Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

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Volume 18, Number 1, 2005

URI: https://id.erudit.org/iderudit/1069244ar
DOI: https://doi.org/10.7202/1069244ar

See table of contents

Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)
2561-6994 (digital)

Explore this journal

Cite this article

Jakhu, R. (2005). IMPLEMENTING GLOBAL PUBLIC INTEREST IN INFORMATION SOCIETY. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, *18*(1), 171–184. https://doi.org/10.7202/1069244ar

Article abstract

Because the means of communication through which information is conveyed are indispensable for the eradication of poverty, public interest requires that all information and communications technology services must be available at affordable cost in all countries and to all areas within a country. Unfortunately, in spite of numerous international efforts, a digital divide still exists at both the national and international levels. Bridging this divide will be extremely difficult in the near future if the international and national regulatory regimes and approaches applicable to means of communications are not revised. There are many challenges, including access to appropriate national communication facilities, the privatisation of international operators in the field of satellite communications, the provision of domestic services by foreign operators, and the lack of national regulatory frameworks. To improve the situation, the Tunis Phase of the WSIS should ensure that all States and relevant international organisations follow the results of the Summit, and should focus on increasing the human intellectual capacity in regulatory matters.

IMPLEMENTING GLOBAL PUBLIC INTEREST IN INFORMATION SOCIETY[*]

By Ram Jakhu[**]

Because the means of communication through which information is conveyed are indispensable for the eradication of poverty, public interest requires that all information and communications technology services must be available at affordable cost in all countries and to all areas within a country. Unfortunately, in spite of numerous international efforts, a digital divide still exists at both the national and international levels. Bridging this divide will be extremely difficult in the near future if the international and national regulatory regimes and approaches applicable to means of communications are not revised. There are many challenges, including access to appropriate national communication facilities, the privatisation of international operators in the field of satellite communications, the provision of domestic services by foreign operators, and the lack of national regulatory frameworks. To improve the situation, the Tunis Phase of the WSIS should ensure that all States and relevant international organisations follow the results of the Summit, and should focus on increasing the human intellectual capacity in regulatory matters.

Compte tenu que les moyens de communication à partir desquels l'information est transmise sont indispensables pour l'éradication de la pauvreté, l'intérêt public rend nécessaire l'accès aux services des technologies de l'information et des communications à un coût abordable dans tous les pays et dans toutes les régions d'un pays. Malheureusement, malgré de nombreux efforts internationaux, un fossé numérique existe toujours, tant au niveau international que national, et l'écart sera très difficile à combler dans un futur rapproché si les approches et régimes de régulation internationaux et nationaux applicables aux moyens de communication ne sont pas révisés. De nombreux défis surgissent, tels l'accès à des équipements de communication nationaux appropriés, la privatisation des opérateurs internationaux dans le domaine des communications par satellite, la fourniture des services domestiques par des opérateurs étrangers et le manque de cadres nationaux de régulation. Pour améliorer les choses, la phase du SMSI qui aura lieu à Tunis devra assurer que les États et les organisations internationales pertinentes suivront les résultats du Sommet et devra porter attention au développement des capacités intellectuelles humaines en matière de régulation.

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[*] A paper presented at the International Seminar on The Information Society, Human Dignity and Human Rights, held at McGill University, Montreal, Quebec, Canada, on 17th and 18th June, 2004. Certain portions of the material in this paper have been previously published by the author, but they have been adapted and updated for purpose of this paper.

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Introduction

According to Sir William Arthur Lewis, the winner of the 1979 Nobel Prize for Economics, "The fundamental cure for poverty is not money but knowledge." The creation, acquisition or use of knowledge are highly dependant on the availability of relevant information, which could/should be sought, received and imparted by any means of communications from anywhere. This implies that means of communication through which information is conveyed are indispensable not only for the acquisition of knowledge but also for the eradication of poverty.

Global and national eradication of poverty, which is the root of almost all human misery and serious challenges, has been universally accepted to be in the public interest. "Public interest" means the interest of the general public, which often is different from that of specific individuals, entities and interest groups.[1] Also, "public interest" does not imply the protection or promotion of particular interests, values or viewpoints. In the context of Information and Communications Technologies (ICTs), the term "public interest" should be understood and applied from the universal human rights and global development perspectives; i.e. all people are entitled to equal development opportunities irrespective of their geographical area of residence and of their economic situations.[2] This perspective is relevant both in the developed and developing countries since ICTs are only a means (and not a goal) for human development. Serious inequalities in the availability and use of ICTs exist not only amongst various countries (i.e. "international digital divide") but also within each country (i.e. "domestic digital divide").[3] Therefore, public interest requires that all ICT services must be available to all persons at an affordable cost in all countries and to all areas within a country.

