

TELECOMMUNICATION  
LAWS IN EUROPE

Sixth Edition

EDITOR  
JOACHIM SCHERER

BAKER & MCKENZIE

BLOOMSBURY

# The Law of the International Telecommunication Union and the World Trade Organisation<sup>1</sup>

Joachim Scherer and Serge Pannatier

*Baker & McKenzie, Frankfurt/Geneva*

## THE ITU

### History

**4.1** The International Telecommunication Union (ITU) was established on 9 December 1932. On 1 January 1949, it became the specialised UN agency for telecommunications by an agreement with the United Nations of 4 September/15 November 1947.<sup>2</sup>

The ITU dates back to the International Telegraph Union, which was founded by 19 European states in 1865.<sup>3</sup>

Following the patenting of the telephone in 1876 and the subsequent growth of the telephony market, the International Telegraph Union began, in 1885, to draw up the first provisions governing the international telephone service. With the invention in 1896 of wireless telegraphy and the growing utilisation of this new radio communication technology, it was decided to convene a preliminary radio conference in 1903 to study the question of international regulations for radio telegraph communications. The first International Radio Telegraph Conference was held in 1906 in Berlin and led to the first International Telegraph Convention (revised London 1912, Washington DC 1927). In 1924, the International Telephone Consultative Committee (CCIF) was set up; the International Telegraph Consultative Committee (CCIT) was established in 1925 and the International Radio Consultative Committee (CCIR) in 1927. These bodies were responsible for coordinating the technical studies, tests and measurements in the various fields of telecommunications and for drawing up international standards.

**4.2** At the 1932 Madrid conference, the Union decided to combine the International Telegraph Convention of 1865 and the International Radio Telegraph Convention of 1906 to form the International Telecommunication Convention. It was also decided to change the name of the Union to International Telecommunication Union.

---

1 Editing of this chapter closed on 1 January 2013. Joachim Scherer is the author of the ITU subchapter; Serge Pannatier is the author of the WTO subchapter.

2 UNTS, Vol 30 no 175.

3 For a history of the ITU see Tegge, *Die Internationale Telekommunikations-Union* (Baden-Baden, 1994), pp 28 et seq.

After World War II the ITU became a UN specialised agency, as mentioned above, and the headquarters of the organisation were transferred in 1948 from Bern to Geneva. At the same time, the International Frequency Registration Board (IFRB) was established to coordinate the increasingly complex task of managing the radio frequency spectrum. The Table of Frequency Allocations, which had first been introduced in 1912, was declared mandatory.

In 1956, the two International Consultative Committees, CCIT and the CCIF, were merged to form the International Telegraph and Telephone Consultative Committee, with a view to responding more effectively to the requirements generated by the development of these two types of communication.

**4.3** In 1989, the Plenipotentiary Conference held in Nice<sup>4</sup> established the Telecommunications Development Bureau (BDT) in order to promote the development of telecommunication technologies and infrastructures in the developing countries of the world. At the same time, the Nice Plenipotentiary Conference launched an in-depth review of the structure and functioning of the Union with a view to achieving greater cost effectiveness within and between the ITU organs and activities and to improve the Union's structure, organisation, finance, staff, procedure and coordination to ensure that the Union would respond more effectively to the needs of its members. In 1992, an additional Plenipotentiary Conference held in Geneva decided on a number of far-reaching organisational reform measures, including the establishment of three Sectors, corresponding to the ITU's three main areas of activity: the Telecommunication Standardization Sector (ITU-T), the Radio communication Sector (ITU-R), and the Telecommunication Development Sector (ITU-D). For each sector, an advisory group was established, including representatives of Member States and representatives of industry, to review the priorities, programmes, operations and strategies of the sectors and provide guidance for their operation.<sup>5</sup>

## Legal Framework

**4.4** The legal framework of the ITU comprises three legal instruments, which have international treaty status. They are:

- the Constitution of the International Telecommunication Union ('CS'), which is the 'basic instrument' of the Union;<sup>6</sup>
- the Convention of the International Telecommunication Union ('CV'); and
- the Administrative Regulations, which complement the Constitution and Convention.

**4.5** The Constitution contains the basic provisions regarding the purposes of the Union, its composition, the rights and obligations of its members, its legal

4 For a brief summary of the reform process initiated at the Nice Plenipotentiary Conference, see Noll, 'The International Telecommunication Union', in MMR 8/1999, pp 465 et seq.

5 See paras 4.35, 4.44 and 4.51 below.

6 Art 4 no 29 CS; in the following, references to the Constitution (CS) and the Convention (CV) are to the versions as amended by the Plenipotentiary Conference Kiyoto, 1994, the Plenipotentiary Conference Minneapolis, 1998, the Plenipotentiary Conference Marrakesh, 2002, the Plenipotentiary Conference 2006, Antalya, and the Plenipotentiary Conference 2010, Guadalajara. References are to the articles and margin numbers of the Constitution. A consolidated version can be found in International Telecommunication Union, Collection of the basic texts of the International Telecommunication Union adopted by the Plenipotentiary Conference, 2011 Edition.

instruments and sets out the organisational structure of the Union, including its three Sectors, their working methods and overall provisions on the functioning of the Union. The Constitution also contains a number of general provisions relating to telecommunications, such as the right of the public to use the international telecommunications service (Art 33 CS), the principle of secrecy of telecommunications (Article 37 CS) and the principle of priority of telecommunications concerning safety of life (Article 40 CS). Furthermore, the CS contains basic substantive provisions regarding radio communications, such as the principles of effective use of the radio frequency spectrum and of the geostationary satellite and other satellite orbits (Article 44 CS), the obligation to avoid harmful interference (Article 45 CS), and the principle of priority for distress calls and messages (Article 46 CS).

**4.6** The Convention establishes detailed rules on the functioning of the Union and its organs, contains specific provisions regarding conferences and assemblies, and sets out the details of a voluntary arbitration procedure which may be initiated by Member States to settle their disputes on questions relating to the interpretation or application of the Constitution, the Convention or of the Administrative Regulations.

**4.7** The two basic legal instruments of the Union, the Constitution and Convention, are complemented by the Administrative Regulations, which regulate the use of telecommunications and which are binding on all Member States. These Administrative Regulations are:

- the International Telecommunication Regulations; and
- the Radio Regulations.<sup>7</sup>

The standards (Recommendations) which are adopted by ITU-R and ITU-T are not legally binding, unless they are specifically incorporated in the Regulations.<sup>8</sup>

## The Radio Regulations

**4.8** The Radio Regulations are an international treaty governing the use of the radio frequency spectrum and the geostationary satellite and non-geostationary orbits. The provisions of the radio regulations are legally binding. Under the Radio Regulations, the radio frequency spectrum is divided into frequency bands which are allocated to some 40 radio services for radio communication on an exclusive or shared basis. The list of services and frequency bands allocated in different regions constitute the Table of Frequency Allocations, which is part of the Radio Regulations. The Radio Regulations are regularly amended by the World Radiocommunication Conference.<sup>9</sup>

---

<sup>7</sup> The Radio Regulations were signed on 17 February 2012 with a majority of their provisions having entered into force on 1 January 2013.

<sup>8</sup> There was consensus that ITU Recommendations should remain legally non-binding at the World Conference on International Telecommunications 2012 in Dubai; see WCIT Highlights, Issue No. 2 (<http://www.itu.int/osg/wcit-12/highlights/dec04.html>, last visited 28 December 2012).

<sup>9</sup> See para 4.28 below.

## International Telecommunication Regulations

**4.9** The International Telecommunication Regulations ('ITR')<sup>10</sup> were adopted at the World Administrative Telegraph and Telephone Conference in Melbourne (1988) and have been subject to ongoing discussions at least since the Plenipotentiary Conference of Minneapolis 1998. The ITR are binding international instruments<sup>11</sup> subject to revision by the World Conference on International Telecommunications.<sup>12</sup>

**4.10** The purpose of the ITR is to establish general principles relating to the provision and operation of international telecommunications services offered to the public as well as to the underlying international telecommunication transport means used to provide such services.<sup>13</sup> The ITR contains statements of principle and specific provisions regarding the routing of international traffic, as well as charging and accounting principles. The ITR obliges Member States to ensure that their telecommunications 'administrations' or recognised private operating agencies cooperate in the establishment, operation and maintenance of the international network to provide a satisfactory quality of service,<sup>14</sup> to promote the implementation of international telecommunication services and to endeavour to make such services generally available to the public international networks.<sup>15</sup> The ITR recognises the right of Member States to allow their administrations and telecommunications organisations to enter into special mutual arrangements provided that no technical harm is caused to the operation of the telecommunication facilities of third countries.<sup>16</sup>

**4.11** The ITR establishes the principle that for each applicable telecommunication service, the telecommunications operators concerned shall 'by mutual agreement' establish and revise the accounting rates to be applied between them, ie the mutual compensation for receiving and terminating calls.<sup>17</sup> In 1997, the Federal Communications Commission of the United States ('FCC') issued a 'Benchmark Order' which took effect on 1 January 1998.<sup>18</sup> It obliged US carriers to negotiate cost-based accounting and settlement rates with corresponding foreign carriers according to a time table established by the FCC. Where carriers were unable to do so, the FCC specified what rates American carriers may pay. Both this unilateral challenge to the ITU's accounting rate regime and the methodology applied by the FCC led to considerable controversy.<sup>19</sup> The unilateral enforcement of the FCC's Benchmark Order forced the telecommunications operators in other ITU Member States to

---

10 International Telecommunication Union, Final Acts of the World's Administrative Telegraph and Telephone Conference Melbourne, 1988, International Telecommunication Regulations, Geneva, 1989.

11 Art 54 no 215 CS.

12 Art 25 no 146 CS.

13 Art I.1 ITR.

14 Art 3.1 ITR.

15 Art 4.1 ITR.

16 Art 9.1 ITR.

17 Art 6.2.1; see also ITU Recommendation D.140 Accounting Principles for International Telephone Services, which established key principles for accounting rates, such as the principle of cost orientation and non-discrimination.

18 Federal Communications Commission, In the matter of International Settlement Rates – Report and Order, FCC 97/280, Docket, no 96–261, adopted 7 August 1997.

19 See William J Drake, 'Towards Sustainable Competition in Global Telecommunications: From Principle to Practice – Summary Report of the Third Aspen Institute Roundtable on International Telecommunications' (Washington, 1999); see also William J Drake, 'The Rise

reduce the rates at which US carriers compensate them for terminating traffic and thus rendered the relevant provision of the ITR de facto irrelevant.<sup>20</sup>

**4.12** Given that the ITR had not been changed for a decade, despite the dramatic changes in technology and market structure, the Plenipotentiary Conference (Minneapolis 1998) instructed the Secretary General to review to what extent the needs of Member States were still satisfied by the ITU instruments, especially the ITR.<sup>21</sup> However, neither an expert group nor a Council working group, which was open to all Member States, were able to achieve consensus on how to proceed until 2006. Three approaches had been suggested by Member States, namely: (1) to leave the ITR unchanged, (2) to amend the ITR, including adding new provisions especially regarding the Internet, or (3) to terminate the ITR and transfer certain provisions to the Constitution, Convention and ITU-T Recommendations.<sup>22</sup>

**4.13** Whilst the Plenipotentiary Conference Antalya 2006 had agreed to organise a World Conference on International Telecommunications ('WCIT') to review the ITRs in 2012,<sup>23</sup> the major issue amongst Member States remained controversial: there has been no answer to the question whether and to what extent the ITU should gain responsibilities in matters of the Internet with respect to both standardisation and regulation. At present, assignment of IP-addresses is handled by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-governmental organisation tasked with Internet governance. Some countries, in particular Russia, China, Iran, Saudi Arabia and some African States, intend for the ITU to take over this task. Other countries take a very critical stance towards such a shift of competences. They want to maintain the multi-stakeholder Internet governance model and fear that governmental supervision and regimentation can lead to dangers for freedom in cyberspace. As a result of the disagreement on matters of Internet governance the new ITRs, which have been adopted by WCIT-12,<sup>24</sup> merely contain some provisions referring to unsolicited electronic communications ('spam') and cyber-security. However, to some Member States those passages, too, seem to be too extensive. Those states, amongst them the United States, Japan, Australia and many EU Member States, announced that they would not or at least not without further national consultation ratify the new ITRs. Another issue with the new ITRs arises with respect to network neutrality, ie the neutrality of treatment of data in respect of transfer rates and transmission fees. Even after 15 years of debate, the process of ITR reform still has not come to a conclusion.

