|  |  |
| --- | --- |
|  | **Document EG-ITRs-1/2** |
| **7 September 2023** |
| **English only** |
|  |  |
| Contribution from HILL |
| OVERALL CONSIDERATIONS |
| **Purpose**Discussion**Action required**The document is submitted to EG-ITRs **for discussion**. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Reference**[Council Resolution 1379, revised 2023](https://www.itu.int/md/S23-CL-C-0121/en) |

**1. Introduction**

1.1 The work of the current ITR-EG is specified in its Terms of Reference[[1]](#footnote-1):

*2 Taking into consideration the work of the previous two Expert Groups, the review may consider, among others:*

*a) new trends in telecommunications/ICT and emerging issues in international telecommunications/ICT environment which may impact the ITRs,*

*b) empirical data on the current use of the ITRs by operating agencies and/or administrations and the proportion of global telecommunication services which now rely on the ITRs, and*

*c) the relevance of the ITRs which “consist of high-level guiding principles” in the current telecommunication/ICT environment.*

1.2 As shown below:

1. It is appropriate to continue discussions on the ITRs
2. All international telecommunication services rely on the ITRs to some extent
3. The 2012 ITRs include provisions on new issues, for which binding treaty-level provisions have been proposed in trade negotiations
4. The use of AI in international telecommunication services should be discussed in the context of the ITRs, as this is a new trend/emerging issue
5. Some criticism of the 2012 ITRs is not justified
6. There are overlaps between ITU’s work and proposals made in trade negotiations

1.3 Proposals made in trade negotiations indicate that agreement on treaty-level provisions regarding certain matters within the scope of ITU is a new trend and/or and emerging issue in telecommunications/ICTs and its environment which may impact the ITRs. In particular, there are provisions (agreed or proposed) in trade agreements regarding spam (see 1.16 below), cybersecurity (see 1.17 below), frequency allocation, and even network neutrality.

1.4 In light of the above, Member States are invited to consider the situation and to consider how to address it in the context of the review of the ITRs. In particular, they may wish to consider:

1. Provisions should refer to, and bind, only Member States, not private parties. (Some of the language of the 1988 ITRs, which were agreed when there were still many state-owned monopoly telecommunications operators, was carried over to the 2012 ITRs.)
2. The ITRs should complement the CS/CV, not overlap with it. Consequently, Member States may wish to consider abrogating, either in the CS/CV, or in the ITRs, provisions that overlap or are duplicative or redundant.
3. Member States may wish to consider whether new provisions are required to fill gaps and to address new/emerging issues.

1.5 A more detailed discussion for each of the articles of the 2012 ITRs, and for possible gap-filling, is provided in the addendums to this contribution.

**1.1 It is appropriate to continue discussions on the ITRs**

1.6 As a preliminary matter, we note that absence of agreement is not an argument to stop discussions. On the contrary, absence of agreement indicates the necessity to continue discussions: interests and positions can change over time, as can technologies and policies.

1.7 Thus, in our view, it is appropriate to continue discussions on the ITRs until such time as consensus is reached.

**1.2 All international telecommunication services rely on the ITRs to some extent**

1.8 Further, contrary to what seems to be implied in C 73[[2]](#footnote-2), and C 66[[3]](#footnote-3), all international telecommunication services rely on the ITRs to some extent, and the provisions of the ITRs **are** applicable in fostering the provision and development of international telecommunication/ICT services and networks. While most international telecommunication services no longer use the accounting rates of Article 6 of the 1988 ITRs, Internet traffic is enabled by the Special Arrangements of Article 9 of the 1988 ITRs[[4]](#footnote-4). Indeed, the 2012 ITRs recognize the fact, in their Article 8, that accounting rates are no longer prevalent, however Special Provisions were retained as Article 13, in order to ensure that Internet traffic would not be disrupted. See also the discussion regarding Articles 8 and 13 in the addendums to this contribution.

1.9 Requests for empirical data on the current use of the ITRs by operating agencies will inevitably result in replies to the effect that the ITRs are not used by operating agencies, because, in the current environment, operating agencies are mostly private companies and thus not directly bound by the ITRs, which are a treaty. While some provisions of the ITRs might be transposed to national law, operating agencies have no reason to know that they are indirectly affected by the ITRs. See also 1.32(a) below.

1.10 Requests for empirical data on the current use of the ITRs by administrations and the proportion of global telecommunication services which now rely on the ITRs should result in replies to the effect that essentially all international Internet traffic is enabled by the Special Arrangements provision of the ITRs.

