



INTERNATIONAL TELECOMMUNICATION UNION

**EXPERT GROUP ON THE
INTERNATIONAL TELECOMMUNICATION
REGULATIONS**

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Executive Summary

**of the Findings of the Group of Experts on Reform of the
International Telecommunication Regulations.**

Introduction

Having been appointed by the 1999 session of the ITU Council, the members of the Expert Group on the International Telecommunication Regulations have met once in Geneva (8-10 November, 1999) and subsequently worked using e-mail and telephone calls to progress their studies on the ITRs, and their relevance in the current telecommunications environment and its evolution.

Given the broad spectrum of backgrounds which members of the Expert Group had, it is probably fair to say that the one area upon which the entire Group could agree was that if the ITRs, which were produced back in 1988, were to be formulated today, they would be different, although the exact nature of the difference and the question of timing the introduction of any revised regulation could not be agreed.

To some degree, the disparity of views which have been exchanged within the Expert Group should come as no surprise as the international telecommunications environment has changed considerably during the last 12 years in many countries, since the WATTC-1988.

Initial Findings of the Expert Group

During the first meeting of the Expert Group it became clear that further work would be needed by all Expert Group members to fulfil their mandate as stated in items 1 through 4 of "resolves to instruct the Secretary-General" of PP-98 Resolution 79. In reviewing the objectives of the Expert Group a total of four possible "Options" were identified and these are listed in Annex 4 of the November Meeting Report.

In an attempt to develop these "Options", two Working Groups were set up to work using e-mail with the aim of producing separate reports which would effectively review and develop three of the Options identified, one Group (Working Group A) would review the position from the standpoint of Developing Countries and the other Group (Working Group B) would review the ITRs from the standpoint of current and future needs of Member States, particularly where liberalisation was either in place or under implementation.

The outputs of these two Working Groups can be found in the respective reports (attached at Annexes 1 and 2) which were prepared by the mediators shown below:

- Working Group A - Mr. Rohan Samarjiva and Mr. Eckart Lieser.
- Working Group B - Mr. Richard Thwaites, Mr. Fernando Carillo and Mr Tsunekazu Matsudaira.

In addition, further discussion resulted in a paper outlining the basis for the fourth Option (Defer Determinations on whether to change the ITRs) and this is provided in Annex 3.

Conclusions

The varied backgrounds of the Expert Group ensured that a full range of possible approaches and associated issues were explored and documented. To provide a flavour of the scope of the Expert Group discussions, some key points are listed below:

- The balanced Expert Group reflected a wide ranging difference of opinion with regard to the need for the International Telecommunication Regulations as a Treaty-level instrument, whether they should be amended and, if so, how and when this should occur.
- This variety of opinions supports the need for further detailed investigation of the options identified in Annex 4 of the November meeting report
- The Telecommunications Industry is evolving rapidly in line with technological developments and the pace of change is unprecedented. This step change in pace requires the ITU to consider future and more frequent review mechanisms for the ITU Instruments and Roles.

Whilst it is true to say that every member of the Expert Group may have some differing views on the issues, there was general agreement that differing expectations are likely to be placed on any regulatory provisions that are produced in the future. The wide range of views on the relevance of the ITRs both now and in the future, also poses the question as to how these views can be harmonized to produce an international regulatory framework which will be universally respected and will benefit everyone.

The views which have been produced in the form of contributions to the Expert Group, together with the outputs from the Group, do not yet provide a simple answer. However, the views do provide a number of alternatives to progress the work which needs to be done, for example, to produce a “menu of options” that would meet the varying needs of Member States.

These alternatives can be summarized as follows:

1. At national level, the relative pace of privatisation and liberalization differs worldwide. This disparity in regulatory evolution requires a specific programme of information and education to identify the benefits and pitfalls which others have experienced. Such information and education sessions should also identify the differences in approach which have been adopted by Member States on this issue i.e. identify the prevalent regimes and arrangements.
2. The formation of Task Groups to produce detailed texts which would enable the following options to be reviewed by Council 2001 to determine the requisite action that would need to be undertaken at the Plenipotentiary in 2002 and/or at a World Conference on International Telecommunications:
 - (a) The possible termination of the existing ITRs, to be achieved through integration of the relevant provisions into the ITU Constitution, Convention or other instruments such as Recommendations (which could include descriptions of alternative approaches), Resolutions and MoUs or otherwise.
 - (b) The modification of the ITRs, with a detailed update of the existing provisions, with a view to keeping the ITRs as a Treaty level text.
 - (c) Detailed proposals explaining why there is a need to defer determinations on whether to review and modify the ITRs.
 - (d) Proposals for new areas of regulation to enable further development and determination as to which were really appropriate for an inter-governmental Treaty level regulatory agreement.

A possible combination of the above-mentioned options should not be excluded by the Task Groups in their studies.

Having outlined the alternative approaches which could satisfy the requirements of PP-98 Res. 79, the Expert Group is aware of the dangers of repeating the debates which have taken place already rather than moving forward. In this respect, careful consideration needs to be given to the mechanisms which should be employed, the time-frames for output and criteria for assessing the merits of the respective outputs to enable informed discussions to take place prior to PP-2002.

The members of the Expert Group would like to thank the members of the Secretary-General's staff who have assisted the Group in its work throughout and without whom this series of reports would not have been possible.