---

and Decline of the International Telecommunications Regime', in Christopher T Marsden (ed), *Regulating the Global Information Society* (London 2000), pp 124, 170 et seq.

20 See also William J Drake, in Christopher T Marsden (ed), *Regulating the Global Information Society* (London 2000), p 172.

21 Resolution 79.

22 Cf Expert Group on the International Telecommunication Regulations, Executive Summary of the Findings of the Group of Experts on Reform of the International Telecommunication Regulations, May 2000; Working Group on the International Telecommunication Regulations, Report 3 rev 1, 11–13 May 2005.

23 Resolution 146 (Antalya, 2006).

24 See International Telecommunication Union, Draft of the future ITRs; <http://www.itu.int/en/wcit-12/Documents/draft-future-itrs-public.pdf> (last visited 28 December 2012).

## Membership

**4.14** Membership of the ITU is open to governments as well as to private organisations (the 'Sector Members').<sup>25</sup> The ITU currently (January 2013) has 193 Member States and over 700 Sector Members. The membership of states is based on the principle of universality: any state which is a Member State of the United Nations or any other state with the approval of two-thirds of the Member States of the Union<sup>26</sup> may accede to the Union. Withdrawal is possible at any time with a one-year denunciation period.<sup>27</sup> Each Member State has one vote at all Plenipotentiary Conferences, all World Conferences and all Sector Assemblies and Study Group Meetings and, if it is a Member State of the Council, all sessions of the Council ('one country, one vote').<sup>28</sup>

**4.15** The Sector Members are recognised operating agencies (including carriers, telecommunication service providers, equipment manufacturers), scientific or industrial organisations and financial or development institutions which are approved by the Member States concerned, other entities dealing with telecommunication matters which are approved by the Member State concerned, regional and other international telecommunication, standardisation, financial or development organisations.<sup>29</sup> Sector Members may elect to join one or more of the ITU's three Sectors, depending on their particular interests. They are entitled to participate fully in the activities of the Sector of which they are members and, in particular, may provide chairmen and vice chairmen of Sector Assemblies and meetings as well as World Telecommunication Development Conferences; they are entitled to take part in the adoption of questions and recommendations and in decisions relating to the working methods and procedures of the sector concerned. They do not participate, however, in the Plenipotentiary Conference nor in the Council. They are not entitled to vote on amendments of the Constitution or of the Convention which are the prerogative of the Plenipotentiary Conference<sup>30</sup> nor on the adoption or amendment of administrative regulations, which are the prerogative of the World Conference on International Telecommunications<sup>31</sup> and of the World Radiocommunications Conferences.<sup>32</sup> In an attempt to broaden the participation of industry in the Union's proceedings, the assemblies and conferences of the individual Sectors<sup>33</sup> have been granted the right to admit entities or organisations to participate as 'associates' in the work of a given Study Group or subgroup.<sup>34</sup>

## Purposes and Principles of the ITU

**4.16** The ITU is an intergovernmental organisation which is based, according to the preamble of the Constitution, on the recognition of 'the sovereign right of each state to regulate its telecommunication'. The Union has been established 'with the object of facilitating peaceful relations, international cooperation among peoples

---

25 Art 2 no 20 CS.

26 Art 2 no 23 CV.

27 Art 57 CV.

28 Art 3 no 27 CV.

29 Annex no 1001 b CS, art 19 no 228–231 CV.

30 Art 8 no 57 CS.

31 Art 25 no 146 CS.

32 Art 13 no 89 CS, art 7 no 114 CV.

33 See below, paras 4.28, 4.30, 4.40, 4.48.

34 Art 20 no 241 A – 241 E CV.

and economic and social development by means of efficient telecommunications services'.<sup>35</sup> To this end, the purposes of the Union are, *inter alia*:

- to maintain and extend international cooperation among all its Member States for the improvement and rational use of telecommunications of all kinds;
- to promote and enhance participation of entities and organisations in the activities of the Union and foster fruitful cooperation and partnership between them and Member States for the fulfilment of the overall objectives as embodied in the purposes of the Union;
- to promote and to offer technical assistance to developing countries in the field of telecommunications;
- to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services;
- to promote the extension of the benefits of the new telecommunication technologies to all the world's inhabitants;
- to promote the use of telecommunications services with the objective of facilitating peaceful relations;
- to harmonise the actions of Member States and promote fruitful and constructive cooperation and partnership between Member States and Sector Members in the attainment of those ends; and
- to promote, at the international level, the adoption of a broader approach to the issues of telecommunications in the global information economy and society, by cooperating with other world and regional intergovernmental organisations and those intergovernmental organisations concerned with telecommunications.<sup>36</sup>

#### 4.17 Among the particular purposes of the Union are:

- to allocate bands of the radio-frequency spectrum, allot radio frequencies and register radio-frequency assignments and, for space services, any associated orbital position in the geostationary-satellite orbit or any associated characteristics of satellites in other orbits, in order to avoid harmful interference between radio stations of different countries;
- to coordinate efforts to eliminate harmful interference between the radio stations of different countries and to improve the use made of the radio-frequency spectrum for radio communication services and of the geostationary-satellite and other satellite orbits;
- to facilitate the worldwide standardisation of telecommunications, with the satisfactory quality of service;
- to foster international cooperation and solidarity in the delivery of technical assistance to the developing countries;
- to coordinate efforts to harmonise the development of telecommunication facilities, notably those using space techniques;
- to foster collaboration among Member States and Sector Members with a view to establishing the lowest possible rates; and
- to undertake studies, make regulations, adopt resolutions, formulate recommendations and opinions, and collect and publish information concerning telecommunication matters.<sup>37</sup>

<sup>35</sup> Preamble CS.

<sup>36</sup> Art 1 no 2-9 CS.

<sup>37</sup> Art 1 no 10-16, 18 CS.

**4.18** Member States have reserved the right to convene regional conferences, to make regional arrangements and to form regional organisations for settling telecommunications questions which are susceptible of being treated on a regional basis, as long as such arrangements are not in conflict with either the Constitution or the Convention.<sup>38</sup> Such arrangements include, for example, the Inter-American Radio Agreement (Washington 1949); the Regional Agreement for the European Broadcasting Area (Stockholm 1961), and the Regional Agreement for the African Broadcasting Area (Geneva 1963).

## Organisational Structure of the Union

### Overview

**4.19** The ITU has three organs which convene periodically and five permanent organs.<sup>39</sup> The supreme organ of the Union is the Plenipotentiary Conference, which is composed of delegations representing the Member States and is normally convened every four years.<sup>40</sup> The Council, which is composed of Members States elected by the Plenipotentiary Conference, acts in the interval between Plenipotentiary Conferences as the governing body of the Union within the limits of the powers delegated to it by the Plenipotentiary Conference.<sup>41</sup>

The World Conference on International Telecommunications may partially or, in exceptional cases, completely revise the International Telecommunication Regulations<sup>42</sup> and may deal with any question of a worldwide character within its competences and related to its agenda; its decisions must in all circumstances be in conformity with the Constitution and Convention of the Union.<sup>43</sup>

The permanent organs of the Union are the General Secretariat, which is directed by the Secretary General,<sup>44</sup> and the three Sectors of the Union, ITU-R, ITU-T and ITU-D.<sup>45</sup>

### Plenipotentiary Conference

**4.20** The Plenipotentiary Conference determines the general policies of the Union, establishes its strategic plan<sup>46</sup> and the basis for the Union's budget, provides general directives dealing with the staffing of the Union, and examines its account and approves it, if appropriate.<sup>47</sup> The Plenipotentiary is also empowered to elect the Member States which are to serve on the Council, the Secretary General, the Deputy Secretary General and the Directors of the Bureaus, as well as the members of the Radio Regulations Board.<sup>48</sup> At any of these elections, the Plenipotentiary Conference has to give due consideration to an equitable geographical distribution

38 Art 43 CS.

39 Art 7 CS.

40 Art 8 no 47 CS.

41 Art 20 no 65, 68 CS.

42 See paras 4.9–4.13 above.

43 Art 25 no 146–147 CS.

44 Art 11 CS.

45 See para 4.26 et seq below.

46 Cf Strategic plan for the Union for 2012–2015, Resolution 71 (Rev Guadalajara 2010), Annex.

47 Art 8 no 49, 51, 52, 53 CS.

48 Art 8 no 54, 55, 56 CS.

amongst the regions of the world. As the Union's supreme organ, the Plenipotentiary is generally empowered to 'deal with such other telecommunication questions as may be necessary'.<sup>49</sup>

### *The Council*

**4.21** The Council comprises a maximum of 25 per cent of the total number of Member States, which are elected by the Plenipotentiary Conference with due regard to the need for equitable distribution of the Council seats among the five world regions (Americas, Western Europe, Eastern Europe, Africa, Asia and Australasia). Currently, the Council is comprised of 48 Members.

**4.22** In addition to its task to consider, in the interval between Plenipotentiary Conferences, broad telecommunication policy issues and its duty to prepare a report, for consideration by the Plenipotentiary, on the policy and strategic planning of the Union, the Council is also responsible for ensuring the day-to-day functioning of the Union and to exercise effective financial control over the General Secretariat and the three Sectors. Furthermore, the Council has to take all steps to facilitate the implementation by the Member States of the provisions of the ITU's Constitution, the Convention, the administrative regulations, the decisions of the Plenipotentiary Conference and, where appropriate, of the decisions of other conferences and meetings of the Union.<sup>50</sup>

### *The General Secretariat*

**4.23** The General Secretariat, which is headed by the Secretary General, is responsible for the overall management of the Union's resources, the coordination of the activities of the General Secretariat and the Sectors of the Union, the coordination of the implementation of the Union's Strategic Plan and for the annual preparation of a four-year rolling operational plan of activities to be undertaken by the staff of the General Secretariat consistent with the strategic plan.<sup>51</sup> Other tasks of the General Secretariat include the management of the administrative and financial aspects of the Union's activities, including the provision of conference services, information services, and corporate functions, eg legal advice, finance, personnel, communications and common services.<sup>52</sup>

**4.24** In order to ensure proper coordination among the three Sectors of the Union, a Coordination Committee has been established consisting of the Secretary General, the Deputy Secretary General and the Directors of the three Sector Bureaus.<sup>53</sup> The Coordination Committee is presided over by the Secretary General and acts as:

[an] internal management team, which advises and gives the Secretary General practical assistance on all administrative, financial, information system and technical cooperation matters which do not fall under the

---

<sup>49</sup> Art 8 no 59 CS.

<sup>50</sup> Art 10 no 69-71 CS, see also art 4 CV.

<sup>51</sup> Art 5, 84, 85, 86 A, 87 A.

<sup>52</sup> Cf art 5 CV.

<sup>53</sup> Art 26 no 148 CS.

exclusive competence of a particular sector or of the General Secretariat and on external relations and public information'.<sup>54</sup>

### *World Conference on International Telecommunications*

**4.25** World Conferences on International Telecommunications are held at the request at the Plenipotentiary Conference and have treaty-making powers: they can revise the International Telecommunication Regulations<sup>55</sup> and may deal with 'any question of a worldwide character within its competence and related to its agenda'.<sup>56</sup>

### **Tasks, Structure and Functioning of the Radiocommunications Sector**

**4.26** The tasks of the ITU's Radiocommunications Sector (ITU-R) are:

- to determine the technical characteristics and the operational procedures for a broad range of wireless communications services;
- to manage, at global level, the frequency spectrum by allocating bands of the radio frequency spectrum, allotting radio frequencies and registering radio frequency assignments and any associated orbital position in the geostationary satellite orbit in order to avoid harmful interference between radio stations of different countries; and
- to coordinate efforts to eliminate harmful interference between radio stations of different countries and to improve the use made of radio frequencies and of the geostationary satellite orbit for radiocommunication services.<sup>57</sup>

#### *Structure*

**4.27** The Radiocommunication Sector works through:

- World and Regional Radiocommunication Conferences,
- Radiocommunication Assemblies,
- the Radiocommunication Bureau, which is headed by the elected Director,
- Radiocommunication Study Groups,
- the Radiocommunication Advisory Group, and
- the Radio Regulations Board.<sup>58</sup>

#### *World Radiocommunication Conferences*

**4.28** World Radiocommunication Conferences ('WRC') are normally convened every two to three years. The conferences are composed of delegations of the administrations of Member States. The task of the WRC is to review and to revise, in part or in full, the Radio Regulations. In addition, the WRC may consider any radio communication matter of a worldwide character, and it may instruct the

---

54 Art 26 no 149 CS; see also art 6 CV.

55 See paras 4.9–4.13 above.

56 Art 25 no 146 CS.

57 See also the mission statement in Resolution 71, Annex, Part II, 4.1.

58 Art 12 no 80–85 CS.

Radio Regulation Board and the Radiocommunication Bureau and reviews their activities. Furthermore, the WRC identifies topics to be studied by the Radiocommunication Assembly and the Radiocommunication Study Group in preparation for future Radiocommunication Conferences. The general scope of the WRC's agenda is established four to six years in advance with the final agenda being established by the Council, two years before the conference, with the concurrence of a majority of the Member States.<sup>59</sup>

### *Regional Radiocommunication Conferences*

**4.29** Regional Radiocommunication Conferences (RRCs) are conferences of either one of the ITU regions or of a group of countries with a mandate to develop an agreement concerning a radio communication service or a frequency band of a regional nature.<sup>60</sup> A regional conference cannot modify the Radio Regulations, unless the proposed modifications are approved by a WRC<sup>61</sup> and the 'Final Acts' of the regional conferences are binding only on those countries that are party to the agreement.<sup>62</sup>

### *Radiocommunication Assembly*

**4.30** Radiocommunication Assemblies (RAs) are normally convened every two or three years and may be associated in time and place with Radiocommunication Conferences.<sup>63</sup> Their task is to approve the program of Radiocommunication Study Groups, to establish or dissolve Study Groups according to need, to consider Study Group reports and to approve, modify or reject the draft ITU-R recommendations contained in those reports. The Assembly assigns conference preparatory work and other questions to the Study Groups, responds to requests from ITU conferences, and suggests suitable topics for the agenda of future WRCs.

