

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

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1. 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).
2. 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.tpeeditor.com/utsumi.htm>).

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,

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.

3. 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."

4. 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.
  
5. 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.

6. 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.

7. 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.
8. 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

1. 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.