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1 See Ram Jakhu, "Safeguarding the Concept of Public Service and the Global Public Interest in Telecommunications" (2001) 5:1 S.J.I.C.L. 71.

2 Under Article 19 of the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71., everyone has been entitled to the "right to communicate"; i.e. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". The 1948 *Declaration* is generally believed to have become part of customary international law. It is generally believed that there exists a close relationship between communications capability and human development, which without effective implementation of all fundamental human rights is not achievable to a full extent (United Nations Development Programme, *Human Development Report 2000* (Oxford: Oxford University Press, 2000) at 2 [UNDP]). It should not be surprising to note then that a large majority of the world's population, living primarily in the developing countries, still remains without the full enjoyment of the fundamental human rights as well as without meeting their basic human needs. Therefore, for a complete and effective implementation of all the fundamental human rights recognised in the *Declaration*, everyone must have reasonable access to modern means of communications.

3 See UNDP, *ibid*. at 6, 8: "Global inequalities in income increased in the 20th century by order of magnitude out of proportion to anything experienced before (…) Gaps between rich and poor are widening in many countries (…) About 790 million people are hungry and food insecure, and about 1.2 billion live on less than $1 a day (1993 PPPUS$). Even in OECD countries some 8 million people are undernourished. In the United States alone, some 40 million people are not covered by health insurance, and one adult in five is functionally illiterate".

There exists a clear gap between the information-rich and information-poor in the world. This problem of "digital divide" is universally recognised. For example, in December 2003, the World Telecommunication Development Report[4] indicated that teledensity in South Asia is only 4.5% while in Europe it is as high as 77%. According to a Report by Bridges.Org, there is real evidence of disparities between information-haves and information have-nots:

> In the entire continent of Africa, there are a mere 14 million phone lines – fewer than in either Manhattan or Tokyo. Wealthy nations comprise some 16 per cent of the world's population, but command 90 per cent of Internet host computers. Of all the Internet users worldwide, 60 per cent reside in North America, where a mere five per cent of the world's population resides. One in two Americans is online, compared with only one in 250 Africans. In Bangladesh, a computer costs the equivalent of eight years average pay.[5]

Similarly, Kofi Annan, the Secretary General of the United Nations, in his Report to the Millennium Assembly, stated that: "At present, a yawning digital divide still exists in the world. There are more computers in the United States of America than in the rest of the world combined. There are as many telephones in Tokyo as in all Africa. This digital divide can – and will – be bridged."[6] This statement provides an accurate assessment of the current situation and ends with an optimistic note. I also believe that the digital divide will be bridged, but only if and when there is a sufficiently strong political will to do so, both at the international and national levels. Unfortunately, that political will seems to be generally lacking at present.

The Geneva Phase of the World Summit on the Information Society (WSIS), in its *Declaration of Principles* and *Plan of Action*, has attempted to give effect to the principle of public interest in ICTs facilities and services. For example, the *Plan of Action* sets the following goals and targets for improving connectivity and access in the use of ICTs to be achieved by 2015:

a) to connect villages with ICTs and establish community access points;

b) to connect universities, colleges, secondary schools and primary schools with ICTs;

c) to connect scientific and research centres with ICTs;

d) to connect public libraries, cultural centres, museums, post offices and archives with ICTs;

e) to connect health centres and hospitals with ICTs;

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4 International Telecommunication Union (ITU), *World Telecommunication Development Report 2003: Access Indicators for the Information Society* (2003) at 18, online: ITU <http://www.itu.int/ITU-D/ict/publications/wtdr_03/material/WTDR2003Sum_e.pdf>.

5 Bidges.org, "Spanning the Digital Divide: Understanding and Tackling the Issues," (May 2001) at 3, online: Bridges.org <http://www.bridges.org/spanning/pdf/spanning_the_digital_divide.pdf>.

