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5 April 2005

## **Cluster Three Assessment Report**

### **1. Issue: Competition policy, liberalization, privatization, regulations**

#### **2. Institutions**

There are two international organizations that have governance responsibilities related to this set of issues:

- The International Telecommunication Union (ITU), through its International Telecommunication Regulations (ITRs) and a series of less formal governance mechanisms that include the World Telecommunication Policy Forum (WTPF) and activities undertaken by the Telecommunication Development Sector (ITU-D);
- The World Trade Organization (WTO), through the General Agreement on Trade in Services (GATS) that was negotiated during the Uruguay Round, and in particular the agreements on trade in enhanced and basic telecommunication services that form part of the GATS.

#### **3. Relationship to the Internet**

During the 1980s and 1990s, competition policy, liberalization, privatization and regulation were dominant themes of global policy discourse in a number of different areas, such as transportation, telecommunications, financial services, and other service industries.

During this period, there was a general movement, in each of these policy areas and in all regions of the world, to:

- privatize state-owned operators;
- open markets that had been dominated by monopolies and oligopolies to competition;
- establish regulatory authorities that were independent of government;
- replace highly detailed, sector specific regulatory models – which had often been subject to “capture” by regulated entities – with more general frameworks designed to promote competition and to protect consumers, rather than incumbent operators.

The impact of these trends was perhaps greatest in the field of telecommunications, which underwent a more or less complete transformation of industry and regulatory structures during

these two decades. As a result of this transformation, the telecommunications industry experienced strong growth in all regions of the world – and also suffered some notable failures.

These global trends notwithstanding, competition policy, liberalization, privatization and regulation remain national policy prerogatives. Different approaches to these issues have been taken in different countries and regions, and opinions continue to differ on what mix of policies and strategies is likely to be most effective in promoting growth, and in achieving balanced economic and social benefits in the longer term.<sup>1</sup>

### *Transformation of Telecommunications and the Internet – 1995-2005*

The transformation of telecommunications from a government owned or controlled monopoly into a competitive business – and the rapid growth that resulted in markets for telecommunications equipment, networks and services – coincided in the latter half of the 1990s with the transformation of the Internet from a medium primarily used by the research and academic communities into what the WSIS Declaration calls “a global facility available to the public”.

If it is true, as is generally believed, that this transformation would not have been possible without the development of the World Wide Web, it is also true that the exponential growth in the number of Internet users and of the Internet industry as a whole (ISPs, service and service providers) would not have been possible without the transformation that had already taken place in the telecommunications industry, as a result of policies that introduced competition and regulations that promoted it.

Pro-competitive policies and regulations resulted in a dramatic increase in the availability of affordable high bandwidth end-user data connections, such as data-over-cable, ADSL, and improved conventional modem speeds. The availability of this end-user connectivity was in turn enabled by a dramatic increase in affordable high bandwidth for backbone networks, resulting principally from deployment of fiber-optic cables and competition among suppliers of backbone connectivity.

In the most highly developed regions of the world, these policies and regulations resulted in plenty of capacity being available to carry Internet traffic within and between countries, falling costs for leased lines, minimal barriers to entry into the Internet service provider market, and increasing competition for customers between fixed line, cable, and wireless operators in the local access marketplace.

Policies and regulations favouring privatization, liberalization and competition have progressively extended these conditions to other regions, and helped support the growth of the Internet on a world-wide basis.

In sum, since users typically access the Internet via local telecommunication facilities, and since the Internet and its applications largely run on the infrastructure built and maintained by the telecommunications industry, it is unlikely that the Internet would have grown as rapidly as it did during the 1990s and into the 2000s had telecommunications remained largely a government owned or controlled monopoly.

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<sup>1</sup> See the WGIG “Issues Paper on Competition Policy, Liberalization, Privatization and Regulations” for an account of different points of view.

### *Transformation of Telecommunications and the Internet – 2005-*

Ten years ago, the transformation of telecommunications was a necessary precondition for the transformation of the Internet. Today, the situation is reversed. The transformation of the Internet over the past decade into a true multi-media communication system has become a necessary precondition for the transformation of the traditional fixed telecommunications industry – a movement symbolized by the emergence of VoIP as a potential commercial competitor to traditional telephone service.<sup>2</sup>

Going forward, the next stage in the transformation of telecommunications – which will see the emergence of IP-based Next Generation Networks (NGNs), ubiquitous networks, and optically-switched networks – is likely to blur the boundaries not only between fixed and mobile telecommunications and the Internet, but also between telecommunications, the Internet, broadcasting and other content industries. This movement in turn will raise new issues in relation to:

- competition among previously distinct industries that have been regulated according to very different principles pertaining to ‘carriage’ and ‘content’;
- privatization of content;
- liberalization of markets for content;
- regulatory models that aim to create level playing fields between radically-transformed constellations of suppliers, and at the same time aim to protect consumers and the public interest in a highly privatized environment.

