J. Coyne *Reconstructing Weak and Failed States: Insights from Tocqueville*, Department of Economics, Hampden-Sydney College, available at [http://www.ccoyne.com/Insights\\_from\\_Tocqueville.PDF](http://www.ccoyne.com/Insights_from_Tocqueville.PDF)

<sup>13</sup> Christoph Schreuer: "Arbitration is the preferred method for the settlement of disputes arising from investments". at [http://public.univie.ac.at/fileadmin/user\\_upload/legal\\_studies/courses/syllabus\\_investment\\_arbitration.pdf](http://public.univie.ac.at/fileadmin/user_upload/legal_studies/courses/syllabus_investment_arbitration.pdf)

<sup>14</sup> See Thomas Walde, "*Current Issues in Investment Disputes: Comments* ", available at [http://www.dundee.ac.uk/cepmlp/journal/html/forum\\_8.html](http://www.dundee.ac.uk/cepmlp/journal/html/forum_8.html): "I recently discussed these matters in a large Latin American country. The Minister, an old Latin American, very educated nationalist said: "That is not possible here. Our Constitution forbids these things, our courts would intervene. We cannot have a private group of people sitting in judgment over a sovereign nation." I then looked on the Internet that evening and found a bilateral investment treaty signed by this country which says: "We hereby submit irrevocably to investment arbitration for a number of enumerated disciplines." The next day, when I told this, the Minister was shocked. He had never heard about the treaty because government agencies often don't collaborate well. He could not stomach this and said: "No, no, but that is all invalid. Our Constitution is against it, and that is much more important than international law."

<sup>15</sup> See note 12 supra

<sup>16</sup> Benedict Kingsbury, "*The Administrative Law Frontier in Global Governance*", American Society of International Law Proceedings, 2005

here<sup>17</sup>. Of course, many governments are undertaking extensive reforms; again the point is the vastness of governments, and of their many component elements, good and bad.

An interesting study, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*,<sup>18</sup> tells the story of one sector of government and specifically the handling of disputes (most, although not all, of the disputes discussed are between two or more operators, rather than between regulator and operator, and the adoption of domestic ADR seems to be the principal prescription).

There are the beginnings of specific attention, at the international level, to the relation of regulator and operator. Possibly the most extensive is a requirement found in Article VI of the WTO's General Agreement on Trade in Services to have independent regulatory agencies or their equivalent, in the covered sectors, whose function extends to the resolution of regulator-operator disputes<sup>19</sup>. The United States and others, in their bilateral negotiations, have begun to extract and give commitments, to regularize the process of administrative rule-making and regulatory proceedings generally<sup>20</sup> and in particular areas<sup>21</sup>.

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<sup>17</sup> Louis T Wells and Rafiq Ahmed, *"Making Foreign Investment Safe"* (Oxford University Press, 2006)

<sup>18</sup> Note 3 supra

<sup>19</sup> GATS, Article VI; currently specific government commitments are rather limited, Trachtman, Joel P., *"Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation"* (January 29, 2002). Available at SSRN: <http://ssrn.com/abstract=298760> or DOI: 10.2139/ssrn.298760

<sup>20</sup> See US-Colombia Trade Promotion Agreement(2006):

"Article 19.2: Publication

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

2. To the extent possible, each Party shall:

- (a) publish in advance any such measure that it proposes to adopt; and
- (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

Article 19.4: Administrative Proceedings:

With a view to administering in a consistent, impartial, and reasonable manner all measures of general application affecting matters covered by this Agreement, each Party shall ensure that in its administrative proceedings applying measures referred to in Article 19.2 to particular persons, goods, or services of another Party in specific cases that:

- (a) wherever possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;
- (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
- (c) its procedures are in accordance with domestic law."

<sup>21</sup> US-Panama Free Trade Agreement (2007), Chapter Seventeen, Environment, e.g. Article 17.3:

"1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws.

(a) Such proceedings shall be fair, equitable, and transparent and, to this end, shall comply with due process of law and be open to the public, except where the administration of justice otherwise requires.

(b) The parties to such proceedings shall be entitled to support or defend their respective positions, including by presenting information or evidence.

(c) Each Party shall provide appropriate and effective remedies or sanctions for a violation of its environmental laws that:

- (i) take into consideration, as appropriate, the nature and gravity of the violation, any economic benefit the violator has derived from the violation, the economic condition of the violator, and other relevant factors; and
- (ii) may include criminal and civil remedies and sanctions such as compliance agreements, penalties, fines, injunctions, suspension of activities, and requirements to take remedial action or pay for damage to the environment.

2. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws, and that each Party's competent authorities shall give such requests due consideration in accordance with its law.

3. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to proceedings referred to in paragraph 1. 4. Each Party shall provide appropriate and effective access to remedies, in accordance with its law, which may include rights such as:

- (a) to sue another person under that Party's jurisdiction for damages under that Party's laws;

## National Provisions for Resolution of Disputes

UNCITRAL, in its Legislative Guide on Privately Financed Infrastructure Projects(2001), and its accompanying Model Legislative Provisions(2004; that is to say a model for national laws), deals in several places with disputes and their resolution. The Guide adverts to disputes at various phases of the concessioning process: competitive selection/formation(Alexei Zverev may touch on this in his presentation), the construction phase, operations, termination. Most of the disputes between regulator and operator(whether under a concession or not) will arise during the operations phase. In terms of prophylaxis, it is apparent that a sound selection process and attendant negotiations can serve to anticipate and possibly minimize future disputes.

The Guide contemplates both the concession agreement and regulations as dealing with the machinery to deal with disputes; it is possible we underplayed the role of regulations<sup>22</sup>; in any event, in the case of merchant power plants or other infrastructure providers not operating under a concession agreement, regulations will be paramount. Incidentally, the Guide also may not emphasize sufficiently that the formulation of such regulations should involve consultation with operators and others in the sector to be regulated. The Guide deals with machinery, whether, for arbitration or conciliation, or review boards, somewhat in the abstract and maybe not be keyed enough to our regulator-operator relations. As it deals with law and legislation, it does touch on a matter of particular relevance to our subject: the consignment by most civil law countries of the disputes we are discussing to the exclusive jurisdiction of conseils d'état and lower administrative tribunals, the application of administrative(often giving government unilateral powers to alter projects) rather than commercial or private law, and the prohibition of arbitration in these cases. This regime has rendered projects "unbankable" in some cases<sup>23</sup>.

Some countries have created special commissions to deal with regulator-operator disputes, whether of rates, market standards, safety or other matters.<sup>24</sup>

But these commissions frequently become part of the problem, rather than the solution<sup>25</sup>. The reasons are many: commissions which are part of the ministry or agency which is the regulator or a competitor of the disputing operators, or commissions not sufficiently independent of government and government policy<sup>26</sup>.

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(b) to seek sanctions or remedies such as monetary penalties, emergency closures or temporary suspension of activities, or orders to mitigate the consequences of violations of its environmental laws;

(c) to request that Party's competent authorities to take appropriate action to enforce its environmental laws in order to protect the environment or to avoid environmental harm; or

(d) to seek injunctions where a person suffers, or may suffer, loss, damage, or injury as a result of conduct by another person subject to that Party's jurisdiction that is contrary to that Party's environmental laws or that violates a legal duty under that Party's law relating to human health or the environment.

5. Each Party shall ensure that tribunals that conduct or review proceedings referred to in paragraph 1 are impartial and independent and do not have any substantial interest in the outcome of the matter.

6. For greater certainty, nothing in this Chapter shall be construed to call for the examination under this Agreement of whether a Party's judicial, quasi-judicial, or administrative tribunals have appropriately applied that Party's environmental laws."

<sup>22</sup> Thus the Model Provisions Article 49 reads, " Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract". Note that the 'contracting authority' may be different from a later regulator.

<sup>23</sup> Amnesty International "Turkey constitutional amendments: Still a long way to go", available at <http://web.amnesty.org/library/Index/ENGEUR440072002>; this situation required Turkey to amend its constitution,(Constitution Of the Republic of Turkey, published in Official Gazette no. 17863, dated November 9, 1982, and amended 2001, available at <http://www.legislationline.org/upload/legislations/63/e1/d24f120df114ba9003796ee0f617.htm>), and points up the required reform in national regimes which is the thesis of this paper.

<sup>24</sup> E.g. in Mexico, Federal Telecommunications Commission, in the Dominican Republic INDOTEL( Instituto Dominicano De Telecomunicaciones), in India Telecom Regulatory Authority of India (TRAI)

<sup>25</sup> See Mark Kantor "Arbitration Award May Alter Dabhol Debate", Transition Dispute Management, vol. I, issue 2, May 2004, available at <http://www.transnational-dispute-management.com/samples/freearicles/>

\tv1-2-article179b.htm, on the Dabhol case in India.