6 UN Secretary-General, *Millennium Report of the Secretary-General* (New York: UN, 2000) at 32.

f) to connect all local and central government departments and establish websites and email addresses;

g) to adapt all primary and secondary school curricula to meet the challenges of the Information Society, taking into account national circumstances;

h) to ensure that all of the world's population have access to television and radio services;

i) to encourage the development of content and to put in place technical conditions in order to facilitate the presence and use of all world languages on the Internet;

j) to ensure that more than half the world's inhabitants have access to ICTs within their reach.[7]

In giving effect to these goals and targets, special attention is to be paid to the needs of developing countries.[8]

In this article, I intend to establish that such goals and targets will be extremely difficult, if not impossible, to achieve by the year 2015 if the international and national regulatory regimes and approaches applicable to means of communications are not made conducive to meeting these goals and targets. Unfortunately, these regimes and approaches have not been challenged nor are they required to be changed by the Geneva Phase of the WSIS. Under paragraph 18, the *Declaration of Principles* must *not* be construed as impairing, contradicting, restricting or derogating from the provisions of international instruments, including the agreements concluded through International Telecommunication Union (ITU) and World Trade Organisation (WTO).

I. Numerous International Efforts, But No Concrete Achievement

International community, particularly through the United Nations (UN), has been active in the consideration of all issues related to ICTs (including the "digital divide") and their implications for the global society. On April 11th, 1997, the Administrative Committee on Co-ordination (ACC) of the UN[9] adopted an important

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7 "Plan of Action", *World Summit on the Information Society*, 12 December 2003, at para. 6 (WSIS-03/GENEVA/DOC/5-E, online: ITU <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!MSW-E.doc> [*Plan of Action*].

8 *Ibid.* at para. 7.

9 The 1946 UN Economic and Social Council Resolution 13 (III) (*Co-ordination Committee*, GA Res. 13(III), UN ESCOR, 1946, UN Doc. E/231.) created the ACC as a standing committee to supervise the implementation of the agreements between the United Nations and the then existing three Specialised Agencies. At present, twenty-five UN system organisations, including UN funds and programmes as well as specialised agencies, WTO and the Bretton Woods institutions, participate in the work of ACC.

Statement entitled "Universal Access to Basic Communication and Information Services."[10] According to this Statement, knowledge and information

> represent the life blood of the emerging global information society and its attendant infrastructure […] [but there exists] mal-distribution of access, resources and opportunities in the information and communication field […] between industrialized and developing nations.[11]

The Executive Heads of the ACC concluded that

> the introduction and use of ICT and information management must become an integral element of the priority efforts by the United Nations system to promote and secure sustainable human development for all; hence our decision to embrace the objective of establishing universal access to basic communication and information services for all.[12]

This Statement has become the basis and starting point for other major international debates and policies. At its May 2000 session, the ACC reiterated its 1997 Statement and recognised "the right of universal access to information and communication technologies, and knowledge as a global public good."[13] In the ACC's view,

> the *Digital Divide* is real and represents a gross imbalance in the access to or use of information and communication technologies in different parts of the world [and it emphasised the] need for further urgent, targeted, and coordinated action from the United Nations system to support efforts to ensure access and connectivity to the global knowledge network for all.[14]

Similarly, the Okinawa meeting of the G8 countries drew up a Charter on the Global Information Society in 2000. The Charter, in part, provides that: "Efforts to bridge the international divide, as in our societies, crucially depend on effective collaboration among all stakeholders […] [Information Technology], in short, is global in dimension, and thus requires a global response."[15]

For designing the international regulatory and operational mechanism for Global Mobile Personal Communication Satellite (GMPCS) systems, the first ITU World Telecommunication Policy Forum, held in 1996, laid stress on the special importance of these systems for developing countries in bridging the digital gap. The GMPCS have the potential to serve anyone, from and to anywhere, anytime. The

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10 Administrative Committee on Co-ordination (ACC), *Statement to General Assembly on Universal Access to Basic Communication and Information Services*, UN Doc. A/52/354 (1997), online: UN <http://acc.unsystem.org/-documents/joint.statements/9724387e.pdf>.

11 *Ibid.*

12 *Ibid.*

13 ACC, *Statement to the Economic and Social Council on Information and Communication Technologies (ICT) and Development* (24 May 2000), online: UNITeS <http://www.unites.org/reference/pdf/news-acc.pdf>.