Annexes:

1. Working Group A: “to progress the elements of work concerning Regulatory Issues and the concerns of Developing Countries” (page 5 - 8)
2. Working Group B: “to progress the review of basic instruments with a view to meeting the current and future needs of Member States, either by revising or integrating the ITRs” (page 9 - 17)
3. Option 4: “to defer determinations on whether to change the ITRs” (page 18 – 23).

Annex 1 to the Chairperson's Executive Summary of the ITR Expert Group

Summary Report of Working Group A of Expert Group on International Telecommunication Regulations

**Rohan Samarajiva
18 April 2000**

Based on the comments posted for discussion, substantial consensus appears to exist on the need to move forward with the task undertaken by Working Group B (WG-B), that of revising and integrating the current provisions of the ITRs "up" to the Constitution and Convention, on one hand, and "down" to the Recommendations, on the other. There is less agreement on the task undertaken by Working Group A (WG-A), "to progress the elements of work concerning Regulatory Issues and the concerns of Developing Countries." Views supporting action to create an international regime for the rapidly changing international telecommunication services and views opposing such action on the grounds that change is too rapid and/or the direction of change is indeterminate have been expressed. There appears to be merit in a course of action on the lines suggested by Mr. Virata, namely that of activating a less formal process such as the regulatory colloquium (which, depending on the outcome, may lead to a World Telecommunications Policy Forum (WTPF) or to action by Study Groups or other entities of ITU-T) to address in a thoughtful and broadly inclusive way the possible role, if any, that the ITU could play in the formalization of a broad set of multilateral rules to govern international telecommunication services in the post-accounting-rates era. In sum, there is substantial, though not unanimous, support for a hybrid solution that combines Options 2 (now) and 3 (possibly later, depending on outcome of consultative processes).

Much of the concern regarding reopening the ITRs appears to be driven by memories of the difficulties experienced in Melbourne in 1988. But as everyone agrees, much has changed since 1988. The international telecommunication environment has changed radically, and so have the players. Unlike in 1988, a large (and increasing) number of governments no longer supply telecommunication services which require recognition of the reality of commercial arrangements among private entities governing areas hitherto under direct government control. Today, liberalization is not limited to a few developed market economies but is the dominant trend. Therefore, there is little chance of the debate becoming polarized in terms of reviving the international accounting rate system versus defining an alternative competition-centered arrangement. As the ITU Secretary General recently stated, "there is no longer a defensible logic to the argument that the price of making an international telephone call should be significantly higher than the price of a domestic telephone call" (Utsumi, Y. (2000, February). "Moving beyond international accounting rates," *Telecommunications Policy*, 24(1), at <<http://www.tpeditor.com/utsumi.htm>>).

1. Even if there is potential for disagreement, it would appear that creating a forum for differing viewpoints to be voiced, and a range of possible actions and/or a supranational solution identified, is the central mission of the ITU. As the Strategic Plan for 1999-2003 states,
2. Essentially, [the purposes of the Union] are to provide a forum in which the Union's membership can cooperate for the improvement and rational use of telecommunications of all kinds in the following domains:
 - a technical domain – to promote the development, efficient operation, usefulness and general availability of telecommunication facilities and services
 - a development domain – to promote the development of telecommunications in developing

- countries and the extension of the benefits of telecommunications to people everywhere;
- a policy domain – to promote the adoption of a broader approach to telecommunication issues in the global information economy and society.

Unlike in 1988, the ITU now has at its command a range of mechanisms such as the WTPF and regulatory colloquia to allow stakeholders to discuss problems in a comprehensive and non-adversarial manner and to discover areas of possible consensus. The Council can adopt a three-track approach whereby (a) the formal processes necessary to incorporate elements of the current ITRs and remove unnecessary duplication can be set in motion; (b) ITU-T (principally Study Group 3) be invited to develop recommendations to replace some provisions of the ITRs, such as Appendix A, and (c) initiate the processes of inclusive consultation that could, at a later time, lead to a comprehensive revision of the ITRs, if considered necessary. There is no agreement within WG-A that ITRs, in the form of Treaty-level obligations, are necessary.

To simply remove substantive provisions to other legal instruments and leave the ITRs to atrophy would not appear to serve "to strengthen the multilateral foundations of international telecommunications," one of the five goals set out in the ITU's Strategic Plan (annexed) that is specifically mentioned in Resolution 79 of the Minneapolis PP. Indeed, the proposed inclusive, consultative process to identify national or supranational policy solutions to the impending demise of the old regime for international telecommunication services involves two of the four general activities listed under Goal D1 in the Strategic Plan: "Developing the world telecommunication policy forum (WTPF) as a forum convened on an ad hoc basis for developing a non-binding shared vision on cross-Sectoral policy issues," and "deciding on the need to revise the International Telecommunication Regulations (ITR) to take account of developments in the telecommunication environment, particularly the WTO agreements."

Is there a need for Treaty-level instruments in the form of the ITRs? This question can be answered both in legal and procedural terms (if the Constitution is taken as a given), as well as in substantive terms. It is, of course, possible for the Expert Group to make recommendations to the Secretary General and the Council to set in motion the process of amending the Constitution by decision of the Plenipotentiary Conference, and thereby change the legal basis of the ITRs. Such recommendation may include, in addition to substantive proposal for change, deletion of references to ITRs in Article 25 and elsewhere.

