

6.3

Legal Context of Regulatory Reform

The development of an effective regulatory framework for the ICT sector requires the establishment of a comprehensive set of laws, rules, and regulations that clearly identifies the contractual obligations and property rights of governments and stakeholders. The structure of this framework is determined, in part, by the legal and constitutional system of each country. This Chapter discusses these issues and other factors that impact the legal context of regulatory reform, including international and regional commitments, telecommunications-related legislation, and competition policy.

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Reference Documents

- [Armenia World Trade Organization Schedule of Specific Commitment](#)
- [Australia - Foreign Ownership in the Telecom Sector](#)
- [Australia Telecommunications Competition Regulation - Inquiry Report](#)
- [Bangladesh - World Trade Organization Schedule of Specific Commitments](#)
- [Black Economic Empowerment ICT Charter - Draft 4](#)
- [Brazil - Perspectives on the Expansion and Modernization of the Telecommunications Sector](#)
- [Central American Free Trade Agreement - Chapter 13](#)
- [Chile - Decreto Ley 211 - Ley de Competencia](#)
- [Chile - Ley General de Telecomunicaciones](#)
- [Comments of FCC General Counsel Wright - Introducing the Transactions Team Presentation on Timely Consideration of the Applications Accompanying Mergers](#)
- [Competition Law and Policy in Chile - A Peer Review](#)
- [Consolidated Version of the Treaty Establishing the European Community](#)
- [Creating the "Right" Enabling Environment for ICT](#)
- [Directorate General Competition - Best Practices on the Conduct of EC Merger Proceedings](#)
- [Dominican Republic - Proyecto de Ley de Defensa de la Competencia](#)
- [Draft Black Economic Empowerment Charter for the ICT Sector](#)
- [EC Merger Regulation](#)

- [EU Accession Negotiations Guide](#)
- [EU Directive on Competition in the Markets for Electronic Communications Networks and Services](#)
- [European Commission Recommendation on Relevant Product and Service Markets Susceptible to Ex Ante Regulation](#)
- [European Regulators Group - Common Position: Appropriate Remedies in the New Regulatory Framework](#)
- [Federal Communications Commission - Foreign Ownership Guidelines](#)
- [Foreign Direct Investment in Developing Asia](#)
- [Foreign Direct Investment in Latin America](#)
- [Foreign Direct Investment in Least Developed Countries](#)
- [GATS - Schedule of Specific Commitments - Supplement 1 Revision 1](#)
- [GSM Tax Report](#)
- [ICASA Foreign Ownership Regulation](#)
- [India - Competition Act 2002](#)
- [India - New Telecom Policy 1999](#)
- [India - Telecom Regulatory Authority of India Act 1997 - Chapter I](#)
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- [Manila Declaration 2002](#)
- [New Zealand Mobile Termination Rate Report](#)
- [Organisation for Economic Co-operation and Development - Anti-Spam Law Enforcement Report](#)
- [Organisation for Economic Co-operation and Development - Anti-Spam Regulation](#)
- [Organisation for Economic Co-Operation and Development Cross Border Guidelines](#)
- [Organisation for Economic Co-Operation and Development IDB Competition in the Dominican Republic](#)
- [Organisation for Economic Co-Operation and Development Overview of Regulatory Reform in Germany 2004](#)
- [Procedimiento no Contencioso: Operacion de Concentracion entre Empresas: Telefonica Moviles-Bellsouth](#)
- [South Africa Competition Act as Amended](#)
- [South Africa Competition Second Amendment Act 2000](#)
- [South Africa Independent Communication Authority of South Africa and Competition Commission MOU](#)
- [South Africa Policy Framework](#)
- [Speech by Viviane Reding: The Review of the Regulatory Framework for E-Communications](#)
- [Summary of the OECD Roundtable on Communications Convergence](#)
- [The Digital Trade Agenda of the US - Parallel Tracks of Bilateral, Regional and Multilateral Liberalization](#)
- [The Relationship between Competition Authorities and Sectoral Regulators - Contribution from Chile](#)
- [Tratamiento del Control de Fusiones en el Anteproyecto de Ley de Defensa de la Competencia de la Republica Dominicana: Consideraciones Institucionales](#)
- [Treaty of the Economic Community of West African States](#)

- UN General Assembly - World Summit on the Information Society Resolution
- US - Competition Organisation for Economic Co-operation and Development 2005
- US - Trade Act of 2002
- US 1992 Horizontal Merger Guidelines
- US Spam Act
- US Supreme Court Decision - Verizon v Trinko LLP 2004
- US Telecommunications Act of 1996
- West African Common Market Project: Harmonization of Policies Governing the ICT Market in the UEMOA-ECOWAS Space
- World Trade Organization - Services Sectoral Classification List

6.3.1 IMPACT OF DIFFERENT LEGAL TRADITIONS ON THE REGULATORY FRAMEWORK

3.1.1 SNAPSHOT OF DIFFERENT LEGAL TRADITIONS

Regulation does not occur in a vacuum, and the establishment of a legal and regulatory framework is determined in large part by a country's specific legal tradition. The conception of law and legal system differs depending on the country and is often rooted in perceptions based on customs, culture, religion, and politics.* For example, in certain countries, law is viewed as a "model code of behaviour," while in others it is considered an "instrument of compulsion."* Today, we have numerous classes of legal systems: civil, common, socialist, Islamic, Hindu, and African, to name a few. Among these, the most prominent in modern times are common law and civil law legal traditions. The map on Figure 3-A shows some of the predominant legal systems around the world.

It is difficult to point to one country that has a pure legal tradition without influence from other systems. For historical reasons, as well as political and economic influences, the legal systems of countries are often an amalgamation of various legal systems, incorporating elements of different legal traditions. For example, many countries in the Middle East and Africa have legal systems based on a mixture of legal traditions. Algeria has a mixed legal system (i.e., socialist, French civil law, and Islamic law) whereas Cameroon has a civil law system, with elements of common law. Moreover, sometimes two countries may have different legal systems, but may have similar elements in their legal frameworks; for example, both may have the same type of government structure (e.g., federal republic versus unitary state).* This occurs in countries such as Brazil, the United States, and Germany, where there is a distinction between federal law and state law, as opposed to countries that follow a unitary state model, such as China, France, and United Kingdom.*



◀ Figure 3-A: Legal Traditions Around the World

Source: Université d'Ottawa [University of Ottawa] Faculty of Law, <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php>

Note that this map only includes Civil law, Common law, Customary law, Muslim law, and Mixed law systems. Other legal systems such as the African legal system and the Socialist Legal System are not depicted in this map.

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◀ Figure 3-A: Legal Traditions within the World



Source: Université d'Ottawa [University of Ottawa] Faculty of Law, <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php>

Note that this map only includes Civil law, Common law, Customary law, Muslim law, and Mixed law systems. Other legal systems such as the African legal system and the Socialist Legal System are not depicted in this map.

6.3.1.2 REGULATORY FRAMEWORKS IN DIFFERENT LEGAL SYSTEMS

The last two decades years has resulted in dramatic changes in the telecommunications regulatory frameworks of many countries as a result of market liberalization. Some degree of regulatory reform has been implemented in most countries, including the establishment of independent regulators in 131 countries by 2005.* As a result of these changes, regulatory models have been developed incorporating internationally recognized best practices, despite the countries having different legal traditions. In implementing these models, the legal tradition has influenced the procedure and approach towards the achievement of the policy and regulatory goals that support such best practices, but has not necessarily determined the content of the telecommunications regulatory framework.*

Similarly, the process of globalization and world trade has played a significant role in shaping the content of a country's regulatory framework. As further discussed in Section 3.3, countries seeking to attract investment in their telecommunications sectors, strengthen their economies and engage in bilateral and multilateral trade integration, are often required to fulfil several regulatory preconditions aimed at the removal of market barriers. For example, the World Trade Organization (WTO) Reference Paper, which articulates the principles of a telecommunications regulatory framework, has been adopted by close to 90 countries throughout the world. (See Table 3-1 for examples of countries with different legal traditions that have committed to the WTO Reference Paper.) This Reference Paper requires countries to

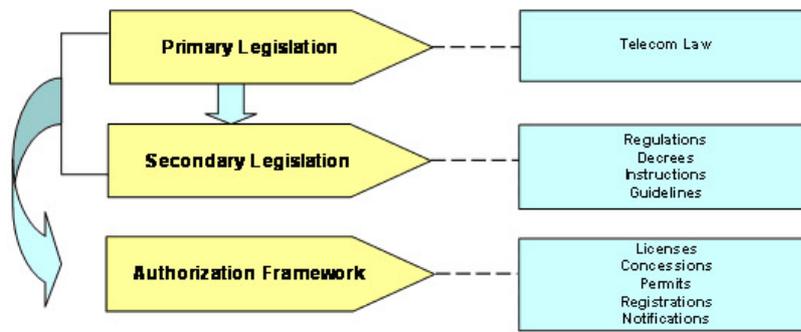
establish an independent regulator, as well as incorporate fundamental tenets into their telecommunications regulatory framework regarding interconnection, universal service, competitive safeguards, licensing criteria, and allocation and use of scarce resources.

Practice Notes

- **Table 3-1: Countries Committing to WTO Reference Paper with Different Legal Traditions [3.1.2]**

6.3.1.3 IMPLEMENTATION OF REGULATORY DESIGN

The design of legal instruments used to regulate the telecommunications sector may vary depending on the legal tradition of a country. Generally, however, the legal framework follows a hierarchy beginning with primary legislation, such as laws and decrees from which secondary legislation such as regulations, resolutions and guidelines follow (see Figure 3-B). This legislation, in turn, provides the legal basis for the regulator or the relevant ministry to issue authorization instruments such as licences, concessions, and permits to operators. This legal hierarchy provides certainty and predictability to consumers and other stakeholders because it specifies the rights and obligations (*i.e.*, the rules of the game) that apply to the sector. Such hierarchy provides assurances to stakeholders that secondary legislation (*e.g.*, rules, decrees and instructions) cannot be used by the government to nullify certain rights and obligations set forth in primary legislation. This stable environment, in turn, encourages investment and increases consumer confidence in the sector.



◀ Figure 3-B: Hierarchy of Regulatory Frameworks

Primary Legislation

The primary legislation for the sector should consist of the framework that will be used to regulate the sector. To the extent possible, this should be issued through a legal instrument not susceptible to easy revocation by a government authority in order to ensure stability and predictability. It should lay out the basic elements and framework, such as the establishment of the regulator, the powers and responsibilities of the regulator, the role of the minister responsible for communications (if applicable), enforcement powers and ability to sanction. While the primary legislation should address fundamental regulatory issues such as universal service and interconnection, the details of such issues are better addressed through secondary legislation. When looking at primary legislation in both civil and common law traditions, many of the same elements are included, as noted in [Table 3-2](#).

In countries with civil law traditions, however, subject areas covered by the principle of legal reserve (*i.e.*, subject matters that have been constitutionally reserved to regulation by an instrument with the hierarchy of a law) also may need to be included within the text of primary legislation. Such subject areas typically encompass direct limitation of individual rights (*e.g.*, the right to free enterprise and property, or freedom of speech) as well as the regulation of prohibited conduct and applicable sanctions. Moreover, in civil law jurisdictions it is often the case that in order to regulate certain matters through secondary legislation, they must be referred to in the primary legislation. Further, the extent of specificity contained in the primary legislation from civil law jurisdictions is mixed. In certain countries, such as Bulgaria,^{*} the primary legislation is quite comprehensive, including extensive details regarding the licensing framework, universal service, interconnection, consumer interests, fees, and sanctions; whereas, in countries such as Algeria,^{*} the primary legislation address similar issues, but the provisions are much less detailed.

Secondary Legislation

The more detailed elements of regulatory issues may be addressed best in secondary legislation, which can be amended and modified more easily to complement the pace of technological development without the intervention of the legislature. Typical regulatory issues addressed through secondary legislation include interconnection, competitive safeguards, numbering, universal service, and tariffs.

Secondary legislation may take different forms (e.g., regulations, instructions, decrees, guidelines) and depending on the jurisdictions there may be a hierarchy with regard to the secondary legislation. For example, in Spain, regulations may only be issued by the minister, as the regulator only has authority to issue “instructions.” This challenges the independence of a regulator to establish its own policy because the ministry can always issue a regulation that modifies an “instruction” issued by the regulator.

Authorization Instruments

A variety of “authorization” instruments are used by governments to grant an entity the right to undertake certain activities in the telecommunications sector (e.g., provide telecommunications services, operate networks, and use spectrum). These instruments include concessions, franchises, delegations, licences, permits, and other forms of authorizations.⁷ Typically, the general authorization framework is set forth in the primary legislation and further expanded upon and described in specific detail in secondary legislation.

Administrative acts and administrative contracts

In civil law jurisdictions, the “authorization” instrument often is either a unilateral administrative act or a bilateral administrative contract. A bilateral administrative contract when used as an “authorization” instrument generally is a concession, franchise, delegation or other type of agreement. However, not all contracts entered into with public entities are administrative contracts. In comparison to licences, concessions, franchises and delegations are more often in the form of an administrative contract than a unilateral administrative act. Typically, an administrative contract requires the consent of the parties to be amended. Thus, some investors find concessions (as well as franchises and delegations) to be a more attractive vehicle than a licence.

Usually, a telecommunications licence is a unilateral administrative act, rather than an administrative contract. Although different views exist as to whether an administrative act can be unilaterally amended or revoked, it is considered a more flexible instrument than an administrative contract.

In certain jurisdictions, such as Jordan, the “licensing” instrument consists of a licence and an administrative contract (i.e., licensing agreement). Jordan’s Telecommunications Law provides that “the licence shall be issued by virtue of a resolution by the Board, provided that a contract of an administrative nature is drawn including the following terms and conditions in addition to any other conditions stipulated in this law, or the regulations issued pursuant thereto, or any exceptions determined by the Board: (...).”⁸

Shift away from concessions

While moving towards liberalization, some countries permitted the delivery of telecommunications services through the unilateral issuance of licences or concession contracts between the relevant government authority and the private party authorized to provide a particular service. As countries implement regulatory reforms, however, they are typically shifting away from concessions and moving to licences, permits, notifications and registrations which tend to be more straightforward and uniform. Moreover, in many countries, licensing instruments are much more streamlined, with the terms and conditions associated with the licence generally addressed in secondary legislation rather than the licence. From a regulator’s standpoint, this is a less cumbersome process because changes do not have to be introduced to each licence that has been issued, rather changes can be introduced by amending, or issuing new secondary legislation.

Practice Notes

- [Table 3-2: Jamaica and Brazil - Comparison of Telecommunications Laws in Civil and Common Law System \[3.1.3\]](#)

6.3.2 IMPACT OF MULTILATERAL AND REGIONAL COMMITMENTS

Significant developments have taken place on a global (e.g., WTO) and regional (e.g., EU) level to foster the trend of market liberalization and competition. As countries make global and regional commitments to open their telecommunications markets to foreign investment and harmonize local legislation with that of other countries in similar geographic or economic situations, such commitments may serve as a means to accelerate regulatory reform, facilitate global or regional best regulatory practices, and provide telecommunications investors with a level of certainty and predictability. A list of countries that established independent regulators after undertaking WTO and other regional commitments can be found at the [ITU ICT Eye](#). In addition, such multilateral and regional frameworks also serve to establish government accountability in ensuring a certain level of transparency and market-oriented regulation.

The extent and consequences of such commitments vary by country and generally have less to do with a country’s legal system, and more to do with a country’s political and economic situation and the level of development and competition in

its telecommunications market.

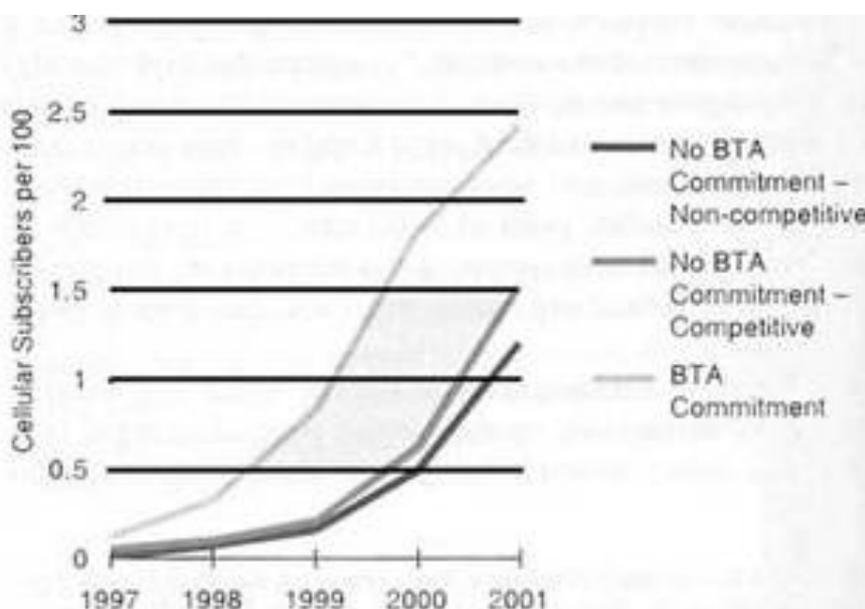
6.3.2.1 ROLE OF THE WORLD TRADE ORGANIZATION

Created in 1994 as a result of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO) is a global international trade organization that develops international commerce rules and mediates trade disputes among its members. The WTO brings together 148 members¹ that participate in negotiations and binding commitments concerning the promotion of competition and the liberalization of international trade of goods and services.

General Agreement on Trade in Services

Concluded in 1997 under the auspices of the WTO, the Fourth Protocol to the General Agreement on Trade in Services (GATS) represents one of the major steps towards liberalization of the global telecommunications marketplace and the establishment of liberalization.² The purpose of GATS is to facilitate liberalization of trade in services. Two types of obligations exist under GATS: (i) general obligations that apply to all members and all service sectors covered under GATS regardless of whether or not specific commitments have been made; and (ii) sector-specific commitments regarding market access and national treatment for sectors and activities that members agree to open to international trade.