14 *Ibid.*

15 "Okinawa Charter on Global Information Society", *Kyushu-Okinawa Summit*, 21-23 July 2000, at para. 15, online: US EMBASSY <http://usembassy.state.gov/tokyo/wwwhg 063.html>.

Forum adopted some voluntary principles, several of which seem to be stating the protection and enhancement of universal service and global public interest in communications. For example, the Principle on Global Service Availability warns against discrimination among different countries of categories of users in GMPCS service provision; and the Principle on Universal Access outlines measures to promote access to GMPCS services in remote or rural areas, by the provision of service by operators at a reasonable cost. Unfortunately, these principles, being non-prescriptive and non-binding, remain unimplemented. Sadly, almost all GMPCS systems have now failed commercially.

The ITU's World Telecommunication Development Conference (WTDC), which took place in Istanbul on March 18-27 2002, was the world's largest and highest-level intergovernmental global conference on the development of communications. The main objective of the Conference was to identify strategies to bridge the digital divide in all its dimensions (technical, societal and economic) and to harness the power of ICTs for socio-economic development of the largest number of people. The Conference stressed that community access to ICTs is one of the most cost-effective ways of achieving universal access in many developing countries. It agreed upon six programs and an Action Plan to implement them.[16] It may be noted that this ITU initiative, like several others, created only policy recommendations, not legally binding obligations on its Member States. The value of the initiative lies only in the fact that it may influence the approaches taken by national policy-makers and law-makers.

The latest of such international efforts has been the convening of the Geneva Phase of the WSIS with the aim of adopting a global plan to ensure everyone has access to information and to communications technologies. The results of this international gathering seem also to be disappointing as they did not bring any positive change in the status quo.

Nations of the world have been making declarations and adopting action plans, but these initiatives seem to remain empty promises and pious statements, unaccompanied by any concrete steps to narrow the digital divide. Ironically, the same countries have been adopting binding agreements, as discussed below, which have in practice contrary effects. Thus, the digital gap not only lingers on, but also continues widening.

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[16] ITU, News Release, "The Istanbul Declaration and Action Plan" (presented at the World Telecommunication Development Conference, Istanbul, 18-27 March 2002), online: ITU <http://www.itu.int/ newsroom/press_releases/2002/11-idap.html>.

II. National Communication Facilities: Problem Of Access To Appropriate Tools

The wonder of communications during the last two decades of the twentieth century has been the invention and use of the Internet. Broadband Internet[17] offers to develop an integrated voice, data and video network and is an excellent tool for e-government, e-commerce, e-education and e-health services. In addition to cable-satellite TV, pay-TV, interactive entertainment services, future communication systems are expected to be designed to meet rapidly increasing demand for broadband and high-speed Internet. Presently, the vast majority of broadband Internet users are in developed countries, but as the cost of the service is decreasing some developing countries could use broadband Internet in the future. Satellite broadband Internet services would have the potential to provide desirable and modern services both to rural and remote areas in developed countries and would prove to be an invaluable development tool to developing countries.

Wireless technologies, particularly satellites for broadband Internet and networks for mobile services,[18] have the greatest potential for bridging the digital gap with relative speed and ease, amongst countries and within each country, as they are the most suited communications systems for innovative services in un-served or underserved areas.[19] Wireless communications, including satellites, are operated with the use of appropriate radiocommunication links. Most of the communication satellites use the geostationary orbit. However, the radio frequency spectrum and the geostationary orbit are limited international natural resources. The scarcity of the radio frequency spectrum and the geostationary orbital positions has direct and important implications for ICTs, particularly in the achievement of goals set by the first session of the WSIS.

The most important international legal practice that determines the access to radio frequencies and orbital positions is the rule of "first-come first-served". Under the ITU Radio Regulations, all Member States must follow the prescribed procedures for the processing of notifications, registrations, and possible coordination of frequency assignments. International rights with respect to access to and use of radio frequencies are derived only from the successful recording of their assignments in the

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17 ITU, *Promoting Broadband: Background Paper*, Document: PB/03 (7 April 2003) (prepared for Workshop on Promoting Broadband, Geneva, 9-11 April 2003) [unpublished].

18 ITU, *"Has Africa's ICT renaissance begun?"* online: ITU <http://www.itu.int/AFRICA2004/media/renaissance.html> ("Africa is the fastest growing region for mobile communications and may well present one of the most fertile grounds for ICT investment anywhere in the world").

