

Legal analysis of the 2012 ITRs

Richard Hill¹, October 2017

Various concerns have been expressed regarding certain provisions of the 2012 ITRs. Because of those concerns, a significant number of states did not sign the 2012 ITRs. Many of the non-signatories stated that they would analyse the legal implications of the provisions in question and consider subsequently acceding to the treaty.

A comprehensive legal analysis² of the provisions in question has been published in the peer-reviewed Oxford University Journal of Law and Information Technology. According to that analysis:

a) The third paragraph of the Preamble, which recognizes the right of access of Member States to international telecommunication services, does not limit or otherwise prejudice the right of Member States to suspend the international telecommunication service, pursuant to Article 35 of the ITU Constitution, either generally or only for certain relations and/or for certain kinds of correspondence, outgoing, incoming or in transit. Furthermore, the Preamble does not contain operative provisions and therefore it does not modify existing rights and obligations.

b) As specified under number 4 (Article 1.1a), the Regulations do not address the content-related aspects of telecommunications. This understanding applies to all provisions of the ITRs, including in particular Article 6 on Security and robustness of networks, and Article 7 on Unsolicited bulk electronic communications.

c) Number 5 (Article 1.1b), which specifies that these Regulations also contain provisions applicable to authorized operating agencies, aligns the Regulations with number 38 (Article 6) of the ITU Constitution and thus does not change the scope of the Regulations regarding the entities to which they apply. Furthermore, the area covered by the Regulations, as defined in article 1, has not been changed. Thus the scope of the Regulations has not been changed compared to the 1988 version of the Regulations.

d) Resolutions contained in the Final Acts of the World Conference on International Telecommunications (Dubai, 2012) are not part of the Regulations. They do not require any ratification, acceptance or approval by individual Member States, and they are not inherently binding on Member States. Resolution 3 on Fostering an enabling environment for the greater growth of the Internet cannot and does not change the mandate of the ITU.

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² Richard Hill, "WCIT: failure or success, impasse or way forward?", *International Journal of Law and Information Technology*, vol. 21 no. 3, p. 313, DOI:10.1093/ijlit/eat008, <http://ijlit.oxfordjournals.org/content/21/3/313.abstract>

A summary is available at:

<http://www.ip-watch.org/2013/06/11/criticism-of-the-2012-itrs-not-valid-says-former-senior-itu-official/>

A detailed analysis of the legislative history of the 2012 ITRs, and of all articles, can be found in Richard Hill, *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History* (2013) Schulthess/Springer, <http://www.amazon.com/The-International-Telecommunication-Regulations-Internet/dp/3642454151>