### *National and International Governance of Competition, Privatization, Liberalization and Regulations in Relation to the Internet*

As previously indicated, global trends notwithstanding, issues of competition policy, privatization, liberalization and regulations are governed nationally, in relation to telecommunications and the Internet as in other fields. However, this is not to say that international institutions are without influence in national policy-making on these issues, particularly at times of transformation and instability.

The two institutions that are the focus of this assessment note have, at different times, exercised important influence over national policy-makers, particularly in developing countries, through international governance frameworks that spring from very different sources, which have very different objectives, and which may even contradict each other in certain cases.

- The governance framework associated with the ITU and embodied in its International Telecommunication Regulations (ITRs) was developed over a long period of time, beginning in 1865 and ending in 1988. During this period of time, international telecommunications service was jointly provided by corresponding national

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<sup>2</sup> This paper does not separately address another major transformation that has taken place within the telecommunications industry during the past 10 years – the rapid growth of mobile telecommunication services, the growing substitution of mobile for fixed services, and the development of Internet services in the mobile environment. However, it is worth noting that mobile communications and the Internet have grown at comparable overall rates during this period, and that mobile has outpaced the Internet on measures such as numbers of users, penetration rates, and dollar volume.

monopolies, pursuant to bilateral agreements concerning charging, revenue sharing, and other administrative arrangements. In other words, prior to 1988 the ITRs reflected at the international level the ‘public service/monopoly’ model of telecommunications that existed at the national level. Since 1988, this world has largely disappeared at both the national and international levels as a result of competition, privatization, and liberalization.

- The governance framework associated with the WTO and embodied in the telecommunications annexes to the General Agreement on Trade in Services (GATS) was developed during the first half of the 1990s. Its purpose was to extend to the international level the policies of promoting competition and liberalizing market access that had been developed among the world’s wealthiest countries and regions during the 1980s. This was made explicit in the agreement by the inclusion of commitments to a set of pro-competitive regulatory principles, embodied in the “Regulatory Reference Paper”, as well as commitments to provide market access to foreign suppliers of telecommunications services.

Some think that the ITU and WTO frameworks represent different visions of how telecommunications should be governed – one from what is now the distant past, the other from the recent past. Others disagree, and point out that a country can be a signatory to both instruments and implement national laws that are fully compliant with both instruments. Some think that neither instrument includes an adequate vision for governing telecommunications, the Internet or the relationship between them – today, or in the future. Others disagree, and point out that “packet-switched networks” (which include the Internet) are considered “basic services” under the WTO framework, and that many countries define telecommunication in such a way that it includes the Internet, so that the provisions of the ITRs apply.

- For a number of years, there has been discussion in the ITU about what should be done with the ITRs and – in a separate but not entirely unrelated thread – what the ITU should do in relation to the Internet. Some ITU members favor leaving the ITRs unchanged. Other ITU members favour terminating the ITRs, moving some provisions to the ITU Constitution or Convention, and completely eliminating other provisions so as to favour greater liberalization. Still other ITU members favour updating the ITRs to include additional normative provisions that would apply to all telecommunication technologies, specifically defined to include the Internet.
- For their part, the members of the WTO have been uncertain whether, how and to what extent the Internet fits into their governance framework, not only in relation to GATS, but in relation to the WTO agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and trade in goods (GATT). As indicated in a companion assessment note on “E-Commerce, Taxation and Trade”, WTO members so far have contented themselves with establishing a work program to study these issues. However, it is worth noting that a number of rulings by WTO dispute resolution panels on issues ranging from leased line access to content (online gambling) have made it clear that at least some commitments made by WTO members do apply to the Internet.

In sum, going forward the appropriate framework for governing communication technologies broadly understood to include the converging technologies that underlie telecommunications, broadcasting, mobile communications, and the Internet, is likely to remain one of the most

important, complex and difficult questions of ICT governance at both the national and international levels – particularly in connection with the policy issues this relationship raises in the areas of competition, privatization, liberalization and regulation.

## **Governance mechanisms**

### *The ITU*

Like the ITRs, the mechanism traditionally used by the ITU to govern international telecommunications is in a state of suspended animation. The last World Administrative Telephone and Telegraph Conference (WATTC), the treaty-making body responsible for periodically updating the ITRs, took place in 1988. The main issue facing this conference was what to do about competition, and the main result was to amend the ITRs to allow competition in international telecommunications between consenting countries, while preserving full autonomy with respect to national regimes.