1.11 If today’s telecommunications services do not rely on the ITRs, and if the ITRs are no longer applicable, then why haven’t countries that are not signatories to the 2012 ITRs withdrawn from the 1988 ITRs, or suspended the operation of the 1988 ITRs, or proposed to terminate the ITRs[[5]](#footnote-5)? Surely if the ITRs are not needed, then Member States should withdraw from it, or propose to terminate it, instead of continuing to be bound by it.

**1.3 The 2012 ITRs include provisions on new issues, for which binding treaty-level provisions have been proposed in trade negotiations**

1.12 Further, the 2012 ITRs include provisions on new issues, in particular countering spam, security, e-waste, and accessibility. Many countries, including in particular developed countries, have proposed to negotiate binding treaty-level provisions for some of those issues in other forums, such as trade negotiations, see 1.23 ff. below and the addendums to this contribution regarding the corresponding articles of the 2012 ITRs. Thus discussions on those issues should take place, regardless of whether or not certain provisions of the 1988 ITRs are no longer relied upon.

1.13 In particular, proposals being discussed in the WTO JSI, under the heading “D.2(2), Cooperation”, could be seen as an attempt to put the WTO in charge of every significant ICT issue, which means putting the WTO in charge of everything. Again, this underscores that discussions on those issues should take place, regardless of whether or not certain provisions of the 1988 ITRs are no longer relied upon.

1.14 And proposals being discussed in the WTO JSI, under the heading “D.3 Capacity building”, could be seen as an attempt to recreate ITU-D within WTO. This too underscores that discussions on those issues should take place, regardless of whether or not certain provisions of the 1988 ITRs are no longer relied upon.

1.15 The WTO JSI provisions on spam and security are far more detailed and prescriptive than the provision in the 2012 ITRs, see Addendums 6 and 7 to the present contribution.

1.16 The WTO JSI provision on spam includes a footnote that would appear to allow spam to be sent to an IP address; this could result in unwanted messages being sent directly to a user’s personal computer or smartphone, by targeting their IP address. For example, unwanted advertising could be sent directly to a personal computer or smartphone. Perhaps this was intended, in order to enshrine in a binding international treaty the current Internet funding model based on targeted advertising. Or perhaps it was not intended, and is a reflection of possible lack of technical knowledge by WTO negotiators.

1.17 Regarding security, one of the topics under discussion in the WTO JSI is whether to refer to “cybersecurity” – which has traditionally been used to refer to the non-content related technical aspects of ICT security, such as confidentiality and authentication – or to “information security” – which has traditionally been used within the United Nations to refer also to content-related aspects of ICT security, such as combating so-called disinformation.

1.18 Once again, the scope and nature of discussions in the WTO JSI indicates that discussions on spam and security should take place, regardless of whether or not certain provisions of the 1988 ITRs are no longer relied upon.

**1.4 The use of AI in international telecommunication services should be discussed in the context of the ITRs**

1.19 In addition, the emergence of Artificial Intelligence (AI) and software based upon it is a new trend and an emerging issue. While many aspects of AI are outside the scope of the ITU, surely the use of AI in international telecommunication services is squarely within the scope of the ITU. For example, AI can be used for network management, including traffic shaping (optimization of traffic). A committee of the US Congress has recently voted to request that a study be conducted on accountability measures for AI systems used by communications networks.[[6]](#footnote-6)

1.20 There appears to be an emerging consensus[[7]](#footnote-7) that, at a minimum:

1. AI systems should be transparent: it should be clear when something is AI-produced, and the training data and model architectures should be disclosed;
2. builders of AI systems should be made accountable for the outputs produced
3. AI systems should not have full autonomous control of critical systems or infrastructure (which would include basic telecommunications infrastructure).

1.21 Specific suggestions regarding AI are given in Addendum 3 to this contribution.

**1.5 Some criticism of the 2012 ITRs is not justified**

1.22 Criticism of the 2012 ITRs has been addressed in academic writings[[8]](#footnote-8), [[9]](#footnote-9), which show that some of that criticism is not justified from a legal point of view.

**1.6 There are overlaps between ITU’s work and proposals made in trade negotiations**

1.23 There are numerous overlaps between work carried out in the International Telecommunication Union (ITU) and trade-related proposals regarding e-commerce and telecommunications that have been agreed in plurilateral instrument such at the Trans-Pacific Partnership (TPP)[[10]](#footnote-10) or that are being proposed for discussion in the context of the World Trade Organization (WTO) work on e-commerce[[11]](#footnote-11) or other plurilateral agreements such as Trade in Services (TISA).