- Under the general obligations, there are two main principles: (i) WTO member countries must afford each other most favored nation (MFN) treatment (i.e., prohibition on discrimination that requires countries to afford “treatment no less favourable than that accorded to like services and service suppliers of any other country”);³ and (ii) countries must ensure transparency of local regulations (e.g., countries should publish measures of general application, and allow a period of public comment prior to their issuance).
- Sector-specific commitments are made regarding market access;⁴ national treatment;⁵ and other additional commitments.⁶ WTO members make commitments on market access and national treatment based on one of the following four modes of supply: (i) cross border supply;⁷ (ii) consumption abroad;⁸ (iii) commercial presence;⁹ and (iv) presence of natural persons.¹⁰ Studies show that since 1997, countries that made GATS commitments have experienced faster levels of fixed-line penetration, mobile subscribership, and telecommunications sector revenues.¹¹ In particular, just between 1997 and 2001, low-income Sub-Saharan Africa countries that scheduled commitments out-performed those that did not (see Figure 3-C).^{*}



◀ Development/Economic Impact of WTO on Low-Income Countries in Sub-Saharan Africa

Basic Telecommunications Agreement

The series of telecommunications commitments that make up a portion of the GATS are referred to as the WTO Basic Telecommunications Agreement (BTA).¹³ (See Box 3-1.) The BTA established the basis for structural reform of the telecommunications sector aimed at removing barriers to entry and competition, and the adoption by the majority of members of certain pro-competitive regulatory principles that are set out in the “Reference Paper on Regulatory Principles.”¹⁴

These telecommunications commitments apply to basic telecommunications and certain value-added services, but not to

audiovisual services. To date, 105 of the 148 WTO members have made commitments under the BTA. Ninety-eight WTO members have made specific commitments on basic telecommunications and 89 members with respect to value-added telecommunications services.¹⁵

Definitions/Coverage:

Telecommunications services (covered under the BTA):

- *basic telecommunications services* are public and private telecommunications services that involve end-to-end transmission of customer supplier information. These include voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, and private leased circuit services.
- *value added-services* are services for which suppliers enhance the form or content of the customer's information, thereby "adding value" to the customer's information, and include electronic mail, voice mail, on-line information and data base retrieval, Electronic Data Interchange (EDI), enhanced/value-added facsimile services, including store and forward, and store and retrieve, code and protocol conversion, on-line information and/or data processing (including transaction processing), and other services.

Audiovisual services involve the dissemination of content, including motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services, and sound recording.

Key Documents:

- GATS (general obligations and Fourth Protocol);
- GATS Annex on Telecommunications;
- Schedules of specific commitments and exemptions (country-specific); and
- Reference Paper.

The purpose of GATS is not to regulate competition, but to ensure that members that have made commitments do not establish regulations that would hinder the international trade of services.

WTO membership does not entail automatic submission to the BTA as countries must expressly make commitments through their respective schedule of commitments. These schedules may contain modifications or derogations from the overall text. Members are free to include in their schedules the sectors and activities that will be covered under the commitments. Commitments are made by identifying a particular subsector in the respective schedule and therefore only the services listed in a schedule are open to international trade, subject to any limitations or conditions set forth in the applicable schedule. As a result, if a sector or activity does not appear listed in a schedule it means that a commitment has not been made regarding that sector or activity, and it is not open to international trade.¹⁶

Countries can make BTA commitments as part of their accession to the WTO, as part of a formal round of negotiations (e.g., the Doha round of negotiations launched in November 2001), or unilaterally. As a result of the MFN treatment imposed under GATS, a telecommunications commitment made by a WTO member benefits all members regardless of whether or not such other members have made commitments. GATS rules also apply to the provision of services by monopoly service providers, to the extent the provider has been granted special or exclusive rights to provide the service under monopoly (i.e., the rules do not apply to *de facto* monopolies).¹⁷

Telecommunications services and audiovisual services appear as different subsector classifications under the main "Communications" sector heading of the GATS Services Sector Classification List.¹⁸ While the structure of these schedules is the same, countries were given the flexibility of creating distinctions or sub-divisions within the telecommunications sector heading (i.e., local, long distance and international; wire and radio-based; public or non-public; and resale or facilities-based services), making limitations on market access or national treatment, and in certain cases, adding technological conditions (e.g., for satellite access). As a result, the items and terms included under each classification vary among members, creating potential discrepancies in the manner in which countries classify different types of services.¹⁹

These commitments are important documents that establish international obligations undertaken by countries and are a clear reference for potential foreign investors on the countries' liberalization strategy. Countries may decide to gradually open their market to competition or to take a more aggressive approach. However, they must clearly specify in their commitments where and for how long they wish to restrict their commitments.

Ghana, for example, undertook commitments aimed at phasing in competition over a given period. More specifically, Ghana committed to:²⁰

- Duopoly operators for the provision of local, domestic and international long distance services, and private leased circuit services for an exclusive five-year period, ending in 2002. Additional suppliers of local services can be licensed to supply underserved areas where duopoly operators have declined right of first refusal.
- Full competition in data transmission, Internet and Internet access (excluding voice) and teleconferencing.
- Mobile services (terrestrial and satellite-based) including mobile data services, fixed satellite services, paging and cellular with the reservation that cross-border voice services can only be supplied through commercial arrangements with the duopoly operators.
- The Reference Paper on regulatory principles.

However, Ghana stated in its commitments that the government would conduct a review of its policy after the duopoly period so as to determine whether to license additional telecommunications services suppliers. Pursuant to the country's Telecommunications Policy implemented in 2005, Ghana has opened several markets to competition, including international gateway, mobile services, and fixed satellite services.*

This is different from Jordan's WTO commitment where the Government specified that no restrictions would exist after 1 January 2005. Jordan's commitments are based on a WTO Chairman's Note S/GBT/W/2/Rev.1 dated 16 January 1997. This Note foresees that unless otherwise noted in the sector column, any basic telecommunications service listed encompasses local, long distance, and international services for public and non- public use; that it may be provided on a facilities-basis or by resale; and that it may be provided through any means or technology (e.g., cable, wireless, or satellites).*

Jordan's commitments also indicate that it has removed market access limitations on spectrum availability pursuant to another WTO Chairman's Note S/GBT/W/3 dated 3 February 1997. This Note recognizes the right of all WTO members to exercise spectrum/frequency management that may affect the number of service suppliers provided this is done in accordance with the relevant provisions of GATS.

The effects of the BTA extend beyond the countries that have made commitments thereunder, with some countries, such as the United States, adopting parallel commitments under bilateral agreements beyond the scope of the WTO (see Box 3-2).

Given the slow progress of the Doha Round of negotiations and the uncertainty as to the treatment of certain converged services under the WTO classification framework, the United States has sought to fulfil certain of its trade objectives by means of such bilateral and regional trade agreements. As a result, numerous countries have adopted telecommunications commitments outside the scope of the WTO that are similar to, or which extend beyond, those under the BTA pursuant to these bilateral and regional free trade agreements.

In 2002, the U.S. Congress passed the Trade Promotion Authority Act allowing the executive branch to negotiate trade agreements where Congress can only vote to approve or reject the agreements, without making any modifications (this process is referred to as “fast-track authority”).²² Within this authority is the mandate for the United States Trade Representative (USTR) to ensure that the agreements concluded foresee and prevent trade barriers in digital services, including the trade of digital services and goods (the “digital trade agenda”).²³ Under such fast-track authority and the USTR mandate, to date the United States has concluded eight free trade agreements (and is in the process of negotiating three other agreements, including the U.S.-Andean FTA with Peru, Ecuador and Colombia, and the U.S. SACU FTA, with five member countries of the Southern African Customs Union (SACU) -- Botswana, Lesotho, Namibia, South Africa and Swaziland) where countries have generally agreed to an open and competitive telecommunications market, and removing barriers to the trade of digital goods and services.²⁴ In broad terms, all trade commitments under the FTAs (except for few carve-outs – e.g., Costa Rica, under the CAFTA), provide for: (i) reasonable and non-discriminatory access to the networks of the signatory parties; (ii) the right of telecommunications companies to interconnect with networks in the signatory countries at nondiscriminatory, cost-based rates; (iii) non-discriminatory access to facilities, such as telephone switches and submarine cable landing stations; (iv) the ability to lease elements of telecommunications networks on non-discriminatory terms and to resell such telecommunications services; (v) the recognition by each signatory of the importance of supplying services by electronic means as a vehicle to establish a vibrant e-commerce environment; (vi) non-discriminatory treatment of digital products; and (vii) the protection of intellectual property rights. To a large extent, these principles parallel those under the WTO’s Reference Paper, but extend these obligations to digital services and goods that may not be covered under certain countries’ WTO commitments.

The United States has also used the FTA as a means to further expand the scope of WTO commitments of certain countries or to achieve some of the same objectives sought under the WTO. For example, the recently approved U.S.-Central American Free Trade Agreement (CAFTA) is directed to promote trade liberalization between the United States and Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. Although some of the CAFTA countries are WTO members, they had not fully adopted the BTA or the WTO Information Technology Agreement. However, in signing CAFTA these countries committed to a chapter on telecommunications services that incorporates many elements of the BTA and the Reference Paper. In addition, CAFTA, which was substantially modeled after the ten-year old North American Free Trade Agreement (NAFTA), also contains a relevant section directed to the liberalization of telecommunications among the signing parties. Thus, through CAFTA, Costa Rica, for the first time made a commitment to open its market to foreign competition in Internet services, private data networks, and wireless services. CAFTA also requires the Dominican Republic, Guatemala, Honduras and Nicaragua to join the WTO ITA so that U.S. high-tech exports enter their markets duty-free.*

WTO Reference Paper

The Reference Paper, which consists of six principles that serve as a “checklist of ‘success’ of telecommunications reform in many countries,”* was conceived as a necessary instrument for the removal of regulatory barriers to market access, and its implementation is aimed at preventing anticompetitive practices by major suppliers.* Members may adopt the Reference Paper in whole or in part, and by doing so, they commit to maintain appropriate regulatory measures to ensure a competitive marketplace, as well as transparent and fair regulatory procedures. The six Reference Paper principles are:

- *Competitive safeguards:* Members are required to establish competitive safeguards preventing major suppliers from engaging in anticompetitive conduct. The Reference Paper does not define competitive safeguards or anticompetitive practices; this is left for each member to determine in its national legislation. However, the Reference Paper lists certain examples of anticompetitive practices including: anticompetitive cross-subsidization; use of information obtained from competitors with anticompetitive results; and withholding technical data.
- *Interconnection:* Major suppliers (i.e., those with the ability to materially affect the terms of price and supply in the

market by exploiting their control over “essential facilities” or their position in the market) of members are required to provide interconnection upon request, under non-discriminatory terms and conditions, and at cost-orientated rates that are transparent and feasible.

- *Universal service*: Members have the right to define the kind of universal service obligation they wish to maintain, provided such obligations are not anticompetitive *per se*, and are administered in a transparent, non-discriminatory and competitively neutral manner. Universal service obligations may not create unnecessary burdens on service suppliers.
- *Public availability of licensing criteria*: To the extent a licence is required, members should make publicly available: (i) the licensing criteria and the time it will take to decide on a licence application; and (ii) the terms and conditions of individual licences.
- *Independent regulators*: Members should ensure that the regulatory authority is separate from, and not accountable to, any supplier of basic telecommunications services, and that their decisions are impartial with respect to market participants. This requirement seeks equal, transparent and objective treatment of all operators in the market.
- *Allocation and use of scarce resources*: Allocation and use of scarce resources (*i.e.*, frequencies, numbers, and rights of way) should be carried out in an objective, timely, transparent and non-discriminatory manner, and the allocation of frequency bands should be made publicly available. Details of government-use frequencies do not have to be made publicly available.

To date, close to 90 countries have committed to adopting the Reference Paper.^{*} The Reference Paper has been criticized for its general nature and the fact that it does not prescribe the manner in which these principles should be applied. However, it has provided countries with a baseline approach of what are considered the “minimum standards of international good practice.”^{*} Moreover, it can be, and has already been, used as a vehicle to evaluate the appropriateness of existing measures or the lack thereof under the WTO’s dispute settlement mechanism (the decisions of which are binding upon WTO members). (See Section on “WTO Dispute Settlement Mechanism” below for a discussion on the U.S.-Mexico Panel Report.)

Annex on Telecommunications

Concluded at the Uruguay Round, the GATS Annex on Telecommunications recognizes that access to and use of public telecommunications networks are essential to the effective provision of services covered under GATS and requires WTO members to allow suppliers of scheduled services to use the “public telecommunications transport network and services” on reasonable and non-discriminatory terms.^{*} This obligation extends to any kind of service sector for which a schedule has been made accepting specific market access and national treatment (*e.g.*, value-added services, banking services, legal services, and computer services) regardless of whether the particular country has liberalized its basic telecommunications sector. As a result, the Annex on Telecommunications does not deal with market access to basic telecommunications (as this is dealt with in each member’s schedule) and does not specifically require liberalization of telecommunications services; rather it deals with the ability of service suppliers to access such services. Such ability is limited by the right of the network owner to establish access and use conditions that address public service responsibilities, the protection of the technical integrity of the network or to deny use of the network for services not covered under any schedule of commitments.

Audiovisual Services

Also under the “Communications” sector list are audiovisual services (*i.e.*, motion picture and videotape production services, motion picture projection services, radio and television services, sound recording, and others). These services are not covered under the BTA, and the national laws of each country are used to interpret the services that fall under the audiovisual subsector (*e.g.*, for most WTO member countries, satellite services fall under broadcasting/audiovisual activities, but under U.S. legislation these are considered telecommunications services).³²

Audiovisual services are not as liberalized as telecommunications services and many countries maintain rules prohibiting foreign ownership of broadcasters and reception of foreign satellite television programming. Some countries expect to achieve greater liberalization of these services through the Doha Round of negotiations; however, there have been challenges in achieving a unified approach since a division exists between those countries with a strong interest to export audiovisual services and those whose cultural and/or economic objectives direct them to protect their domestic industries.

New Round of Services Negotiations

WTO members commit to progressively liberalize trade in services through periodical rounds of negotiations.³³ The Doha Round of negotiations launched in 2001 (*i.e.*, Fourth Ministerial Conference in Doha, Qatar) included negotiations of telecommunications services and audiovisual services, and there were proposals to: (i) update the listing of services; (ii)

negotiate an e-commerce classification; (ii) enhance provisions on regulatory independence; and (iii) limit licensing and universal services fees. More generally, the 2001 Doha Ministerial declaration reaffirmed the GATS Treaty and adopted the position that the negotiations on trade in services must be “conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries.”*

Although further Ministerial discussions on the Doha negotiations have taken place in Cancún in 2003, Geneva in 2004, Hong Kong in 2005 and Geneva in 2006 and 2008, negotiations are still underway. In the current Doha Round of negotiations, the objectives of many of the negotiating requests made by WTO members to their trading partners regarding telecommunications are related to additional reforms to open markets and the binding of recent reforms, including a commitment to refrain from increasing a rate of duty beyond an agreed-upon level.*

At the 2005 Hong Kong Ministerial, a new sector-specific negotiating mechanism was mandated by the trade ministers, including the following negotiating objectives as outlined by WTO members in the Chairman's note to the Trade Negotiations Committee:*

- achievement of broad telecommunications coverage in a technology-neutral manner and significant commitments in all modes of supply;
- cooperation with least-developed countries and developing countries to promote new and improved offers and to provide technical assistance to support this process;
- reduce or eliminate exclusive rights, economic needs tests (i.e., tests using economic criteria to decide whether the entry into the market of a new foreign firm is warranted), restrictions on the types of legal entity permitted and limitations on foreign equity;
- commitment to all provisions of the telecommunications reference paper; and
- elimination of exemptions to most-favored nation (MFN) treatment to ensure non-discrimination.

Regulatory Impact of WTO commitments

WTO commitments constitute legally binding obligations on members, enforceable through the WTO's binding dispute settlement process. As a result, the impact of WTO commitments on a country's regulatory framework can be seen through voluntary compliance of a member's commitments or as a result of enforcement through the WTO's dispute settlement mechanism.

Voluntary Compliance

WTO commitments may have a greater impact on developing countries than on developed countries. For many developed countries, adoption of the GATS principles was a reinstatement of pro-competitive liberalization policies that were already in place and compliance with GATS did not require substantial legislative reform. However, for many developing countries, liberalization of their telecommunications market required certain reforms to their telecommunications legislation and structure.

GATS seeks the establishment and enforcement of a framework without creating unnecessary barriers to trade.* It explicitly recognizes members' right to regulate the supply of services in order to meet national policy objectives, and therefore liberalization does not imply deregulation. One of the main objectives of GATS with respect to developing countries is to increase their participation through progressive liberalization, taking into account their development levels.

* To achieve such liberalization and comply with GATS telecommunications commitments, many WTO members were required to modify their laws to reflect compliance with their international commitments (e.g., implementing transparent regulatory structures and procedures, establishing an independent regulator; and removing market access barriers). While GATS does not require members to privatize the incumbent operators, many countries did engage in privatization and liberalization efforts as a means to introduce competition in the market. However, even when countries have adopted the legal and structural reforms necessary to comply with their WTO commitments, effective competition and adequate enforcement of a regulatory framework may sometimes be hindered by the size of the market and the country's lack of technical, financial, and human resources.

For example, Bangladesh has been WTO a member since its inception in 1995. Bangladesh did not expressly agree to adopt the Reference Paper.* Instead, Bangladesh agreed to review the creation of regulatory disciplines, including specific commitments to:*

- issue licences to two additional fixed-line operators;
- introduce full competition in voice and data transmission over closed user groups and Internet access services;

- grant licences to four mobile telephone service suppliers; and
- make no limitations on national treatment (subject to certain subsidies and tax benefits that may only be extended to national operators).

In 2001, Bangladesh approved the Telecommunications Act, establishing an independent regulator and setting the stage for telecommunications reform. Mobile licences were also issued to four companies, which has permitted growth and competition in the sector. Licences were also granted to fixed-line operators, but competition and growth in this market has been slower as a result of interconnection issues with the fixed incumbent telecommunications operator.* Bangladesh is expected to privatize the incumbent operator and remove additional barriers that still exist in the mobile services market (i.e., restrictions on interconnection with the incumbent operator).*

Also illustrative of the impact of the WTO is Uganda. Although a founding WTO member, Uganda made GATS commitments on basic telecommunications unilaterally (i.e., not as a part of formal negotiating rounds) and revised these commitments in 1999 as a result of the introduction of competition and privatization of the incumbent operator. In its schedule of specific commitments Uganda:

- - agreed to adopt the Reference Paper;
 - maintained the right of duopoly major licence holders and other pre-existing licence holders over international gateway services (including international roaming for mobile services) “according to the terms of those licences”; and
 - agreed to grant licences to three mobile carriers.

Uganda began its telecommunications liberalization process in 1994 with the introduction of competition in the mobile sector where three operators currently compete. Liberalization of the fixed-line market began in 1997 when it awarded a second licence to a fixed-line operator, granting it “shared-exclusivity” with the incumbent telecommunications operator until 2005. In 2006, a new, technology-neutral licensing regime was adopted that further liberalized the telecommunications sector, including the licensing of more than a dozen facilities-based operators.*

Other countries that were not WTO founding members, but have acceded to the WTO post BTA, have been required to undertake significant market restructuring as part of their accession, including dismantling of their monopoly telecommunications operators. For example, Croatia and Georgia, which entered telecommunications commitments in 2000, were required to open their telecommunications market to competition by removing existing monopolies by 2003 and 2004, respectively.* In 2001, Moldova also agreed to lift the existing monopoly by 2003.*

WTO Dispute Settlement Mechanism - Effects of the DSB decision within Mexico

The impact of WTO commitments in the shaping of national legislation also can be seen in the context of the dispute settlement mechanism provided in GATS. WTO Dispute Settlement Body (DSB) rulings are binding for the members upon which judgment has been passed, and are automatically adopted unless there is a consensus to the contrary.* In this sense, dispute settlement constitutes a coercive mechanism for enforcing members’ WTO commitments in such cases where voluntary compliance is not forthcoming. Hence, such disputes may arise, for example, when one member takes, or omits to take, certain actions that another member state deems a breach of pre-existing WTO commitments. WTO rules exclude individual service providers from directly seeking relief, but the service provider may seek its country of origin government to put pressure on another country’s government to comply with its GATS obligations, and ultimately activate the dispute settlement procedure.