In 1992, as part of its ongoing reform process, the ITU changed the name of the WATTC to the World Conference on International Telecommunication (WCIT). Following the conclusion of the initial GATS agreements on trade in telecommunication services in 1995, discussions began within the ITU about what to do with the ITRs. These discussions were triggered by the apparent contradiction some saw between the ITRs and the obligations some ITU members had assumed under the GATS. Following several rounds of inconclusive debate about whether the ITRs should be terminated, lightly revised or substantially re-written, the 2002 Marrakech Plenipotentiary Conference decided that a WCIT would be held during the 2007-2010 timeframe to decide this question.

Apart from the WATTC/WCIT, the ITU has a number of other ‘softer’ governance mechanisms that have been used to address issues related to competition, privatization, liberalization, and regulations – in relation to telecommunications in general, and in relation to the Internet in particular. These include:

- The World Telecommunication Policy Forum (WTPF), a forum that meets periodically to develop non-binding Opinions in relation to important policy and regulatory issues. Among other subjects, the ITU held WTPFs in 1998 to discuss the implications of the WTO telecommunications agreements, and in 2000 to discuss the implications of Internet telephony. Although not binding, the Opinions resulting from the WTPF have generally provided useful guidance to national policy-makers and regulators, particularly in developing countries, as well as to the ITU Sectors.
- The activities of the Telecommunication Development Sector (ITU-D), which include:
  - adopting non-binding Resolutions and Recommendations on policy and regulatory issues at periodic World Telecommunication Development Conferences (WTDC);
  - publishing annual reports analyzing trends and issues in telecommunications policy and regulation, the Internet, and the telecommunications industry; and
  - holding an annual Global Symposium for telecommunications regulators.

### *The WTO*

The General Agreement on Trade in Services (GATS), which came into effect in 1990, provides the general policy umbrella under which governments negotiate agreements pertaining to specific industries, such as telecommunications. Typically, these negotiations take place over a period of several years, often without firm deadlines, under the general supervision of the WTO Trade in Services Council and periodic Ministerial Conferences.

In the case of telecommunications, the WTO agreements were developed in two stages. The first stage, which took place as part of the Uruguay Round between 1986 and 1994, resulted in an agreement on trade in ‘value-added’ telecommunication services – i.e. services that were “bearers” of other traded services, such as financial and professional services. The next phase of negotiations, which ran from 1994 to 1997, focused on trade in ‘basic’ telecommunication services and on competitive regulatory principles. A third round began in 2000, but has not yet produced results.

#### 4. Evaluation against WSIS criteria

**5.1 *Process Criteria*** *To what extent to the institution’s Internet-related governance mechanisms meet the following criteria, given what could be reasonably expected in light of the governance mechanism used?*

- *Multilateral*
- *Transparent*
- *Democratic*
- *Full involvement of governments, the private sector, civil society and international organizations*

#### *The ITU*

If and when the WCIT takes place, it will be a treaty-making conference in which only representatives of ITU Member States have the right to participate – i.e. it will be “multilateral, transparent, and democratic” in the traditional sense described in the *chapeau* to the assessment reports.

Insofar as the involvement of other actors is concerned, if countries wish to include representatives of the private sector and civil society on their national delegations, there is nothing to prevent them from doing so, and many countries routinely follow this practice at ITU treaty-making conferences. At this point, it is impossible to speculate on what other kinds of events might be organized in preparation for a WCIT in order to seek input from the private sector, civil society, and international organizations on the range of issues that might be before the conference.

The other, less formal governance mechanisms that have been deployed by the ITU to address issues of competition policy, privatization, liberalization and regulations, in general and in relation to the Internet, are more inclusive than the WCIT. For example,

- The World Telecommunication Policy Forum is an exceptional event, not only in the ITU but in the world of intergovernmental organizations, in that representatives of national governments, the private sector, and civil society all have the right to participate fully in its preparations and deliberations in their own name – i.e. not merely as members of national delegations – as long as they are members of the ITU. The

WTPF is a possible model for the kind of forum that could be put in place, post-WSIS, to address Internet governance issues on a truly multi-stakeholder basis.

- Close to 300 private sector, civil society and international organizations participate in the work of ITU-D as Sector Members. Since World Telecommunication Development Conferences do not produce treaties or other binding outcomes, but aim at building understanding and developing consensus with respect to the ‘development of telecommunications’ and ‘telecommunications for development’ non-governmental actors are able to play active roles in their preparations and proceedings.

### *The WTO*

Participation in WTO conferences that result in Agreements (i.e. treaties with binding dispute resolution mechanisms built in to them) is limited to government representatives, as is participation in negotiations on specific subjects, such as trade in telecommunications services, which take place on an ongoing basis.