1.24 Indeed, several Member States, in particular developed countries, have proposed, in the WTO Joint Statement Initiative (JSI) on e-commerce, that provisions regarding matters covered by the 2012 ITRs should be agreed and somehow made binding for at least some WTO members.

1.25 The analysis in sections 2 through 11 below is based on provisions in TPP, recent proposals in the WTO Joint Statement Initiative (JSI) on e-commerce, and leaked versions of TISA. The provisions in TPP, the JSI on e-commerce, and TISA are similar.

1.26 As shown in detail in sections 2 through 11 below, many of the provisions go against what has been agreed in ITU. It is not clear why trade negotiations should be used to override agreements made in a specialized agency that has greater expertise in the subject matter than does an agency whose mandate is to facilitate international trade.

1.27 Further, in some cases developed countries have made proposals in free trade negotiations that are exactly the opposite of the proposals that they have made in ITU. For example, developed countries have opposed detailed binding provisions on international mobile roaming in ITU, but agreed them in TPP (and proposed them in TISA and plurilateral agreements such as the JSI on e-commerce); the same holds for a provision on recourse to national authorities by foreign enterprises; and for provisions on security and for countering spam.[[12]](#footnote-12) And, more recently, proposals have been made in the JIS on e-commerce with respect to network neutrality, whereas developed countries have opposed including such provisions in the ITRs.

**1.7 Conclusion**

1.28 In light of the above, it appears that agreement on treaty-level provisions regarding those matters is a new trend and/or and emerging issue in telecommunications/ICTs.

1.29 This has led to comments from civil society[[13]](#footnote-13), [[14]](#footnote-14), [[15]](#footnote-15).

1.30 The trends/emerging issues in question may impact the ITRs.

1.31 Further, since new provisions are being proposed/agreed, it appears that additional high-level guiding principles for in the current telecommunication/ICT environment should be introduced in the ITRs.

1.32 Therefore, Member States are invited to consider the situation and to consider how to address it in the context of the review of the ITRs. In particular, they may wish to consider:

1. Provisions should refer to, and bind, only Member States, not private parties. (Some of the language of the 1988 ITRs, which were agreed when there were still many state-owned monopoly telecommunications operators, was carried over to the 2012 ITRs.)
2. The ITRs should complement the CS/CV, not overlap with it. Consequently, Member States may wish to consider abrogating, either in the CS/CV, or in the ITRs, provisions that overlap or are duplicative or redundant.
3. Member States may wish to consider whether new provisions are required to fill gaps and to address new/emerging issues.

1.33 A more detailed discussion for each of the articles of the 2012 ITRs, and for possible gap-filling to address new trends and emerging issues, is provided in the addendums to this contribution.

**2. Allocation and use of frequencies and numbers**

2.1 Articles 13.5 and 13.19 of TPP contain specific provisions on allocation and use of frequencies and numbers, including number portability. Similar provisions are proposed in the JSI on e-commerce.

2.2 Yet this is one of the core mandates of the ITU, and there are numerous ITU Recommendations[[16]](#footnote-16), Resolutions and even treaty provisions for frequencies[[17]](#footnote-17).

2.3 The ITU provisions regarding number allocations and portability are not binding. Since there is no agreement in ITU on making such provisions binding, the TPP provisions contradict what has been agreed in ITU.

2.4 Further, the TPP provisions on the use of frequencies impose certain restrictions on domestic measures; such restrictions have not been agreed in ITU. If such restrictions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on frequency matters.

**3. Access to infrastructure and interconnection**

3.1 Articles 13.7-13.12 and 13.14-13.15 of TPP contain specific provisions on access to infrastructure and interconnection; article 13.13 has provisions on co-location. Similar provisions are proposed in the JSI on e-commerce.

3.2 ITU publishes best practices and capacity building for conditions for the use of infrastructure by competitors[[18]](#footnote-18) and for interconnection[[19]](#footnote-19).

3.3 The relevant ITU provisions are not binding. Since there is no agreement in ITU on making such provisions binding, the TPP provisions contradict what has been agreed in ITU. If binding provisions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

**4. Internet Interconnection**

4.1 Article 14.12 of TPP states “The Parties recognise that a supplier seeking international Internet connection should be able to negotiate with suppliers of another Party on a commercial basis. These negotiations may include negotiations regarding compensation for the establishment, operation and maintenance of facilities of the respective suppliers.”