<sup>26</sup> See Section 2 of "Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions" (International Telecommunication Union and World bank, 2004), pps.19-22

## Some Innovations in the Resolution of Disputes involving Regulators

It is not apparent that the “ton of prevention” needed at the national level is taking place. To be sure governments in most countries, developing and developed, are constantly evolving and seeking to ‘re-invent’ and improve themselves. In this respect, movement towards e-government is surely a flavor of the year. Another is the promotion of arbitration for governments<sup>27</sup>, although rarely involving regulator-operator disputes; operator-operator disputes may sometimes be covered. The ITU-World Bank report<sup>28</sup> on the telecommunication sector details some of this. Arbitration is beginning to impinge on regulation, if not the regulator itself; thus the EU now prescribes arbitration between private parties affected by EU merger review orders(although the EU Commission is not a party-it does reserve the right to be informed and file amicus briefs!)<sup>29</sup>. So too the United States in its bilateral tax treaties<sup>30</sup> contemplates arbitration between government “competent [tax] authorities” to resolve clashes between governments that affect private taxpayers- but again there is not resolution of direct disputes between regulator(tax authorities) and operator(taxpayers).

There are examples of regulator-operator dispute resolution by arbitration, but they are rare. One example from the US: the laws of the state of Florida provide for arbitration of disputes between the state insurance regulator and insurance companies, over the rate of return on investment for insurance companies<sup>31</sup>.

It is not that countries do not have reasonable arrangements in place; the economically successful Nigerian telecommunications sector, in Part X of its Communications Act of 2003, provides for administrative and judicial procedures which might well be emulated; a description is in Annex 1.

### What Should be Done?

Not all problems have complete solutions, but surely a situation that may, as I have said, call for a “ton of prevention”, has parts which need addressing. I believe that this is a problem that UNCITRAL itself can address; we have worked on infrastructure problems, and we have worked on many aspects of dispute settlement, through arbitration and other means.

What form the work might take, needs reflection: legislative guide? model law? other? The issue: to develop solutions for administrative aspects of national regulatory regimes which run from alpha to omega: an open and proper system for developing rules and administration, provision in agreements and regulations for regular information exchange between regulator and operator, “early warning” systems as problems arise<sup>32</sup>, possibly standing machinery(analogous to contract review boards, or other standing provision for the application of independent expertise)<sup>33</sup> to tackle problems in their incipency by assuring

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<sup>27</sup> See for example for the US, Jeffrey M Senger, *Federal Dispute Resolution: Using ADR with the United States Government*(Jossey-Bass, 2004).

<sup>28</sup> See note 3 supra

<sup>29</sup> Gordon Blanke, *“The Use and Utility of International Arbitration in EC Commission Merger Remedies”* (Europa Law Publishing, 2006).

<sup>30</sup> E.g. Convention between the Government of The United States of America and the Government of The Republic of Bulgaria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, (signed February 23, 2007 in Washington, DC). These examples of arbitration involving regulation and other public measures suggest that earlier concerns about ‘arbitrability’, that is to say what subjects may be arbitrated, may sometimes have been exaggerated. See, e.g., William W. Park, *“The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic”*, 12 ARB. INT’L 137 (1996).

<sup>31</sup> Florida Administrative Code Annotated, Title 69. Financial Services, Subtitle 690. Office of insurance regulation, Chapter 690-170. Property and Casualty Insurance Rating, Part IV. The Rate Filing Arbitration Rules of Procedure; See *Nationwide Insurance Company of Florida v. Florida Office of Insurance Regulation*, American Arbitration Association, case number 33 195 Y 00453 06 . By contrast the elaborate regulatory regime managed by the US Federal Energy Regulatory Commission(FERC), over gas and power, seems to immunize the FERC from judicial attack(and presumably has no provision whatsoever for arbitration or anything comparable) under the so-called “filed rate doctrine”, See *Montana-Dakota Utilities Co.v. Northwestern Public Service Co.*(341 U.S. 246)

<sup>32</sup> Legislative Guide, note 1 supra, p176

<sup>33</sup> *Ibid.*, p181

legitimate implementation of regulations by the regulator and good faith compliance by the operator, of course good and competent administration overall; some dispute settlement machinery, whether commission or arbitrator that is and is seen to be independent of politics and short term government policy; judicial review presumably(although pure judicial solutions will probably not be expert or expeditious enough, and at least foreign investors would be skeptical) and surely effective and honest enforcement of the result. Detailed consideration of questions such as the selection and composition of the dispute settling bodies and the means to ensure their competence and independence would be required-some of this will be in the nature of public, rather than private, law; some political science and public administration, rather than law; some will deal with technical and economic expertise, not the mere application of existing rules to given facts. To be sure, this is a tall order. But UNCITRAL and others have done this kind of work before<sup>34</sup>.