The legal and procedural rationale for the ITRs can be found in the Constitution. Article 4 of the Constitution sets out a hierarchy of instruments. Paragraph 1 identifies the Constitution, the Convention and the Administrative Regulations as the instruments of the Union. Paragraphs 2, 3 and 4 position the ITRs and the Radio Regulations (RRs) as subordinate to the Convention and Constitution (which is identified as the basic instrument). It can be concluded that the Recommendations, MoUs and Resolutions are subordinate to the Administrative Regulations. An approach based on the Constitution shows a three-level hierarchy, with ITRs and RRs at the second level. The problem, however, is that the unlike the RRs which can be amended more easily and frequently than the Constitution and the Convention under Article 13 of the Constitution, the ITRs are more difficult to amend than both the Constitution and the Convention (see ITR/03, 1.2). The set frequency of WRCs ("every two to three years") specified in Article 13 of the Constitution and the fact that several WRCs have been held since 1988 have resulted in the RRs being more amenable to amendment than the ITRs, which can only be amended by WCITs (frequency unspecified) according to Article 25 of the Constitution.

If the proposed informal processes lead to the conclusion that a set of "new" ITRs are required, it is essential that Article 25 of the Constitution be amended to provide for a more flexible method of amendment of ITRs. However, Ms Lambert's intervention on Working Group A issues of 23 December 1999 disputes the need for periodic revisions to ITRs, stating that they should be broad and flexible enough to preclude the need for

periodic revisions and that the current arrangements, though not speedy, provide full transparency and opportunities for all ITU members to participate in a debate on changes.

Mr. Thwaites' intervention, dated 23 Dec 1999, suggests that the ITRs are superfluous (however, the accompanying e-mail leaves open the question of maintaining a separate ITR instrument). The intervention, entitled "Task 3.2: Draft Direct Integration Option," contains three principles stating that Treaty-level regulation should be reserved for high level principles and undertakings that require government-government agreement and do not require regular review. Items that require regular review are to be covered by non-treaty instruments. This formulation essentially defines away the need for ITRs. The intervention makes a useful differentiation among the levels of flexibility that should be associated with the different kinds of instruments.

The interventions by Mr. Samarajiva and Mr. Virata argue that there is a substantive need for new ITRs, making reference to the limited information-generating and regulatory capacities of developing countries. Mr. Rouxville is open to the possibility that there may be a need in the future for new ITRs, though he believes the fast pace of change in the telecommunication environment makes the task of defining them difficult. He also sees a need to wait until national regulatory processes run their course. Ms Lambert is open to the possibility that ITRs may be needed for routes where either one end or both ends are non-competitive, but states that intrusive regulation of the type found in Articles 3, 4 and 6 of the current ITRs should not be applied to competitive to competitive relations. Ms Lambert emphasizes that regulation is only needed where there is market failure and regulation of competitive markets is likely to distort that market. Ms Lambert's comments may be interpreted as positing a short-term need for ITRs (the need disappearing as and when the non-competitive markets liberalize), while Mr. Rouxville sees a future (but not a short-term) need. Mr. Filyushin wishes the Expert Group to continue to study issues such as the incorporation of international telecommunication legal norms into the ITRs in the context of competition, while retaining the ITRs. Mr. Lieser sees a possible need for governments to coordinate regulatory policy goals (distinct from operational details) that do not have a purely national character. Mr. Marks leaves open the possibility "it would be useful to have an instrument which did not enshrine such a regime as accounting rates and which did not directly address operational arrangements between operators . . .," but this must be read in relation to his overall conclusion which is to defer action. Clearly, there is a range of opinion within WG-A on the substantive need for ITRs.

The electronic interventions do not provide an adequate basis for consensus on whether there is a need for Treaty-level instruments in the form of the ITRs. Therefore it is appropriate that discussion of this matter be continued by a broader group in the context of a well-balanced and inclusive regulatory colloquium. Even if discussion at a regulatory colloquium does not yield a consensus, it can promote education and exchange of views on changes in the telecommunication industry and the regulation thereof. Mr. Filyushin's interest in the continuation of the work of the EG will be accommodated by the larger process of the regulatory colloquium.

The interventions by Mr. Marks are quite comprehensive and make a very useful contribution to the debate. Many of the issues raised in this contribution are likely to find a place in a possible set of issues developed for discussion in a regulatory colloquium. It must be emphasized that Mr. Marks' conclusion that no rules are needed for international telecommunications services could well be the outcome of the proposed process. However, such a conclusion is better arrived at through a collective and inclusive process by the Member States and Sector Members, than by default.

Annex 1

Excerpt from the ITU Strategic Plan, 1999-2003

D.1 Goal 1 – Strengthen the multilateral foundations of international telecommunications

The trends and developments analysed in part II of this document illustrate the multilateral nature of key ITU activities. Since the most basic purpose of the Union is to maintain and extend international cooperation between all its members for the improvement and rational use of telecommunications, the central goal of the Union's strategy must be to take this into account and strengthen multilateral cooperation in areas where its effectiveness may be in question. To this end, the following priority actions are proposed:

ITU-R

- Considering the implications of the large increase in workload for preparation of, participation in and follow-up work of WRCs, and taking appropriate action.
- Further enhancing the structure of ITU-R through clarification of the roles of the RAG, RA and WRC, and in particular establishing clearer linkages between advisory, decision-making and budgetary responsibilities.