### *The Radiocommunication Bureau*

**4.31** The Radiocommunication Bureau ('BR'), which is headed by a Director elected by the Plenipotentiary Conference, organises and coordinates the work of the Radiocommunications Sector.<sup>64</sup> As the executive arm of the Radiocommunication sector, the Radiocommunication Bureau:

- provides administrative and technical support to Radiocommunication Conferences, Assemblies and Study Groups;
- applies the provisions of the Radio Regulations and of the various regional agreements;
- records and registers frequency assignments and orbital characteristics of space services, and maintains the 'Master International Frequency Register';
- provides advice to Member States on the equitable, effective and economical use of the radio frequency spectrum and satellite orbits and investigates and assists in resolving cases of harmful interference;

<sup>59</sup> Section 8 no 118 CV.

<sup>60</sup> Art 9 no 138 CV.

<sup>61</sup> Art 13 no 92 CS.

<sup>62</sup> Art 9 no 138 CV.

<sup>63</sup> Art 13 no 91 CS.

<sup>64</sup> Art 16 CS, art 12 no 161 CV.

- coordinates the preparation, editing and dispatch of circulars, documents, and publications developed within the sector; and
- provides technical information and seminars on national frequency management and radio communications.

**4.32** The Bureau fulfils its role as global spectrum coordinator through its Space Services Department ('SSD') and its Terrestrial Services Department ('TSD'). The SSD handles the procedures involved in the coordination and registration of satellite systems and earth stations, including the capture, processing and publication of the relevant data and the review of the frequency assignment notices submitted by national administrations with a view either to their inclusion in the official coordination procedure or to their recording in the Master International Frequency Register.

The TSD fulfils technical and regulatory functions in relation to terrestrial radio communication services, including the processing of frequency assignment notices and the maintenance of the Master International Frequency Register, which is regularly updated in accordance with the requirements of the Radio Regulations and of the relevant regional agreements. This Register currently includes over 1.2 million terrestrial frequency assignments and more than 325,000 assignments servicing some 1,500 satellite networks.

#### *Radiocommunication Study Groups*

**4.33** Radiocommunication Study Groups are expert groups set up by a Radio communications Assembly.<sup>65</sup> Currently, more than 1,500 specialists from telecommunication organisations and administrations throughout the world participate in the work of the Study Groups which encompasses the drafting of the technical bases for Radiocommunication Conferences, the preparation of draft recommendations and the compilation of handbooks on frequency management and use.

**4.34** At present, ITU-R has established six Study Groups specialising in spectrum management (Study Group 1), radiowave propagation (Study Group 3), satellite services (Study Group 4), terrestrial services (Study Group 5), broadcasting service (Study Group 6), and science services (Study Group 7).<sup>66</sup> As with other ITU Recommendations, compliance with the ITU-R Recommendations is not mandatory. However, having been developed by recognised radio communication experts, they enjoy a high reputation and are implemented on a worldwide basis.

#### *Radiocommunication Advisory Group*

**4.35** The Radiocommunication Advisory Group ('RAG') consists of representatives of administrations of Member States, representatives of Sector Members and the Chairman of the Study Groups and other groups. The RAG's tasks are

- to review the priorities and strategies adopted in the ITU-R sector, to monitor the progress of and to provide guidance for the work of the Study Groups; and

<sup>65</sup> Art 11 no 148 CV.

<sup>66</sup> For a detailed description of the work programme of these Study Groups see International Telecommunication Union, Radiocommunication Bureau, ITU-R Study Groups, Geneva 2012.

- to recommend measures for fostering cooperation and coordination with other organisations and with other ITU Sectors.

The RAG acts as an advisory body to the Director of the Radiocommunication Bureau and may receive specific mandates from the Radiocommunication Assemblies.<sup>67</sup>

### *The Radio Regulations Board*

**4.36** The Radio Regulations Board ('RRB') consists of 12 elected members who are qualified in the field of Radiocommunications and have practical experience in the assignment and utilisation of frequencies.<sup>68</sup>

The Board Members do not act as representatives of their respective Member States or regions, but as 'custodians of an international public trust'.<sup>69</sup> They perform their duties independently and on a part-time basis.

**4.37** The RRB approves the 'Rules of Procedure', which are used by the Radiocommunication Bureau in applying the provisions of the Radio Regulations and registering frequency assignments made by the Member States. These 'Rules of Procedure' clarify and interpret the provisions of the Radio Regulations, regional agreements and resolutions and recommendations of World and Regional Radio communication Conferences. The RRB also addresses matters referred to it by the Bureau which cannot be resolved through application of the Radio Regulations and the Rules of Procedures and considers appeals against decisions made by the Radiocommunication Bureau regarding frequency assignments. Furthermore, the RRB considers reports of unresolved interference investigations which have been carried out by the Bureau at the request of one or more administrations and adopts recommendations. Decisions of the RRB may be brought before the World Radiocommunication Conference.<sup>70</sup>

### **Tasks, Structure and Functioning of the Standardisation Sector**

**4.38** The task of the Telecommunication Standardisation Sector (ITU-T) is to study technical, operating and tariff questions and to ensure the production of recommendations with a view to standardising telecommunications on a worldwide basis.<sup>71</sup>

As of December 2012, ITU-T has 280 Sector Members and 146 associates. Well over 3,000 recommendations (standards) are in force; while ITU-T recommendations are legally non-binding, they are generally complied with by manufacturers, network operators and service providers alike.

**4.39** The Telecommunication Standardisation Sector operates through:

- World Telecommunication Standardisation Assemblies;
- Telecommunications Standardisation Study Groups;

<sup>67</sup> For specific matters assigned to the RAG see Resolution ITU-R 52.

<sup>68</sup> Art 14 no 93, 93 A CS, see also art 10 CV.

<sup>69</sup> Art 14 no 98 CS.

<sup>70</sup> Art 7 no 116 CV.

<sup>71</sup> Art 17 no 104 CS; for the mission statement of ITU-T see Resolution 71, Annex, Part II, 5.1.

- Telecommunications Standardisation Bureau; and
- Telecommunications Standardisation Advisory Group.

### *World Telecommunication Standardisation Assembly*

**4.40** The World Telecommunication Standardisation Assembly ('WTSA') takes place every four years. It brings together delegations of the Member States, representatives of Sector Members and observers of regional telecommunication organisations, other regional organisations or international organisations dealing with matters of interest to the Assembly, and specialised agencies of the United Nations.<sup>72</sup> The WTSA defines the general policy of the Sector and adopts its working methods and procedures.<sup>73</sup> It considers the reports of Study Groups and approves, modifies or rejects draft recommendations. It also approves the work programme and the organisation of the work of ITU-T for each four-year study period, establishes the Study Groups and appoints the Study Group Chairman and Vice Chairman.<sup>74</sup>

### *Telecommunication Standardisation Study Groups*

**4.41** The Telecommunication Standardisation Study Groups and their Working Parties conduct the actual standardisation work. They study the questions set forth in the work programme established by the WTSA and elaborate the Recommendations.

For the study period 2013–2016, ITU-T has established 10 Study Groups which cover a broad range of topics, such as economic and policy issues (Study Group 3), environment and climate change (Study Group 5), broadband cable and TV (Study Group 9), protocols and test specifications with a focus on machine-to-machine service layer (Study Group 11), future networks (Study Group 13), transport and access (Study Group 15), multimedia (Study Group 16) and security (Study Group 17).

### *Telecommunication Standardisation Bureau*

**4.42** The Telecommunication Standardisation Bureau ('TSB'), which is led by the elected director, organises and coordinates the work of the Telecommunication Standardisation Sector.<sup>75</sup> It provides secretarial support for the work of the ITU sector and services for the participants in ITU-T work, including the coordination of the approval process for recommendations and ensuring the publication of the ITU-T recommendations, handbooks and guides.

**4.43** The TSB also coordinates international numbering: Based on an ITU-T recommendation establishing the country codes, which are the basis for the structuring of the international numbering space,<sup>76</sup> TSB provides country code number assignments for telephone, data and other services. It also acts as registrar for Universal International Free Phone Numbers, which enable an international free

72 Art 25 no 295–298 f CV.

73 Art 13 no 184 a CV.

74 Art 13 no 188, 191 a, 181 b CV.

75 Art 15 no 198 CV.

76 ITU-T Recommendation E.164.

phone service customer to be allocated a unique Free Phone Number that is the same throughout the world.<sup>77</sup> The TSB also provides administrative support for the regulation of alternative calling procedures (call-back); under a resolution adopted by the World Telecommunication Standardisation Assembly 2004<sup>78</sup> on alternative calling procedures on international telecommunication networks, each country has the right to authorise, prohibit or regulate call-back practices. National regulatory measures regarding call-back must be respected by other countries within the limits of their own legislation. To facilitate the required collaboration between the National Regulatory Authorities in the ITU Member States, a draft guideline has been prepared under which ITU is to collect information once a year on the positions adopted by each country regarding call-back practices and to disseminate the findings among administrations to enable them to take the necessary steps to prevent call-back practices from being supplied to countries which prohibit them.<sup>79</sup>

### *Telecommunication Standardisation Advisory Group*

**4.44** The Telecommunication Standardisation Advisory Group ('TSAG') consists of representatives of the administrations of Member States, representatives of Sector Members and the Chairmen of the ITU-T Study Groups and other Groups.<sup>80</sup> Its main task is to review the priorities, programmes, operations, financial matters and strategies for the ITU-T sector, to restructure and establish ITU Study Groups and to provide guidelines for their operation. The TSAG also elaborates recommendations on the work methods and procedures of the ITU-T Study Groups.<sup>81</sup>

### *Alternative Approval Process (AAP)*

**4.45** In response to long-standing criticism of ITU-T's slow and cumbersome standardisation procedures, WTSA 2000 adopted a fast-track approval process for technical standards, the 'Alternative Approval Process' ('AAP').

Whereas the Traditional Approval Process ('TAP'), which is still used for recommendations that are considered to have regulatory or policy implications, requires an approval of proposed standards at a Study Group meeting, with prior determination at a previous Study Group or working party meeting, and an announcement by circular before the approval meeting, which adds up to an approval time of six to nine months, the Alternative Approval Process allows for approval of a recommendation within six weeks. Under the AAP, once the text of a draft AAP recommendation is mature, it is submitted for consent at a Study Group or working party meeting. The consent given by the Study Group signals the start of the Approval Process which requires that the mature text is posted on the ITU-T website and an announcement is made that the AAP is in progress. Comments can then be made

77 This function is based on ITU-T Recommendation E.169 and Recommendation E.152.

78 Resolution 29 WTSA - 04.

79 See, in this context, International Telecommunication Union, Telecommunication Standardisation Bureau, TSB Circular 30 CUM 3/ST of 2 May 2005: Replies to the questionnaire on conditions for provision of 'call-back'.

80 Art 14 a no 197 a CV.

81 Art 14 a no 197 b - 197 i CV.

during a four-week period. If no comments are received, the recommendation is considered approved by the Study Group Chairman in consultation with TSP.<sup>82</sup>

### **Tasks, Structure and Functioning of the Telecommunication Development Sector**

**4.46** The Telecommunication Development Sector ('ITU-D'), which was established in 1989, is the youngest Sector of the Union.