Although there are no formal provisions for allowing non-government actors to take part in the WTO negotiations, private sector input into the negotiating process is obtained through a variety of informal mechanisms that exist both at the national level (e.g. industry advisory councils), and at the international level.

As indicated in a companion assessment note on “E-Commerce, Taxation, and Trade”, the WTO has made an effort in recent years to reach out to civil society and to solicit its views through informal, consultative mechanisms, such as the annual WTO Public Symposium. In addition, a wide range of non-government actors, including many from civil society, have been accredited to attend the biennial WTO Ministerial Conferences as observers.

**5.2 *Role and responsibility criteria*** (To what extent do the institution’s Internet-related governance mechanisms enable the different stakeholder groups to fulfill their roles and responsibilities as defined by WSIS? To what extent do the different stakeholder groups have the capacity to fulfill their roles and responsibilities?)

- Governments
- Private Sector
- Civil society
- Intergovernmental organizations
- Other international organizations

### *The ITU*

Although the ITU’s formal, treaty-making governance mechanisms, like the WCIT, limit the extent to which non-governmental actors can formally play the roles envisaged for them in the WSIS Declaration of Principles in relation to issues of competition, privatization, liberalization, and regulations, the informal mechanisms which have actually been deployed to address these issues in recent years provide considerable scope for other actors to provide input into ITU decision-making processes. In addition, in practice almost all ITU decisions on substantive

matters (as opposed to procedural or financial matters) are driven or influenced by private sector participants who are present in the national delegations of many countries.

The main obstacle non-governmental actors face in seeking to take advantage of these opportunities is the requirement to become a Sector Member of the ITU, and to pay annual membership fees in addition to the cost of attending meetings. Depending on the number of Sectors a non-governmental entity wishes to join, and whether or not they come from a developing country, these fees can run from a low of around 15,000 Swiss francs to a high of around 70,000 Swiss francs. Even though the ITU has introduced a new, lower-cost category of Associate Member, fees still range from a low of around 2,000 Swiss francs to a high of around 10,000 Swiss francs.

### *The WTO*

As indicated in the previous section, the WTO does not provide an equivalent range of formal opportunities for non-governmental actors to provide input to its work.

#### **5.3 Outcome Criteria** *(How effectively to the institution's Internet-related governance mechanisms contribute to achievement of the following goals?)*

- Equitable distribution of resources
- Access for all
- Stable and secure functioning
- Multilingualism

To date, the major impact of ITU and WTO governance activities in relation to issues of competition, privatization, liberalization, and regulation has been on the “access for all” criterion.

As indicated in section 3, the tremendous growth of the Internet and increase in the number of Internet users that has taken place during the past ten years has been made possible, in part, by the growth of the telecommunications networks that the Internet runs on. The growth of these networks, in turn, has largely been driven by market forces that were unleashed as a result of policies and regulations that favoured competition, privatization, and liberalization.

Internationally, the WTO agreements on trade in telecommunication services have given impetus to these policies, and to the widespread adoption of pro-competitive regulatory principles.

The ‘sea change’ that resulted from the transformation of telecommunications and the rise of the Internet presented significant governance challenges to the ITU, many of whose members were reluctant to open the door to competition at the 1988 WATTC, but did so – at least at the international level – under pressure from other members. A decade later, the results of the 1998 World Telecommunication Policy Forum on the impact of the WTO agreements showed that the ITU membership as a whole was prepared to embrace the new paradigm, and to assist its members in adjusting. ITU-D, in particular, has undertaken many ‘soft’ governance activities aimed at helping its constituency adjust to the realities of a globally competitive telecommunications marketplace, and learn to benefit from its possibilities.

**5. Coordination: How effectively is governance of this issue coordinated with governance of other Internet-related issues?**

To date, coordination has not been an issue. As indicated in section 3, the Internet has thrived in the environment created by the governance decisions that were taken at the national level in the 1980s and internationally in the 1990s with respect to issues of competition policy, privatization, liberalization and regulation. However, as also indicated in that section, very interesting coordination issues, that have scarcely begun to be imagined let alone addressed at the international level, are likely to begin emerging in the not-too-distant future.

**6. Overall assessment: What are the points that most need improvement in order to meet the WSIS criteria?**

- Policy vision mechanisms to identify and assess the impact and implications of the Internet for governance regimes and institutions, while encompassing the needs of all stakeholders
- Coordination mechanisms to address the horizontal, ‘barrier-breaking’ impacts of the Internet within and between governance regimes and institutions
- Innovative governance mechanisms to more fully and effectively engage non-government actors in decision-making processes, including representatives of consumers and users in addition to the private sector
- Capacity building mechanisms to assist governments and other stakeholders in developing countries