ITU-T

- Producing high-quality Recommendations quickly in response to market demands.
- Broadening participation and enhancing involvement by non-administration entities in the Sector's standardization process.
- Developing Recommendations to achieve accounting rate reform and proposing means to encourage their implementation.

ITU-D

- Developing new approaches to the provision of multilateral telecommunication assistance, inter alia by building partnerships for telecommunication development in priority areas, with special emphasis on telecommunication sector restructuring, regulatory reform, finance and resource mobilization, technology applications and human resources development.

General activities

- Developing the world telecommunication policy forum (WTPF) as a forum convened on an ad hoc basis for developing a non-binding shared vision on cross-Sectoral policy issues.
- Where agreed by the membership, developing innovative mechanisms for international cooperation outside the formal structures defined in the Constitution and Convention (e.g. MoUs).
- Deciding on the need to revise the International Telecommunication Regulations (ITR) to take account of developments in the telecommunication environment, particularly the WTO agreements.
- Extending cooperative participation to an increasing number of administrations and organizations, by encouraging the participation of Member States not currently active in ITU activities, encouraging and facilitating the participation of additional entities and organizations, including small or narrowly-focused entities, and increasing coordination and cooperation with other relevant international and regional organizations.

Annex 2 to the Chairperson's Executive Summary of the ITR Expert Group

Expert Group on Reform of the International Telecommunication Regulations

Draft Summary Report of Working Group B

Richard Thwaites

April 2000

The task assigned to WGB is "to progress the review of basic instruments with a view to meeting the current and future needs of Member States, either by revising or integrating the ITRs".

Please note two key points in this remit:

1) The criterion is to meet the needs of "Member States", because it is Member States alone who take responsibility for any instrument at Treaty level, such as the ITRs. Our group comprises a balanced group of experts, as required by the Plenipot Resolution, so as to ensure that the views of ROAs are taken into consideration.

2) Options are to be considered either to revise the ITRs, or to integrate the elements of the ITRs into other appropriate instruments.

A draft work plan agreed by the first meeting of the Expert Group and attached to its report (as Box 1) provided for work to proceed in parallel on the Revision option (3.1) and the Integration option (3.2). Contributions received by the Working Group have generally addressed one or the other of these approaches:

3.1 Revision option (Salma Jalife, Nestor Virata and Y. Grin); or

3.2. Integration option (Richard Thwaites, Anne Lambert, Bernard Rouxville, and T. Matsudaira)

Herbert Marks' contribution counselled "No immediate action" on the grounds that current arrangements were not causing insuperable problems, and that hasty change could result in unforeseen negative consequences. He suggests that "time and resources could be best allocated to educating Member States and Sector Members on the regulatory options which will better accommodate the variety of regulatory regimes, the changing patterns of national regulation and the evolving structure of telecommunications markets".

This contribution is taken as a valid cautionary note that should be kept in mind while assessing the active options 3.1 and 3.2 and in particular the scope of any proposed additional areas of regulation.

Revision Proposals:

Contributors have put forward a number of issues that might be considered for inclusion in future ITRs (or equivalent instruments). These contributions were not discussed in any detail within the Working Group. They are listed in Appendix 1.

Integration Proposals:

Contributions advocating integration of the ITRs with existing instruments supported an approach which would move a small number of key government-level commitments into Constitution or Convention or the Radio Regulations, and devolve the remaining corporation-level principles and standards into ITU-T Recommendations. A number of members suggested items that are currently in the ITRs that should be considered in this way. A consolidated table of the proposals is attached at [Appendix 2](#).

Article 6 & Appendix 1 of the ITRs

Mr. Matsudaira prepared a paper on Article 6 & Appendix 1 of the ITRs, which draws attention to the major inconsistencies between the ITRs and today's real market in the area of accounting and settlement rates. He points out that, if Article 6 & Appendix 1 were to be transferred to ITU-T Recommendations, the Convention would need to be amended to reflect the changes. Mr Matsudaira's contribution is at [Appendix 3](#).

Future Work

Stage 3.3 of the work program requires our Working Group to assess how to handle proposals that cannot be met by the minimalist integration approach. This means that we need to consider what process should be used to deal with a wide range of suggestions for new areas of regulatory agreement that have been proposed. Several procedures could be considered:

- 1) Add new articles or appendices to existing ITU treaty-level instruments other than the ITRs (that is, extending the integration approach to accommodate the new elements); and/or
- 2) Create new instruments such as MoUs, Resolutions or Recommendations to embody the new elements; and/or
- 3) Follow the established processes to revise the ITRs through a WCIT.

Members of the group supporting an Integration approach consider that future work should focus on detailed development of the texts and procedures that would transfer the essential treaty-level elements of the ITRs to other ITU treaty instruments, and that would transfer the industry-level elements of the ITRs to non-treaty instruments.

Proposals for new areas of regulation would require further development and refinement, with decisions taken on which areas were really appropriate for government-level regulatory agreement. Priority should be given to identifying items that could gain broad support for adoption at treaty level - i.e. that require and could obtain treaty commitment from Member States. Other non-treaty procedures can be recommended for proposed items that may be agreeable at non-treaty level among ITU Member States and Sector Members.

Mediator's Note

While all proposals may have merit in meeting a need of all or some of the ITU membership, care needs to be taken in proposing appropriate mechanisms that will be effective in meeting that need. A major purpose of reviewing the ITRs is to restore credibility to the ITU within its field of competence. The ITRs currently are not fully respected, because they contain provisions unacceptable to many Member States. Most contributors to this Working Group have recognised that, in the new telecommunication environment, many Member States consider it inappropriate to undertake direct responsibility for particular commercial arrangements between telecommunication businesses in a global marketplace.

