

## ITU EXPERTS GROUP ON THE INTERNATIONAL TELECOMMUNICATION REGULATIONS OPTION 4: (DEFER DETERMINATIONS ON WHETHER TO CHANGE THE ITRs)

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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 cannon of construction is that the agreements should be read, if possible, in a manner that permits compliance with both agreements.<sup>1</sup> 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 33 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.<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> See, Vienna Convention at Article 30.

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.

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## 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>	
<b>Low Income</b>	17.1%	14.9%	
<b>Lower Middle Income</b>	16.3%	15.2%	
<b>Upper Middle Income</b>	10.8%	9.0%	
<b>High Income</b>	3.1%	2.4%	
<b>WORLD</b>	<b>6.9%</b>	<b>5.5%</b>	<b>WORLD</b>
	10.4%	8.1%	<b>Africa</b>
	5.3%	3.9%	<b>Americas</b>
	12.5%	11.0%	<b>Asia</b>
	4.1%	3.9%	<b>Europe</b>
	2.6%	1.2%	<b>Oceania</b>

*ITU World Telecommunication Indicators (October 1999)*

#### Mobile Market

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

*ITU World Telecommunication Development Report 1999*

#### International Carriers

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

*TeleGeography 2000*

**International Telephone Traffic**

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

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>
<b>Western Europe</b>	14.9%
<b>Africa</b>	26.5%
<b>Middle East</b>	14.7%
<b>Caribbean</b>	16.2%
<b>North and Central America</b>	13.6%
<b>South America</b>	21.2%
<b>Asia</b>	26.7%
<b>Oceania</b>	32.1%
<b>Eastern Europe</b>	26.1%
<b>Antarctica and Maritime</b>	6.8%
<b>TOTAL</b>	<b>17.8%</b>

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

**Trans-Oceanic Capacity in Submarine Cable Systems**

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

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>
<b>Western Europe</b>	20.4%
<b>Africa</b>	18.5%
<b>Middle East</b>	16.9%
<b>Caribbean</b>	33.6%
<b>North and Central America</b>	14.4%
<b>South America</b>	26.0%
<b>Asia</b>	24.4%
<b>Oceania</b>	29.1%
<b>Eastern Europe</b>	44.2%
<b>Antarctica and Maritime</b>	94.0%
<b><i>TOTAL</i></b>	<b><i>21.9%</i></b>

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

**Satellites**

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

Via Satellite (July 1999)