To date, only one telecommunications case has been submitted to the DSB: a case involving trade of services between the United States and Mexico, which resulted in the Report of the Panel on Mexico’s Measures Affecting Telecommunications Services (the Panel Report).* In 2000, after failed bilateral talks, the United States initiated a WTO consultation proceeding claiming Mexico’s failure to comply with its commitments under the GATS Annex on Telecommunications and the Reference Paper with respect to basic and value-added services. Mexico’s schedule of commitments (adherence to the Reference Paper, market access, and national treatment) required it to:

- ensure cost-orientated interconnection;
- prevent anticompetitive practices; and
- ensure that foreign service suppliers have access to Mexican public telecommunications networks.

The United States claimed that Mexico:

- Failed to ensure that local operator, Telmex, provide interconnection to U.S. suppliers on cost-orientated, reasonable rates, terms and conditions (*i.e.*, inconsistency with interconnection principles under the Reference Paper).
- Maintained legislation that failed to prevent anticompetitive practices by Telmex, allowing it to establish international interconnection rates on behalf of all of the suppliers in the market (*i.e.*, inconsistency with the competitive safeguards principles under the Reference Paper).
- Failed to comply with the Annex on Telecommunications, as U.S. suppliers were unable to access Mexico's public telecommunications network for the provision of certain international services (*i.e.*, non-facilities based services through Mexican commercial agencies, "comercializadoras," and international simple resale through cross-border leased circuits).

As a result of the failed consultation proceedings, in 2002, a Panel was constituted, concluding with the DSB Panel Report in June 2004 which found that Mexico had breached several of its WTO telecommunications obligations. As a result, the United States and Mexico agreed on an implementation timetable addressing the compliance issues laid out in the Panel Report. According to such compliance agreement, Mexico was required to:

- Revise its International Long Distance Rules (the ILD Rules), eliminating those aspects of the existing ILD Rules that implemented the "uniform settlement rate" system, the "proportional return" system, and the requirement that the carrier with the greatest proportion of outgoing traffic to a country negotiate the settlement rate on behalf of all Mexican carriers for that country. All such practices were deemed by the Panel Report to be a breach of Section 1.1 of the Reference Paper.* Thus, the new ILD Rules had to allow the competitive commercial negotiation of international settlement rates.
- Maintain regulations authorizing the issuance of permits for the resale of international long distance public switched telecommunications services. Such regulations would have to regulate commercial agencies (comercializadoras) established in Mexico and permit them to purchase and resell these telecommunications services through the use of capacity of concessionaires. The absence of such regulations was deemed by the Panel Report to be a breach of Article 5 (a) and (b) of the Annex on Telecommunications.

In light of this compliance schedule, Mexico has undertaken the following reforms:

- New international long distance telecommunications rules* were approved providing for the competitive negotiation of settlement accounting rates or international interconnection rates, including prices for incoming and outgoing traffic.* In addition, foreign operators now are free to decide which Mexican operator they wish to use to terminate their traffic in Mexico.*
- With regards to the rules for licensing of "comercializadoras," Mexico issued Regulations for the Resale of Long distance and International Long distance Telecommunications Services, allowing the commercial resale of long distance and international long distance services originating in Mexico. This regulation authorizes the issuance of licences for the resale of international long distance public switched telecommunications services.

Converged Services in the WTO Framework

Regulatory frameworks that are vertically structured around industries and more service-orientated, face greater challenges in adapting to and enabling convergence. While the WTO framework was an important step towards removing traditional barriers to trade and competition in the telecommunications market, its vertically segmented structure may lead to an un-harmonized approach towards convergence. As shown above, communications subsectors are technology oriented, and may not provide the flexibility necessary to accommodate new converged services.

A 1998 note by the WTO Secretariat highlighted that the GATS "classification of services [may be] inadequate [...] to meet the rapid changes of the sector [...] and any other list that might be devised could become quickly out of date." Moreover, the lack of specificity regarding the scope and services under each commitment creates a degree of uncertainty about members' commitments in connection with converged services. Moreover, WTO members have the flexibility to use their national legislation to interpret or define the category of services for which commitments have been made and therefore the treatment and liberalization of the same service may vary by country. The evolution of convergence has caused the vertical separation of services and industries to disappear, making the WTO's service-based classification obsolete. This also leads to uncertainty regarding the commitments applicable to newly developed services, as such services may potentially fall outside of the scope of existing classification headings and therefore not be subject to any commitment.

Practice Notes

- **Understanding GATS [3.2.1]**

6.3.2.2 REGIONAL FRAMEWORKS

Europe

i. Regional Framework

Beginning in the mid 1990s, the European Commission's Convergence Green Paper ¹ commenced the policy formulation debate on the regulatory implications of convergence. This process resulted in the 1999 Review² that examined the existing regulatory framework for telecommunications, and presented a series of policy proposals for a comprehensive cross-border regulatory framework covering all transmission networks and services. As a result thereof, in 2002, the EC approved a new regulatory framework (NRF) consisting of a Framework Directive and four principal specific directives:

- the directive on the authorization of electronic communications networks and services (Authorization Directive);
- the directive on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive);
- the directive on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); and
- the directive concerning the processing of personal data and the protection of privacy in the telecommunications sector (Data Privacy Directive) (hereinafter the Specific Directives).³

Also part of the NRF are the Commission Recommendation on Relevant Markets and the Commission Guidelines on Market Analysis which directs regulatory authorities to conduct market analysis of specific markets that may be susceptible to regulation.⁴

Specifically, the NRF seeks to achieve "sustained effective competition without on-going regulatory intervention"⁵ by removing regulation where competition has been determined to be effective and refocusing regulation where it does not exist. The general goals of the NRF are to encourage competition in the electronic communications markets, to improve the functioning of the internal market, and to guarantee basic user interests that would not be guaranteed by market forces.

The NRF is intended to be technology neutral, leaving behind such concepts as voice telephony and the distinctions between fixed and mobile communications previously relied upon by the EU for its telecommunications liberalization process during the 1990s. This is a corollary of the lessons derived from convergence, as it has been recognized that rigid regulatory concepts cannot evolve at the same pace as that of technological changes. The Framework Directive stresses the need for the EU member states to ensure that national regulatory authorities make regulation technologically neutral, "that is to say that it neither imposes nor discriminates in favor of the use of a particular type of technology."⁶ It should be noted, however, that technological neutrality does not preclude member states from promoting specific services where this is deemed justified, (e.g., digital television as a means for increasing spectrum efficiency).

A relevant aspect of the NRF is that the EU has separated the regulation of transmission from the regulation of content. Therefore, content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, is excluded from the scope of the framework.⁷

ii. 2009 Telecoms Reform

Although the 2002 regulatory framework contributed to the development of a strong ICT sector across Europe by opening markets and providing greater consumer choice, the European Commission (EC) began the process of reforming the rules in 2007 in order to better facilitate cross-border competition, ensure more effective consumer protections and provide for more efficient utilization of spectrum resources in light of the rapid technological developments in the ICT sector, particularly VoIP and IPTV.⁸ The EC first proposed a review of the telecoms framework in 2007, which was followed by two years of consultations with service providers, national regulators, consumers and other stakeholders before being discussed and adopted by the Council and European Parliament in December 2009.⁹ The final telecom rules reform the 2002 directives relating to authorization, access, universal service and data privacy.¹⁰ The 2009 directives require all EU Member States to have transposed these new telecom rules by May 2011.

The 2009 telecoms reform package is comprised of 12 main elements:¹¹

1. The right for consumers to obtain fixed and mobile number portability within one working day.
2. Better consumer information, including more detailed consumer contracts that specify, among other things, minimum service quality levels and compensation/ refunds if these levels are not met, as well as options for non-published

information and clear information on the qualifying criteria for promotional offers.

3. A new Internet freedom provision explicitly requiring Member States to respect the fundamental rights and freedoms of citizens to access to or use of services and applications, including by respecting the presumption of innocence and the rights to privacy, fair and impartial proceedings and effective and timely judicial review.

4. New guarantees for an open and more "neutral" Internet by granting national regulatory authorities (NRAs) the power to set minimum quality levels for network transmission services, as well as implementing new transparency requirements that ensure, prior to signing a contract, consumers are informed about the terms of service, including traffic management practices and their impact on service quality and other limitations such as bandwidth caps or available connection speed.

5. Better consumer protections against personal data breaches and spam, including protections of subscribers' names, email addresses and bank account information through mandatory notifications for personal data breaches, as well as new rules related to the use of "cookies" and other online devices for tracking, storing and sharing user information.

6. Better access to emergency services by extending the access requirements from traditional telephony to new technologies, including VoIP, and strengthening operators' obligation to pass information about caller location to emergency authorities.

7. NRAs are provided greater independence by eliminating political interference in their day-to-day duties and adding protection against arbitrary dismissal for the heads of national regulators.

8. Improve regulatory harmonization by granting the EC the authority to oversee regulatory remedies proposed by NRAs, such as conditions of access to a dominant operator's network, in order to avoid inconsistent regulation that could distort competition in the single EU telecoms market.

9. Permit NRAs to overcome competition problems by implementing functional separation rules as a last-resort remedy, which would require operators to separate communication networks from their service branches.

10. Bridge the digital divide through better management of radio spectrum, including a stronger emphasis on technology and service flexibility in spectrum use, as well as making more spectrum available for wireless broadband services in regions where building new fiber infrastructure is too costly. In addition, Member States may expand universal service obligations beyond narrow-band internet access.

11. Encourage competition and investment in next generation access (NGA) networks through new rules relating to open access and sharing of network elements, as well as provisions to ensure that telecom operators receive a fair return on their investments.

12. Creation of the Body of European Regulators for Electronic Communications (BEREC), a new European Telecoms Authority that will help to ensure fair competition and more consistency of regulation on the telecoms markets. The role of BEREC is addressed in the following section.

ii. Regional Regulatory/Supervisory Body

Part of the 2009 telecoms reform was the adoption of the regulation establishing BEREC, which replaced the loose cooperation of the European Regulators Group (ERG) created in 2002 with a more transparent and more efficient approach.¹² Similar to ERG, BEREC is not a European Community agency, but acts as an advisory body for the European Parliament, the Council and the Commission in the field of electronic communications and provides the exclusive forum for cooperation among the NRAs, particularly for cross-border issues.¹³ In addition, BEREC, like the ERG, is composed of one member per Member State, which is typically the head of each Member State's NRA. Greater transparency is one of the key differences between ERG and BEREC. In particular, the regulation establishing BEREC sets out the processes for issuing decisions and taking votes; requires BEREC to adopt and make publicly available its rules of procedure; and provides for public participation through consultations.

Overall, BEREC plays several roles as an advisory body, including developing best practices for NRAs to adopt; providing assistance to NRAs on regulatory issues; delivering opinions on the EC's draft decisions, recommendations and guidelines related to the Framework Directive and other telecom directives; and assisting the European Parliament, Council and Commission, as well as the NRAs, in discussions with third parties. Since its inception, BEREC has held several public consultations on a broad range of issues including best practices to facilitate the ability for consumers to switch service providers, ensuring equivalence in access and choice for disabled end-users and solutions for cross-border issues.¹⁴

iii. Regional Harmonization Efforts

In 2005, the EC proposed the i2010 – European Information Society 2010, a strategic framework seeking to “build towards an integrated approach to information society and audiovisual media policies in the EU.”¹⁵ Specifically, the EC recognizes that to address digital convergence, EU rules on information society and media should be consistent, and as a result proposes the following general policies: “(i) completion of Single European Information Space which promotes an open and competitive single market for information society and media (ii) strengthening innovation and investment in ICT research to promote growth and more and better jobs; (ii) achieving an inclusive European Information Society that promotes growth and jobs in a manner that is consistent with sustainable development and that prioritizes better public services and quality of life.”¹⁶ The Single European Information Space seeks to accelerate the economic benefits of digital convergence through various measures, including a review of the electronic communications framework in 2006, modernizing EU rules on audiovisual services, and defining a new efficient spectrum management strategy in 2005.

All countries seeking accession to the European Union are required to align their legislation to the *acquis communautaire*, (i.e., the entire body of European laws, including treaties, regulations and directives passed by the European Union and decisions of the European Court of Justice). For many candidate countries with transitional economies, negotiating and adopting Chapter 19 of the *acquis* (the telecommunications and IT chapter) requires significant regulatory reform to accommodate the telecommunications *acquis*. Implementation of *acquis* required the establishment of an independent telecommunications regulatory authority and a “separation of policy and law making authorities from ownership interests.” As such, candidates are required to:

- Adopt a national telecommunications policy for the development of the sector consistent with EC policy;
- Prepare market players for the pressure of competition expected when they join the EU;
- Prepare the telecommunications market through the transposition and implementation of EC legislation, in particular through price rebalancing;
- Ensure the objective enforcement of the regulatory framework through an adequately resourced and well-trained independent regulatory authority; and
- Address the communications needs of under-developed regions, especially the adoption of a universal service policy.¹⁷

Americas

MERCOSUR

i. Regional Framework

Mercado Común del Sur (Common Market of Southern Cone or MERCOSUR) created in 1995, is the economic block formed by Argentina, Brazil, Paraguay, and Uruguay, with Bolivia, Peru, and Chile as associate member states. The MERCOSUR treaty seeks commercial integration among member countries and in particular (i) the free movement of goods and services among the signatory countries; (ii) the coordination of macroeconomic policies in communications; and (iii) the harmonization of national legislation in the relevant areas to strengthen the integration process.¹⁸ MERCOSUR does not have a single body of telecommunications rules or directives. Instead, through its regional institutional process, decisions issued by the Common Market Council on relevant commercial matters governed under the MERCOSUR treaty are later adopted into the national legislation of the member states.¹⁹

ii. Regional Regulator/Supervisory Body

The Common Market Group of MERCOSUR established Working Subgroup 1 (SGT1), which is responsible for the negotiation of communication related matters under the treaty (i.e., postal services, broadcasting, radio communications, and public telecommunications services). The Common Market Group issued a negotiating directive for SGT1 instructing it to identify adequate steps for harmonization and consolidation of rules and practices in telecommunications.²⁰ The areas subject to review by SGT1 included:

- Ongoing identification of spectrum bands that could be subject to harmonization;
- Compilation and consolidation of laws and telecommunications rates of each member state;
- Advance mobile telecommunications services;
- Use of numbering resources within MERCOSUR;
- Convergence of telecommunications networks and services;
- Definition of the structure of common public telecommunications services to be provided in MERCOSUR;
- Establishment of interconnection criteria of the public networks of the member states; and

- The regulatory harmonization of converged services.

SGT1 is responsible for issuing regulatory recommendations to the Common Market Council on matters regarding postal services, radio communications, broadcasting, and public telecommunications services. SGT1 is comprised of four commissions, each one responsible for one of these four sectors of communications. These commissions hold joint meetings to discuss overlapping matters, propose ways of harmonizing legislation where their industries converge and remove legislation that hinders the integration of member states. SGT1 issues recommendations that must be ratified by the Common Market Council, and once ratified, member states must adopt the necessary measures to incorporate them into their national legislation.²¹ SGT1 has also issued general guidelines followed by the regulatory agencies of the member states with the objective of harmonizing administrative procedures and establishing common approaches on international forums.

iii. Regional Harmonization Efforts

Since its inception in 1995, SGT1 has issued several recommendations that have been incorporated into the national legislation of the member states. These include:

- The provision of basic public telephone services in the bordering areas of MERCOSUR;
- The adoption of common bands for paging and trunking services;
- Manuals and procedures for frequency coordination for radiocommunications and broadcasting services;²²
- Adoption of a Unified Code of Emergency Services within MERCOSUR;²³
- Regulatory framework for FM radio broadcasting;
- Harmonization of new technologies;²⁴ and
- General rules for international roaming within MERCOSUR.

Other private efforts include the signing of a multilateral agreement, SINTONIA, among Brazil's EMBRATEL, Uruguay's ANATEL, Argentina's TELINTAR and Chile's CTC-Mundo, aimed at serving multinational business customers that operate in the MERCOSUR region in order to ensure integrated, homogenous services throughout the region. This agreement has been further expanded to include Bolivia-based Entel, Paraguay-based Antelco, and Telefónica del Perú in Peru.

OECS

i. Regional Framework

In 1981, Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines formed the treaty-based Organisation of Eastern Caribbean States (OECS).²⁵ The OECS seeks to promote economic integration and cooperation among its member states, maximizing the benefits of their geographical position to facilitate their collective integration with the global economy. The OECS recognizes telecommunications as an essential tool for economic diversification and five countries (the Commonwealth of Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines) developed a Telecommunications Reform Project in an effort to seek ways of introducing competition in the sector.²⁶ A review of the sector concluded that the high costs of access to telecommunications services and the lack of physical infrastructure and trained personnel in the sector were factors affecting the development of the telecommunications industry. The OECS governments also recognized the inadequacy of their telecommunications regulatory framework and the need to create regulatory frameworks favourable for development and investment in accordance with the WTO BTA. As a result, the five participating countries agreed to adopt a harmonized regulatory framework and a competitive regulatory authority.

ii. Regional Regulator - ECTEL

On May 4, 2000, the Commonwealth of Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines (the Contracting States) signed a treaty establishing the Eastern Caribbean Telecommunications Authority (ECTEL) a regional advisory body to promote market liberalization and competition in their telecommunications industry.²⁷ ECTEL's main objectives include promoting market liberalization and competition in the telecommunications sector of the Contracting States and establishing a harmonized regional regulatory regime. ECTEL is headed by a Council of Ministers, including the minister responsible for telecommunications in each of the Contracting States.