**4.47** Its objective is to discharge:

'the Union's dual responsibility as a United Nations specialised agency and executing agency for implementing projects under the United Nations development system or other funding arrangements so it has to facilitate and enhance telecommunications development by offering, organising and coordinating technical cooperation and assistance activities'.<sup>83</sup>

ITU-D is structured similarly to the two other Sectors. It comprises:

- World and Regional Telecommunication Development Conferences;
- Telecommunication Development Study Groups;
- the Telecommunication Development Bureau; and
- the Telecommunication Development Advisory Group.

As of December 2012, ITU-D has approximately 340 Sector Members.

#### *World and Regional Telecommunication Development Conferences*

**4.48** Telecommunication Development Conferences are held for the discussion and consideration of topics, projects and programmes relevant to telecommunication development and for the provision of direction and guidance to the Telecommunication Development Bureau.<sup>84</sup> The Telecommunication Development Conferences do not produce Final Acts, rather, their conclusions take the form of resolutions, decisions, recommendations or reports.<sup>85</sup> At the Fifth World Telecommunication Development Conference ('WTDC-10') in Hyderabad 2010, an Action Plan was adopted that aims at fostering the global development of information and communication networks and services.<sup>86</sup>

It includes the development of information and communication infrastructure and technology, cyber-security, capacity building, digital inclusion and the building of a global Information Society, environmental issues with a focus on adaption to climate change and special actions for developing and least developed countries.

---

82 For a detailed description see Recommendation H 8.

83 Art 21 no 118 CS.

84 Art 22 no 137 CS.

85 Art 22 no 142 CS.

86 Hyderabad Action Plan, in Final Report, World Telecommunication Development Conference, Hyderabad 2010, ITU 2010, Annex C.

### *Study Groups*

**4.49** The current ITU-D Study Groups' mandates are: enabling environment; cyber-security; information and communication technology applications; Internet-related issues; communication infrastructure and technology development; emergency telecommunications and climate-change adaptation.<sup>87</sup> The Study Groups produce recommendations, guidelines, handbooks, manuals and reports.

### *The Telecommunication Development Bureau*

**4.50** The Telecommunication Development Bureau ('BDT') is the executive arm of the Telecommunication Development Sector. It is headed by an elected Director. Its tasks include fostering telecommunication development in developing countries through policy advice, the provision of technical assistance, the mobilisation of resources and initiatives with a view to bridge the 'digital divide'. BDT also supervises regional and global projects launch by ITU-D to assist developing countries in modernising their telecommunications systems and regulatory frame works.

### *Telecommunication Development Advisory Group*

**4.51** The Telecommunication Development Advisory Group is open to representatives of Member States, Sector Members and to Chairmen and Vice Chairmen of Study Groups; it meets once a year. Its mandate is to review priorities, programmes, operations, financial measures and strategies for the activities in the ITU-D sector and to advise the Director of ITU-D accordingly.

## **ITU Reform**

**4.52** For the last four decades, the ITU has been engaged in a lengthy process of mainly incremental reforms of its structure, its procedures and its management.<sup>88</sup> Many of the reforms were brought about by the transformation of the telecommunications sector which, in turn, has been a consequence of market liberalisation, the convergence of the telecommunications sector with the computing and broadcasting sectors, and the development of the Internet which is transforming the industry.

**4.53** Following a debate of the need to adapt the Union's organisational structure to its changing environment, the 1989 Nice Plenipotentiary Conference established the High Level Committee ('HLC') with a mandate to carry out an in-depth review of the ITU's structure and functioning. Based on the HLC's report,<sup>89</sup> a special Plenipotentiary Conference in 1992 overhauled the structure of the Union by creating the ITU-T, ITU-R and ITU-D Sectors. Initiated by the Kiyoto Plenipotentiary Conference of 1994,<sup>90</sup> a task force known as ITU-2000 conducted another

<sup>87</sup> Cf <http://www.itu.int/net3/ITU-D/stg/index.aspx> (last visited 14 December 2012).

<sup>88</sup> Cf at last Strategic plan for the Union for 2008–2011, Resolution 71 (Rev Antalya, 2006), Annex 1, Part I, 3.2, Goal 5.

<sup>89</sup> Report of the High Level Committee to review the structure and functioning of the International Telecommunication Union, *Tomorrow's ITU: The Challenges of Change*, Geneva 1991.

<sup>90</sup> See Resolution 15, Resolution 39.

in-depth review of the Union's structure and submitted a series of recommendations,<sup>91</sup> including recommendations on enhanced cooperation with the private sector through Sector Members and the membership status termed 'associate',<sup>92</sup> the acceleration of the ITU's standardisation process, and recommendations to improve the ITU's financial situation.

**4.54** The Plenipotentiary Conference Minneapolis 1998 approved the streamlined standardisation process<sup>93</sup> and broadened the private sector's rights in the standardisation process. The Plenipotentiary renewed its commitment to organisational reform by establishing a new 'Working Group for Reform' ('WGR') with the mandate to review the management, functioning and structure of the Union as well as the rights and obligations of Member States and Sector Members. The WGR's final report<sup>94</sup> contained 40 recommendations for the improvement of the Union's budgetary system, the effectiveness of its overall management and of the effectiveness of several of its organs, including the Plenipotentiary Conference, the General Secretariat, the Council and the World Radiocommunications and Development Conferences.

**4.55** At the Plenipotentiary Conference in Marrakesh in 2002, only modest steps were made towards increased rights for industry in the standardisation process; the Plenipotentiary instructed the Council to establish a 'Group of Specialists' ('GoS'), composed of five individuals, one from each administrative region, with a mandate to review the management of the Union.<sup>95</sup> In its report, which was submitted in May 2003, the GoS submitted 21 'near-term', 'mid-term' and 'long-term' recommendations, including recommendations on the Council's oversight role, the Union's system of budgets, financial management control mechanisms and cost accounting, the need for decentralisation of authority and for comprehensive review of ITU's plans and budgets.<sup>96</sup>

**4.56** The Plenipotentiary Conference Antalya 2006 adopted a strategic plan with special regard to bridging the 'digital divide' and improving the ability of developing countries to fully participate in Internet-related technical and policy processes ('broadband inclusion for all').<sup>97</sup> The Plenipotentiary developed strategies in order to implement the outcomes of the World Summit on the Information Society (WSIS) which had been organised by ITU and which was held in Geneva and Tunis in 2003 and 2005.<sup>98</sup> Debates also focused on expanding the ITU's mandate beyond its traditional technological responsibilities; there were proposals for the Union to assume a stronger role when it comes to Internet-related issues, namely cybersecurity, network stability, countering spam and managing of critical Internet

---

91 ITU-2000 Recommendations, RAG 98-1/6-E.

92 See para 4.15 above.

93 See para 4.45 above.

94 Document C 2001/25-1 of 1 May 2001.

95 Decision 7 (Marrakesh 2002).

96 See Review of the management of the Union, Report of Group of Specialists (GoS) to review the management of the Union to the ITU Council, C 03/32 (Rev 1)-E; for the implementation of the GoS Recommendations, see Council Resolution 1216 of 16 June 2004.

97 See Strategic plan for the Union for 2008-2011, Resolution 71 (Rev Antalya, 2006), Annex I, Part I, 3.2, Goals 2 and 6; Resolutions 30 and 123 (Rev Antalya, 2006).

98 See Strategic plan for the Union for 2008-2011, Resolution 71 (Rev Antalya, 2006), Annex I, Part I, 3.1, 3.2, Goals 1 and 2 and *passim* and in particular Resolution 140 (Rev Antalya, 2006).

resources including Internet Domain Names and addresses.<sup>99</sup> Neither these proposals nor the proposals to reduce the number of elective ITU posts from five to two (by graduating the posts of directors of ITU-R, ITU-T and ITU-D) have been implemented to date.<sup>100</sup>

Consensus was achieved on the need to organise a World Conference on International Telecommunications (WCIT) to review ITR in 2012.<sup>101</sup>

**4.57** Bridging the 'standardisation gap' between developed and developing countries,<sup>102</sup> defining the ITU's role in handling the Internet,<sup>103</sup> reviewing ITR<sup>104</sup> and implementing the outcomes of the WSIS<sup>105</sup> were again key issues to the Plenipotentiary Conference 2010 in Guadalajara, Mexico.<sup>106</sup> Delegates also agreed to improve accessibility of information and communication technology for persons with disabilities,<sup>107</sup> to strive for a better use of information and telecommunication technologies to manage climate change<sup>108</sup> and to open sector membership to academic and research institutions.<sup>109</sup>

**4.58** As the debate on ITU reform has focused more and more on narrow and detailed issues of the ITU's management, more basic, structural issues seem to have disappeared from the reform agenda.<sup>110</sup> They include:

- the allocation of functions between the ITU Sectors, in particular ITU-R and ITU-T; and
- an adaptation of the Sectors' organisational structures and their procedural rules to their respective functions.

**4.59** The development of telecommunications technology, the privatisation of state-owned communications entities and the liberalisation of telecommunications markets has led, in many Member States of the Union, to a separation of regulatory and operational functions.<sup>111</sup> As part of this functional separation, the preparation and adoption of technical standards, including standards in the telecommunications field, has largely been entrusted to private standardisation bodies.<sup>112</sup>

**4.60** Regulatory functions include:

- regulation of market entry and/or supervision of market behaviour;
- regulation of enterprises with significant market power;

99 Cf ITU, Final Press Report of the 17th ITU Plenipotentiary Conference held in Antalya, Turkey, 6–24 November 2006.

100 Cf Resolutions 101 and 102 (Rev Antalya, 2006), see para 4.12 ff above.

101 Resolution 146 (Antalya, 2006).

102 Cf Resolutions 30, 123 and 139 (Rev Guadalajara, 2010).

103 Resolution 178 (Guadalajara, 2010).

104 Resolution 171 (Guadalajara, 2010).

105 Cf Resolution 140 (Rev Guadalajara, 2010) and Resolution 172 (Guadalajara, 2010).

106 Cf ITU, Press Release from 22 October 2012.

107 Resolution 175 (Guadalajara, 2010).

108 Resolution 182 (Guadalajara, 2010).

109 Resolution 169 (Guadalajara, 2010).

110 See Note by the Secretary General, Report by the Chairman of the Working Group on Structure – Review of the ITU Structure, Document C 05/34-E, 14 April 2005.

111 For Europe see Art 3 para 2 of the Framework Directive; see para 1.53 above.

112 For an analysis of telecommunication standardisation in Europe as a system of 'regulated self-regulation', see Kerstin Schultheiss, *Europäische Telekommunikationsstandardisierung* (Münster, 2004), p 245 et seq.

- regulation of access and interconnection;
- frequency planning and management including the allocation of frequency bands to specific radio services;
- management of the numbering space, including the allocation of country codes;
- regulation of universal service provision;
- consumer protection; and
- protection of telecommunications secrecy and data protection.

**4.61** Despite decades of debate, the ITU has not adapted its organisational structure and its allocation of functions among ITU-R and ITU-T to this universally accepted structural separation: while ITU-R currently discharges mainly regulatory functions with respect to spectrum allocation and frequency management, it also engages in standardisation activity in the radio communications field. On the other hand, ITU-T, while predominantly entrusted with standardisation in the Telecommunications Sector, has traditionally also been engaged in certain regulatory functions, such as, in particular, the administration of the international numbering space.

**4.62** Separating regulatory from standardisation functions and allocating them to ITU-R and ITU-T respectively, could have benefits for all stakeholders concerned: The standardisation process could be further streamlined and the role of Sector Members with respect to the adoption of standards could be strengthened. To the extent that technical standards have regulatory implications, ITU-R could be empowered to validate the relevant standards and/or to 'mandate' ITU-T to elaborate certain standards with regulatory implications.

On the other hand, ITU-R, as a 'regulatory' sector could streamline its organisational structure and its procedures and include the national regulatory authorities in its decision-making structure.<sup>113</sup>

**4.63** On the basis of a clear allocation of regulatory and non-regulatory (standardisation) functions, the Union would be well positioned to overcome what appears to be one of the major obstacles to its organisational efficiency, namely the Union's 'one size fits all' approach in organising its three Sectors. It has been noted<sup>114</sup> that for historical and political reasons, the three Sectors of the Union have been structured in a broadly identical fashion, despite their completely diverging purposes and objectives; this has led to radical reform proposals to re-organise ITU by establishing three differently structured organisational entities (a regulatory body, a standardisation body and a development agency) under its roof.

