

Potential Tensions Between World Conference on International Telecommunications (WCIT-12) Proposals and International Trade Agreements

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This December, the Member States of the International Telecommunication Union will convene a World Conference on International Telecommunications (WCIT) in Dubai, United Arab Emirates, at which they will revise the international treaty known as the International Telecommunication Regulations (ITRs). Member States need to ensure that the outcomes neither call into question existing obligations under the World Trade Organization (WTO) Agreement, including the General Agreement on Trade in Services (GATS), nor impede further progress in building out the trade disciplines and market openings that are in play either in the WTO or in bilateral and regional fora. Current WCIT proposals put WTO commitments at risk, and may conflict with existing FTA obligations. Such a result would be an unacceptable outcome for many governments, including the United States. The European Administrations also have already flagged this as a serious issue. [1]

WCIT preparations have considered a broad range of possible revisions to the ITRs, ranging from minor editorial corrections and updates to the proposed addition of detailed new Articles and sub-Articles addressing issues such as Internet Protocol (IP) interconnection rates, international mobile roaming, and cybersecurity. In the course of the WCIT preparations, little formal attention has been paid to the interplay between proposed revisions

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to the ITRs and other international legal obligations of the ITU Member States. Earlier in the preparatory process, the ITU's Legal Advisor explained that under customary international law, a later treaty provision will supercede an earlier provision on the same subject matter as between the same parties, under the principle of "*lex posterior derogat priori*." [2] Although this matter would require independent analysis by the legal advisors for each administration to determine the effect under national law, it may be that new treaty obligations imposed by the revised ITRs unintentionally could be inconsistent with obligations or commitments in other international agreements, or could have unforeseen consequences for existing national and international regulatory regimes. [3]

Many ITU Member States have made commitments in the context of their WTO agreements. These agreements post-date the current ITRs. Therefore, to the extent there are differences with the current ITRs, the terms of these agreements apply as between the signatories. In particular, WTO Members have made detailed commitments to liberalize markets for international telecommunications services. Some WCIT proposals – if adopted – could create tensions with respect to these binding trade commitments. ITU Member States that are also WTO Members should take care that any proposed new or expanded treaty obligations are not inconsistent with long-established and successful international trade structures and relationships. WCIT negotiators should especially be certain of their countries' preexisting international agreements so as not to bind their respective countries to commitments that jeopardize their abilities to uphold important international obligations.

I. Potential Tensions Between WCIT Proposals and Trade Commitments

ITU Member States are parties to a variety of international trade agreements, many under the auspices of the WTO, and their other regional agreements and arrangements are consistent with their WTO obligations. At least two sets of issues contained within some circulating WCIT proposals may conflict with Members' commitments under WTO structures. These include proposals that would 1. Support expansive interpretations of the definition of telecommunication, and 2. Create Internet charging regimes that have different rates based upon the nature of the communication or content of the traffic.

A fundamental organizing principle of the WTO approach to communications services is the distinction between basic telecommunications and value-added services. [4] These services have been treated separately in the GATS and WTO Members have taken on different obligations with respect to these types of services. Additionally, some WTO Members have taken on obligations with respect to "computer-related" services. The Internet and Internet-related services have been considered by many WTO Members as "value-added" or "computer-related" services.

This raises an apparent conflict because some WCIT proposals are inconsistent with this core principle of the WTO's treatment of communications services. For example, some have asserted that the definition of telecommunication used in the ITRs already includes "ICTs" or information and communications technologies – commonly understood to include Internet-based services. However, such an expansive interpretation of the definition of "telecommunication" in the ITRs essentially would deny the important distinction between value-

added and basic telecommunications services that is basic to many crucial WTO obligations, and upon which governments have undertaken additional commitments through various regional and bilateral trade agreements.

If this assertion—that Internet services are telecommunication—were written in to the ITRs, it would jeopardize the continued validity of the separate value-added and basic GATS commitments, in contrast to the common sense principle of treaty interpretation that one should avoid assuming that the drafters—and sovereign signatories— ignored or were unaware of the important differences between the meaning of the language and concepts they employed. Any “evolution” in the definition of telecommunication also would create confusion about which WTO Member commitments apply to Internet-based services—only the commitments made with respect to value-added services, all commitments under the WTO basic telecommunications agreements, or both? These same considerations would apply for WTO Members that have made commitments regarding computer-related services.

A second WTO-related challenge posed by WCIT proposals is the proposition that the ITRs create a system for Internet peering, transit or termination charges that differentiates prices based on the nature, use or content of the communications. For example, some proposals would require that peering or transit agreements reflect non-cost-oriented principles such as “network externalities” or the “value” of the “traffic flows.” In effect, these proposals could lead Member States to implement regimes treating voice over IP or streaming video traffic differently than email communications or web browsing, based on a perceived “value” of the traffic.