ECTEL's functions include:²⁸

- Coordinating with and advising the Contracting States on telecommunications matters to meet the objectives of the ECTEL Treaty;

- Issuing recommendations to the Contracting States on a harmonized regional radio spectrum plan;
- Preparing and recommending the adoption by the Contracting States of harmonized regulation including application forms and other forms in respect of licences, frequency authorizations and tender documents; and
- Designing and conducting open tender procedures for individual licences as requested by Contracting States.

iii. Harmonization Efforts

At the recommendation of ECTEL, each Contracting State adopted harmonized telecommunications legislation and regulations liberalizing the industry and introducing competition.²⁹ Each Contracting State also established establishment of National Telecommunications Regulatory Commissions (NTRCs), with the responsibility of formulating national telecommunications policy, and ensuring efficient, economic and harmonized development telecommunications and broadcasting services in each Contracting State. To date, each Contracting State has adopted harmonized telecommunications regulations dealing with equipment and public networks, interconnection, private network licensing, licensing and authorizations, spectrum management, numbering, tariffs, confidentiality in network and services, and fees. The new regulatory frameworks required all telecommunications licences to be issued on a non-exclusive basis, resulting in the termination of the monopoly service provider's (Cable & Wireless) exclusive rights in the Contracting States. As a result, in 2001, the Contracting States entered into an agreement with Cable & Wireless establishing the terms for a joint collaboration and a gradual transition to full competition.³⁰

CARICOM

i. Regional Framework

In 1973, the Treaty of Chaguaramas established the Caribbean Community (CARICOM) and transformed the Caribbean Free Trade Association (CARIFTA) into the Caribbean Common Market.³¹ Between 1989 and 2000, the Member States worked towards ensuring greater freedom of movement of goods and services, resulting in the Revised Treaty including new issues such as e-commerce, government procurement, trade in goods from free zones, free circulation of goods, and the rights contingent on the free movement of persons.³² CARICOM has 15 Member States including the five ECTEL countries, as well as Antigua and Barbuda; The Bahamas; Barbados; Belize, Guyana; Haiti; Jamaica; Montserrat; Suriname and Trinidad and Tobago. In addition, there are five Associate Members, namely Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos Islands.

Among other areas, CARICOM is strongly focused on increasing the deployment and adoption of ICTs throughout the region. For example, the Directorate of Trade and Economic Integration (TEI) within the CARICOM Secretariat has implemented the Information and Communication Technology for Development (ICT4D) program. Although the ICT4D which has the overarching goal of advancing the development of the people in the Caribbean Community through the use of ICTs as a catalyst for transforming the CARICOM Member States into a knowledge-based society.³³

ii. Regional Regulator/Supervisory Body

The Caribbean Telecommunications Union (CTU) was established by the Heads of Government of CARICOM Members in 1989.³⁴ It has full legal personality and capacity to contract, acquire and dispose of real and personal property and to be party to legal proceedings. In addition, the CTU possesses immunities and privileges accorded to diplomatic and international organizations of equal status. The CTU was set up on the recommendation of the Ministers for Telecommunications to correct:³⁵

1. the fragmented policy frame of telecommunications sectors of member countries;
2. the problems of frequency incompatibility between and among member countries
3. the lack of Caribbean input in major international issues, which disregarded rights and sovereignty of the Caribbean states, thereby denying them opportunity
4. the absence of coordinating machinery to facilitate an increase in the impact of resources and assistance for Caribbean telecommunications development.

As such, the overarching objective of the CTU is to harmonize telecommunications policies and plans, as well as encourage cooperation among the Member States, to the greatest possible extent. Some of the specific objectives include: (i) facilitating the coordination of planning and development of intra-regional and international communications networks; (ii) promoting ICT awareness; (iii) encouraging the exchange of information and transfer of technology among Member States; and (iv) harmonize, as much as possible, the positions of Member States in preparation for international and regional telecommunications conferences and other meetings.³⁶

iii. Harmonization Efforts – HIPCAR

In response to requests by Member States, the CARICOM Secretariat, the CTU and the ITU, with funding from the EU and ITU, established the three-year project Harmonization of ICT Policies, Legislation and Regulatory Procedures (HIPCAR) in order to encourage competition and growth of ICTs throughout the region.³⁷ The main impetus for the HIPCAR project was the recognition that although the Caribbean countries as a whole had liberalized their telecommunications sectors, they had taken different policy approaches. In order to help CARICOM countries develop similar regulatory frameworks, the HIPCAR project focused on two areas of ICT policy and legislative frameworks, namely information society issues and telecommunications, and is divided into two phases.

Phase I, completed in 2010, focused on developing model policy guidelines and model legislative texts for various issues related to the information society and telecommunications. For sector issues related to the information society, the HIPCAR Project focused on electronic transactions, electronic evidence in e-commerce, privacy and data protection, interception of communications, cybercrime and access to public information (freedom of information).³⁸ For sector issues related to telecommunications, the HIPCAR Project addressed universal access and service, interconnection and access, and licensing.³⁹

Phase II is to be completed in 2011 and is focused on direct in-country assistance to help Member States implement and transpose these models into national policies, laws & regulations. Several CARICOM countries have requested assistance, including Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago.⁴⁰

Africa

i. Regional Framework – ECOWAS

The Economic Community of West African States (ECOWAS) is among the various regional economic communities in Africa that have been proactive in creating initiatives to foster cooperation and integration of their telecommunications and information technology activities. As opposed to other African regional initiatives, such as the Southern African Development Community (SADC) the ECOWAS Treaty foresees the harmonization of legislation, including in the telecommunications field, similar to the EU model.

ECOWAS, founded in 1975, is a regional organization of West African States (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo). Its main objective is to form a unified economic zone in West Africa through economic integration and shared development in various industries, including telecommunications.⁴¹ In the area of telecommunications, the ECOWAS treaty seeks to establish “common transport and communications policies, laws and regulations.”⁴² The treaty further requires member states to:

- Develop, modernize, coordinate and standardize their national telecommunications networks in order to provide reliable interconnection among member states;
- Complete, with dispatch, the section of the pan-African telecommunications network situated in West Africa;
- Coordinate their efforts with regard to the operation and maintenance of the West African portion of the pan-African telecommunications network and in the mobilization of national and international financial resources;” and encourages member states to seek private sector participation so as to achieve these objectives.⁴³

In addition, the Council of Ministers⁴⁴ of ECOWAS has determined that the following items are priorities for the region:⁴⁵

- - Harmonization of regulatory frameworks and institutions.
 - The evolution of a regional regulatory framework - the ECOWAS ICT Task Force has been established to harmonize ICT policies of member countries.
 - Fostering competition.
 - Building a robust Regional Backbone Infrastructure capable of supporting seamless cross-border connectivity.
 - Reducing costs associated with rights of way through the installation of optical fibre cable on power lines to carry electricity supply between countries that have electricity.
 - Granting operating licences on a priority basis to private investors that are interested in entering the markets in the region.

ii. Regional Regulatory/Supervisory Body

In 2002, ECOWAS was responsible for the creation of the West African Telecommunications Regulatory Association (WATRA), the main objective of which is to coordinate dialogue regarding telecommunications and regulation in the West African region. WATRA is an association of regulators and the respective government ministries of West African Territories responsible for telecommunications matters.⁴⁶

WATRA is intended as a vehicle to foster continued development of information communications technology (ICT) within the subregion, and decisions and directives issued by the Conference of Regulators are binding on all national regulators. In this respect, WATRA encourages the establishment of consistent standards throughout the region to facilitate the deployment of interoperable ICT systems and services. The members expect WATRA to “become a leading forum for regulators in the region to exchange ideas and formulate plans regarding regulatory and technical issues that will accelerate development of infrastructure across the region.”⁴⁷

Given the limited resources available for the development of regulatory frameworks that promote ICT sector development, WATRA may provide countries with a source of information (e.g., best practices and regulatory modeling) and support in the development of appropriate regulatory structures.

In September 2005, WATRA took on the leading role in approving the ECOWAS telecommunications guidelines on key regulatory issues at an Ordinary General Meeting in Accra.⁴⁸ These guidelines will be the basis for ECOWAS Telecommunications Directives that are expected to be adopted by ECOWAS Ministers in early 2006. These efforts are a first in Africa and will set an example for other subregions in Africa and around the world.

iii. Harmonization

ECOWAS has undertaken a Telecommunications Regulation Harmonization Project⁴⁹ aimed at designing a strategy for the harmonization of telecommunications policies in ECOWAS. To date, each ECOWAS country, with the exception of one, has commenced liberalization of the telecommunications sector and has separated postal and telecommunications operation from regulation. In addition, 11 ECOWAS countries⁵⁰ have established telecommunications regulatory authorities.⁵¹

As ECOWAS progresses in its harmonization efforts, some of the challenges it may face include harmonization of existing national ICT policies (e.g., regional spectrum and licensing); evolving common principles for interconnection and universal access; safeguarding the interests of citizens (e.g., control of content); and using ICTs to reduce distance barriers among communities.⁵² See Box 3-3 for a description of other African regional harmonization initiatives.

◀ Box 1 Other African Regional Initiatives

Source: Box Credit

Economic community: South African Development Community (SADC)

Member states: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.

Related Telecommunications Association: Communications Regulators Association of Southern Africa (CRASA)⁵³

Harmonization Efforts: SADC is among the most advanced regional economic communities with respect to telecommunications liberalization and ICT issues. TRASA has advocated establishment of independent regulators, and is proactive in attracting foreign investment in telecommunications infrastructure development. It advocates the introduction of operators to compete with the incumbent telecommunications operator and the corporatization of the public operator.⁵⁴ TRASA also has established model ICT policies, legislation document, and regulatory guidelines for the SADC countries.

Economic community: West African Economic and Monetary Unit (UEMOA)

Member states: Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo.

Related telecommunications association: None

Harmonization efforts: UEMOA is currently working on directives aimed at the harmonization of telecommunications laws of the member countries. Given that all its members are also members of ECOWAS, UEMOA has actively participated in ECOWAS and WATRA workshops on the ECOWAS guidelines and aims to harmonize its directives with ECOWAS.

Economic community: Common Market for Eastern and Southern African (COMESA)

Member states: Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

Related telecommunications association: Association of Regulators of Information and Communication in Central and Eastern Africa (ARICEA)

Harmonization efforts: Through ARICEA, COMESA has been very proactive in member state capacity building. It has initiated programs to harmonize ICT policies and attract foreign investment to the region, and drafted model ICT policies, licensing rules, and frameworks. It also has established an agenda to stimulate regulatory harmonization. In 2011, ARICEA and COMESA began a study on cybersecurity in the region, which is expected to result in draft policy guidelines and draft model bill.⁵⁵

Economic community: Central African Economic and Monetary Community (CEMAC) and Economic Community of Central African States (CEEAC)

CEMAC Member states: Cameroon, the Central African Republic, Chad, Democratic Republic of the Congo, Equatorial Guinea and Gabon.

CEEAC Member States: Angola, Burundi, Cameroun, Chad, Central African Republic, Gabon, Republic of Congo, Democratic Republic of the Congo, Equatorial Guinea, Rwanda, São Tomé and Príncipe

Related telecommunications association: Central African Telecommunication Regulators Association (ARTAC)

Harmonization efforts: ARTAC has based itself on other regional models, including CRASA, and seeks to encourage the development of regional harmonized, modern legislative and regulatory structures in the ICT sector.⁵⁶

Asia

ASEAN

Since 2001, the Association of Southeast Asian Nations (ASEAN) has worked towards creating an effective framework to promote growth in the telecommunications industry has been a top priority for, particularly through the ASEAN Telecommunications and IT Ministers (TELMIN). ASEAN is an intergovernmental organization comprised of the Governments of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and

Vietnam. ASEAN has several committees, meetings, and working groups⁵⁷ focused on promoting liberalization and harmonization of the ICT industry⁵⁸ and it has developed several ambitious proposals (e.g., the development of a seamless telecommunications network and a uniform regulatory framework among ASEAN countries). However, it has been challenging to achieve concrete results, largely due to the lack of binding authority of ASEAN's decisions on its member countries.⁵⁹ For example, after the 14th ASEAN Telecommunications Regulators' Council (ATRC) Meeting in 2008, Singapore noted that ASEAN needs a more comprehensive ICT regulatory framework, which could be achieved through the adoption of a rules-based system able to transform ATRC into a more effective and cohesive organization.⁶⁰

ASEAN countries have signed several framework agreements and declarations vowing to open their markets to competition and work together towards the enhancement of their ICT sectors.⁶¹

In 2004, the ATRC agreed to develop non-binding regulatory models on best practices in "(i) competition and management and interconnection; (ii) convergence and new services; and (iii) cooperation on capacity-building."⁶² The purpose of these models is to serve as guidelines for ASEAN regulators to develop new legislation and regulatory practices to establish their respective systems and processes. Such regulatory frameworks have not yet been developed.

A 2004 study conducted on the "Liberalization and Harmonization of the ASEAN Telecommunications" indicated that all ASEAN member countries were in different stages of market liberalization (i.e., either fully liberalized, substantially liberalized, in transition or in the first stages of policy change).⁶³ The study found that a framework for reform was needed, consisting of three stages: (i) establishing the foundations for a regulatory regime; (ii) fostering network development through the introduction of competition; and (iii) full liberalization.

A second study focused on the objectives identified by the ASEAN Telecommunications Regulatory Council (i.e., interconnection and competition management; convergence and licensing of new service; and confronting the digital divide). The study recognized that work still needs to be done in these areas and that the first priority is the establishment of a "robust regulatory framework," that will ensure effective regulation and an "independent regulator capable of dealing with sector-specific issues of market dominance."⁶⁴

The Brunei Action Plan, implemented in 2006, focused on enhancing ICT competition and capacity-building among ASEAN countries, particularly through programs that facilitate e-commerce, build emergency response preparedness, promote e-society and cultural initiatives and improve access to ICTs.⁶⁵ The 9th TELMIN Meeting in 2009 adopted the Vientiane Declaration on Promoting the Realization of Broadband across ASEAN, which seeks to promote "the expeditious development of next generation networks by establishing an ASEAN broadband infrastructure connecting to high speed national information infrastructures through facilitative policies and regulation as well as by leveraging on other regional backbone initiatives, to ensure sufficient capacity and route diversity, to have adequate infrastructure for redundancy and to avoid over reliance on any particular regional system between the ASEAN Member States and to extend broadband access to the ASEAN communities by 2015."⁶⁶

These initiatives have culminated in the ASEAN ICT Masterplan (AIM2015), which was adopted at the 10th TELMIN in January 2011 and consists of six strategic thrusts:⁶⁷

1. Economic transformation
2. Empowerment and engagement of people
3. Innovation
4. Infrastructure development
5. Human capital development
6. Bridging the digital divide.

Each of these thrusts includes various initiatives to help achieve the objectives. For example, the goal of economic transformation includes developing a framework that facilitates transparent and harmonized ICT regulations, as well as developing public-private partnerships for the ICT industry. Infrastructure development is to be achieved through various means, including establishing an ASEAN broadband corridor and Internet exchange network while bridging the digital divide will be achieved, in part, by reviewing USO policies and implementing school connectivity programs.

Bilateral Agreements

In addition to opportunities for countries to coordinate within multilateral and regional frameworks, bilateral agreements help to foster further collaboration efforts between countries to increase trade and support investment and development, as well as promote fundamental principles and best practices. For example, the European Union and United States

established a bilateral agreement in April 2011, which includes ten principles related to trade in ICT services to be promoted worldwide.⁶⁸ Other bilateral agreements focus on promoting the development of ICT infrastructure and services between two countries. For instance, France and Israel signed a *Bilateral Agreement for cooperation in the field of telecommunications* in 2009 that includes provisions on cooperation in international organizations, as well as mutual exchange of information and advice on regulatory developments, spectrum management, satellite coordination and promotion of R&D.⁶⁹ The agreement includes a proposal to hold annual meetings between the two parties to review ways to ensure implementation of the agreement.

6.3.2.3 MULTILATERAL ICT ORGANIZATIONS

International Telecommunication Union The International Telecommunication Union (ITU) is the leading United Nations agency for information and communication technology issues, and the global focal point for governments and the private sector in developing networks and services.¹ For 145 years, ITU has coordinated the shared global use of the radio spectrum, promoted international cooperation in assigning satellite orbits, worked to improve telecommunication infrastructure in the developing world, established the worldwide standards that foster seamless interconnection of a vast range of communications systems and addressed the global challenges of our times, such as mitigating climate change and strengthening cybersecurity. Based in Geneva, Switzerland, ITU membership includes 192 Member States and more than 700 Sector Members and Associates.

The Plenipotentiary Conference is the top policy-making body of the ITU. Held every four years, the Plenipotentiary Conference is the key event at which ITU Member States decide on the future role of the organization. Although ITU Sector Members, Regional Telecommunication and Intergovernmental Organizations, and the United Nations and its specialized agencies also attend the Plenipotentiary Conference as observers, the ITU Member States:²

- set the ITU's general policies,
- adopt four-year strategic and financial plans and
- elect the senior management team of the organization, the members of **Council** and the members of the **Radio Regulations Board**.

There are multiple basic texts of the ITU, which establish a binding, global framework for international telecommunications.³ The Constitution of the ITU sets forth the structure of the Union while the Convention addresses the ITU's diverse and far-reaching activities promoting telecommunications. Other basic texts include the Optional Protocol on the settlement of disputes, the Decisions, Resolutions and Recommendations in force, as well as the General Rules of Conferences, Assemblies and Meetings of the Union.

The ITU is divided into three sectors: 1) Radiocommunication (ITU-R), which manages the international radio-frequency spectrum and satellite orbit resources; 2) Standardization (ITU-T), which is the ITU's standards-making body; and 3) Development (ITU-D), which was established to help spread equitable, sustainable and affordable access to ICTs.

i. ITU-R

The ITU-R's mission is to ensure the rational, equitable, efficient and economical use of the radio-frequency spectrum by all radiocommunication services, including those using satellite orbits, and to carry out studies and approve Recommendations on radiocommunication matters.⁴ In implementing this mission, ITU-R aims at creating the conditions for harmonized development and efficient operation of existing and new radiocommunication systems, taking due account of all parties concerned.

The primary objective of ITU-R is to ensure interference-free operations of radiocommunication systems through implementation of the Radio Regulations and Regional Agreements, as well as the efficient and timely update of these instruments through the processes of the Regional and World Radiocommunication Conferences (WRCs). WRCs are held every three to four years during which ITU Member States review and revise the **Radio Regulations**, as needed.⁵ The Radio Regulations is the international treaty governing the use of the radio-frequency spectrum and the geostationary-satellite and non-geostationary-satellite orbits around the world. Revisions to the Radio Regulations are made on the basis of an agenda determined by the **ITU Council**, which takes into account recommendations made by previous world radiocommunication conferences.

The general scope of the agenda of a WRC is established four to six years in advance, with the final agenda set by the ITU Council two years before the conference, with the concurrence of a majority of Member States. Under the terms of the **ITU Constitution**, a WRC can:

- Revise the Radio Regulations and any associated frequency assignment and allotment plans;

- Address any radiocommunication matter of worldwide character;
- Instruct the **Radio Regulations Board** and the **Radiocommunication Bureau**, and review their activities;
- Determine **questions** for study by the **Radiocommunication Assembly** and its **Study Groups** in preparation for future Radiocommunication Conferences.

The ITU-R Recommendations constitute a set of international technical standards developed by the ITU-R. They are the result of studies undertaken by Radiocommunication Study Groups on:

- The use of a vast range of wireless services, including popular new mobile communication technologies;
- The management of the radio-frequency spectrum and satellite orbits;
- The efficient use of the radio-frequency spectrum by all radiocommunication services;
- Terrestrial and satellite radiocommunication broadcasting;
- Radiowave propagation;
- Systems and networks for the fixed-satellite service, for the fixed service and the mobile service;
- Space operation, Earth exploration-satellite, meteorological-satellite and radio astronomy services.