**4.64** A less radical restructuring of the ITUs' sectors along the lines of regulatory and operational (standardisation) functions would pave the way for a rational discussion of new, additional 'regulatory' tasks to be discharged by ITU-R at international level: they could include, for example, international cooperation to combat spam and the misuse of numbering, the coordination of measures to enhance information security and data protection and contributions to Internet

113 To date, the NRAs participate in ITU activities mainly through conferences and regulator.

114 Don McLean, 'Sovereign Right and the Dynamics of Power in the ITU: Lessons in the Quest for Inclusive Global Governance', Manuscript, 2003.

governance, which is currently high on the agenda of communications policy makers in preparation of the 'World Summit on the Information Society in Tunis 2005'.<sup>115</sup>

## THE WTO

### The WTO in a Nutshell

**4.65** The World Trade Organisation ('WTO') is an international, inter-governmental organisation. There are currently 157 Members,<sup>116</sup> including all major trading nations. Key exceptions include Kazakhstan, Algeria, Lebanon and Iran, most of which are currently negotiating their accession to the organisation. The WTO thus enjoys near-global coverage.

**4.66** The WTO came into being on 1 December 1995 as result of the 'Uruguay Round' of multilateral trade negotiations launched in 1986 by Contracting Parties to the General Agreement on Tariffs and Trade ('GATT') of 1947. For the first time in the history of successive trade rounds, the agenda covered not only trade in goods but also, inter alia, trade in services and the protection of trade-related intellectual property rights. The round resulted in the Agreement establishing the World Trade Organisation ('WTO Agreement'), concluded in 1994 in Marrakesh, which contained under its umbrella not only the revised GATT with multiple sub-agreements but also, among other things, a new General Agreement on Trade in Services ('GATS') as well as the Agreement on Trade-Related Intellectual Property Rights ('TRIPS') – the three 'pillars' of the WTO system.

**4.67** There are numerous other so-called WTO Covered Agreements that, depending upon the subject matter, may or may not be relevant to telecommunications services and products. Other Covered Agreements include:

- Agreement on Technical Barriers to Trade;
- Agreement on Trade-Related Investment Measures;
- Anti-Dumping Agreement;
- Agreement on Customs Valuation;
- Agreement on Pre-shipment Inspection;
- Agreement on Rules of Origin;
- Agreement on Import Licensing;
- Agreement on Subsidies and Countervailing Measures;
- Safeguards Agreement; and
- Government Procurement Agreement.

**4.68** While the GATS is the most important of the Covered Agreements for telecommunications, GATT and TRIPS are also of significance to the sector. The GATS provides a framework of rules for the international trade in telecommunications services of all kinds within which firms and individuals can operate. Specific market access commitments undertaken by WTO Members under the GATS include specific access rights for telecommunication services and service providers in a number of so-called 'modes of supply' (see below). In addition, in the landmark

---

<sup>115</sup> For a summary of ITU's activities to date see ITU, 'ITU and its Activities Related to Internet Protocol (IP) Networks' (April 2004); see also Working Group on Internet Governance, Report of the Working Group on Internet Governance, June 2005.

<sup>116</sup> Status in May 2012.

1997 'Fourth Protocol to the GATS'<sup>117</sup> countries undertook a set of commitments on regulatory disciplines in the basic telecommunications sector by subscribing to the so-called 'Reference Paper'.<sup>118</sup> The GATT, in turn, governs the regulation of international trade in telecommunications-related goods, as well as trade in goods sold via telecommunication means, including the 'physical side' of virtually all forms of e-commerce. The TRIPS establishes a high level of protection of trade-related intellectual property rights ('IPRs'). These include IPRs specifically relevant to telecommunications operators such as patents, trademarks, copyrights, integrated circuits, and business secrets.

**4.69** Apart from the substantive rules set out in the Covered Agreements, there is also the Dispute Settlement Understanding ('DSU'), establishing a very effective dispute settlement system, as well as a Trade Policy Review Mechanism ('TPRM') which provides for a regular comprehensive review of every Member's policies relating to the WTO agreements.<sup>119</sup>

### The Relevance of WTO Rules to Private Companies

**4.70** As the WTO is an intergovernmental organisation, it may be asked why WTO law may be of relevance to private persons. As the WTO system has only been in existence for less than 20 years, businesses have yet to realise the full potential of how the WTO forum and its rules can be of assistance. In developing commercial strategy, a company must take on board important questions of market access, preferential tariffs, licensing requirements, entry tests and recognition of standards. A company can waste significant amounts of time and effort if it has not adequately considered the basic trade and investment framework of a target market. However, where a company keeps abreast of WTO rules and is attuned to their local implementation, it can reduce both trade and investment risks. There are at least three areas where companies will interface with the WTO, namely:

- domestic litigation;
- international dispute settlement; and
- domestic and international rule-making processes.

**4.71** In certain jurisdictions, private persons can rely directly on the WTO obligations of their country in private actions before national courts. However, most systems (including the EU, the United States and Japan) generally refuse to recognise the direct effect of WTO obligations within their domestic systems. Notwithstanding this, many courts adhere to a doctrine of consistent interpretation, whereby courts interpret domestic law to be consistent with the relevant country's obligations pursuant to public international law, which will include WTO law. WTO law can, therefore, be a useful mechanism to assist a private person to influence a national court to adopt a certain interpretation of domestic law.

117 Fourth Protocol to the General Agreement on Trade in Services, S/L/20, adopted 30 April 1996, entered into force on 5 February 1998.

118 See para 4.113 et seq below.

119 A useful text providing an overview of WTO law is Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization, Law, Practice, and Policy* (The Oxford International Law Library). A number of articles have also been written addressing the impact of the WTO system on the telecommunications industry. See, for example, Luff, 'Telecommunications and Audio-visual Services: Considerations for a Convergence Policy at the World Trade Organization', (2004) 38(6) *Journal of World Trade* 1059–1086 and also Zhao, *Further Liberalization of Telecommunications Services in the Framework of the WTO in the 21st Century*, *International Journal of Communications Law and Policy*, Issue 8, Winter 2003/4.

**4.72** Even though the WTO Dispute Settlement Mechanism is purely inter-governmental (with no rights for private persons to commence actions),<sup>120</sup> private persons can play a key role in initiating a dispute. It is often private companies that bring to the attention of their government the fact that they are having difficulty penetrating an overseas market and that accordingly an overseas country may be violating its WTO obligations. The company can assist its government to investigate a possible violation by another country by providing trade data and other relevant commercial information. Companies could also be the driving force behind the dispute by funding the legal costs associated with WTO dispute proceedings. A private person can also play a crucial role in monitoring compliance with dispute settlement rulings that are eventually handed down.

**4.73** Finally, and perhaps most importantly, companies can also use WTO rules as part of policy advocacy or lobbying initiatives before both national and international fora. At the national level, this may involve, for example, private companies arguing that, in order to ensure compliance with WTO obligations, a national telecommunications regulator must take certain action against dominant telecommunications undertakings to prevent anti-competitive behaviour. At the international level, this could entail companies lobbying their national delegation to the ITU, for example, to argue against relevant ITU policy initiatives in case they could result in a conflict between the ITU and WTO regimes. Therefore, WTO rules can assist companies to play a pivotal role in influencing the rule-making process at both the domestic and international level.

### **Telecommunications at the WTO – A Brief Historical Overview**

**4.74** According to the WTO Secretariat, telecommunications services are a global market worth over \$1.5 trillion in revenue. Mobile Services account for roughly 40 per cent of this, while mobile subscribers worldwide currently outnumber the use of fixed telephone lines by more than two to one. In the past two decades, the market has witnessed far-reaching changes, with the introduction of competition into a sector that was once principally a monopoly.

At the start of the Uruguay Round in 1986, telecommunications services around the globe were still largely in the hands of state-owned national monopolies. At the time, the United States had just experienced the break-up of AT&T. A year later, in 1987, the European Commission made its first proposals for a partial liberalisation of telecommunications services in the European Community.<sup>121</sup>

**4.75** Sectoral talks on telecommunications services began in 1989. The negotiations, however, encountered several specific difficulties. The GATT Contracting Parties agreed to extend sectoral negotiations on basic telecommunications until 1996.<sup>122</sup> These continued negotiations first resulted in a breakdown in 1996 when the United States pulled out, claiming a lack of a critical mass of commitments from other Members. The negotiations ultimately resulted in a significant package of specific commitments in basic telecommunications services undertaken by 69

120 There is the possibility for private persons to submit *amicus curiae* briefs (or so-called friend of the court letter) to WTO panels or the Appellate Body. However, past practice indicates that there is a reluctance to take on board the views of private companies in dispute settlement cases unless the brief is formally adopted by one of the governmental parties to the dispute.

121 See European Commission, Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290 Final (Brussels, 30 June 1987).

122 Decision on Negotiations on Basic Telecommunications, attached to the WTO Agreement.

countries. In addition to specific market access commitments, all but two of these countries undertook to adhere to a 'Reference Paper' that includes regulatory disciplines.

**4.76** In the landmark dispute settlement case of *Mexico – Measures Affecting Telecommunication Services ('Telmex')*, the WTO dispute settlement panel found Mexico to be in violation of, inter alia, obligations relating to interconnection and to the prevention of anti-competitive practices, both sets of obligations emanating from the 'Reference Paper'.<sup>123</sup>

### 'Rule of Law': Dispute Settlement at the WTO

**4.77** In contrast to the former GATT system, the WTO emerged as a strictly rules-based system. While a dispute settlement system had in fact gradually evolved under the GATT over the 47 years of its operation, it remained largely a forum for diplomatic, rather than law-based, solutions. Under the previous GATT system, the final adoption of panel verdicts, or 'reports', required the consensus of GATT contracting parties. The reports could, therefore, be – and commonly were – blocked by the losing party. GATT obligations were, therefore, seen as something less than hard law due to the ability to block reports.

**4.78** The WTO, in marked contrast, benefits from a two-instance, compulsory and rather expedient dispute settlement procedure under the Dispute Settlement Understanding (DSU), another multilateral agreement that forms part of the 'single undertaking' of all WTO Members. Disputes between WTO Members over alleged violations of the WTO Covered Agreements (eg the GATT, the GATS and the TRIPS) can be brought before a dispute settlement panel. The panel's verdict is issued in the form of a 'report'.<sup>124</sup> The parties to a dispute may then appeal a panel report, in which case the WTO Appellate Body will review the decision. The appeals review process is limited to issues of law.

**4.79** The procedure is governed by detailed rules and a fixed timetable. The DSU provides that the time from the request for the establishment of a panel until the adoption of its report should be no longer than nine months and, in the case of an appeal, no longer than 12 months. While these deadlines are sometimes missed, WTO dispute settlement proceedings are still, nonetheless, faster than many domestic judicial proceedings.

**4.80** Most importantly, the DSU no longer allows the losing party to block the adoption of the ruling of the panel. Instead of the 'positive consensus' required under the old GATT 1947, which gave each country a veto, the DSU provides for a 'negative consensus' rule, under which a consensus will be required amongst Members to block a panel report.

**4.81** The outcome, 'the report', is a legally binding decision, which obliges the state to comply with it. In the vast majority of cases, WTO Members comply with panel or Appellate Body rulings without further enforcement. However, the DSU permits two sanctions if the rulings of the panel or the Appellate Body are not implemented within a reasonable period. The first is compensation payable by the losing party, which may typically consist of additional trade concessions, usually in

123 The relevant findings of the Panel are discussed below in the context of the respective rules and commitments.

124 A semantic concession to GATT history. WTO panel or Appellate Body reports are de facto binding judgments.

related economic areas to the dispute, that are acceptable to the winning party as a substitute for maintaining the trade barriers in dispute. Compensation is a voluntary remedy in that it requires the agreement of both parties to the dispute. The second sanction is retaliation (suspension of concessions) against the losing party. Retaliation must be authorised by the Dispute Settlement Body and it must match the level of the impairment suffered by the winning party.

**4.82** In the 18 years since its inception, the WTO dispute settlement system has handled nearly 400 cases, more than its predecessor GATT in 47 years. In the landmark *Telmex* case – the first WTO dispute to be resolved solely under the GATS – the United States successfully challenged certain regulations of Mexico's telecommunications law. The United States had, in particular, complained that Mexico failed to ensure that its dominant provider 'Telmex' provided interconnection to US telecom suppliers on reasonable terms and that Mexico failed to prevent Telmex's anti-competitive practices.<sup>125</sup>

## THE GATS

### Structure

**4.83** The GATS aims to cover, in principle, all international trade in services between WTO Members. Broadly modelled on the GATT, the GATS is built on the principles of market access, non-discrimination, transparency, the rule of law, and, more generally, predictability and reliability in relation to national regulations affecting trade in services.