Any proposals that seek to bind all ITU Member States to more rigorous intervention in market arrangements are likely to be rejected by a significant number of Member States, and therefore will not achieve their purpose. On the other hand, proposals which have a strong basis of voluntary support among Member States, Sector Members and ROAs may find appropriate expression through the ITU in the form of treaty instruments, MoUs or Sector Recommendations. If the nature of the instrument is well matched to the purpose, it will enhance the credibility of the ITU as a global forum for consensus in international telecommunication matters.

Richard Thwaites
Mediator
Working Group B

APPENDIX 1

Revision proposals:

The contributions proposed several issues that a future ITRs (or equivalent instrument) might seek to address. These have not been discussed in detail by the group, and are recorded as proposed:

- a mechanism to resolve disputes and apply sanctions
- creation of a permanent group to deal with definitions
- regulation to achieve satisfactory quality of service
- defining universal access and its technical and operational requirements
- different treatment of different types of networks with different flows of traffic
- transitional arrangements towards cost orientation
- regulation of competition
- regulation of content
- regulation of Internet traffic
- regulation of E-commerce
- regulation of new and emerging services
- interoperability procedure for new services
- socialised international telecommunication services
- socialised pricing arrangements for international telecommunication services
- arrangements for different categories of Members
- reasons and procedures for suspending services
- how information is to be disseminated
- special arrangements for developing countries
- provisions for international telecommunication mutual relations procedure based on WTO/GATS principles
- regulation of operators of global systems of communications

Integration Proposals

(Preliminary analysis of options that would meet current ITR purposes)

ITR Articles already covered by the Constitution or Convention

Preamble	covered by the Preamble to the Constitution
Article 1.1a	covered by Article 1 of the Constitution
Article 1.1b	covered by Article 42 of the Constitution
Article 1.7a	covered by preamble to the Constitution
Article 2.1	covered by Constitution Annex 1012
Article 2.2	covered by Constitution Annex 1011
Article 2.3	covered by Constitution Annex 1014
Article 2.4	covered by Constitution Annex 1006
Article 3.1	covered by Articles 38 and 1.2c of the Constitution
Article 3.2	covered by Article 1.1c of the Constitution
Article 4.2	covered by Articles 1 and 38 of the Constitution
Article 5.1	covered by Articles 40 and 46 of the Constitution
Article 5.2	covered by Article 41 of the Constitution
Article 7	covered by Article 35 of the Constitution
Article 8	covered by Article 5.1 o and p of the Convention
Article 9	covered by Article 42 of the Constitution

ITR Articles covered in Recommendations

Article 2.7	covered by Recommendation D.000
Article 2.8	covered by Recommendation D.000
Article 2.9	covered by Recommendation D.000
Article 2.10	covered by Recommendation D.000

ITR Articles that could be covered in the Constitution or Convention

Article 1.2
Article 1.3
Article 1.6
Article 1.7b
Article 1.8
Article 2.5
Article 2.6
Article 3.4
Article 4.1

ITR Articles that could be covered in Recommendations

Article 1.5
Article 3.3
Article 4.3
Article 5.3
Article 6

ITR Articles that become obsolete under the Integration Option

Article 1.4
Article 1.7c
Article 10

**Expert Group on the
International Telecommunication Regulations**

Working Group B

Considerations on ITR - Article 6 & Appendix 1 -

Mediator: Tsunekazu Matsudaira

1. General

- 1.1 One of the major “inconsistencies” between the ITRs and today’s “real” market is said to be the area of accounting/settlement. The ITRs take it for granted that any international telecommunication service offered to the public is provided jointly between two terminal carriers, with an involvement of transit carrier(s) where necessary. Because a service is jointly provided, there has to be a mechanism for apportionment of revenue. The wisdom of the industry has devised the accounting rate system and the settlement rules to enable what would otherwise be very complicated multinational financial transactions. The reality in the market today is that it is no longer required to provide an international service on a joint or a bilateral basis. “Self correspondence” or unilateral operation is possible. There are so-called “global transport providers”. Rather than jointly providing service on a 50:50 basis, carriers with originating traffic now have the choice of selecting the least cost route, and to trade volumes of traffic. Terminating carriers vigorously compete to provide termination and transit carriers strive to hub and re-originate traffic. Telephone minutes and routes have become commodities. The situation is far from that contemplated when the current ITRs were written.
- 1.2 ITU-T Study Group 3 has recently adopted a substantial revision of Recommendation D150 (New system for accounting in international telephony). In an effort to respond to the market realities as summarized above, D150 now allows carriers to elect to use “other procedures” (than, for example, the conventional accounting revenue division procedure or the newly introduced termination charge procedure) where such procedures are more suited to the nature of their relationship.
- 1.3 On the other hand, although the conventional accounting/settlement procedures based on the ITRs have become outmoded, it should also be well recognized that for still a great majority of worldwide international telephone traffic today, the traditional arrangement is very much alive and it may well be for several more years. In fact, the greatest problem with the traditional accounting/settlement rate system is the level of the rates, rather than the system itself, although it may be said that the system is to blame for the high rates. Therefore, if the rates become more market-orientated, the system may well be sustained for much longer time. The market forces (plus some effect of the US benchmarks) have had strong influence on the level of the actual rates in recent years so that they are declining at a rapid pace. Study Group 3, after adopting the first version of Recommendation D140 (Accounting rate principles for international telephone services) in 1992, has striven to meet the objective of attaining cost-orientated accounting rates, including the fierce debate during the recent several meetings over the adoption of the proposed Annex E to that Recommendation which was developed by the Focus Group. However, whether partly as the result of such efforts or not, accounting rates are falling down. For example, an ITU survey shows that for relations which had accounting rates revised, the average decline from 1998 to 1999 was 34.62 %.