4.2 This is related to, albeit less specific than, the provisions of ITU-T Recommendation D.50, which recommends: “that administrations [Member States] take appropriate measures nationally to ensure that parties (including operating agencies authorized by Member States) involved in the provision of international Internet connections negotiate and agree to bilateral commercial arrangements, or other arrangements as agreed between administrations, enabling direct international Internet connections that take into account the possible need for compensation between them for the value of elements such as traffic flow, number of routes, geographical coverage and cost of international transmission, and the possible application of network externalities, amongst others;”.

**5. Security**

5.1 Articles 14.15 and 14.16 of TPP call for cooperation regarding security and cybersecurity. Similar provisions are proposed in the JSI on e-commerce.

5.2 There are numerous ITU Recommendations on security[[20]](#footnote-20) and cybersecurity[[21]](#footnote-21), and article 6 of the 2012 International Telecommunication Regulations, a treaty, provides that: “Member States shall individually and collectively endeavor to ensure that the security and robustness of international telecommunication networks in order to achieve effective use thereof and avoidance of technical harm thereto, as well as the harmonious development of international telecommunication services offered to the public.”

5.3 The TPP provision is more specific than the ITU provision. Thus the TPP provision contradicts what has been agreed in ITU. If specific binding provisions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

**6. Spam**

6.1 Articles 14.14 and 14.15 of TPP call for cooperation regarding spam. Similar provisions are proposed in the JSI on e-commerce.

6.2 There are numerous ITU-T Recommendations on spam[[22]](#footnote-22), and article 7 of the 2012 International Telecommunication Regulations, a treaty, provides that: “Member States should endeavor to take necessary measures to prevent the propagation of unsolicited bulk electronic communications and minimize its impact on international telecommunication services. Member States are encouraged to cooperate in that sense.”

6.3 The TPP provision is far more specific than the ITU provision. Thus the TPP provision contradicts what has been agreed in ITU. If specific binding provisions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

**7. Open Source software**

7.1 Article 14.17 of TPP would appear to restrict the use of open source. Similar provisions are proposed in the JSI on e-commerce.

7.2 ITU WTSA Resolution 90 (Hammamet 2016) resolves that ITU-T should continue to work on the benefits and disadvantages of the implementation of open source projects.

7.3 Thus the TPP provision would appear to go against what has been agreed in ITU.

**8. Universal service and net neutrality**

8.1 Article 13.17 of TPP covers universal service. Similar provisions are proposed in the JSI on e-commerce.

8.2 ITU has numerous activities related to universal service.[[23]](#footnote-23)

8.3 The TPP provision imposes certain restrictions on domestic measures; such restrictions have not been agreed in ITU. If such restrictions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

8.4 A provision related to network neutrality has been proposed in the JSI on e-commerce.

8.5 The JSI provision imposes certain restrictions on domestic measures; such restrictions have not been agreed in ITU. If such restrictions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

**9. Roaming**

9.1 Article 13.6 of TPP contains detailed provisions on international mobile roaming, including on the regulation of rates (prices).

9.2 There are ITU-T Recommendations on roaming[[24]](#footnote-24) and articles 4.4 through 4.7 of the 2012 International Telecommunication Regulations, a treaty, provide that: “Member States shall foster measures to ensure that authorized operating agencies provide free-of-charge, transparent, up-to-date and accurate information to end users on international telecommunication services, including international roaming prices and the associated relevant conditions, in a timely manner. Member States shall foster measures to ensure that telecommunications services in international roaming of satisfactory quality are provided to visiting users. Member States should foster cooperation among authorized operating agencies in order to avoid and mitigate inadvertent roaming charges in border zones. Member States shall endeavor to promote competition in the provision of international roaming services and are encouraged to develop policies that foster competitive roaming prices for the benefit of end users.”

9.3 The TPP provision is more specific than the ITU provision. Thus the TPP provision contradicts what has been agreed in ITU. If specific binding provisions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

**10. Regulatory body and licensing**

10.1 Article 13.6 of TPP calls for the establishment of independent telecommunication regulatory bodies. Article 13.8 of TPP includes detailed requirements on requirements for licenses for suppliers of public telecommunication services. Similar provisions are proposed in the JSI on e-commerce.

10.2 ITU has numerous activities related to best practices for regulatory bodies[[25]](#footnote-25) and licensing[[26]](#footnote-26).

10.3 The relevant ITU provisions are not binding. Since there is no agreement in ITU on making such provisions binding, the TPP provisions contradict what has been agreed in ITU. If binding provisions are felt to be useful and necessary, then they should be negotiated and agreed in the ITU, which is the agency with expertise on such matters.