**4.84** Unlike the GATT, however, the GATS itself does not provide for absolute market access rights. Such rights are exclusively contained in the specific national commitments embodied in the so-called schedules.

### Principles

#### *Four modes of supply*

**4.85** Article I (2) of the GATS defines four 'modes of supply' of services in international trade, namely:

- (a) services supplied from the territory of one Member into the territory of another Member (cross-border supply, also called 'mode 1');
- (b) services supplied in the territory of one Member to the service consumer of another Member (consumption abroad, also called 'mode 2');
- (c) services supplied by a service supplier of one Member through commercial presence in the territory of another Member (commercial presence, also called 'mode 3'); and
- (d) services supplied by a service supplier of one Member through the presence of natural persons of a Member in the territory of another Member (presence of natural persons, also called 'mode 4').

**4.86** These four modes aim to cover any situation where a service is traded internationally. The most important, both generally and for telecommunications

---

<sup>125</sup> We discuss the details of the case below in the respective context of the relevant legal provisions.

services, are modes 1 and 3. Under mode 1, the service itself, but not the service provider, crosses national borders. It, therefore, resembles to some extent trade in goods. Under mode 3, service suppliers establish themselves in the territory of another Member. This includes the establishment of a subsidiary or branch as well as the investment in existing service suppliers of that Member. Mode 3, in other words, covers investment in services sectors.

The modes of supply are of crucial relevance for the scheduling of specific market access commitments.<sup>126</sup>

**4.87** The classification of a specific provision of a service into the system of the four modes of supply can be difficult. While, for example, mode 1 clearly applies if a lawyer provides legal advice via telephone to a client in another country, the panel in the *Telmex* case had to deal with an argument put forward by Mexico that the cross-border supply of voice telephony pre-supposed that the service provider was using its own lines on both sides of the border. The panel rejected that interpretation and held that a call from the United States into Mexico constituted the cross-border supply of voice telephony services, irrespective of whether the call was carried through on owned or leased network capacity.<sup>127</sup>

### *Most-Favoured Nation*

**4.88** Article II GATS provides in para 1:

‘With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.’

It should be noted that the Most-Favoured Nation Principle applies independently of whether the respective Member has made specific market access commitments in the respective sector. To the extent that it allows a service provider from any country (not only another WTO Member) to provide a service under any of the four modes of supply, it must grant the same access to services and service suppliers of other WTO Members. It should further be noted that, as under Article I GATT, the Most-Favoured Nation Principle applies unconditionally, ie it is not subject to reciprocity.

**4.89** Members of the WTO had the one-time chance to schedule, ie reserve, exceptions to this Most-Favoured Nation Principle at the time when they scheduled their specific market access commitments. For the original Members of the WTO, this was at the time of the conclusion of the Uruguay Round. For Members who have acceded to the WTO after that date, their ‘Article II Exemptions’ had to be scheduled at the time of accession.

### *Market access and national treatment*

**4.90** Article XVI GATS is the provision that links the so-called ‘Schedules’ of specific commitments relating to market access to the GATS itself. Article XVI incorporates the individual schedules of WTO Members as integral parts into the

<sup>126</sup> See para 4.97 below.

<sup>127</sup> *Mexico – Measures Affecting Telecommunication Services*, Report of the Panel, WT/DS 204/R, para 7.45 (2 April 2004).

GATS. The specific commitments included in a Member's schedule thereby become enforceable WTO law vis-à-vis any other Member.

**4.91** Article XVII GATS provides that within scheduled/committed services sectors and modes of supply, a Member has to grant national treatment to services and service suppliers from other WTO Members. This means that they enjoy treatment no less favourable than corresponding national services or service suppliers of that Member.

**4.92** The restriction of national treatment to scheduled services is a marked departure from the GATT model. Whereas under Article III GATT, goods generally enjoy national treatment (once they have cleared the border), national treatment under the GATS is firmly restricted to scheduled sectors and modes of supply. This means that outside of such scheduled coverage, service suppliers can only demand Most-Favoured Nation treatment, ie equal treatment with other third country suppliers. They have no right to national treatment unless the services are scheduled. The nature and structure of schedules is further discussed below.

### *Transparency and domestic regulation*

**4.93** Article III (1) GATS provides that a Member must publish 'all relevant measures of general application which pertain to or affect the operation of this Agreement' promptly, which means at the latest by the time of their entry into force, except in emergency situations. Further, a Member must notify such measures to the WTO<sup>128</sup> (para 3). Most importantly, a Member is obliged to maintain so-called 'anchor points' where other Members can obtain relevant information.

### *Domestic regulation*

**4.94** While the preamble of the GATS explicitly recognises the right of WTO Members to regulate services, Article VI of the Agreement provides for certain disciplines on such domestic regulation. In sectors where a Member has undertaken specific commitments, it is bound to 'ensure that all measures of general application affecting trade and services are administered in a reasonable, objective and impartial manner'.<sup>129</sup> In addition, Members have to provide for an objective and impartial review of administrative decisions relating to trade and services through judicial, arbitral or administrative tribunals or procedures.<sup>130</sup> A Member is further bound to provide for speedy and transparent authorisation procedures.<sup>131</sup> Qualification requirements and procedures, technical standards and licensing requirements should not constitute unnecessary barriers to trade in services. The requirements applied should be based on objective and transparent criteria, should not be more burdensome than necessary to ensure quality and, in the case of licensing procedures, should not in themselves constitute restrictions on the supply of the service.<sup>132</sup>

---

128 Council for Trade and Services.

129 Art VI (1) GATS.

130 Art VI (2) (a) GATS.

131 Art VI (3) GATS.

132 These criteria apply directly in sectors where a Member has made specific commitments, see Art VI (5) GATS. In other sectors, guidelines are provided for further disciplines to be developed under the auspices of the Council for Trade and Services ((Art VI) (4) GATS).

### Exceptions

**4.95** A number of exceptions apply to the coverage of general GATS rules. The Most-Favoured Nation and National Treatment Principles, as well as specific scheduled commitments, do not apply to government procurement. WTO Members thereby remain free to discriminate against, and not procure from, foreign service suppliers.<sup>133</sup>

**4.96** Similar to Article XX GATT, Article XIV contains 'general exceptions' for measures necessary for the advancement of non-trade-related policy goals such as the protection of public morals, the maintenance of public order or the protection of human, animal or plant life or health. Such measures are consistent with the GATS if they 'are not applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade and services'. Article XIV b is further more provides for security exceptions.

### Schedules of Specific Commitments

**4.97** Commitments regarding telecommunications services were first made during the Uruguay Round (1986–1994), mostly in value-added services. After the creation of the WTO, WTO members negotiated on basic telecommunications services. Since 1997, commitments have been made by acceding members upon accession to the WTO or unilaterally at any time.

GATS schedules are relatively complex documents.<sup>134</sup> They usually contain two major sections on horizontal commitments (applying to all scheduled services sectors) and vertical, or sector-specific, commitments (applying specifically to a listed services sector or sub-sector). Both are contained in tables consisting of four columns.

As of today, a total of 108 WTO members have made specific commitments to facilitate trade in telecommunications services. This includes the establishment of new telecommunications companies, foreign direct investment in existing companies and cross-border transmission of telecommunications services. Out of this total, 99 WTO members have committed to extend competition in basic telecommunications. In addition, 82 WTO members have committed to the regulatory principles spelled out in the 'Reference Paper', a blue print for sector reform that largely reflects best practice in telecommunications regulation.

**4.98** The first column names and, where necessary, further describes those service sectors or sub-sectors for which commitments are undertaken.<sup>135</sup> Listing sectors or sub-sectors in the first column opens up these sectors for services and service suppliers from other WTO Members under any of the four modes of supply, unless the second column specifies restrictions. The second column, therefore, usually contains a number of specific limitations, specified with respect to each mode of supply with respect to each scheduled sector. Typical market access limitations

133 Art XIII (1) GATS. Paragraph 2 of the provision provides for negotiations on disciplines on such government procurement. However, no results have been achieved until now.

134 For background information on schedules and scheduling see Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92, 28 March 2001.

135 In the horizontal commitments section this entry usually reads 'All sectors included in this schedule', referring to the specific sectors listed further below in the schedule.

include, for example, maximum percentages of foreign shareholdings in national service supply companies (commercial presence, mode of supply 3).

**4.99** Because Article XVII GATS provides in principle for the extension of national treatment to all scheduled services, the third column must contain all limitations on national treatment that the respective WTO Member wants to maintain in these sectors. Any limitation on national treatment not listed in this column would be contrary to WTO law. The fourth column finally contains any additional commitments WTO Members may want to schedule. By way of example, the parties to the Fourth Protocol to the GATS of 1997 included their commitment to the 'Reference Paper' in this column.

**4.100** By way of example, the section of the United States' schedule covering basic telecommunications<sup>136</sup> – a relatively simple schedule – looks as follows:

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

#### UNITED STATES – SCHEDULE OF SPECIFIC COMMITMENTS (Excerpt)

Modes of supply: 1) Cross-border supply 2) Consumption abroad  
3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
2.C. TELECOMMUNICATIONS SERVICES:*			
2.C.a. Voice services	(1) None	(1) None	The United States undertakes the obligations contained in the Reference Paper attached hereto.
2.C.b. Packet-switched data transmission services	(2) None	(2) None	
2.C.c. Circuit-switched data transmission services	(3) None, other than – Comsat has exclusive rights to links with Intelsat and Inmarsat.	(3) None	
2.C.d. Telex services	– Ownership of a common carrier radio license:	(4) Unbound except as indicated by horizontal commitments.	
2.C.e. Telegraph services			
2.C.f. Facsimile services			
2.C.g. Private leased circuit services			

136 GATS/SC/90/Suppl. 2, as agreed under the Fourth Protocol to the GATS of 11 April 1997.

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p>2.C.o. Other Mobile Services Analogue/Digital cellular services PCS (Personal Communications services) Paging services Mobile data services</p> <p>* Excluding one-way satellite transmissions of DTH and DBS television services and of digital audio services</p>	<p>Indirect: None Direct: May not be granted to or held by (a) foreign government or the representative thereof (b) non-US citizen or the representative of any non-US citizen (c) any corporation not organized under the laws of the United States or (d) US corporation of which more than 20 per cent of the capital stock is owned or voted by a foreign government or its representative, non-US citizens or their representatives or a corporation not organized under the laws of the United States. (4) Unbound except as indicated by horizontal commitments</p>		

**4.101** It should be noted that in the language of GATS scheduling, 'none' indicates 'no limitations', ie full commitments, whereas 'unbound' indicates the opposite, namely 'no commitments'.

## Specific Commitments and Rules Relating to Telecommunications under the GATS

### *Categories of telecommunications services and the distinction between basic and value-added telecommunications*

**4.102** The GATS Services Sectoral Classification List<sup>137</sup> used by most Members in the Uruguay Round negotiations breaks down telecommunications into 14 sub-sectors (a.– n.) and one ‘other’ (o.) category. The list did not differentiate between basic and value added telecommunications services. That distinction was introduced into the GATS framework by the United States, reflecting US regulatory categories used to delineate the powers of the FCC.<sup>138</sup> The exact delineation between the two categories is a matter of varying interpretations by Members.<sup>139</sup> US law defines ‘basic services’ as ‘the offering of transmission capacity for the movement of information’ while value-added, or enhanced, services are defined as ‘any offering over the telecommunications network that is more than a basic transmission service’.<sup>140</sup>

**4.103** The distinction played a role not so much in designing schedules, where Members make use of the said 15 categories, but in the negotiations and in particular in the decision to split negotiations in two when it became clear that Members were too far away from an agreement on commitments on basic telecommunications at the end of the Uruguay Round. While Members did make commitments in value-added services at that time, they decided to leave basic telecommunications on the table. The Decision on Negotiations on Basic Telecommunications annexed to the WTO Agreement required further negotiations that eventually resulted in the Fourth Protocol to the GATS of 1997.<sup>141</sup> The Decision defines basic telecommunications simply as ‘trade in telecommunications transport networks and services’.<sup>142</sup> The categories used in the negotiations leading to the ‘Fourth Protocol’ included a. voice telephone, b. packet-switched data transmission, c. circuit-switched data transmission, d. telex, e. telegraph, f. telefax, g. private-leased circuit and o. ‘other’ services, including, inter alia, mobile phone, paging and teleconferencing services.<sup>143</sup>

**4.104** The distinction between basic and value-added services, however, does play an important role with respect to the ‘Reference Paper’, which defines its scope as being solely related to ‘principles and definitions on the regulatory framework for the basic telecommunications services’.<sup>144</sup>

137 MTN.GNS/W/120. Use of the list was not obligatory. Members were free to use other categorisations if they saw fit. However, most Members’ schedules make extensive use of the list.