2. What to do with Article 6 and Appendix 1 of the ITRs

2.1 As “officially” recognized by the amended Recommendation D150, there are now several procedures for accounting and settlement. The relevant parts of the ITRs basically elaborate only on the conventional “accounting revenue division procedure”. That seems to mean that there are mainly two choices as to the way forward: a) to incorporate the principles of other possible procedures into the ITRs, or b) to drop the present Article 6 and Appendix 1 to a D series Recommendation, with necessary modifications and/or deletions. The choice would certainly depend also on the fate of the ITRs as a whole. However, given that the process of accounting and settlement for international telephone and other relevant services has now become much more if not entirely commercial in nature, it is doubtful if an international treaty status regulations are required, and for this reason, the mediator believes that the option b) is more realistic.

3. The issues

3.1 As already recognized through initial analysis by the Expert Group, Article 6 as well as Appendices 1, 2 and 3 were drawn up and included in the ITRs following the requirements of Articles 36, 37 and 38 of the Convention. These articles require that a) provisions regarding charges and free services, b) provisions regarding the rendering and settlement of accounts and c) the definition of the two monetary units, be set forth in the ITRs. Therefore, if Article 6 and Appendix 1 (as well as Appendices 2 and 3) are to be transferred to recommendations, the Convention needs to be amended. Indeed, at WATTC-88 itself as well as at meetings of PC/WATTC, there were already arguments in favour of dropping the principles of charging, accounting and settlement to D series recommendations. However, the requirement imposed in the Convention, as shown above, overruled. This issue should be considered within the whole context of the convergence approach.

3.2 In addition to the issue of legal consistency explained above, there is the issue of substance. Although there are several “escape” clauses such as “unless otherwise agreed” in the various provisions, Appendix 1 in particular sets out concrete rights and obligation of administrations and ROAs in areas such as the establishment of accounts and the settlement of balances of accounts. To give an example, paragraph 2.2 of Appendix 1 provides: “The accounts shall be sent as promptly as possible and, except in cases of force majeure, before the end of the third month following that to which they relate.” Another example is paragraph 2.4: “any administration* has the right to question the contents of an account for a period of two calendar months after the receipt of the account ...”. Accordingly, if these provisions become Recommendations which have no binding power, there may be problems in the nature of commercial contracts between carriers worldwide because it can be said that the ITRs have effectively substituted the need for individual contracts in bilateral relations. The mediator suggests that Study Group 3 be called upon to examine the actual situation in the world as to the validity of Appendix 1 in this context and the possible consequences of converting the ITRs text to a recommendation text.

3.3 This paper has not covered the host of substantial questions raised in Document ITR/03, as it is understood that these basic issues are to be taken up in the second stage of the whole exercise.

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Annex 3 to the Chairperson's Executive Summary of the ITR Expert Group

ITU EXPERTS GROUP ON THE INTERNATIONAL TELECOMMUNICATION REGULATIONS:

OPTION 4: (DEFER DETERMINATIONS ON WHETHER TO CHANGE THE ITRS)

Contribution of Herbert E. Marks (U.S.)
April 6, 2000

1.0 Introduction. The following comments address matters relevant for the Expert Group's Report to the Secretary General on the question of whether the International Telecommunication Regulations ("ITRs") (Melbourne 1988) should be formally considered for change, and if so, when such consideration should take place. The Expert Group at its first meeting noted (at 2.3):

"... the need to arrive at a common understanding of the current international environment which not only includes the regulatory aspects but also involves the market drivers, the customer expectations, the technological evolutions which will ultimately enable the development of new and enhanced services provisions."

These and the other factors are addressed below.

2.0 International Telecommunications. It is first appropriate to analyze how the Telecommunications Sector has changed since 1988 and then to analyze whether such changes require a change in the ITRs, and if so, the process to effect such a change.

2.1 International Telecommunication Facilities and Services. As the data in Annex 1 reveals, telecommunications has been expanding worldwide in the 1990s. Ever more facilities – terrestrial, submarine, and satellite – are available and are carrying ever more traffic. This includes the construction of new facilities that will serve developing countries. Thus, during the incumbency of the 1988 ITRs international telecommunications has "prospered".

2.2 Internet. In recent years there has been a staggering increase in the number of users of the Internet and an increase of the information accessible over the Internet. Much of this information – including information of a technical, commercial, industrial, and healthcare related – is available to any user without charge. This information, which may be freely imported into a country, provides significant benefits for the users and the development of the economy of each such country. This expansion of the Internet has occurred without the intervention of government imposed telecommunications regulation on the Internet. This expansion has occurred during the incumbency of the 1988 ITRs.