Differentiated treatment of the same class of service could be inconsistent with the WTO and GATS liberalization of those services if it violates the fundamental principles of Most Favored Nation (MFN) or National Treatment (NT). Regardless of whether these services are treated as basic telecommunications, value-added services or computer-related services, signatories to the revised ITRs that committed in their WTO agreements to liberalize such services could find themselves in violation of these commitments if they did not take specific GATS limitations embracing this differentiation within the class of service.

These are two examples of the types of tensions WCIT proposals could raise with existing trade agreements. Because of the numerous and complex possibilities for unforeseen interplay between a revised ITRs treaty and pre-existing trade obligations—and given the expected rapid pace of work at the WCIT—it is critically important that WCIT participants be aware of their countries’ WTO commitments and avoid creating difficulties reconciling their nations’ treaty obligations. To assist in the effort, below is a brief primer on some of the significant communications-related provisions in major WTO agreements.

II. Telecommunications-Related International Obligations

WTO agreements create binding commitments related to the liberalization of global trade in goods and services, including telecommunications services and value-added services. The commitments in these international agreements, including the WTO’s GATS (including the Fourth Protocol on Basic Telecommunications, which incorporates the Telecommunications Reference Paper,) and the Annex on Telecommunications, which post-date the current ITRs, must be considered when negotiating any changes to

the ITRs.

A. The World Trade Organization: The WTO is an international forum for the negotiation of trade agreements and the settlement of trade disputes. The WTO structure is a product of various international agreements, and it is charged with overseeing a number of multilateral trade agreements. According to the WTO, “a total of 108 WTO members have made commitments to facilitate trade in telecommunications services,” [5] including commitments affecting the cross-border transmission of telecommunication services and value-added services.

B. WTO Member Countries’ Telecommunications-Related Commitments

- **General Agreement on Trade in Services (GATS):** All WTO Members are parties to the GATS, which entered into force in January 1995 and contains commitments applicable to trade in services, including telecommunication services. GATS commitments address the ways that governments will treat trade in services, including basic telecommunications services, value-added services and computer-related services, in an effort to foster and promote international trade. The GATS imposes general obligations that apply to all WTO Members in all service sectors, as well as specific commitments that apply only to each individual WTO Member that has accepted them in particular service sectors and sub-sectors. [6]

Under the GATS, subject to certain exemptions, all Member countries must provide “Most Favored Nation” (MFN) treatment to other Members, meaning that they must treat services and service suppliers of one Member no less favorably than they treat services and service suppliers of any other country. [7] “In general, the MFN obligation applies to every measure concerning trade in services, and it would accordingly apply to measures concerning telecommunications services as well.” [8]

WTO Member countries are also bound by the “National Treatment” (NT) obligation. This standard prohibits imposition of discriminatory measures that favor domestic services or service suppliers to the detriment of foreign services and suppliers. It also requires that signatories expand access to their domestic markets in specific sectors to foreign ownership and investment. Unlike the MFN obligation, however, in order for these obligations to apply to services, a WTO Member must have made specific NT and/or market access commitments in identified service sectors and sub-sectors in the Member’s schedule of commitments. As a result of negotiations on basic telecommunications services (embodied in the Fourth Protocol to the GATS), many Members, including China, the European Communities, India, Mexico, Nigeria, Singapore, South Korea and the United States have made NT and market access commitments for the telecommunications sector, albeit with varying levels of limitations and exemptions. Each of these countries, among others, also made such commitments with regard to value-added telecommunications services and/or computer-related services. Other WTO Members have gone further, making specific commitments with respect to the provision of Internet or Internet-access, as have Egypt, Kenya and Oman, for example.

- **GATS Annex on Telecommunications:** The GATS includes an Annex on Telecommunications, which supplements WTO Members' GATS commitments and applies to any measures that affect access to and use of public telecommunications transport networks and services that are offered to the public generally. [9] The Annex "guarantees that whenever a WTO member has made specific market access and national treatment commitments for a particular service sector or subsector (e.g., financial, professional, advertising, publishing, audio-visual, health or education) [in its schedule of commitments], the commitments will also apply to those services sectors and subsectors when delivered in electronic form." [10]

Under the Annex, Member countries agree to abide by commitments that guarantee transparency, a review system, impartial administration, non-discrimination and open market access in their regulation of international telecommunications. Paragraph 5(a) of the agreement prohibits Members from implementing certain discriminatory measures, essentially requiring MFN and NT principles with respect to access to and use of public telecommunications networks services needed by the suppliers of services included in each Member's Schedule. The Annex also includes transparency provisions, including a requirement that Members ensure that "information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available." [11] This requires that Members publish tariffs and other terms and conditions relating to public telecommunications transport networks and services