138 See Marco Bronckers & Pierre Larouche, *Telecommunications Services* (2005), p 996.

139 See Telecommunications Services, Background Note by the WTO Secretariat, S/C/W/74, 8 December 1998, para 7.

140 The definitions stem from the FCC’s ‘Computer Inquiries’, see Marco Bronckers & Pierre Larouche, *Telecommunications Services*, p 996 (2005).

141 See para 4.110 below.

142 Decision on Negotiations on Basic Telecommunications, para 1.

143 Use of the ‘other’ category in relation to the distinction is not uniform.

144 Reference Paper, annexed to the Fourth Protocol to the GATS, see para 4.113 below.

### *The Annex on Telecommunications*

**4.105** The Annex on Telecommunications<sup>145</sup> (the 'Annex') provides for additional, specific disciplines beyond the GATS on 'measures of a Member that affect access to and use of public telecommunications transport networks and services'.<sup>146</sup> The preamble to the Annex emphasises 'the dual role [of telecommunications] as a distinct sector of economic activity and as the underlying transport means for other economic activities'. The Annex, consequently, contains disciplines to ensure that other sectors do not suffer indirectly from insufficient commitments in telecommunications.<sup>147</sup> The Annex thereby comes as a 'bonus'<sup>148</sup> to service suppliers that benefit from scheduled commitments.

#### ACCESS TO AND USE OF NETWORKS

**4.106** Paragraph 5 (a) of the Annex states that:

[e]ach Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule.<sup>149</sup>

**4.107** These access rights are further specified in some detail.<sup>150</sup> The panel in *Telmex* interpreted 'reasonable terms' to include requirements akin to, even if not as far-reaching as, 'cost-orientation' as required by Section 2.1 (b) Reference Paper.<sup>151</sup> It, therefore, found Mexico's termination rates for incoming international calls in violation of the above provision (in addition to a violation of the Reference Paper) because they were significantly above costs.

#### RESERVED RIGHTS OF MEMBERS

**4.108** Members retain the right to take measures necessary to ensure the security and confidentiality of messages as long as these measures are not discriminating.<sup>152</sup> They also retain the right to impose conditions necessary to safeguard suppliers'

145 'Integral part' of the GATS, see Art XXIX GATS.

146 See para 1 of the Annex.

147 Bronckers and Larouche, para 4.102, fn 124 above, p 998, call it 'an insurance policy for suppliers of other services.'

148 Bronckers and Larouche, para 4.102, fn 124 above, at p 999.

149 Section 5(a) of the Annex.

150 Subparagraph (b) specifies that such service suppliers should be allowed to:

- purchase or lease and attach terminal or other equipment which interface with the network and which is necessary to supply a supplier's services;
- interconnect private leased or owned circuits with public telecommunications transport networks and services; or with other privately owned or leased circuits; and
- use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

Subparagraph (c) spells out the right of foreign service suppliers to use public telecommunications transport networks for the movement of information within and across borders, including for intra-corporate communications.

151 *Telmex*, Panel Report, para 4.87 above, at paras 7.310–7.344; see, in particular, para 7.344.

152 Section 5 (d) of the Annex

public services responsibilities, to protect the technical integrity of public networks and services or to enforce the limitations of services commitments made.<sup>153</sup>

## TRANSPARENCY

**4.109** Extending the transparency obligations of Article III of the GATS, the Annex requires Members to ensure that:

‘relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.’<sup>154</sup>

### *The Fourth Protocol to the GATS*

**4.110** The Fourth Protocol,<sup>155</sup> at the time of its conclusion in 1997 also referred to as the ‘Agreement on Basic Telecommunications’, brought two major developments.

**4.111** First, it contained as annexes supplements to 55 GATS schedules covering 69 states<sup>156</sup> containing in large part significant market access commitments in basic telecommunications services, including commitments relating to commercial presence – ie total or partial equity investment in local telecoms operators – from 56 countries covering roughly 97 per cent of total revenue from basic telecoms worldwide.<sup>157</sup>

**4.112** Secondly, remarkably all but two<sup>158</sup> signatories to the Fourth Protocol agreed to undertake significant additional commitments on regulatory principles in the area of basic telecommunications contained in the so-called Reference Paper.<sup>159</sup>

---

153 Section 5 (e) of the Annex. Section 5 (f) contains examples of such conditions, such as restrictions on resale or shared use of services or technical requirements. An additional exception applies to developing countries. Section 5 (g) entitles them to ‘place reasonable conditions on access to and use of public... networks and services necessary to strengthen [their] domestic telecommunications infrastructure and service capacity and to increase [their] participation in international trade telecommunications services. However, this only applies if the conditions are contained in the Members schedule – which was not the case for Mexico in *Telmex*. See Panel Report, para 4.87 above, at paras 7.386–7.389.

154 Section 4 of the Annex.

155 See para 4.68 above

156 The European Communities submitted a single schedule for their (then) 15 Member States.

157 See the very useful unofficial compilation of commitments under the Protocol prepared by the WTO Secretariat, available at [www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_commit\\_exempt\\_list\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm) (last visited 31 January 2013) the compilation also contains Members recently acceded to the WTO and other Members not signatories to the Protocol who undertook similar commitments. See also Bronckers and Larouche, para 4.102, fn 124 above, at p 1000 for summaries.

158 Ecuador and Tunisia.

159 While most participants adopted the Reference Paper unmodified, some Members (Bolivia,

### The 'Reference Paper'

**4.113** The Reference Paper contains a set of rules, or principles, to be applied in the national regulation of telecommunications services by WTO Members in relation to foreign services and service providers. The document has two primary purposes. The first is to provide an effective framework of domestic competitive safeguards for foreign telecommunications service providers, in most cases faced with an entrenched national industry, often dominated by the incumbent former monopolist. The second key purpose is to make such disciplines legally enforceable before the WTO Dispute Settlement Body.

**4.114** Both purposes appear to have been put to effect in the recent *Telmex* case. The panel, largely following the complaints brought forward by the United States, found the Mexican law and practice relating to incoming calls – which the panel identified as price cartels and market sharing – to constitute anti-competitive practices in violation of Mexico's commitments, inter alia, under the Reference Paper.

#### THE NATURE OF THE REFERENCE PAPER: A SET OF ADDITIONAL COMMITMENTS

**4.115** The Reference Paper is a very brief (2 ½ page) minimum standard set of pro-competitive regulatory principles for the regulation of basic telecommunications. As the name indicates, it became applicable to those Members who agreed to it by being incorporated by reference in, and annexed to, their respective schedules of specific GATS commitments. The Reference Paper can, in effect, be called a piece of industry-specific competition legislation.

#### SPECIFIC DISCIPLINES RELATING TO 'MAJOR SUPPLIERS'

**4.116** Given the industry's history of monopoly structures it is not surprising that the Reference Paper takes as its point of reference the concept of the 'major supplier', which the Reference Paper, evidently basing itself on established competition law concepts of market dominance, defines as:

'a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of (a) control over essential facilities;<sup>160</sup> or (b) use of its position in the market'.

The panel in *Telmex* had little difficulty in finding that Telmex was such a 'major supplier'.<sup>161</sup>

---

India, Malaysia, Morocco, Pakistan, the Philippines, Turkey and Venezuela) deleted individual commitments. Others (Bangladesh, Brazil, Mauritius and Thailand) committed to introducing the Reference Paper at a later point in time.

160 The Reference Paper defines 'essential facilities' as 'facilities of a public telecommunications transport network or service that (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service. For a discussion the 'essential facilities' concept and its counterpart in competition law see Marco Bronckers, 'The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?', in Bronckers and Quick (eds) *New Directions in International Economic Law* (2000) pp 371, 385–386.

161 *Telmex*, Panel Report, para 4.87 above, at paras 7.146–7.159. In the course of doing so, the panel made an interesting finding on the 'relevant market' in the case. While Mexico had argued that the relevant market would have to include incoming *and* outgoing international

The 'major supplier' is the specific addressee for two sets of disciplines, to be enforced by the WTO Member concerned, namely competitive safeguards and interconnection obligations.

#### COMPETITIVE SAFEGUARDS

**4.117** Section 1.1 of the Reference Paper provides that '[a]ppropriate measures shall be maintained [to prevent] suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices'. The onus is thus on the Member to ensure, by whatever appropriate means, adequate behaviour by 'major suppliers' within its jurisdiction.

**4.118** The question of what is included in the notion of anti-competitive practices is a matter of fierce debate. Section 1.2 Reference Paper notes that it shall 'include in particular' anti-competitive cross-subsidisation, using information obtained from competitors with anti-competitive results and the refusal to provide information about essential facilities and commercially relevant information to other service suppliers. While the examples and the starting point ('major supplier') may suggest that the relevant behaviour must be related to an abuse of dominance, the Panel in *Telmex* applied a more expansive interpretation of the concept to include price-fixing cartels and market-sharing arrangements. This has been heavily criticised by some<sup>162</sup> and defended by others.<sup>163</sup>

**4.119** In the case at hand, the Mexican international long distance rules provided that uniform rates for the termination of international calls into Mexico were to be negotiated by the supplier who had the biggest market share of *outgoing* traffic from Mexico in the preceding six months (which was invariably *Telmex*). The rules further provided that incoming calls were to be distributed among Mexican international gateway providers in proportion to their respective share of outgoing calls in the preceding month. The Panel found that these practices amounted to price-fixing and market-sharing arrangements, which the Panel found to be 'anti-competitive practices' in the sense of Section 1.1 of the Reference Paper.<sup>164</sup> The fact that Mexican law in fact mandated the actions did not change the finding, as the Reference Paper obligation incumbent on Mexico to prevent such behaviour remained unaffected.<sup>165</sup>

**4.120** With only one dispute ruled on to date, the jurisprudence is as yet novel and will clearly evolve as more disputes are brought before the Dispute Settlement Body. It is possible that future panels might not apply concepts and case references from national competition laws as freely as this one did. However, generally speaking, regulators and dominant operators should expect to be judged against high standards.

---

calls, as Mexico was not providing termination services but was completing international calls on a shared revenue basis (accounting rates), the United States had argued that a 'demand substitution' analysis suggested the opposite. The Panel followed this latter approach.

162 Marsden, 'WTO Decides Its First Competition – With Disappointing Results', (2004) 16(3) *Competition Law Insight* 8. See also George, 'WTO panel condemns anti-competitive behaviour in international telecoms case' (2004) 10(5) *International Trade Law and Regulation* 106.

163 Bronckers and Larouche, para 4.102, fn 124 above.

164 *Telmex*, Panel Report, para 4.87 above, at para 7.238.

165 *Telmex*, Panel Report, para 4.87 above, at paras 7.239–7.245.

## INTERCONNECTION

**4.121** Section 2 of the Reference Paper imposes obligations on 'major suppliers' relating to interconnection with foreign service providers who enjoy market access under specific scheduled commitments. Section 2.2<sup>166</sup> requires that interconnection be ensured at any technically feasible point in the following manner:

- under non-discriminatory terms ...;
- in a timely fashion, on terms, conditions ... and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled ...; and
- upon request at additional termination points, subject to charges.

**4.122** The provision contains a number of terms, like 'cost-oriented', 'sufficiently unbundled', 'reasonable', that are rather broad and for which clear definitions are yet to be developed.<sup>167</sup> It will be the task of the Dispute Settlement Mechanism to bring some clarification of the used terms and, thus, strengthen the impact of this provision.

**4.123** The Panel in *Telmex* did some first steps in this regard. It found that the interconnection rates offered to US operators under the Mexican ILD rules were significantly above costs,<sup>168</sup> elaborating on the interpretation of 'cost-oriented rates'.<sup>169</sup> The Panel also clarified that relevant costs in the context of international interconnection under the Reference Paper must be those that relate to the actual, attributable cost of providing the service (in this case termination),<sup>170</sup> but may be calculated on the basis of incremental cost methodologies.<sup>171</sup>

---

166 The full text of section 2.2 reads:

**2.2 Interconnection to be ensured**

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
- (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.'

167 Some terms, however, have their origin in US or EU law, so that recourse to EU/US interpretation is possible, e.g. 'transparency and cost-orientation', 'sufficiently unbundled' in Art 7 of the former EC Interconnection Directive 97/33; 'technical feasible points' in s 251(c)(2)(B) of the US Telecommunications Act.