The ITU-R Recommendations are approved by ITU Member States. Their implementation is not mandatory; however, as they are developed by experts from administrations, operators, the industry and other organizations dealing with radiocommunication matters from all over the world, they enjoy a high reputation and are implemented worldwide.

◀ Box 1 Overview of ITU-R Radio Regulations

ii. ITU-T

The main products of ITU-T are the sector's Recommendations ("ITU-T Recs"), which provide standards for defining how telecommunications networks operate and interwork.⁶ There are currently more than 3,000 ITU-T Recs (Standards) in force on topics such as service definition; network architecture and security; from broadband DSL; Gbit/s optical transmission systems; next-generation networks (NGN); and IP-related issues, as well as other fundamental components of today's ICTs. Although ITU-T Recs are non-binding, they are generally complied with due to their high quality and because they guarantee the interconnectivity of networks and enable telecommunication services to be provided on a worldwide scale. In 2007 alone, ITU-T produced over 160 new and revised standards, covering everything from core network functionality and to next-generation services like IPTV.⁷ The World Telecommunication Standardization Assembly (WTSA) is conducted every four years and is the event that defines the next period of study for ITU-T, as well as sets the general policy for the Sector and establishes the study groups.⁸

Contribution is the term used to describe membership input into a **Study Group (SG)**.⁹ This input can basically be on any relevant topic but is typically limited to suggesting new work areas, draft Recommendations, changes to existing Recommendations. Study Groups drive their work primarily in the form of study **Questions**. Each of these addresses technical studies in a particular area of telecommunication standardization. Each SG has a Chairman and a number of vice-chairmen appointed by the World Telecommunication Standardization Assembly (WTSA).

To assist in the organization of the work, the SG may be organized into a number of **Working Parties (WPs)**. The WP is the next organizational unit down within the SG. It coordinates a number of study Questions on a related theme, e.g. the Media Coding Working Party in Study Group 16 deals with all study Questions relating to coding of speech, audio and video streams that we use every day for Internet calls, DVDs, etc.

The team of experts working on a specific Question is known as the **rapporteur group**. Their meetings are chaired by the relevant rapporteur. Considering the text of the Question and guidance from the SG, the participants determine what Recommendations are required and develop text for these Recommendations taking all relevant inputs into account and consulting other relevant parts of ITU-T. During a meeting of the parent WP or SG, the experts will normally meet to progress the work, but they may also meet independently of the parent WP or SG, in a more informal setting, when required.

A Question is the basic project unit within ITU-T. The area of study of the project is defined by the text of the Question, and this is generally approved by the study group itself. For a new Question to be established, it is necessary that a number of Members commit to support the work. Questions address technical studies in a particular area of telecommunication standardization, and are driven by contributions. A Question is normally terminated once the defined work has been completed, or the task is revised in the light of developments, which can be technical, market-oriented, network or service driven. The text for each of the Questions assigned to a study group can be found on its web page.

iii. ITU-D

The ITU Telecommunication Development Sector (ITU-D) goal is to ensure the right to communicate to all people, everywhere in the world, through access to infrastructure and ICT services.¹⁰ In this regard, the ITU-D's mission, which encompasses ITU's dual responsibility as a UN specialized agency and an executing agency for implementing projects under the UN development system, is to:

- Assist countries in the field of information and communication technologies (ICTs), in facilitating the mobilization of technical, human and financial resources needed for their implementation, as well as in promoting access to ICTs.
- Promote the extension of the benefits of ICTs to all the world's inhabitants.
- Promote and participate in actions that contribute towards narrowing the digital divide.
- Develop and manage programmes that facilitate information flow geared to the needs of developing countries.

The Telecommunication Development Bureau (BDT) is the executive arm of the ITU-D and is mandated to foster international cooperation in the delivery of technical assistance and support for rolling out and upgrading ICT infrastructure and services in developing countries.¹¹ The BDT is also responsible for implementing projects so as to facilitate and enhance telecommunications development by offering, organizing and coordinating technical cooperation and assistance activities. It provides technical advice and is responsible for the collection, processing and publication of information relevant to telecommunication development.

Held every four years, the World Telecommunication Development Conference (WTDC) is the vehicle through which the ITU-D establishes concrete priorities to help achieve its goals of spreading equitable, sustainable and affordable access to ICTs.¹² The WTDC is a high-level platform where Member States and Sector Members come together to set development priorities, strategies and action plans and guide the work of the ITU-D. Preparatory Conferences are held in each of the five ITU-D regions before the WTDC.

Regional Telecommunications Organizations

There are various types of ITU Membership allowing different levels of participation and access to meetings and information. National governments may join the ITU as Member States.¹³ Private, academic and other non-State organizations may join the ITU as a Sector Member (i.e., member of ITU-R, ITU-T and/or ITU-D sector) or Associate (i.e.,

member of a particular Study Group within a sector), including telecommunications carriers, equipment manufacturers, funding bodies, research institutions and regional telecommunications organizations (REGORGs).

Regional telecommunications organizations play an important role in preparatory discussions among Member States and Sector Members to facilitate the work of ITU conferences and meetings. In particular, they are instrumental in regional harmonization of policies, standards and frameworks. Additionally, these organizations prepare positions for Plenipotentiary Conferences, WRCs, WTDCs and WTSAs. There are eight regional organizations that are Sector Members in all three ITU sectors (for more on the REGORGs, see [Module 5, Section 7.2.1](#)):¹⁴

- Asia-Pacific Telecommunity (APT)
- Africa Telecommunications Union (ATU)
- European Conference of Postal and Telecommunications Administrations (CEPT)
- Inter-American Telecommunication Commission (CITEL)
- Caribbean Telecommunications Union (CTU)
- European Telecommunications Standards Institute (ETSI)
- League of Arab States (LAS), of which a subset of countries are part of the Cooperation Council for the Arab States of the Gulf (GCC)
- Regional Commonwealth in the Field of Communications (RCC)

Internet Corporation for Assigned Names and Numbers (ICANN)

Formed in 1998, ICANN is a non-profit, public-benefit corporation headquartered in the United States, with participants from across the globe dedicated to keeping the Internet secure, stable and interoperable through its coordination role of the Internet's naming system.¹⁵ ICANN is responsible for:

- Managing the IP address spaces (IPv4 and IPv6);
- Assignment of address blocks to regional Internet registries;
- Maintaining registries of IP identifiers; and
- Managing the top-level domain names, such as com, net or org.

Although a corporation, ICANN is structured on a multi-stakeholder model through which it develops policy via bottom-up, consensus-based processes in collaboration with governments and international treaty organizations, as well as businesses, organizations, and skilled individuals.¹⁶ To this end, ICANN is made up of several different groups, which represent various Internet-related interests and contribute to all of ICANN's final decisions. There are three "supporting" groups that represent organizations dealing with 1) IP addresses; 2) domain names and 3) managers of country code top-level domain names. In addition, there are four "advisory committees" to provide ICANN with advice and recommendations, which include a wide range of stakeholders, including governments and international organizations, those concerned with the Internet's security and the "at large" community (i.e., average Internet users). Finally, there is a "Technical Liaison Group," which works with the organizations that devise the basic protocols for Internet technologies. For more on ICANN, see the [Practice Note in Section 4.3.4 of this Module](#).

6.3.3 MATURITY OF THE MARKET - RELATIONSHIP BETWEEN TELECOMMUNICATIONS LEGISLATION AND COMPETITION POLICY

A growing trend among countries with highly competitive telecommunications markets, is a growing reliance on competition laws to regulate the sector. The relationship between telecommunications legislation and competition policy varies by country, and is influenced by the country's level of economic development and the maturity of the market. Regardless of the regulatory model adopted, it is essential that telecommunications policies be guided by underlying principles of competition in order for markets to develop for the benefit of consumers. The relationship between telecommunications and competition policies is determined by and evolves in response to factors such as market maturity (i.e., the level of competition in the marketplace) and a country's institutional framework. This section will explore the regulatory models adopted by different countries with respect to their telecommunications and competition regimes, existing regulatory trends in the relationship between these two frameworks, and whether such trends can be transferred effectively to developing countries.

6.3.3.1 THE EVOLUTION FROM SECTOR-SPECIFIC REGULATION TO COMPETITION-BASED REGULATION

The degree of competition in the market plays an important role in the development of new regulatory trends. As ICT markets become more competitive, regulators are beginning to transition from *ex ante* to *ex post* regulation. In promoting access to and adoption of ICTs, policymakers must consider whether to: 1) establish sector-specific, forward-looking regulation (*ex ante* regulation) to prevent or promote certain activities, or 2) establish or rely on competition law to remedy specific instances of anti-competitive behavior (*ex post* regulation).¹ Due to the fast pace of technological advances and an growing recognition of the value of robust competition, policymakers increasingly have implemented *ex post* rules to foster innovative markets while imposing targeted *ex ante* regulation to address specific market failures, particularly with respect to the network infrastructure.

Ex ante regulation is anticipatory in nature and directed toward situations where market failures are expected to occur. The objective of *ex ante* regulation in the ICT sector is to adopt measures to prevent socially undesirable outcomes or to direct market activity towards desirable ends in light of the anticipated market failure. As addressed in Section 2.2 above, *ex ante* regulation should be narrowly tailored to address the specific instances of expected market failure.

Over the next decade, *ex ante* regulation will likely continue to be targeted at the physical infrastructure underlying network infrastructure and may begin to address challenges in other areas such as services and applications. Consequently, regulations will likely focus to varying degrees on access networks, backbone, backhaul and international connectivity. However, recognizing that the rationales for *ex ante* regulation no longer hold as markets mature and become more competitive, gradual fine-tuning or, in some cases, even full withdrawal of targeted *ex ante* regulation becomes necessary to better reflect competitive conditions in the market and serve consumer interests. When market conditions warrant the phasing out of *ex ante* regulation, regulators should consider implementing transition periods to ensure a smooth shift into an *ex post* regulatory environment. Transition periods allow stakeholders, consumers and service providers to gradually adapt to a new regulatory framework.

Both the United Kingdom and Portugal, for example, adopted transition periods as they moved from *ex ante* forms of regulation to *ex post* regulatory frameworks. In May 2008, when reviewing the wholesale broadband access markets, Ofcom determined that British Telecom (BT) no longer had significant market power (SMP) in local exchanges where alternative services providers had emerged.² In response, Ofcom withdrew certain regulatory obligations immediately (e.g., non-discrimination and transparency requirements), but required BT to provide existing customers network access for a 12-month transition period to afford BT's wholesale customers the opportunity to make alternative arrangements. Similarly, when reviewing the wholesale broadband access market in 2009, ICP-ANACOM found that Portugal Telecom (PT) did not have SMP in certain geographic markets and accordingly decided to withdraw *ex ante* regulation in such markets.³ Unlike Ofcom, the Portuguese regulator opted to maintain a 12-month phase-out period for most *ex ante* obligations imposed on PT in these geographic areas, including non-discrimination, transparency, access, cost accounting and financial reporting. The price control, however, was phased-out immediately upon the adoption of the decision.

Relying on *ex post* regulation to address competitive concerns in the ICT market requires the implementation of competition laws and regulations that are effective, enforced and suited to the country's specific conditions. This legal safety net is crucial for competitive forces to take root, but implementing *ex post* regulation may represent a major challenge, particularly for developing countries that lack competition laws and regulations or are affected by weak institutional structures. This challenge may be compounded where economic systems have traditionally relied on strong state intervention, resulting in entire sectors and most dominant firms being state owned, controlled by the government or afforded special protection by government policies.

For over a decade, a series of initiatives have been implemented to create competition law frameworks in various countries around the world. Approximately 100 countries have adopted competition laws, with a quarter of those being developing countries.⁴ Similarly, a series of regional initiatives have been adopted to establish competition law rules and principles, including in the Association of Southeast Asian Nations (ASEAN), Common Market for Eastern and Southern Africa (COMESA), Economic and Monetary Union of West Africa (UEMOA), Economic and Monetary Community of Central Africa (CEMAC), Caribbean Community and Common Market (CARICOM), Andean Community (CAN), and in the Common Market of the Southern Cone (Mercosur).

Countries without general competition laws, such as the Kingdom of Bahrain, are beginning to develop ICT-specific *ex post* rules. Although there is no general competition law in the Kingdom of Bahrain, the Telecommunications Regulatory Authority (TRA) is tasked with acting as both the regulator and competition authority for the ICT sector. In February 2010, the TRA introduced an ICT competition framework, which builds on the authority vested in the TRA by the Telecommunications Law to protect consumers' interest and promote competition by establishing guidelines "to help market participants understand how TRA will assess competition in the telecommunications sector," including both *ex-ante* market reviews and *ex-post* investigations into anti-competitive conduct.⁵

Evolution of the European Union Model

The EU has followed a coordinated reform strategy which began almost two decades ago with the adoption of a series of directives to guide the transition from monopoly to full liberalization. This first framework, referred to as the “1998 Package” in honor of the year in which full liberalization was achieved, was comprised of a sequence of directives prescribing the progressive removal of market barriers and the encouragement of competition, as well as the harmonization of telecommunications regulation throughout the EU. The liberalization process began with niche market segments (e.g., terminal equipment) and moved gradually towards core market segments (e.g., voice telephony).

In light of the maturity and liberalization achieved, in 2002 the EC issued the a new regulatory framework, the NRF, essentially prescribing that sector-specific regulation (*ex-ante* regulations) be confined to cases where effective competition is absent, *i.e.*, in markets where there are one or more undertakings with significant market power, and where national competition law remedies are not sufficient to address the problem.⁶ As such, the NRF places greater reliance on generic EU competition law, and seeks a “market-based” approach to regulation, as opposed to a “service-based” approach.

The NRF⁷ replaced much of the sector-specific regulation with technologically-neutral, general competition law rules,⁸ with the “aim [of reducing] *ex-ante* sector-specific rules progressively as competition in the market develops.”⁹ The NRF provides new market definitions and its significant market power (SMP) concept has been re-defined to be more closely aligned with the competition policy provisions of the concept of dominance set out in the European Treaty.¹⁰

Under the Framework Directive, the EC must identify the product and service “markets” that may raise competition issues and may be subject to *ex-ante* regulation.¹¹ (See Table 3-4 for the list of markets currently identified by the EC.) In making such determinations, the member states rely on EU competition principles and practices. In turn, the NRAs must conduct an analysis of the markets that have been identified as being susceptible to regulation, using the following criteria: (i) determine whether there are entry barriers of a structural, legal or regulatory nature; (ii) examine the state of competition relative to such barriers to determine if effective competition could develop in a relevant period of time; and (iii) determine whether the exclusive application of competition law would properly address market failures.¹² If after conducting its analysis, the NRA determines that regulation is warranted, it may propose a draft measure, which the EC may request be withdrawn if it (i) concerns definition of relevant markets; (ii) would create a barrier to the entry; or (iii) would be incompatible with the EC’s laws or policy objectives (e.g., to move from sector-specific regulations to competition laws). Even if the EC identifies a market as being “susceptible” to *ex-ante* regulation as it would be possible for an operator to maintain market power, it does not mean that regulation will always be required.¹³ Regulation will only be warranted if there is a finding that effective competition does not exist in the relevant market.

In essence, the NRF sets forth the following three-step process:¹⁴

- **Definition of Markets:** NRAs are required to identify markets the characteristics of which warrant the application of *ex-ante* regulation based on three criteria: (i) high and non-transitory entry barriers; (ii) the dynamic state of competitiveness behind entry barriers; and (iii) the sufficiency of competition law in the absence of *ex-ante* regulation.
- **Market Analysis:** NRAs are required to assess the level of competition in the markets which it has identified under (i) above.
- **Imposition of Remedies:** If the NRA finds that a particular market lacks effective competition and identifies operators with significant market power, it may impose certain specific obligations (*i.e.*, those in the Universal Service Directive or Access Directive mentioned in Section 3.2.2 above). The NRA may also maintain or amend obligations that may already be in place. The Framework Directive provides a review and consultation process for the approval of any such remedies to ensure that they are consistent with the objectives of the NRF and that they do not further affect competition in the market.

Although the 2002 Framework Directive set out a list of 18 markets—seven at the retail level and 11 at the wholesale level—the European Commission recommended phasing out sector-specific regulation of electronic communications in a 2007 Recommendation (2007/879/EC).¹⁵ In the Recommendation, the Commission found that 11 of the 18 markets are no longer regarded as needing to be subject to sector-specific *ex ante* regulation. (See Table 3-3 for the list of markets currently identified by the EC.)

Retail Level		Wholesale Level	
1.	Access to the public telephone network at a fixed location for residential customers.	2.	Call origination in the public telephone network provided at a fixed location.
		3.	Call termination on individual public telephone networks provided at a fixed location.
		4.	Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.
		5.	Wholesale broadband access.
		6.	Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity.
		7.	Voice call termination on individual mobile networks.
[Note that markets are often referred to by the numbers assigned to them under the EC Recommendation (e.g., the mobile termination market may be referred to as "Market 7").]			

◀ Table 3-4: Markets Susceptible to ex ante Regulation in the EU, as of Recommendation 17

EU Directives are binding rules meant to be implemented on a national level by each member state. Depending on the maturity of the market and the legislation in place at the time of adoption of the Framework Directive, some countries have had to implement modifications in their national legislation and are at varying stages regarding their analyses of the above-mentioned markets.

Although the EU's 2002 telecoms rules have been successful, it has remained a challenge for telecom operators to deliver pan-European or cross-border services, in large part due to the existence of 27 regulatory systems with widely varying rules. Since the NRAs have had different approaches to similar competition problems, new EU telecom rules have been adopted to help streamline and bring greater consistency to competition issues throughout the EU. As such, the EU passed the 2009 Telecoms Reform, which required Member States to transpose into national law by May 21, 2011. The 2009 Telecoms Reform addresses competition on several levels:¹⁸

- The Body of European Regulators of Electronic Communications (BEREC) has replaced the European Regulators Group (ERG), a loose cooperation between NRAs. BEREC provides a better-structured, more efficient approach than ERG and will help ensure fair competition and more consistency of regulation on the telecoms markets.
- The 2009 telecoms reform gives the European Commission the power to oversee regulatory remedies proposed by national regulators (e.g. on the conditions of access to the network of a dominant operator; or on fixed or mobile termination rates) in order to avoid inconsistent regulation that could distort competition in the single telecoms market. When the Commission, in close cooperation with BEREC, considers that a draft remedy notified by an NRA would create a barrier to the single market, the Commission may issue a recommendation that requires the NRA to amend or withdraw its planned remedy.
- The 2009 telecoms reform enables the Commission to adopt further harmonization measures in the form of recommendations or binding decisions if divergences in the regulatory approaches of NRAs, including remedies, persist across the EU in the longer term (e.g. on broadband access conditions or on mobile termination rates).
- NRAs gain an additional tool of imposing functional separation obligations, where warranted. Under the 2009 telecoms reform, NRAs may require telecoms operators to separate communication networks from their service branches, as a last-resort remedy. This new remedy has been advocated since 2007 by the European Commission and by the 27 national regulators. Functional separation can rapidly improve competition in markets while maintaining incentives for investment in new networks.