2.3 National Telecommunications Regulation:

2.3.1 Since the 1960s, with increasing momentum, there have been significant changes in the regulatory structure of the telecommunications sector. The components of this evolution include:

the separation of telecommunications operations from other activities (*e.g.*, postal) into its own governmental organization; the restructuring of that organization into a commercial company, albeit owned by the Government; the separation of operational and regulatory functions; the liberalization of regulation to permit competition with the incumbent operator; the sale of all or part of the stock of the commercial company to investors in the private sector.

2.3.2 These changes have happened and are happening in different countries in different ways. For example, not all countries have needed all steps; the order of progression can vary; the timing varies; and the precise manner of implementation may vary. However, the trend is clear, the structure is moving toward private sector operators subject to competition in all market sectors. This trend has accelerated during the incumbency of the 1988 ITRs. These regulatory changes in national regulatory regimes affect the manner in which telecommunications facilities and services operate.

2.4 International Trade Regulation. The Uruguay Round of trade talks culminated in the General Agreement on Trade in Services (1994) (“GATS”), which contained a Telecommunication Annex. These talks also resulted in an agreement for further talks which culminated in the commitments (1997) on Basic Telecommunications. This has led to commitments for market access and national treatment for a wide range of telecommunications offerings and for certain behavioral requirements affecting operators with significant market power. The coverage of the GATS Telecommunications Annex and commitments increase with new accessions to the WTO and with new commitments from existing WTO members. These commitments specify different times for such commitments to become effective. Some commitments take effect as late as 2003, 2004, 2006, 2013 for specific services, and some countries have not yet committed for all services. The expected effect of these commitments should be the liberalization of such markets and the entry of new participants, *i.e.*, competitors. This trend has developed during the incumbency of the 1988 ITRs. While there are differences in timing, *etc.*, the trend toward liberalization is clear.

2.5 Regulatory Asymmetry and Change. Whether arising under national telecommunications laws, national competition laws, or the national implementation of international trade agreements, the national regulatory regimes will be asymmetrical and rapidly changing. This process will continue for some time.

3.0 The International Telecommunication Regulations (“ITRs”). Considering the foregoing, the questions are then: (a) should the ITRs be altered; (b) if so, how; and (c) if so, when.

3.1 Structure. It is conceded that the ITRs were intended to facilitate liberalization, see, *e.g.*, Article 9, (special arrangements), but that they do preserve remnants for the historic structure when national governmental monopolies made bilateral arrangements to provide a joint service, *e.g.*, Article 6 (Accounting Rates). It would indeed be useful to have an instrument which did not enshrine such a regime as accounting rates and which did not directly address operational arrangements between operators which now are predominantly private sector companies. However, the ITRs have been able to accommodate a world market where different countries have differing regulatory regimes. But most important, as discussed above, the market has been able to evolve even with the arguably “anachronistic” ITRs.

3.2 Conflicts.

3.2.1 Present ITRs. There have been concerns that a country's telecommunications trade agreements may conflict, as a matter of national law, with its obligations under the ITRs (treaty). However, the specific conflicts have not been identified. Accordingly, the following is a more generalized statement of relevant principles for considering any alleged conflicts. If identified, such "conflicts" can be addressed in detail.

3.2.1.1 Interpretation of International Agreements. A primary canon of construction is that the agreements should be read, if possible, in a manner that permits compliance with both agreements.¹ Thus, a country, which is a member of the WTO and is concerned about the ITRs, can and should act in conformity with the ITRs in a manner that permits compliance with its obligations under WTO agreements. This then leads to the question of whether this is possible. It has been suggested that certain articles of the ITRs may create a conflict. However, exactly how such a conflict would arise has not yet been identified.

3.2.1.2 ITR Mandates. The ITRs can be implemented in a way consistent with WTO obligations. The provisions usually cited as causing concern are articles 3 and 6. Article 6 sets out a process for establishing and administering accounting rates. But, it is not mandatory that accounting rates be used. Indeed, certain international services have never been subject to an accounting rate regime, *e.g.*, leased line services. Article 3 deals with routes and at 3.3 mandates use of direct routes unless there is agreement to the contrary. The conflict between this ITR provision and any WTO obligation has not been identified.

3.2.1.3 Assuming a Conflict. If it assumed, for the sake of argument, that there is a conflict between the telecommunications trade agreements and the ITRs, then the better analysis is that such agreements deal with the same subject matter and the agreement that is later in time, in this case the WTO agreement, controls.²

4.0 Regulatory Principles. The following responds to suggestions about the regulatory principles that should govern international telecommunications.

4.0.1 Simplicity – Forbearance from Regulation. Any international regulatory regime should be as simple as possible so as not to deter entry, innovation, or to complicate operations.

4.0.2 The Problem of Asymmetry/National Regulatory Regimes and Change. As noted, national telecommunications regulatory regimes differ, as do competition law regimes where such exist. Granted that there are some trends toward harmonization, de facto if not de jure. These differences, changes, and differing rates of change, would severely complicate any process for crafting a treaty level regulatory

¹ For example, Article 31 of the Vienna Convention on the Law of Treaties (hereinafter, "Vienna Convention") requires that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purposes."

The purposes of the ITRs (at Article 1) can be accomplished consistent with the WTO agreements.

² See, Vienna Convention at Article 30.

regime. This will not, however, foreclose the valuable work on voluntary technical standards such as is the primary activity of ITU-T.