168 The Panel followed the United States' analysis. The United States had provided four comparisons by proxy, including comparisons with national termination rates that were supposed by law to cover costs. In all four comparisons, the international termination rates were significantly higher. See *Telmex*, Panel Report, 7.186-7.216.

169 See *Telmex*, Panel Report, 7.166-7.185.

170 See *Telmex*, Panel Report, 7.171. The Panel sought and found guidance, inter alia, in ITU-T-series Recommendation 1.40 and 1.50.

171 See *Telmex*, Panel Report, 7.177.

**4.124** It further clarified that guidance for the qualifying phrase 'having regard to economic feasibility' could be drawn from the EC Interconnection Directive, in the context of which, the phrase is understood to mean that operators must be allowed a reasonable rate of return on investment.<sup>172</sup>

**4.125** Sections 2.3 and 2.4 of the Reference Paper oblige the major supplier to make publicly available its procedures for interconnection negotiations and either its interconnection agreements or a reference interconnection offer. Section 2.5 finally requires that a fast-track independent review procedure is available to suppliers requesting interconnection with a 'major supplier'.

**4.126** Based on the *Telmex* experience, it can be said that the interconnection obligations under the Reference Paper are significant. To aggrieved providers, they offer good chances to gain access or reduce disproportionate costs.

#### UNIVERSAL SERVICE

**4.127** An important exemption applies to the benefit of universal service provision. Section 3 of the Reference Paper allows for the implementation of a universal service obligation. These obligations 'will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member'.

**4.128** In the negotiations leading to the Reference Paper the issue of universal service obligations was subject to much debate. While it is generally accepted that the provision of universal service needs some kind of regulatory protection, it was disputed how far-reaching this protection should be. It was argued that universal service exemptions significantly impede market access and are rather used to protect domestic service providers than to enable the provision of universal service.<sup>173</sup> Section 3 Reference Paper, however, makes it clear that every Member retains the right to define the kind of universal service obligation it wishes to maintain, to which services are to be offered universally and what conditions shall apply.

**4.129** Measures under this provision must not be 'more burdensome than necessary'.<sup>174</sup> It remains to be seen whether a reasonably strict necessity test, such as the one applied to measures under the 'general exceptions' provisions of Article XX GATT, will take hold in the interpretation of this exemption.

#### LICENSING DISCIPLINES

**4.130** Where licensing applies, all criteria and time periods normally required as well as terms and conditions of individual licences must be made public. Reasons must be given in case of denial of a licence.<sup>175</sup>

<sup>172</sup> See *Telmex*, Panel Report, 7.185.

<sup>173</sup> See Markus Fredebeul-Klein and Andreas Freytag, 'Telecommunications and WTO discipline', [1997] *Telecommunications Policy* 477, 482.

<sup>174</sup> India, for example, has taken an even broader exception from the provision on anti-competitive practices by stating that universal service obligations are not regarded as anti-competitive per se, since they would be administered in a transparent and non-discriminatory manner (GATS/SC/ 42/Suppl.3, 11 April 1997).

<sup>175</sup> Section 4 Reference Paper.

Critics have voiced dissatisfaction with the limited scope of this provision, as important issues regarding licensing remain unaddressed.<sup>176</sup>

#### INDEPENDENT REGULATORS

**4.131** Section 5 of the Reference Paper demands an impartial regulatory body that is 'separate from, and not accountable to, any supplier of basic telecommunications services'. While this straightforward rule of the separation of operator and regulator is laudable, issues remain. Unlike in EC Law<sup>177</sup> there is no provision for the structural separation of regulator and (state) owner when a telecoms operator is state-owned or state-controlled,<sup>178</sup> so that conflicts of interests and undue pressures may not be fully excluded.

#### ALLOCATION OF RESOURCES

**4.132** Section 6 of the Reference Paper provides for the objective, timely and non-discriminatory allocation of scarce resources, such as frequencies.

#### THE GATT

**4.133** Whilst the focus of this section has been on the GATS, it is, nonetheless, worth referring to the key obligations of the General Agreement on Tariffs and Trade ('GATT'). The GATT governs the international trade between WTO Members of goods, including telecommunications-related equipment. The three key sets of obligations that apply to the international trade in goods are briefly addressed here.

**4.134** Article I GATT guarantees Most-Favoured Nation treatment for the goods of the WTO Members. Under the terms of Article I, any advantage, favour, privilege or immunity granted by any WTO Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the 'like product' originating in or destined for the territories of other WTO Members. There is a significant amount of jurisprudence from both the GATT and WTO systems on what constitutes a 'like product'. As the Most-Favoured Nation treatment is only accorded to 'products', whether products are in fact 'like' is always a keenly disputed issue before the panels and the Appellate Body.

**4.135** Article III GATT ensures that goods imported from other WTO Members receive national treatment in respect of taxation and other regulations. More specifically, Article III:2 GATT prohibits WTO Members from applying, directly or indirectly, internal taxes or charges of any kind in excess of those applied to like domestic products. Article III:4 requires WTO Members to accord treatment no less favourable to products imported from the territories of other WTO Members than that accorded to like products of national origin 'in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use'. Once again, any disputes raising issues under Article III will inevitably result in arguments as to whether the relevant products are

176 Bronckers and Larouche, para 4.103, fn 124 above, pp 1011–12.

177 Art 3(2) Directive 2002/21 [2002] OJ L108/33.

178 Section 5 does not require that the regulatory body has to be structurally separate from the ministry even in the case of still state owned telecommunications companies. Cf. Fredebeul-Klein and Freytag [1999] Telecommunications Policy 625, 632.

'like'. The national treatment principle embodied within the GATT has played a significant role to bring down trade barriers. Unlike the GATS system, national treatment under the GATT applies unconditionally and does not depend upon WTO Members adhering to or specifying additional commitments.

**4.136** Finally, Article XI:1 GATT provides for the general elimination and prohibition of quantitative restrictions relating to both imports and exports. This provision requires WTO Members to remove any and all prohibitions and restrictions, whether made effective through quotas, import or export licences or other measures, in relation to imports from, or exports to, the territory of another WTO Member.

**4.137** As with the GATS, the GATT has an exceptions clause that provides a derogation from compliance with the substantive obligations referred to above. Under Article XX GATT, nothing in the GATT prevents the adoption or enforcement of measures that are, inter alia, necessary to protect public morals, necessary to protect human, animal or plant life or health or relating to the conservation of exhaustible natural resources. Article XX GATT is a commonly litigated provision. Any dispute in which a complainant Member establishes a prima facie violation of the GATT under Articles I, III or XI will typically then move to the defendant Member seeking to justify its conduct under Article XX.

**4.138** There appear to be no cases under the WTO Dispute Settlement Mechanism involving breaches of the GATT in relation to the international trade in telecommunications equipment. Requests for formal consultations were made in *Japan – Measures Affecting the Purchase of Telecommunications Equipment*<sup>179</sup> and *Korea – Laws, Regulations and Practices in the Telecommunications Procurement Sector*.<sup>180</sup> Both disputes, however, appear to have been resolved bilaterally before any panel decision was handed down.

## THE TRIPS

**4.139** The Agreement on Trade-Related Intellectual Property Rights ('TRIPS') is another key Covered Agreement that is likely to be of relevance to operators within the telecommunications sector. It is intended to provide minimum guarantees of protection for those who hold intellectual property rights.

**4.140** As with the GATS and the GATT, TRIPS provides for the following basic rights:

- under Article 3 of the TRIPS, each WTO Member must accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the 'protection' of intellectual property rights (so-called national treatment); and
- under Article 4 of the TRIPS, with regard to the 'protection' of intellectual property rights, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately

<sup>179</sup> This involved a claim by the EC against Japan that a US-Japan agreement relating to telecommunications equipment was inconsistent with, inter alia, Articles I and III of the GATT.

<sup>180</sup> This case related to a claim by the EC against Korea alleging that the latter's procurement practices in relation to the telecommunications sector discriminated against foreign suppliers contrary to, inter alia, Articles I and III of the GATT.

and unconditionally to the nationals of all other Members (so-called Most Favoured Nation treatment).

For the purposes of both Articles 3 and 4 of the TRIPS, the term 'protection' is defined as including 'matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement'.

**4.141** The TRIPS governs a broad array of intellectual property rights including the following:

- copyright and related rights;
- trademarks;
- geographical indications;
- industrial designs;
- patents;
- layout designs (topographies) of integrated circuits; and
- protection of undisclosed information.

**4.142** Perhaps most importantly, the TRIPS provides for minimum enforcement procedures so as to permit effective action against any act of infringement of intellectual property rights covered by the agreement. Enforcement procedures are required to be fair and equitable and not unnecessarily complicated or costly (Article 41(2) TRIPS). Further, pursuant to Article 41(4), parties to proceedings should be afforded the opportunity to have administrative decisions judicially reviewed. TRIPS also requires WTO Members to ensure that the following remedies are made available in relation to intellectual property infringement proceedings: injunctions (Article 44 TRIPS), damages (Article 45 TRIPS), indemnification (Article 48 TRIPS) and provisional measures (Article 50 TRIPS). In addition, Article 61 TRIPS obliges Members to provide for criminal prosecutions, at least in relation to wilful trademark counterfeiting or copyright piracy on a commercial scale.

## THE WTO AND THE ITU

**4.143** As the WTO begins to venture into developing rules for subject matters traditionally falling under the auspices of other international and multilateral organisations, the risk of conflict between different international regimes increases. This risk has been most acute in relation to the overlap between the international trading regime, as set out under the WTO Covered Agreements, and multilateral environmental or health agreements. However, the possibility of conflict also exists as between the rules developed by the WTO and the ITU.

**4.144** One problem area relates to the size of, and differences in, international settlement rates. The price of each international connection has conventionally been negotiated under the ITU by single operators in the country of origin and destination of the call. Prices could vary significantly and inevitably exceeded costs in developing countries. A so-called peace clause was developed, under which WTO Members accepted, by way of informal gentleman's agreement, that they would not challenge the application of settlement rates, as developed under the ITU regime,

before the WTO's Dispute Settlement Mechanism.<sup>181</sup> However, the *Telmex* case challenges this understanding by confirming that, in so far as a WTO Member is bound by the requirements of the Reference Paper, then switched international services will be governed by the rules of the Reference Paper in relation to interconnection. This would suggest that there should be an alignment as between settlement rates and the costs of interconnection. However, this could raise political issues for developing countries, in particular, since they may depend on higher settlement rates in order to help build a more effective domestic telecommunications system. As one commentator notes, '[t]his ruling obviously interferes with ITU rates and poses the politically difficult question of whether the WTO or the ITU has the ultimate economic governance of international telecommunications'.<sup>182</sup>

**4.145** Another issue is the extent to which the WTO's trading rules would allow Members to take into account non-trade objectives including, for example, universal and public service or ensuring the safety and development of networks. Whilst this issue was addressed to some extent in the *Telmex* case, further clarity will be required from future WTO case law.<sup>183</sup>

## OUTLOOK: RECENT, CURRENT AND FUTURE NEGOTIATIONS

**4.146** Like other parts of WTO law, GATS law is in a state of current development through accession and multilateral negotiations. New specific commitments are scheduled by acceding countries at the time of their accession. Recent accessions have, as a rule, included a number of commitments in telecommunications services. Major trading nations now routinely request from accession candidates commitments in key service areas, including financial services and telecommunications services.

**4.147** The so-called 'GATS 2000' negotiations mandated by Article XIX(1) GATS were phased into the new comprehensive 'Doha Development Agenda' negotiations launched in November 2001 in the Qatari capital Doha. The negotiations, however, have run into intermittent deadlocks. While initial requests and some offers have been exchanged between WTO Members, it is too early to say whether, and to what extent, significant commitments in telecommunications services can be expected. Given the rapid development of the industry, however, there is an evident need for progressive development. As of July 2008, 39 governments had made offers to improve their existing commitments or to commit for the first time in the telecommunications sector. It is hoped that WTO members will respond to this need by advancing and successfully concluding the negotiations. However, given the current political focus of WTO Members on other more sensitive aspects of WTO negotiations (in particular, agriculture), it is far from clear that the needs of the telecommunications industry will be met in the near-, or even mid-term, future.

181 See WTO Report of the Group on Basic Telecommunications to the Council for Trade in Services, S/GBT/4, 15 February, para 5.

182 Luff, 'Telecommunications and Audio-visual Services: Considerations for a Convergence Policy at the World Trade Organization' (2004) 38(6) Journal of World Trade 1059-1086, at 1063.

183 Luff, at p 1064.