Transposition of the EU Model

Understanding the EU's regulatory evolution and the state of the EU markets during both phases of regulatory interventions is crucial when considering implementation of a similar model in developing countries. Many developing countries find themselves in a transitional stage similar to the one that existed in the EU during the implementation of the 1998 Package. Therefore caution may be warranted to avoid rushing into its implementation in markets that may not be ready for near-term regulatory dismantling, as they may require some continued regulation to ensure the development of competition.

Additionally, in markets where full liberalization has been achieved, effective application of the EU's competition-based

approach may be influenced by a country's lack of experience and resources to dictate and enforce generic competition principles. The principal elements that may pose a challenge to the successful emulation of the EU model in developing countries are the differences in: (i) market composition and development; and (ii) the institutional frameworks.¹⁹

With respect to market composition and development, the following differences have been identified as potential challenges in adopting the EU model in developing countries:²⁰

- *Dominance of Mobile Networks.* Large mobile penetration in developing countries, resulting in the preeminence of mobile networks with respect to fixed networks, may require that some elements of price regulation traditionally aimed at dominant fixed-line incumbents be applied to mobile networks. However, some other regulations (e.g., local loop unbundling) may be inapplicable to wireless networks.
- *Universal Service and Rural Access.* Compared with Europe and other developed countries, developing countries tend to have lower levels of teledensity. Where most developed countries (with higher teledensity levels) focus on issues of "content, quality and price of basic services," countries with developing communications markets may be required to focus their regulatory resources on the implementation of access measures.
- *Market Liberalization.* Some developing countries have not achieved full liberalization of all market elements and certain monopoly vestiges still exist (e.g., incumbent telecommunications operator's control over international gateway; preferential access to essential facilities by the incumbent's mobile business). As such, developing countries may require greater regulatory intervention as the market transitions to greater liberalization.

The legal, political and institutional dynamics in developing countries also may contribute to the need for more prescriptive sector regulation. The legal and judicial systems in many developing countries may lack sufficient depth and expertise on matters of competition principles, and courts may lack the technical knowledge to effectively resolve complex matters in a constantly evolving market. Political interference by well-connected or state-owned operators is also a factor that supports maintaining sector-specific regulation in order to avoid arbitrary implementation of regulation.²¹

Where generic competition principles may not be applied for the reasons mentioned above, countries may consider incorporating competition law principles into their sector-specific framework, as a mechanism to foster the growth of the market and prevent anticompetitive practices that may hinder its development.

While the EU model as a whole may not be transferable to the developing world, certain of its underlying principles can serve as the foundation for an effective regulatory framework:²²

- Establishment of an independent regulator;
- Existence of an efficient mechanism to appeal decisions of the regulator;
- Applying regulation with principles of transparency, non-discrimination and objectivity;
- 'Two-tier' regulation, where the activities of operators with significant market power are held to greater regulatory supervision;
- Adoption of technology neutral approach (i.e., recognizing the fast-paced development of convergence and shift regulation from technology/service-based, to technology neutral);
- Reducing market access barriers;
- Avoiding over-regulation and progressive reduction of unnecessary regulation upon the existence of effective competition;
- Engaging in open, transparent and thorough consultation prior to the issuance of any regulation that would impact the market; and
- Reducing bureaucratic processes in an effort to reduce costs and streamline processes where possible.

In 2005, the Info-communications Development Authority (IDA), the telecommunications regulator in Singapore, issued a Code of Practice for Competition in the Provision of Telecommunications Services following adoption of a regulatory policy similar to that of the EU. The Code of Practice specifically recognizes that consumer welfare is best promoted through market forces rather than regulation, and states that the IDA will "place primary reliance on private negotiation and industry self-regulation" subject to its duty of preventing anti-competitive conduct.²³ However, the Code of Practice recognizes that *ex ante* regulatory intervention may be required where markets are not sufficiently competitive.²⁴

◀ Box 1 Singapore

6.3.3.2 ANALYSIS OF JURISDICTIONAL DIVISION OF POWER BETWEEN COMPETITION AUTHORITIES AND REGULATORY INSTITUTIONS

The relationship between telecommunications laws and competition policies can be depicted through the jurisdictional division of power between competition authorities and regulatory institutions. When there are separate entities enforcing telecommunications and competition rules, balancing the interplay and jurisdiction between these two entities is a key element in allowing the industry to expand. On the other hand, where a single entity exists (either a telecommunications regulator or a general competition authority), policies applicable to the telecommunications market should encourage growth and competition in the industry. Examples of different models adopted include:

- The most common scenario where countries have both a telecommunications regulator and one or more entities with jurisdiction over economy-wide competition matters (e.g., the United States, Chile, and South Africa); or a telecommunication regulator and a competition authority with a specific mandate over competition in the telecommunications sector (e.g., Australia);
- A model adopted in certain developing countries where there is no competition authority, but a sector-specific regulator with sector-specific competition mandates (e.g., Dominican Republic);
- The least common model adopted in New Zealand, where a sector-specific commissioner is part of the general, economy-wide competition authority.

The structure of competition policy and interplay between institutions is not necessarily pre-determined by the legal system in place. In some cases this may be the result of political and practical considerations such as management of existing human and financial resources, the development and size of the telecommunications market, and the level of competition that exists in the market. (See Table 3-4 for a list of certain countries with both a telecommunications regulatory body and a competition authority.)

Scenario 1 – Existence of Competition and Telecommunications Authorities

United States

In the United States, the Federal Communications Commission (FCC) is the independent regulator in charge of overseeing interstate and international communications, but in matters involving competition issues, it must coordinate with the U.S. Department of Justice (DOJ) or the Federal Trade Commission (FTC) depending on the industries involved and the economic impact.¹

The Communications Act of 1934 (as amended by the Telecommunications of 1996) establishes pro-competitive principles that govern the telecommunications industry in the United States and gives the FCC authority to review and approve (*ex-ante*) merger transactions involving licensed telecommunications carriers.² The Communications Act requires the FCC to consult with DOJ prior to granting certain authorizations to local exchange carriers, and the antitrust law gives the FCC concurrent authority with DOJ to review mergers among telecommunications carriers.³ DOJ's Antitrust Division and the FTC are primarily responsible for overseeing enforcement of U.S. antitrust laws (the Sherman Act and the Clayton Act).⁴ DOJ's Antitrust Division has authority to prevent anticompetitive conduct (e.g., contracts, combinations and conspiracies in restraint of trade) that is subject to either criminal or civil action under U.S. antitrust laws and to review proposed mergers and acquisitions of telecommunications carriers (*i.e.*, to assess their competitive effect and challenge those that threaten to harm competition).⁵ As a result, activities performed by telecommunications service providers in the United States are subject to the FCC's regulatory enforcement under the Communications Act, as well as the DOJ's enforcement under the antitrust laws. However, in a recent Supreme Court decision on whether a carrier's breach of certain duties under the Communications Act also generated antitrust liability under the Sherman Act, the Supreme Court determined that such liability arises where a regulatory structure is already in place to prevent anticompetitive injury.

The FTC is responsible for preventing and penalizing unfair and deceptive market practices in restraint of trade.⁶ While the FTC does not have authority to review mergers involving the FCC-licensed telecommunications common carriers, it does have authority to review mergers of unregulated non-common carriers or mergers involving common carriers that reach a certain monetary threshold.⁷ Therefore, when a merger does not involve a telecommunications common carrier, in principle it may be reviewed by either the FTC or DOJ, as was the case of the merger of America Online (an Internet service provider) and Time Warner (a cable/media operator). The jurisdictional division among these three entities runs parallel and may often overlap. Rather than multiple agencies reviewing a transaction, the law requires one agency to give the other(s) investigative "clearance" to conduct the review. To avoid the overlap and duplicity of review between the FTC and DOJ, and the extensive delays in obtaining such clearance, in 2002, the two entities entered into a Memorandum of Agreement allocating areas of responsibilities in reviewing mergers and enforcing antitrust laws.⁸ As a result, the DOJ now is responsible for enforcing antitrust laws on telecommunications matters (See Box 3-8 for a snapshot of this tripartite

review).

In reviewing mergers or other antitrust actions, the DOJ and FTC focus purely on competition issues, basing their decisions on whether a particular transaction will result in an accumulation of market power that would reduce competition and affect consumers.⁹ While the FCC also may engage in a competition analysis, it applies a broader sector-oriented analysis, focusing on whether the transfer would benefit or harm the public interest, convenience, and necessity.¹⁰ In some cases, the FCC may approve a merger, but may place conditions on the merger after consultations with the DOJ on competition issues.

Chile

Chile, like the United States, has a sector-specific regulator (SUBTEL) and a competition authority. However, the competition authority can intervene in telecommunications matters and apply competition law not only to private parties, but to the regulator itself.

SUBTEL, created in 1977 under the Ministry of Transportation and Telecommunication, is the entity responsible for overseeing the operations of telecommunications networks, and developing and enforcing technical industry standards.¹¹ SUBTEL also is required to approve the transfer of any concession, authorization or permit.¹² The Telecommunications Law of 1982 sets forth certain competition-related provisions applicable to the industry¹³ and operates in conjunction with Chile's antitrust law (Decree 211), which generally prohibits activities that are a restraint to competition.¹⁴ Pursuant to Decree 211, the Tribunal for the Defense of Open Competition (*Tribunal de Defensa de la Libre Competencia*, the "Tribunal") and the National Economic Prosecutor (*Fiscalía Nacional Económica*, the "NEP") are the entities primarily responsible for the promotion and protection of competition in all markets.¹⁵

Unlike the United States, Chile's antitrust law does not require the competition authorities to approve mergers and the Tribunal may not initiate antitrust investigations on its own. However, the Tribunal (at the complaint of interested parties) may prevent actions that can potentially harm competition. The NEP or any private party may file a claim with the Tribunal alleging that a party has engaged in actions that restrain competition and affect the public.¹⁶ Despite the lack of a requirement for authorization, in 2005 the Tribunal issued a pre-merger decision in one of the most significant acquisitions in the Latin American telecommunications market: the acquisition by Telefónica Móviles of BellSouth's Latin American mobile business.

In this instance, Telefónica Móviles and BellSouth filed a motion with the Tribunal requesting that it expressly approve the acquisition in order to avoid potential post-merger litigation.¹⁷ After conducting cost and competition analyses, the Tribunal approved the merger with certain conditions (e.g., divestiture of a particular spectrum concession to avoid 100 per cent control of a particular band by the merged entity).¹⁸

The Tribunal has authority to order Chilean regulators, including the telecommunications regulator, to take certain actions where it identifies competition concerns,¹⁹ such as regulating prices for the telecommunications industry if they find that competitive conditions do not exist.²⁰ Although SUBTEL and the Tribunal generally work well together, there have been instances where the Tribunal has imposed its authority on the regulator.

For example, in 2000, two mobile operators operating in the 800 MHz band petitioned for, and acquired, from SUBTEL additional spectrum in the 1900 MHz band (PCS). Another mobile operator filed a complaint with the NEP. The NEP, in turn, initiated a proceeding with the Antitrust Commission (currently the Tribunal). The Commission ordered SUBTEL to conduct a public spectrum auction without giving preferential treatment to the two mobile operators that had originally applied for the spectrum. Although a more transparent process was used to grant the right to additional spectrum, some argue that the case merely represents an effort to use the competition institution to delay the allocation of new spectrum. In addition, others believe that the competition authority became too involved in technical matters.²¹

In principle, the jurisdictional division of power between the telecommunications regulator and the competition authority in Chile appears to be clear, where intervention by SUBTEL is forward-looking and the competition authority is generally involved on a retrospective basis. However, the example of Telefónica Móviles and BellSouth above shows that companies may prefer to voluntarily submit themselves to the judgment of competition authorities for specific guidance in order to reduce uncertainty and post-acquisition problems.

European Union

In Europe, competition matters are divided between the respective competition authorities within the EC and the EU member states. There are two separate directorates within the EC that address competition and electronic communications matters: the Competition Directorate General (Competition DG), which has played a significant role in the development of EU telecommunications policy; and the Information Society and Media Directorate-General (DG InfoSoc), responsible for developing Information Society initiatives and harmonization efforts.²² There is no European-wide

telecommunications regulatory authority.

The DG Competition Directorate is responsible for designing and enforcing general competition rules under the EU's Community Treaties, and ensuring "that competition of the EU market is not distorted."²³ Its four main areas of action with respect to competition policy are antitrust and cartels, merger control, liberalization (*i.e.*, introducing competition in monopolistic sectors), and state aid control (to ensure that competition in the Common Market is not distorted). At the EU level, the general competition rules are set forth in the EC Treaties, and pursuant to these, sector-specific competition rules are issued to govern certain sectors of economic relevance. For instance, member states are subject to the Directive on Competition Electronic Communications Markets,²⁴ which prohibits them from establishing exclusive or special rights for the provision of electronic communications networks. This Directive also establishes the general competition principles applicable to the industry and requires the removal of competitive barriers for: (i) vertically integrated public undertakings; (ii) use of frequencies; (iii) satellites; and (iv) cable television networks. Member states are required to adopt the necessary measures to ensure compliance with this sector-specific competition directive.

Competition Matters – Relationship between the EC and NCAs

The EC has the authority to deal with competition matters on a community level, and national competition authorities (NCAs) are responsible for enforcing national competition laws. In some instances, EC authority may be shared with that of NCAs and in others, the EC may have exclusive authority (*e.g.*, when certain practices may have impact on trade between member states or are deemed to be "Community dimension").

The EC Treaty also established general competition rules that apply to all industries throughout the EU, and are enforced in coordination with the NRAs.²⁵ Article 81 of the EC Treaty prohibits anticompetitive agreements (*e.g.*, agreement between competitors and vertical agreements) that may have an effect on trade between member states and which prevent, restrict or distort competition in the common market. Exemptions may be granted if there are overriding countervailing benefits (*e.g.* improvement in efficiency or the promotion of research and development). Article 82 of the EC Treaty prohibits (without the possibility of exception) the abuse of a dominant position to the extent it may affect trade between member states. NCAs must apply articles 81 and 82 of the EU Treaty in individual cases, in cooperation with the EC and the other member states.²⁶ In practice, there have been few cases in the telecommunications sector in which the EC has had to act under the provisions of articles 81 and 82.²⁷ However, the EU's merger control procedures are a useful example to illustrate the allocation of powers between the EC and NCAs.

In 2004, the EU adopted New Merger Control Regulations (NMCR) ²⁸ setting forth a referral system for the allocation of merger decisions between the EC and the NCAs, which complies with the subsidiarity principle set forth in Article 5 of the EU Treaty. According to the subsidiarity principle, unless the EC has exclusive authority to act, EC action is only permissible when the purpose of the proposed action will not be sufficiently achieved by the member states' action (*i.e.*, where the independent action by the member states' institutions will not achieve such purpose effectively).²⁹ Under the NMCR, the EC has exclusive jurisdiction over mergers of "Community dimension", as a result of the transaction exceeding certain turnover thresholds. Mergers that do not meet that turnover should be reviewed by the NCAs, unless referred to the EC through the NMCR's referral process.

EC dimension mergers are those where:

- (i) the combined worldwide turnover of the undertakings concerned (*i.e.*, the merging parties) is greater than €5 billion; and each of at least two of the undertakings concerned had a turnover within the EU of more than €250 million; or
- (ii) the combined worldwide turnover of the undertakings concerned is greater than €2.5 billion; their combined turnover in each of at least three member states is greater than €100 million; in each of those three member states, the turnover of each of at least two of the undertakings concerned is €25 million; and the EU wide turnover of each of at least two of the undertakings concerned is greater than €100 million;

However if more than two-thirds of each of the merging parties' EU turnover in either case is in *one and the same* EU member state, the merger must be examined by the NCA of that member state. Cases also may be allocated to and from the EC and NCAs through a referral procedure that seeks to allocate the case to the best placed authority in a manner consistent with the subsidiarity principle. Where clearance is required in more than three jurisdictions it may be approved by the EC (provided such competition authorities do not object to such referral), in which case such approval would be valid EU-wide. Pursuant to Article 9 of the NMCR, at the request of a member state, the EC may refer a EC dimension transaction to such member state where the transaction (i) threatens to significantly hamper competition in a distinct market within that member state; or (ii) affects competition on a market within that member state, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.³⁰ Article 22 of the NMCR allows the EC to accept a member state's referral of a non-EC dimension referral where trade among member states may be affected.

The EC also has issued merger guidelines³¹ to provide companies instructions on when mergers are likely to be challenged or not, and a document on best practices on the conduct of EC merger control proceedings,³² which seeks to enhance the efficiency of investigations and to ensure transparency in the merger review process.

Role of the NRAs

Unlike the United States, in the EU, NRAs generally do not participate in merger reviews, as these are under the competence of the NCAs. However, in the EU, NRAs play an important role in enhancing competition in national telecommunications markets through sector-specific policies, as they are required to “promote competition in the provision of electronic communications networks, electronic communications and associated facilities and services.”³³ NRAs may participate jointly with NCAs in assessing and ensuring competition in the communications market. As explained in Section 3.3.1 above, NRAs are required to consult with the EC prior to the adoption of measures following a determination of market power and the EC has the authority to require an NRA to withdraw a draft measure.

Given the increasingly competition-oriented regulatory approach of the EU model (see Section 3.3.1, above), there are some areas of overlap between regulatory policy (applied by the NRAs) and competition law (enforced by the NCAs). This has led some to debate over the future role and institutional structure of NRAs within a deregulatory framework in markets where full liberalization and competition exists. Although some have even suggested that NRAs potentially could be absorbed by competition authorities, this view is rejected as unsound regulatory practice.³⁴ The importance of sector-specific regulation and enforcement remains relevant as NRAs are charged with achieving efficiency from a technical and allocation perspective (*i.e.*, use of scarce resources), as well as ensuring competition and meeting universal service goals. Although NRAs apply certain aspects of competition law (as underlying principles of sector regulation), the interaction between the two enforcement authorities are considered an effective regulatory model.³⁵

South Africa

The South African Competition Act expressly recognizes the concurrent jurisdiction that may be exercised by the competition authorities and sector-specific regulators. The Independent Communications Authority of South Africa (ICASA), an independent body responsible for regulating the telecommunications and broadcasting industries, is also responsible for ensuring fair competition among industry players in these industries.³⁶ The Competition Act, which was greatly influenced by developed country experience, establishes three entities responsible for economy-wide competition matters:

a. Competition Commission

– an independent body responsible for the implementation of the Competition Act, (

i.e.,

it investigates restrictive business practices and abuse of dominant positions and mergers);³⁷

b. Competition Tribunal

– an independent tribunal responsible for adjudication in the first-instance of contested competition matters (

i.e.,

it determines whether anti-competitive practices have occurred, and if applicable, imposes sanctions under the Competition Act; it also reviews larger mergers when they have been referred to the consideration of the Tribunal and adjudicates appeals on decisions from the Competition Commission on intermediate mergers and Competition Act exemptions);³⁸ and

c. Competition Appeal Court

– has status equivalent to a high court and considers appeals from decisions rendered by the Competition Tribunal; also confirms orders by the Competition Tribunal on the divestiture of assets by parties who have merged in contravention of the Competition Act (The Competition Commission, the Competition Tribunal and the Competition Appeals Court are, for purposes of this section collectively referred to as the “Competition Authorities”).

