

## Relation between trade rules on e-commerce and telecommunication and work in ITU

Richard Hill, 12 May 2018

There are numerous overlaps between work carried out in the International Telecommunication Union (ITU) and trade-related proposals regarding e-commerce and telecommunications that have been agreed in plurilateral instruments such as the Trans-Pacific Partnership (TPP)<sup>1</sup> or that are being proposed for discussion in the context of the WTO e-commerce agenda or other plurilateral agreements such as Trade in Services (TISA).

The analysis below is based on provisions in TPP, recent proposals in WTO for the e-commerce agenda, and leaked versions of TISA. The provisions in TPP, the e-commerce agenda, and TISA are similar.

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

Further, in some cases developed countries have made proposals in free trade negotiations that are exactly the opposite of the proposals that they have made in ITU. For example, developed countries have opposed detailed binding provisions on international mobile roaming in ITU, but agreed them in TPP (and proposed them in TISA and plurilateral agreements); the same holds for a provision on recourse to national authorities by foreign enterprises; and for provisions on security and for countering spam.<sup>2</sup>

### 1.1 Allocation and use of frequencies and numbers

Articles 13.5 and 13.19 of TPP contain specific provisions on allocation and use of frequencies and numbers, including number portability.

Yet this is one of the core mandates of the ITU, and there are numerous ITU Recommendations<sup>3</sup>, Resolutions and even treaty provisions for frequencies<sup>4</sup>.

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

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

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<sup>1</sup> The full text of TPP is available at:

<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

<sup>2</sup> For more details see Hill, Richard (2013) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History*, Schulthess/Springer

<sup>3</sup> For example, ITU-T Recommendations E.190, E.164, and E.164 Supplement 2 on Number Portability.

<sup>4</sup> The ITU Radio Regulations

## **1.2 Access to infrastructure and interconnection**

Articles 13.7-13.12 and 13.14-13.15 of TPP contain specific provisions on access to infrastructure and interconnection; article 13.13 has provisions on co-location.

ITU publishes best practices and capacity building for conditions for the use of infrastructure by competitors<sup>5</sup> and for interconnection<sup>6</sup>.

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

## **1.3 Internet Interconnection**

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

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

## **1.4 Security**

Articles 14.15 and 14.16 of TPP call for cooperation regarding security and cybersecurity.

There are numerous ITU Recommendations on security<sup>7</sup> and cybersecurity<sup>8</sup>, and article 6 of the 2012 International Telecommunication Regulations, a treaty, provides that: “Member States shall individually and collectively endeavor to ensure that the security and robustness of international telecommunication networks in order to achieve effective use thereof and avoidance of technical harm thereto, as well as the harmonious development of international telecommunication services offered to the public.”

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

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<sup>5</sup> <https://www.itu.int/en/ITU-D/Technology/Pages/default.aspx>

<sup>6</sup> See Recommendation ITU-T D.50 and its Supplements.

<sup>7</sup> See Recommendations ITU-T X.800-X.849; and X.1000-X.1099.

<sup>8</sup> See Recommendations ITU-T X.1200-X.1299; X.1500-X.1599; X.1600-X.1699.

## 1.5 Spam

Articles 14.14 and 14.15 of TPP call for cooperation regarding spam.

There are numerous ITU-T Recommendations on spam<sup>9</sup>, and article 7 of the 2012 International Telecommunication Regulations, a treaty, provides that: “Member States should endeavor to take necessary measures to prevent the propagation of unsolicited bulk electronic communications and minimize its impact on international telecommunication services. Member States are encouraged to cooperate in that sense.”

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

## 1.6 Open Source software

Article 14.17 of TPP would appear to restrict the use of open source.

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

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

## 1.7 Universal service

Article 13.17 of TPP covers universal service.

ITU has numerous activities related to universal service.<sup>10</sup>

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

## 1.8 Roaming

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

There are ITU-T Recommendations on roaming<sup>11</sup> and articles 4.4 through 4.7 of the 2012 International Telecommunication Regulations, a treaty, provide that: “Member States shall foster measures to ensure that authorized operating agencies provide free-of-charge, transparent, up-to-date and accurate information to end users on international telecommunication services, including international roaming prices and the associated relevant conditions, in a timely manner. Member States shall foster measures to ensure that telecommunications services in international roaming of satisfactory quality are provided to visiting users. Member States should foster cooperation among authorized operating agencies in order to avoid and mitigate inadvertent roaming charges in border zones. Member States shall endeavor to promote competition in the provision of international roaming services and

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<sup>9</sup> See Recommendations ITU-T X.1230-X.1249.

<sup>10</sup> See for example: <http://www.ictregulationtoolkit.org/toolkit/4>

<sup>11</sup> See Recommendations ITU-T D.97-D.99.

are encouraged to develop policies that foster competitive roaming prices for the benefit of end users.”

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

### **1.9 Regulatory body and licensing**

Article 13.6 of TPP calls for the establishment of independent telecommunication regulatory bodies. Article 13.8 of TPP includes detailed requirements on requirements for licenses for suppliers of public telecommunication services.

ITU has numerous activities related to best practices for regulatory bodies<sup>12</sup> and licensing<sup>13</sup>.

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

### **1.10 Recourse**

Article 13.12 of TPP provides that enterprises have the right to have recourse to the regulatory and authorities of other states.

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

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

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<sup>12</sup> See for example: <http://www.ictregulationtoolkit.org/toolkit/6>

<sup>13</sup> See for example: <http://www.ictregulationtoolkit.org/toolkit/3>