- **Fourth Protocol: Basic Telecommunications (including the Reference Paper on Telecommunications Services):** As a result of the negotiations on Basic Telecommunications (embodied in the Fourth Protocol to the GATS), Reference Paper on Telecommunications Services is also binding on the nearly 90 WTO Member countries that have appended it to their schedule of commitments, including Argentina, China, Côte d'Ivoire, the European Communities, Egypt, Ghana, Oman, Russia and South Korea, among many others. [12] The Reference Paper contains pro-competitive principles on competitive safeguards, interconnection, universal service, licensing, allocation and use of scarce resources and independent regulation. The Reference Paper obligations stress transparency, non-discrimination and competitive neutrality in the treatment of international telecommunications services.

Each of the Telecommunications Reference Paper commitments may be relevant to WCIT negotiators; however of most obvious importance would be the Interconnection obligations. The Reference Paper includes obligations related to "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier,"[13] or, in other words, "the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable customers to have access to the customers, services and networks of other service providers." [14] The agreement states that "[i]nterconnection with a major supplier will be ensured at any technically feasible point in the network." [15] Major suppliers must provide interconnection in a non-discriminatory manner, in a timely fashion, and at cost-oriented rates. [16] Cost-oriented interconnection charges should be based on "the different costs incurred by the incumbent to provide

interconnection.” [17]

III. Conclusion

WCIT negotiators should consider their home countries’ existing international trade commitments when assessing any changes to the ITRs. Each ITU Member State that is a WTO Member has made detailed commitments related to communications services that post-date the current ITRs. Particular WCIT proposals could intrude upon the jurisdiction of the WTO, a separate United Nations specialized agency. Other proposals could be inconsistent with the fundamental principles of the international trade structure, or could complicate compliance with existing trade obligations. As such, negotiators should take great care in agreeing to any new binding obligations at the WCIT and should ensure that the revised ITRs do not conflict with the national law of their home country or their existing trade agreements.

[1] See CEPT Criterion 3: “Over 100 countries have made commitments consequential to the Agreement on Basic Telecommunications Services in the Fourth Protocol of the General Agreement on Trade in Services (GATS). Therefore, proposals that are incompatible with the principles underlying the WTO Treaties or that undermine commitments contracted in this organisation cannot be supported.” WCIT-12/16E at 3 (filed Oct. 18, 2012).

[2] See, e.g., Vienna Convention, Article 30, § 3 (“When all the parties to the earlier treaty are parties also to the later treaty [...], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”).

[3] Of course, one way this possible conflict could be resolved is for the WCIT to include a clause which states that obligations under the WCIT instruments are subject to obligations under the GATS treaty.

[4] Basic telecommunications “include all telecommunication services, both public and private that involve end-to-end transmission of customer supplier information.” Value-added services are understood to mean those telecommunications for which suppliers “add value” to the customer's information by enhancing its form or content or by providing for its storage and retrieval, including on-line data processing, on-line data base storage and retrieval, electronic data interchange, and email. World Trade Organization, Services: Coverage of Basic Telecommunications & Value-Added Service, available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_coverage_e.htm.

[5] World Trade Organization, Services: Sector by Sector: Telecommunications Services, available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm.

[6] See Lee Tuthill, The GATS and new rules for regulators, Telecommunications Policy, Vol. 21, No. 9/10 (1997) at 785.

[7] See GATS Art. II.

[8] Marco Bronckers and Pierre Larouche, A Review of the WTO Regime for Telecommunications Services, *The World Trade Organization and Trade in Services* (2008) at 348.

[9] See Annex on Telecommunications at ¶ 2(a).

[10] Kent Bressie, Michael Kende, and Howard Williams, Telecommunications trade liberalization and the WTO, Paper Presented to the 15th ITS Biennial Conference Berlin (Sept. 5-7, 2004) at 7. See also Marco Bronckers and Pierre Larouche, A Review of the WTO Regime for Telecommunications Services, *The World Trade Organization and Trade in Services* (2008) at 325 (“The [Annex] is based on the recognition that telecommunications are an essential tool for other economic activities, such as banking. It therefore set forth certain principles to make sure that concessions on other services would not be frustrated by a lack of progress on telecommunications negotiations”).

[11] Annex on Telecommunications at ¶ 4.

[12] Telecommunications Services: Reference Paper (Apr. 24, 1996) (“Telecommunications Reference Paper”).

[13] *Id.* at ¶ 2.1.

[14] Boutheina Guerhazi, *Exploring the Reference Paper on Regulatory Principles* (2000) at 6.

[15] Telecommunications Reference Paper at ¶ 2.2.

[16] *Id.*

[17] Boutheina Guerhazi, *Exploring the Reference Paper on Regulatory Principles* (2000) at 8.