The Competition Act expressly recognizes the possibility of the Competition Authorities and sector regulators (*i.e.*, ICASA) to exercise concurrent jurisdiction over industry-specific competition matters, which to the “extent possible” should be managed pursuant to an agreement between the Competition Commission and the regulator for purposes of harmonizing their exercise of jurisdiction and ensuring a consistent application of the Competition Act.³⁹ To this end, the Competition Commission and ICASA entered into a Memorandum of Agreement setting forth the manner in which they would operate when both have jurisdiction over the “investigation, evaluation and analysis of mergers and acquisition transactions and

complaints involving telecommunications and broadcasting matters.”⁴⁰ Although neither entity waived its respective authorities, they agreed on the establishment of a joint working committee to facilitate cooperation and consultation of matters that require their involvement.⁴¹

In the case of mergers that require the approval of the Competition Commission and ICASA, the Memorandum of Agreement recognizes that the entities may consult each other, but requires them to make independent determinations based on their respective legislations. In the event that each reaches different determinations, the Memorandum of Agreements sets forth a procedure by which both entities should try to reach the same decision on the merger. If either the Competition Commission or ICASA fails to approve the transaction, the merger may not go through.⁴² Decisions may be appealed to the relevant courts (*i.e.*, the Competition Tribunal if appealing a decision of the Competition Commission; or the ordinary courts if appealing ICASA’s decision). In some cases however, even after bringing the matter before the court, companies have opted to settle given the court’s and the Competition Tribunal’s limited understanding of industry-specific matters and the length of time it takes a court to decide on these issues.⁴³

India

India has a telecommunications regulator and an economy-wide competition authority. Enacted in 2003, India’s Competition Act is in its initial stages of development, with enforcement entrusted to the Competition Commission of India. The Competition Act generally prohibits anticompetitive agreements (*i.e.*, one that is likely to cause an appreciable adverse effect on competition within India) and abuse of dominant position (*i.e.*, where an enterprise directly or indirectly, imposes unfair or discriminatory conditions in the purchase and pricing conditions), and regulates corporate “combinations” through the acquisition of shares, control and mergers. The Competition Commission has an express mandate over competition issues with respect to a variety of services, including “communication” services.⁴⁴

The Telecommunications Regulatory Authority of India (TRAI) is an autonomous body responsible for the regulation of telecommunications services in India. TRAI is responsible for “facilitate[ing] competition and enforce[ing] efficiency in the operation of telecommunications services” in order to facilitate growth.⁴⁵ TRAI is also responsible for adjudicating disputes among service providers and between groups of licensees on matters concerning technical compatibility and interconnection between service providers, revenue sharing arrangements, quality of telecommunications services and interests of consumers. However, the TRAI Act specifically excludes from TRAI’s jurisdiction matters concerning “the monopolistic trade practice, restrictive trade practice and unfair trade practice.” If a matter is brought before TRAI that raises such competition issues, or any other issue under the jurisdiction of the Competition Act, TRAI is required to refer such issues to the Competition Authority.⁴⁶

Scenario 2 – Lack of Competition Authority, but Enforcement of Sector Specific Competition Rules by Telecommunications Regulator

Bahrain

The Kingdom of Bahrain does not have a general competition law or economy-wide competition authority. Instead, the Telecommunications Law of 2002 tasks the Telecommunications Regulatory Authority (TRA) with promoting effective and fair competition among new and existing licensed ICT operators through the issuance of necessary regulations, orders and determinations.⁴⁷ TRA’s authority under the Telecommunications Law includes review and the imposition of sanctions for any conduct that restricts or distorts competition in the ICT sector, including abuse of dominant position or anti-competitive agreements. Additionally, the Law grants TRA the authority to conduct reviews of proposed mergers or other changes to the market structure that may restrict or distort competition.

In 2010, TRA issued Competition Guidelines that assist market participants to understand how it will assess competition in the telecommunications sector, including both *ex ante* market reviews and *ex post* investigations into anti-competitive behavior.⁴⁸ Although the Competition Guidelines focus mainly on abuse of dominant position, they also address collusion and mergers. Under the Competition Guidelines, the following types of behavior may raise abuse of dominant position concerns that TRA could then investigate:

- Excessive pricing – when prices are set significantly and persistently above the competitive level;
- Predatory pricing – when prices are set anti-competitively below cost;
- Margin squeezing – when a vertically integrated operator sets the price of the retail and/or wholesale product such that the margin between the two does not enable an efficient competitor in the retail market to trade profitably;

◀ Table 3-5 below shows certain countries that have both a communications regulator and a competition authority, and the entity with jurisdiction over competition issues in the telecommunications sector.

- Bundling or tying – when two or more products are sold together in an anticompetitive manner;
- Price or non-price discrimination – when equivalent products are provided to different customers on different terms in an anti-competitive manner;
- On-net/off-net price discrimination – when the prices of on-net and off-net calls diverge in an anti-competitive manner;
- Refusal to supply – when a dominant vertically integrated operator’s behavior unreasonably restricts competitors access to its network; and
- Unduly long-term contracts – when retail service contracts are unjustifiably long.

Scenario 3 – The Case of New Zealand - Competition Authority Enforcing General Competition Policies and Sector-Specific Regulations

New Zealand introduced industry specific provisions, such as the regulation of interconnection and number portability, with the adoption of the Telecommunications Act in 2001, but the general competition statutes play an important complementary role, notably the Commerce Act of 1986, as amended, which prohibits anticompetitive practices (e.g., misuse of a dominant position) and business acquisitions that create or strengthen dominance.⁴⁹

The Ministry of Economic Development (MED) advises the Minister of Communications on “the operation and regulation of specific markets and industries...including telecommunications.”⁵⁰ The general, economy-wide competition authority is the Commerce Commission (Commission), which is an independent agency not subject to government direction.⁵¹ The Commission is responsible for enforcing competition legislation including the Telecommunications Act 2001.⁵² Within the Commission, primary responsibility for making decisions about, and providing advice to the Minister on telecommunications, rests with the Telecommunications Commissioner.

The jurisdictional division of power between these two agencies with respect to telecommunications matters is clearly defined in New Zealand’s legislation, and is evidenced in rulemaking proceedings. An interplay between MED and the Commission recently took place in connection with the Commission’s proposal regarding the regulation of mobile termination rates. Under the Telecommunications Act, the Commission is responsible for conducting “investigations into the desirability of regulating additional services or amending the regulation of services where considered necessary, and make recommendations to the Minister of Communications.”⁵³ In 2004, as a result of complaints of high mobile termination rates and lack of competition in New Zealand’s mobile termination market, the Commission initiated an investigation to determine whether to regulate the mobile termination market. In June 2005, the Commission issued a report to the Minister of Communications recommending the regulation of fixed-to-mobile termination rates (excluding 3G networks).⁵⁴

Under the Telecommunications Act 2001, the Minister of Communications has the ultimate authority to accept or reject the Commission’s recommendations, or to require the Commission to reconsider its recommendation “for any reason specified by the Minister.”⁵⁵ However, the Minister of Communications cannot reject the Commission’s recommendation and substitute his own preferred outcome – if he rejects the Commission’s recommendation, then the regulatory status quo prevails. As a result of this authority and despite supporting a reduction of mobile termination rates, the Minister of Communications required the Commission to reconsider its recommendation, particularly on aspects of implementation and achieving benefits to end-users.⁵⁶

As of the date of this publication, New Zealand’s mobile termination proceeding has not concluded, but it serves to highlight the interplay between the relevant agencies. Worth noting is the broad authority of the Minister of Communications with respect to the recommendations of the Commission, which may be subject to reconsideration for reasons not specifically set forth in the Telecommunications Act or the Commerce Act.

New Zealand’s approach has not been emulated in other countries, and there are no indications that this approach would lead to higher levels of competition than that achieved by countries with sector-specific regulation.⁵⁷ Furthermore, this approach is unlikely to be successful in developing countries that lack expertise in the enforcement of generic competition laws.

Practice Notes

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- [Box 3-5: United States Tripartite Review \[3.3.2\]](#)
 - [Table 3-5: Entity with Jurisdiction over Competition Issues in the Telecommunications Sector in Certain Countries with both a Telecommunications Regulator and Competition Authority \[3.3.2\]](#)

6.3.3.3 PRACTICAL LESSONS FOR DEVELOPING COUNTRIES

Regardless of the stage of development of their telecommunications market and regulation, the most significant lesson that developing countries may draw from some developed countries is that the objective of competition policy is to foster the expansion of the market, the availability of new technologies, and the accessibility of low-cost quality services to the public.

The small number of players in a market, and the lack of technical, human and financial resources may not make it feasible for developing countries to engage in dramatic legislative change (*i.e.*, from sector-specific to general competition rules). A report issued by the International Competition Network (ICN)¹ evaluated the effectiveness of competition advocacy in regulated sectors (including telecommunications) and draws several important lessons in this respect:²

1. Regulatory agencies should be aware of the importance of competition. To the extent there is both a competition authority and a regulatory agency, the latter should endeavour to consult with the former in developing and proposing new regulations in order to achieve pro-competitive policies.
1. An “open and active dialogue” should be maintained between competition authorities and sector regulators. This may include (i) requiring competition authorities to opine on proposed telecommunications regulations or telecommunications regulators to be consulted prior to the issuance of general competition guidelines that may affect the sector; (ii) participation of competition authorities in meetings with the regulator and the incumbent telecommunications operator in order to “promote competition values;” or (iii) the ability of competition authorities to “advise regulators on market definitions.”
1. Having the competition authority adopt “formal procedures,” which may include (i) the development of formal memoranda on cooperation between the competition authority and the telecommunications regulator; and (ii) implementation of telecommunications regulation that provides the competition authority with decision-making power on competition matters.
1. Using the media as a means to enable the competition authority to explain “its views and arguments within the framework of advocacy activities to the wider public.”
1. Ensuring an adequate level of technical expertise that may include (i) exchanging “high quality of information” between the competition authority and the telecommunications regulation; and (ii) developing “technical know-how” with the competition authority so that competition principles can be effectively transferred to the telecommunications sector.
1. Having a “forward looking” approach, which involves developing sound strategies to “anticipate and address” potential competition problems and deal with them before they negatively impact the market (This is the goal sought by the market analysis under the EU NRF discussed above).
1. Adopting a “legalistic approach,” which may include (i) incorporating formal rules governing the relationship between the competition authority and the telecommunications regulator to ensure that the “recommendations and opinions made by the competition agency are provided at the early stages of the regulated sector reform” (see Box 3-6 for example of Brazil’s legalistic approach); (ii) developing a code of conduct that seeks to improve the relationship among industry participants; and (iii) establishing conditions regarding the protection and exchange of confidential information.

The Brazilian System of Defense of Competition (SBDC), comprised of the Administrative Council of Economic Defense (CADE), the Secretariat of Economic Law (SDE), and the Secretariat for Economic Monitoring (SEAE), is responsible for ensuring the protection of competition in Brazil. CADE has entered into several competition promotion agreements with sector-specific regulatory agencies in order to institutionalize cooperation among them in competition and antitrust matters (this would be an example of the “formal procedures” approach).³ However, General Telecommunications Law contains specific provisions governing the interplay between the telecommunications regulator, Anatel, and CADE and establishing the hierarchy of competition law with respect to the telecommunications sector, as follows:

- ■ General competition rules (i.e., “rules for the protection to the economic framework”) are applicable to the telecommunications sector, to the extent that they do not conflict with the telecommunications law (Article 7 of the General Telecommunications Law);
- Any act among telecommunications service providers that seeks any form of economic concentration is subject to the controls, procedures and conditions set forth in the general competition law and will be submitted for consideration by CADE.
- Anatel has the ability to supervise, control and prevent activities that harm the economy, unless such activities fall within the purview of CADE.

Under this structure, Anatel’s duties are similar to those of the SDE, which initiates administrative proceedings and issues determinations on mergers to be approved by CADE.⁵

6.3.4 IMPACT OF OTHER LEGISLATION

The effective implementation of telecommunications regulation and the achievement of its objectives may be influenced by other laws that affect the sector. In meeting other government objectives, laws may be passed that directly or indirectly affect the development of the telecommunications sector. These laws may enhance or diminish the effectiveness of the telecommunications legal and regulatory framework in creating an enabling environment for the development of the sector, affecting the degree of investment and competitiveness in the sector, and the ease of accessibility by new entrants to the market.

The breadth of legislation potentially affecting the telecommunications sector is quite expansive. This section focuses on the legislation generally considered to most directly impact the sector – tax laws, foreign ownership laws, consumer protection laws, spam legislation, and property laws. The interaction between competition law and telecommunications law is addressed more fully in Section 3.3.

6.3.4.1 TAX LAW

The regulation of telecommunications services will be affected by the taxation of such services, whether at the federal, state or local level. The taxation of telecommunications services, the amount of taxes, and the determination of any exemptions, will depend on the particular tax laws in each country. Taxes collected from telecommunications operators and service providers are important sources of revenue to many governments, and are used for a variety of purposes, including financing the cost of regulating the sector, and helping fund universal service programs, emergency services, and services for disabled persons. However, excessive taxation of the telecommunications industry can retard competition, and discourage technological development and investment in the sector. Given the importance of the telecommunications sector, the development of adequate telecommunications infrastructure and the costs associated with such development, investment in the sector is critical. One of the main considerations for attracting investment in telecommunications infrastructure and services are the additional costs associated with the taxes levied by individual governments. Many countries, for example, offer incentives to attract foreign direct investment in the form of tax concessions, holidays and credits, export subsidies, import entitlements and accelerated depreciation.¹ Some governments have created “tax-free” zones to attract investors in the telecommunications sector. Panama, for example, created a tax-free environment in the Howard Special Economic Area and the “City of Knowledge Tecnopark” as an incentive for companies to establish businesses.²

The effect of taxation on the “digital divide”, particularly in developing countries, is evident in a 2010 study released by the GSM Association on the impact of taxation on the development of the mobile broadband sector. This study examined the impacts of various taxation approaches on mobile telephony, including direct taxes (both general and sector-specific), value-added taxes, handset taxes and import duties, finding that for every dollar reduced in taxes, emerging countries may be able to generate between US \$1.4 and US \$12.6 in additional GDP.³ Further, the foregone tax revenues were expected to be partially or even completely compensated by taxes collected on the larger GDP. The study concluded that although it

is important for governments to use tax revenues to fund universal service objectives where private investment is lacking, tax models may not be efficient, particularly where special taxes are applied to the telecommunications sector that “crowd out” private spending. The study also highlighted inconsistent policy goals wherein some regulations seek to develop the ICT sector while other regulations treat ICT services as “cash cows” for tax purposes. Particularly for developing countries, it is necessary that policy makers align taxation approaches for mobile services, particularly mobile broadband, with national ICT objectives to ensure that taxes do not represent an obstacle for diffusion.

The advance of new technologies in the telecommunications sector is also likely to impact the way countries impose telecommunications taxes. For example, as regulators define VoIP services, they must also consider the tax implications of the regulatory classification of VoIP, which could affect whether VoIP services are subject to federal, state or local taxes, whether interconnection fees apply, and whether VoIP providers are subject to universal service contributions.⁴

6.3.4.2 FOREIGN OWNERSHIP

Given its status as a critical public utility, telecommunications has been regarded as an integral part of a country's sovereignty and thereby subject to **foreign ownership restrictions** under either telecommunications legislation or a country's foreign investment law. However, largely as a result of liberalization, many countries have eased foreign ownership restrictions in order to attract investment, particularly as public sector financing has shrunk since the 1980's and the private sector, both domestic and foreign, has had to assume responsibility for financing development in the ICT sector.¹ Foreign investment has facilitated the growth and development of the telecommunications sector in many countries, increasing access to capital for network development and modernization, and allowing for the transfer of technology and know-how. However, despite the benefits of foreign investment, not all countries are initially open to establishing a legal environment that is conducive to overseas ownership in the sector (see Box 3-10 below). Where foreign ownership restrictions continue to exist, governments should balance the reasons for such restrictions with the need for creating a favourable environment that is conducive to competition and development as well as an adequate access to capital.

Under Vietnam's investment law of 1992, as amended in 2000, foreign companies are allowed to provide services to Vietnam's telecommunications market only under a Business Corporation Contract (BCC). A BCC is, in essence, a partnership agreement between a foreign and a Vietnamese party in which private investors provide capital and receive a negotiated return on their investment for a prescribed number of years. Foreign investors are not allowed to own equity stakes in Vietnamese telecommunications companies and the Vietnamese party is the only party permitted to hire and manage a workforce. A foreign company must be present in Vietnam for at least two years before entering into BCC negotiations.

Recognizing that this scheme discouraged foreign investors because they had no operational control over their investments, the Vietnamese Government issued a new Law on Telecommunications and Decree implementing the Law loosening these restrictions. As of June 1, 2011, foreign ownership restrictions on telecommunications services provided under Vietnam's market access commitments in its WTO services schedule apply for other WTO members. For example, for facilities-based basic telecommunications services, foreign capital contribution may be up to 49% of the charter capital of a joint venture.

◀ Box 1 Vietnam's Business Corporation Contracts

Source: Decree Detailing Telecom Law of Vietnam, Vietnam Briefing (Apr. 2011) at <http://www.vietnam-briefing.com/news/decree-detailing-telecom-law-vietnam.html/#more-3531>

The level and nature of foreign investment in a country depends on various factors, such as openness of the market, government policies, infrastructure quality, political and regulatory stability, taxes and tariffs, labor costs, international commitments, and the existing legal framework. In South Africa, for example, foreign ownership restrictions in the telecommunications sector originate from the political history of the region. To address the effects of apartheid, the government's policy of economic reform has been based on economic empowerment, which encourages ownership and significant participation by historically disadvantaged groups.² In the ICT sector, Sections 35(3) and 35(4) of the Telecommunications Act requires the regulator, ICASA, to promote the empowerment and advancement of disadvantaged groups and women by giving them preference in the award of any licences for up to 30 per cent equity ownership (and sometimes higher).³

Although foreign ownership restrictions have been eased in numerous countries they continue to exist in some countries, even in liberalized economies, chiefly due to concerns regarding national identity and security, economic espionage, damage to law enforcement interception capabilities, and potential for damage to critical infrastructure.⁴ For example, although India recently raised the foreign direct investment limit in the telecommunications sector from 49 per cent to 74 per cent in order to attract more investment in the sector, it has imposed various conditions on foreign investment to address national concerns which limit the impact of the changes. These conditions state that: (i) the majority of the Board

of Directors, including the Chairman, Managing Director and Chief Executive Officer, must be resident Indian citizens; (ii) at least one resident Indian promoter must hold 10 per cent equity in any telecommunications company; (iii) the Chief Technical Officer and Chief Financial Officer must be resident Indian citizens; (iv) no sensitive information relating to subscribers and accounts can be transferred outside India; and (v) the identity of subscribers must be traceable at all times.⁵

Although a country's telecommunications laws may contain foreign ownership restrictions, it is often the case that other national laws regarding foreign investment in general may impose limitations. **Canada** and the **United States**, for example, not only have foreign ownership restrictions in their telecommunications laws, but have national laws regarding foreign investment such as the Committee on Foreign Investment in the United States (CFIUS) review in the United States and the Investment Canada Act in Canada. In the United States, the Committee on Foreign Investment in the United States (CFIUS) review is applied to all foreign acquisitions of U.S. companies to evaluate the impact on national security. If countries have foreign investment laws which require a review of telecommunications transactions and investment, they should ensure they do not become a hurdle that is non-transparent, timely, resource-intensive, and creates uncertainty. On the other hand, the Investment Canada Act provides for the review by the Minister of Industry of any foreign acquisitions in order to ensure a "net benefit" to Canada.