**11. Recourse**

11.1 Article 13.12 of TPP provides that enterprises have the right to have recourse to the regulatory and authorities of other states. Similar provisions are proposed in the JSI on e-commerce.

11.2 A very similar provision was proposed for the 2012 International Telecommunication Regulations, but was rejected by the developed countries.

11.3 Thus the TPP goes against what had been agreed in ITU.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. <https://www.itu.int/md/S23-CL-C-0121/en> [↑](#footnote-ref-1)
2. <https://www.itu.int/md/S23-CL-C-0073/en> [↑](#footnote-ref-2)
3. <https://www.itu.int/md/S23-CL-C-0066/en> [↑](#footnote-ref-3)
4. Hill, Richard (2013) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History*,Schulthess/Springer, p. 8 [↑](#footnote-ref-4)
5. See Article 65 of the Vienna Convention on the Law of Treaties [↑](#footnote-ref-5)
6. <https://www.meritalk.com/articles/house-panel-takes-step-toward-ai-regulation/> [↑](#footnote-ref-6)
7. The US government has obtained voluntary commitments from leading AI companies, see:

 <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/> ; and it plans to internationalize those commitments, see:
 <https://insidetrade.com/daily-news/blinken-raimondo-promise-ai-coordination-democratic-partners> .

The European Parliament is developing a regulation, see:
 <https://www.europarl.europa.eu/news/en/press-room/20230505IPR84904/ai-act-a-step-closer-to-the-first-rules-on-artificial-intelligence> .

The US Congress may consider some measures, see:
 <https://www.foxnews.com/politics/house-baby-step-ai-regulation-government-accountability> .
For an AI developer’s point of view, see:
 <https://aiguide.substack.com/p/thoughts-on-a-crazy-week-in-ai-news> . [↑](#footnote-ref-7)
8. Hill, Richard (2013) ["WCIT: failure or success, impasse or way forward?"](http://ijlit.oxfordjournals.org/content/21/3/313.abstract), *International Journal of Law and Information Technology,* vol. 21 no. 3, p. 313,  DOI:10.1093/ijlit/eat008 [↑](#footnote-ref-8)
9. Hill, Richard (2013) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History*,Schulthess/Springer, p. 75 [↑](#footnote-ref-9)
10. The full text of TPP is available at:
 <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [↑](#footnote-ref-10)
11. The text being negotiated in WTO is not publicly available, but a recently leaked version can be found here:
 <https://www.bilaterals.org/?wto-2023-plurilateral-ecommerce-48862> [↑](#footnote-ref-11)
12. For more details see Hill, Richard (2013) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History,* Schulthess/Springer [↑](#footnote-ref-12)
13. <https://www.newsclick.in/Why-Spam-Trade-Issue-Suits-Dominant-Developed-Countries> [↑](#footnote-ref-13)
14. <http://apig.ch/WTO%20ITU%20overlaps%20paper.pdf> [↑](#footnote-ref-14)
15. Hill, Richard (2020) “[A New Convention for Data and Cyberspace](https://itforchange.net/digital-new-deal/2020/10/30/a-new-convention-for-data-and-cyberspace/)”, in the call for a [Digital New Deal](https://itforchange.net/digital-new-deal/) (October 2020) [↑](#footnote-ref-15)
16. For example, ITU-T Recommendations E.190, E.164, and E.164 Supplement 2 on Number Portability. [↑](#footnote-ref-16)
17. The ITU Radio Regulations [↑](#footnote-ref-17)
18. <https://www.itu.int/en/ITU-D/Technology/Pages/default.aspx> [↑](#footnote-ref-18)
19. See Recommendation ITU-T D.50 and its Supplements. [↑](#footnote-ref-19)
20. See Recommendations ITU-T X.800-X.849; and X.1000-X.1099. [↑](#footnote-ref-20)
21. See Recommendations ITU-T X.1200-X.1299; X.1500-X.1599; X.1600-X.1699. [↑](#footnote-ref-21)
22. See Recommendations ITU-T X.1230-X.1249. [↑](#footnote-ref-22)
23. See for example: <http://www.ictregulationtoolkit.org/toolkit/4> [↑](#footnote-ref-23)
24. See Recommendations ITU-T D.97-D.99. [↑](#footnote-ref-24)
25. See for example: <http://www.ictregulationtoolkit.org/toolkit/6> [↑](#footnote-ref-25)
26. See for example: <http://www.ictregulationtoolkit.org/toolkit/3> [↑](#footnote-ref-26)