4.0.3 Conflict Avoidance. It has been suggested that the ITRs might incorporate language from the WTO agreements. An ITR provision which uses text from the WTO Agreements, *e.g.*, the Reference Paper is, at first impression, possibly appealing. But this does not withstand careful analysis. If one were to add such text, there immediately arises the likelihood that even the same text would be differently defined in different fora. Conflicting regulatory regimes would greatly impair the development of international telecommunications.

5.0 Conclusion. Accordingly, it is concluded that the consideration of changes in the ITRs could and should be deferred.

5.0.1 Rather than addressing revisions of the ITRs – certainly in any way that attempts to create a body of substantive economic regulation – it would be better to focus on actions that would foster continuation of the favorable trends discussed above. The following are examples of such areas:

5.0.1.1 Education Generally. It is probable that part of the interest in securing revised, and more detailed ITRs, is based on the perceived uncertainties occasioned by changes in the market and the regulatory regimes. A certain amount of uncertainty is a natural concomitant of such changes. It is also a component of a market economy with the entry and exit of operators and it is not elegant. The better approach is not to try to freeze change in the name of order, but rather to educate about change and the options available to each country as it crafts its own regime. There will always be variations in national regimes.

5.0.1.2 Documentation of Options. Given that there will be differences in national patterns of telecommunications, the focus in various ITU fora, whether Study Groups, or otherwise should be to define and display the arrangements that are likely to arise under the various regimes. Thus, for example, there would not necessarily be a single regime. Discussing and displaying alternatives would educate Members States and Sector Members on what they may expect in a world where telecommunications markets and regulatory regimes are changing.

Herbert E. Marks

Annex I

Telecommunications Has Been Expanding Worldwide

Main Telephone Lines

<i>CAGR 1995-98</i>	<i>Growth in Main telephone lines</i>	<i>Growth in Teledensity (main telephone lines per 100 inhabitants)</i>	
Low Income	17.1%	14.9%	
Lower Middle Income	16.3%	15.2%	
Upper Middle Income	10.8%	9.0%	
High Income	3.1%	2.4%	
WORLD	6.9%	5.5%	WORLD
	10.4%	8.1%	Africa
	5.3%	3.9%	Americas
	12.5%	11.0%	Asia
	4.1%	3.9%	Europe
	2.6%	1.2%	Oceania

ITU World Telecommunication Indicators (October 1999)

Mobile Market

	WORLD	Developing-World Share
1990	>11 million users	~5%
1998	>300 million users	~20%

ITU World Telecommunication Development Report 1999

International Carriers

July 1995	367
July 1996	470
July 1997	586
July 1998	1,042
July 1999	1,760
July 2000 (estimate)	>2,200

TeleGeography 2000

International Telephone Traffic

	<i>Growth in Minutes of outgoing telephone traffic (CAGR 1995-98)</i>	International telephone circuits in 1998 (thousands)	
Low Income	11.6%	39.6	
Lower Middle Income	8.3%	176.4	
Upper Middle Income	13.5%	127.0	
High Income	9.2%	473.3	
WORLD	9.5%	816.2	WORLD
	9.8%	45.5	Africa
	12.3%	207.7	Americas
	10.0%	203.1	Asia
	7.0%	354.4	Europe
	9.5%	5.5	Oceania

ITU World Telecommunication Indicators (October 1999)

International Telephone Traffic from the U.S.

<i>from U.S. to:</i>	<i>Growth in U.S.-Billed Minutes (annual rate of growth 1992-97)</i>
Western Europe	14.9%
Africa	26.5%
Middle East	14.7%
Caribbean	16.2%
North and Central America	13.6%
South America	21.2%
Asia	26.7%
Oceania	32.1%
Eastern Europe	26.1%
Antarctica and Maritime	6.8%
<i>TOTAL</i>	<i>17.8%</i>

FCC Trends in the U.S. International Telecommunications Industry (September 1999), Table 8

Trans-Oceanic Capacity in Submarine Cable Systems

	Aggregate capacity (Gbps)						
	1995	1996	1997	1998	1999 planned	2000 planned	2001 planned
Trans-Atlantic	23	23	23	153	168	2,088	5,928
Trans-Pacific	4	4	14	24	189	349	349
Europe-Africa- Asia	1	1	11	11	91	111	111
<i>TOTAL</i>	<i>28</i>	<i>28</i>	<i>48</i>	<i>188</i>	<i>448</i>	<i>2,548</i>	<i>6,388</i>

TeleGeography 2000

International Leased Lines from the U.S.

<i>from U.S. to:</i>	<i>Growth in U.S.-Billed Revenues (annual rate of growth 1992-97)</i>
Western Europe	20.4%
Africa	18.5%
Middle East	16.9%
Caribbean	33.6%
North and Central America	14.4%
South America	26.0%
Asia	24.4%
Oceania	29.1%
Eastern Europe	44.2%
Antarctica and Maritime	94.0%
<i>TOTAL</i>	<i>21.9%</i>

FCC Trends in the U.S. International Telecommunications Industry (September 1999), Table 10

Satellites

	In Orbit	Under Construction
Asia Pacific	48	18
Europe	46	9
North America	39	16
Trans-Atlantic Ocean	24	7
Latin America	11	3
Trans-Indian Ocean	11	2
Trans-Pacific Ocean	10	0
Middle East	9	1
Africa	1	0
<i>TOTAL</i>	<i>199</i>	<i>56</i>

Via Satellite (July 1999)