Practice Notes

- [Foreign Ownership in Canada \[3.4.2\]](#)
- [Foreign Ownership in the United States \[3.4.2\]](#)
- [Table 3-6: Foreign Telecommunications Ownership Restrictions in Selected Countries \[3.4.2\]](#)

6.3.4.3 CONSUMER PROTECTION LAW

It is important that the telecommunications legal and regulatory framework create an environment that promotes public interest, confidence and participation in the sector. Most countries have done so by enacting consumer provisions in telecommunications legislation, such as number portability, quality of service and universal service. Many countries also have general consumer laws to protect consumer interests in the purchase of goods and services, which also affects telecommunications. The popularity of mobile phones has also resulted in the enactment of special legislation in some countries against mobile phone theft. The interaction of different consumer protection laws that affect the telecommunications sector is seen, for example, in Australia,¹ where consumer protection legislation is embodied in the Telecommunications Act 1997, the Telecommunications (Consumer Protection and Service Standards) Act 1999, the Privacy Act 1988 and the Spam Act 2003.² In addition, there are general consumer safeguards under the Trade Practices Amendment (Telecommunications) Act 1997, general unfair trading legislation and customer rights under contract law in Australia.³

Due to the interaction of different consumer protection laws, such as in the case of Australia, a need exists for consistency among the laws in order to lessen confusion, and to ensure that the highest standard of consumer protection prevails. In particular, consumer issues and the degree of regulatory oversight may be influenced by the maturity of the national market and the degree of competition in the sector. For example, in highly competitive markets, such as Australia, Hong Kong SAR, Malaysia and Singapore, more reliance is placed on industry self-regulation through voluntary codes of practice. In Malaysia, the Consumer Forum, comprised of service providers, telecommunications companies, broadcasting stations, non-governmental organizations and public interest groups, is designated by the Malaysian Communications and Multimedia Commission (MCMC) to prepare industry codes on consumer protection issues.⁴ Generally, however, consumer protection regulations establish the telecommunications operators' obligations regarding their customers. Operators' obligations typically include, but are not limited to, items such as: timely and accurate billing; customer contract policies and procedures, protection of consumer privacy; and terms of reference for suspension of service. These regulations also need to take into account procedures necessary to respond to and resolve users' claims and to ensure that the relationship between telecommunications users and operators are fair and equitable.

Furthermore, given the constantly evolving nature of the telecommunications sector due to new technological developments and convergence, in particular the development of the Internet and the ICT sector, and the large quantity and range of personal information involved, these developments provide certain challenges that may not necessarily be addressed by telecommunications laws or general traditional consumer protection laws. Therefore, many countries are adopting additional laws and regulations that are focused on consumer protection matters in the ICT sector, such as intellectual property rights spam, privacy, fraud, identity theft, cyber crime, and e-commerce transactions. Such legislation protecting consumer activities in the ICT sector, and providing for the security of electronic networks and communications, are necessary to create trust and confidence in the use of digital networks.⁵ Further discussion of the impact of ICT related legislation in the telecommunications sector is found in Chapter 4, Section 4.4. A more detailed

discussion regarding the regulatory responsibility for consumer protection is available in Chapter 6, Section 6.4.1.

Data Privacy Protections

(a) Personal Data

Due to the sensitivity of information involved in communications activities, most telecommunications legislation contains provisions regarding the privacy and confidentiality of user information. However, the ICT environment has greatly facilitated the global transmission of personal information, and it has become much easier to collect and share private information through the Internet. As a result, many countries have enacted data protection legislation to protect individuals' privacy rights by restricting the manner in which personal information is used in the private and public sectors.⁶ Some countries, such as Australia, have also undertaken efforts to harmonize privacy provisions in telecommunications legislation and in other related legislation to ensure a consistent standard of privacy protection applied to both the public and private sectors, which have been subjected to different privacy policy requirements. In 2005, the Australian Office of the Australian Information Commissioner (OAIC) (formerly the Office of the Privacy Commissioner) conducted a review of the Privacy Act in light of the developments in private sector industries, and issued recommendations to the Parliament on improving the private sector provisions in the Privacy Act.⁷ With regard to telecommunications, the OAIC recommended that the Telecommunications Act and the Privacy Act be amended to provide consistency and to clarify what constitutes authorized uses and disclosures under each Act, and to ensure that the Privacy Act cannot be used to lower the standard of privacy protection provided by the Telecommunications Act. These recommendations to privacy obligations in the private sector, along with updates to the government's obligations in protection of citizens' privacy, are being considered as part of broad legislative amendments to the Privacy Act in 2011.⁸

In the EU's 2002 Data Protection Directive⁹ and Privacy Directive,¹⁰ privacy in the processing of personal data and the confidentiality of communications are recognized as fundamental rights that should be protected. The Privacy Directive requires member states to harmonize and ensure an equivalent level of protection of the right to privacy with respect to personal data in the electronic communication sector.¹¹ Pursuant to this, the Data Protection Directive prohibits the transfer of personal information to any country that does not have adequate privacy laws.¹² As a result, EU member states have implemented legislation that prohibits the transfer of personal information from the EU to third countries unless such countries have adequate privacy protection in their laws. As part of the 2009 Telecom Reforms package, the EU implemented additional privacy rules protecting against personal data breaches.¹³ Under the new rules, which Member States were required to transpose by May 25, 2011, telecom operators and ISPs must take stronger security measures to protect the names, email addresses and bank account information of their customers, along with data about every phone call and Internet session they engage in, in order to ensure that data does not accidentally or deliberately end up in the wrong hands.¹⁴ Additionally, the new rules require ISPs to provide better information to consumers regarding the data stored or accessed in their devices through "cookies" (i.e., small text files stored by a user's web browser). In the case of data not related to the service currently accessed by the user, the new rules require Member States to ensure users have given their consent before such data is stored or accessed,

To date, a majority of countries around the world have enacted laws relating to data protection. Often, the protection of personal data is not encompassed in a single law but is covered by a variety of laws depending on the type of information that is being protected. In the United States, for example, legislation has passed regarding medical records (The Standards for Privacy of Individually Identifiable Health Information, or "HIPAA Privacy Rule"),¹⁵ credit reports (Fair Credit Reporting Act),¹⁶ and immigration and citizenship information (USA Patriot Act).¹⁷ Similarly, in Argentina, the protection of personal data is regulated by different legal instruments, namely the Argentine Constitution, the Personal Data Protection Act, Decree No. 1558, and the Data Retention Law, Law No. 25.873, which was incorporated into the Telecommunications Law. In New Zealand, data protection legislation is contained in a number of laws, including the Telecommunications Information Privacy Code 2003¹⁸ and the Privacy Act 1993.¹⁹

(b) Data Retention

Another factor that has shaped the policy on the use of communications data with regards to privacy of information is the concern with national security after the events of September 11th, 2001, in the United States, and the recent terrorist attacks in Spain and in England. One example of the current debate surrounding the use of communications data for national security purposes is the initiative on data retention rules. Some laws, such as the EU Data Retention Directive²⁰, require communications service providers to retain all data created by their users for a prescribed period of time, while other countries, such as the United States, require communications service providers to store specific sub-sets of data for a more limited amount of time for specific purposes. The issue of data retention is hotly opposed by operators and service providers because of the resources required to comply. In Argentina, the Data Retention Law was promulgated in February 2004 and mandated a 10 year data retention period.²¹ However, due to opposition by ISPs, who would bear the burden and costs of retaining the data, and civil liberties groups regarding the long retention period, the government suspended the application of the law in 2005 and has not since been re-enacted or amended.²²

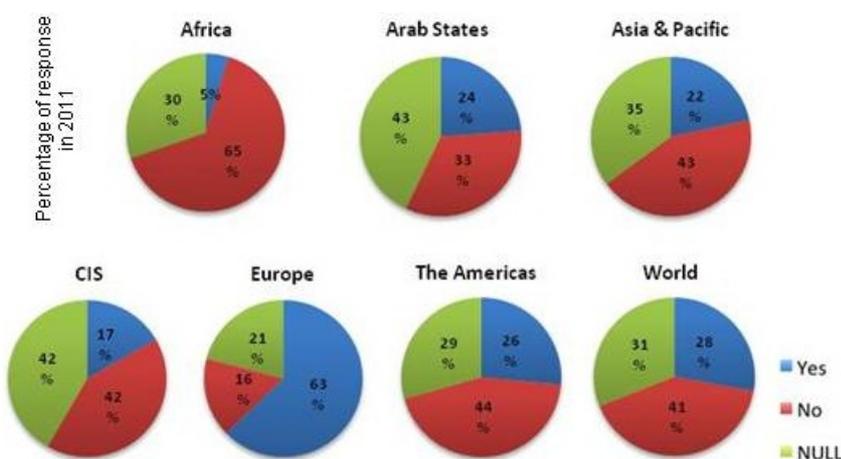
Spam Legislation

Often considered in relation to consumer protection legislation is legislation against spam, or the sending of unsolicited, usually commercial, electronic messages. With the growth of Internet usage, spam became more prevalent although it can also be carried out through other electronic means, such as facsimile, telephone, short message service (SMS) and instant messaging services. (See Box 3-11 for the definitions of spam.) With the growth of ICTs, a continually increasing number of countries have implemented legislation against spamming to supplement existing consumer protection laws (see Figure 3-D).²³ The problems associated with spam are magnified in developing countries, where high volumes of incoming and outgoing spam can cause a severe drain on the limited and costly bandwidth that is available for ICTs.²⁴ Notably, efforts aimed at combating spam have waned in the last few years as policy makers focus more on data privacy and cyber security issues.

Some countries, however, such as Dominica, Iran, Jordan, Moldova, Nicaragua, Sri Lanka and Zambia have reported since 2009 that they do not have any legislation countering spam, while others such as Bulgaria, Chile, Costa Rica, **Malaysia**, Mexico, Morocco, Peru, South Korea and Switzerland have developed legislation to counter spam legislation through consumer protection laws, telecommunications law, or data protection law.²⁵ Nonetheless, several countries such as Canada is in the process of enacting specific anti-spam laws, while others such as Argentina, **Australia**, Austria, Belgium, Brazil, **China**, Czech Republic, Hungary, Japan, Lithuania, the Netherlands, Singapore and the **United States** have enacted specific spam legislation.²⁶ In the EU, legislation against spam is codified in the Directive on Privacy and Electronic Communications which requires member states to prohibit unsolicited communications sent via e-mail, SMS, facsimile, or telephone.²⁷ The Directive's basic principles are that: (a) member states should take an opt-in approach, whereby they ensure under applicable legislation that businesses obtain prior consent before sending unsolicited e-mails for direct marketing; (b) senders must clearly indicate the use of cookies or other tracking devices, including spyware; and (c) the definition of spam is technology neutral.

As part of the 2009 Telecom Reforms, the EU also introduced stronger spam rules.²⁸ In particular, all commercial emails advertising web sites without full information about the company are now illegal. As many spammers operate across borders, cooperation between enforcement authorities will be improved as they have now become part of an EU-wide Consumer Protection Cooperation network. Furthermore, the new rules give internet service providers the right to protect their business and their customers by taking legal action against spammers.

Although national efforts are the main forces in combating spam, due to the "borderless" nature of spam, it is just as important to have international enforcement cooperation. For example, countries such as Australia, Korea, the United Kingdom and the United States have signed bilateral and multilateral memoranda of understanding to coordinate and improve spam enforcement activities. The OECD, to support the development of an inclusive response to spam, has launched an Anti-Spam Toolkit containing resources and information on anti-spam activities at the international level, to help policy-makers, regulators, and industry players formulate policies and find solutions to spam.²⁹



◀ Figure 3-D: Anti-Spam Legislation Worldwide

Source: ITU Global Survey on Anti-Spam Laws and Authorities, 2011.

Box 3-11: What is “Spam”?

There is no internationally agreed definition of what constitutes spam. The following are definitions provided by Australia, the European Union and the United States.

Australia: The Spam Act of 2003 refers to the phrase “unsolicited commercial electronic messages” (the word “spam” is not specifically mentioned in the text of the legislation). There is no reference to bulk messaging; therefore a single unsolicited commercial electronic message could be spam. The judicial provisions are technologically neutral, and therefore apply to any unsolicited commercial messages delivered to the consumer via email, SMS, MMS and instant messaging. Faxes and voice-to-voice telemarketing are excluded.

European Union: The term spam is neither defined nor used. Rather, Article 13(1) of the Privacy and Electronic Communications Directive requires Member States to prohibit the sending of unsolicited commercial communications by fax or e-mail or other electronic messaging systems such as SMS and MMS unless the prior consent of the addressee has been obtained (opt-in system).

United States: In 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act to curb spam, which required the Federal Communications Commission (FCC) to adopt rules that prohibit “sending unwanted commercial e-mail messages” to wireless devices without prior permission. This ban took effect in March 2005. In addition, the Federal Trade Commission (FTC) adopted detailed rules that restrict sending unwanted commercial e-mail messages to computers.

Sources: ITU World Telecommunication Regulatory Database (2010); EU, *Unsolicited communications - Fighting Spam* at http://ec.europa.eu/information_society/policy/ecomm/todays_framework/privacy_protection/spam/index_en.htm.

Despite the enactment of anti-spam laws that are necessary tools for combating spam, such laws, on their own, have been unsuccessful in abating spam.³⁰ Therefore, in addition to enactment of anti-spam laws, which usually involve the sanctioning of spammers through an “opt-in” or “opt-out” approach (Box 3-12), it is also important to consider alternative legal mechanisms such as the establishment of industry-led enforceable codes of conduct for Internet Service Providers (ISPs). This proposed approach would require ISPs to establish and enforce codes of conduct that prohibit their users from using the ISP as a source of spamming and other prohibited acts such as spoofing and phishing and prohibiting users from entering into peering arrangements with ISPs that do not uphold similar codes of conduct. ³¹ The ultimate goal of such codes of conduct is to ensure that ISPs assist with the anti-spam efforts by taking adequate action to keep spammers off the Internet.³²

Most anti-spam laws involve the “opt-in” versus the “opt-out” approach.

Opt-in: This approach, adopted by the EU Directive, prohibits marketers and senders of commercial electronic messages from sending messages to a recipient unless the recipient has affirmatively asked to receive them. Affirmative requests for messages can be delivered directly by a recipient or they can be constructively construed from an existing business relationship between the recipient and the sender. For example, under opt-in laws, if a person purchases a product from a merchant, that merchant may send that person offers in the future until the merchant receives a request to stop sending such offers.

Opt-out: This approach, adopted by the United States, Japan and South Korea, allows senders to send messages to a recipient even if there is no existing business relationship and the recipient has not specifically opted to receive the messages. However, senders must honor the requests of recipients to remove them from a sender’s mailing list.

◀ Box 1 Opt-in or Opt-out

Source: ITU Survey on Anti-Spam Legislation Worldwide 2005.

Reference Documents

- **Nigeria: Memorandum of Understanding between the Consumer Protection Council and the Nigerian Communications Commission**

6.3.4.4 PROPERTY LAW

National laws regarding property transactions can affect the effectiveness of the telecommunications legislation in several ways. Property taxes, for instance, can affect investment in the sector. In addition to taxes, property laws with regard to ownership rights and government confiscation are other factors that investors usually consider when deciding whether to invest in a particular country, and affect the level of public confidence in the stability of the sector. Some countries, such as Jordan, have “investor friendly” property laws. Foreign entities are allowed to own or lease property in Jordan for

investment or personal use, provided that their home countries permit reciprocal rights to Jordanians. Investment properties have to be developed within five years from the date of approval, and foreign companies which hold a majority share in a Jordanian company or wholly owned subsidiaries of foreign companies, are automatically given national treatment with respect to ownership of land where the company's business allows for ownership of land or real estate.¹

Property laws also affect the actual application of the rights granted to licensees under the telecommunications legislation with regard to their access to critical networks and infrastructure. The ability of operators to offer telecommunications services often requires the building of infrastructure, such as installation of cable or optical fiber lines, poles, ducts, and construction of towers, which in turn involves the need to access public or private property. Telecommunications operators' access to rights of way is often reflected in telecommunications legislation, which gives the government the right to appropriate property for such use. Where such appropriation involves private ownership, the landowner is usually compensated for the use of property. However, access to property as provided under the telecommunications law can become complicated in practice, depending on the property laws existing in the particular country. While the federal government has control over federal property, states and municipalities often have jurisdiction over property under their administration.

For example, some countries, such as Brazil, have property laws that are applied at the federal, the state and the municipal level. Rights of way and access of telecommunications operators to property in Brazil are governed in part by the federal Civil Code,² the Telecommunications Law,³ and the municipal laws of each state. Articles 21 and 22 of the Constitution establish the exclusive authority of the federal government to legislate and exploit telecommunications services in Brazil, which is defined as a public service. The power of the government to regulate telecommunications has been delegated to the regulatory agency, Anatel, which regulates the sector under the provisions of the Telecommunications Law. Article 74 of the Telecommunications Law specifically states that the telecommunications licensee is not exempt from complying with engineering regulations and municipal, state and federal laws regarding construction and cable and equipment installation in public areas. Articles 20 and 30 of the Constitution provide that states and municipalities may be authorized to legislate upon specific matters related to the provision of telecommunications services, such as the rights of municipalities to legislate on urban planning and environmental matters and to charge telecommunications operators for the use and occupation of the land under their jurisdiction. Under Title II, Article 1286 of the Civil Code, the owner of a real property must allow public service providers to install cables, ducts and conduits for the provision of public services, pursuant to the payment of a proper indemnity. Article 1369 of the Civil Code states that property owners may confer to any third party the right to build on its land by means of a public deed, and under Article 1371, the tenant is responsible for payment of fees and taxes applicable to the property.

Practice Notes

- [Spam Legislation in Australia, China, Malaysia, and the United States \[3.4.4\]](#)

[Next: 6.4 Impact of Convergence](#) ➔

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