In terms of the form of any work to be undertaken, I would probably at this point opt for a legislative guide to consider the best practice as to the necessary elements of a sound national regime for the prevention and resolution of disputes between regulator and operator. But a model legislative provision, a 'module' to be inserted into relevant national statutes, might also be in order, and doable.

A legislative guide might also, optionally, build on existing programs of cooperation between regulators of different countries, and propose an international organization of national regulators (an organization in which operator groups what also participate in some open and transparent fashion), along the lines of cooperation among central banks(see the several Basel accords), or by capital market regulators in IOSCO(International Organization of Securities Commissions).

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<sup>34</sup> E.g. UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Model Law on Electronic Commerce (1996), EBRD Concession Assessment Project (2005), available at <http://www.ebrd.com/country/sector/law/etc/cetc.pdf>, OECD Guidelines for multinational enterprises(1976)

Annex 1. Resolutions of Disputes between the Regulator and Operators in the Nigerian Telecommunications Sector, prepared by Francisca Aihevba of the Aelx Law Office, Lagos.[see separate document]

## **RESOLUTIONS OF DISPUTES BETWEEN THE REGULATOR AND OPERATORS IN THE NIGERIAN TELECOMMUNICATIONS SECTOR**

Part X of the Nigerian Communications Act 2003 (hereinafter called 'the Act') provides for the review of decisions made by the Commission. Where a dispute or grievance arises as a result of a decision of the Commission, certain steps may be taken.

The first step is provided in § 86 of the Act. It states that an aggrieved person or a person whose interest is adversely affected by any decision of the Commission may request in writing for a statement of the reasons of the decision. Upon receipt of the request, the Commission shall provide a statement of the reasons for the decision and any other relevant information taken into account in reaching the decision<sup>35</sup>.

Where the aggrieved person is not satisfied with the reasons given in the statement, within 30 days after the date of receipt of the statement, he may request in writing that the Commission reviews its decision. His request should contain the reasons and basis for his request. Thereafter, the Commission shall meet to review the decision in the light of the reasons contained in the request. The Commission must conclude the review within 60 days of receipt of the request and inform the aggrieved person of its final decision and the reasons therefor.

Where the aggrieved person is not satisfied with the final decision of the Commission, it can appeal to a court of competent jurisdiction for a judicial review of the decision or any other action.

Please note that, pursuant to §88 (3) of the Act the steps listed above are to be followed in sequential order. Accordingly, each step is a condition precedent to a further step. This provision of the law was upheld in *Econet Wireless V. NCC*<sup>36</sup> where the Federal High Court, Abuja held that the procedural steps necessary to be taken by Econet had not been followed as a result of which the suit was struck out.

We are not aware of any dispute between operators and the commission before any court in Nigeria at present. However, in 2004, MTN did refer a dispute concerning interconnection rates to the Federal High Court. At first the court granted the application of MTN to stay the implementation of interconnection rates by MTN. In a subsequent decision, upon the application of the Commission, the court set aside its earlier order stating that the order could not be enforced for MTN alone as its services could not be isolated from the services of other operators.

Regular interactions and frequent exchanges of information between the Commission and operators have helped to reduce the number of disputes referred for resolution. This is because grievances can be raised in such fora and settled without need for formal dispute notification and resolution procedures.

In addition, due to the fact that most decisions affect operators on a class basis, most cases complaints and grievances are made on a collective basis. Where an individual operator has a grievance, recourse must first be had to the procedure established under the Act for review of decisions. The dispute can only be referred for resolution by a court of competent jurisdiction after the procedure has been followed without a satisfactory outcome for the aggrieved person. It is believed that the procedure has so far worked well in resolving grievances and disputes between operators and the Commission, hence the paucity of court cases.

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<sup>35</sup> Please note the Commission is not required to give the requested statement if it is confidential, may involve the unreasonable disclosure of personal information or is likely to prejudice fair trial.

<sup>36</sup> FHC/ABJ/CS/58/2004