19 United Nations Office for Outer Space Affairs, "Submission to the Secretariat of the World Summit on Information Society on Contribution of the Satellite Communications Technology to Bridge the Digital Divide", Doc. WSIS/PC-3/CONTR/182-E (31 October 2003); *Plan of Action, supra* note 7, at para. 9(i); Mike Jensen, "Improving Rural Connectivity" *ICT Update* 10 (March 2003), online: ICT Update <http://ictupdate.cta.int/index.php/article/articleview/182/1/31/>; Michel Hegener, "Can Satellite Technology Bridge the Digital Divide?" *ICT Update* 10 (March 2003), online: ICT Update <http://ictupdate.cta.int/index.php/article/articleview/184/1/31/>.

ITU's Master International Frequency Register.[20] It is important to note that the State which has registered its satellite system first is under no legal obligation to accommodate the latecomers. Most developing countries, being the latecomers in the use of appropriate radio frequencies and orbital positions, are clearly at a disadvantage.

The ITU's coordination procedures have been abused during recent years due to the increase in demand and competition among applicants. In order to have priority over appropriate radio frequencies and orbital positions, several States have started notifying and registering radio frequencies and orbital positions more than they need, thus creating barriers for entry by other States. Such faulty regulatory procedures, increasing demand for the satellite networks and the consequent race for radio frequencies and orbital positions, has caused abuse of the system and resulted in the rise of the so-called "paper satellite" problem. This problem is real and wide spread.[21] Consequently, the ITU application processing system is seriously clogged and it takes several years for an application for registration to get processed. An effective solution to the "paper-satellite" issue and other similar serious problems is not in sight as the ITU does not have much authority and plays only a timid role. Also, there is a strong trend in "privatising"[22] and weakening the ITU as an inter-governmental organisation.

The *Declaration of Principles*, adopted by the WSIS Geneva Phase, in paragraph 45 recommends that: "The radio frequency spectrum should be managed in the public interest and in accordance with principle of legality, with full observance of national laws and regulation as well as relevant international agreements." Similarly, the *Plan of Action*, under paragraph 13 (q) and (r), recommends that the

> ITU, pursuant to its treaty capacity, coordinates and allocates frequencies with the goal of facilitating ubiquitous and affordable access. Additional steps should be taken in ITU and other regional organisations to ensure rational, efficient and economical use of, and equitable access to, the radio-frequency spectrum by all countries, based on relevant international agreements.[23]

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[20] ITU, *ITU Radio Regulations*, as adopted by the World Radiocommunication Conference (Geneva, 1995) (WRC-95) and subsequently revised and adopted by the World Radiocommunication Conference (Geneva, 1997) (WRC-97), the World Radiocommunication Conference (Istanbul, 2000) (WRC-2000), and the World Radiocommunication Conference (Geneva, 2003) (WRC-03), vol. 1 (Geneva: ITU, 2004) art. 8(1).

[21] ITU, News Release, "Scrambling for Space in Space: ITU Plenipotentiary to Tackle 'Paper Satellite' Problem" (Geneva, 16 September 2002); "Paper Tigers: The Scramble for Space Spectrum," online: ITU <http://www.itu.int/newsroom/pp02/media_information/feature_satellite.html>; Francis Lyall, "Paralysis by Phantom: Problems of the ITU Filing Procedures" (1997) 39 Proc. IISL 187.

[22] Since 1998, private sector representatives have been allowed to participate in the ITU activities at various levels, including decision-making bodies where these representatives have strong and active influence. Private corporations and institutions are entitled to membership of the ITU in the categories of "Sector Members" and "Associate Members". As of April 10, 2004, there are 638 sector members, 93 Associate members as opposed to only 189 State Members.

[23] Further more, the *Plan of Action*, *supra* note 7 at para. 9, recommends that countries should: "d) Develop and strengthen national, regional and international broadband network infrastructure, including delivery by satellite and other systems, to help in providing the capacity to match the needs

Unfortunately, these recommendations are only subject to the relevant international agreements.[24] And there seems to be no political will within the ITU membership to change legal rules relating to access to the appropriate radio frequencies and orbital positions.[25]

In brief, it can be said that the current ITU regulations and procedures are inadequate and increasingly failing to prevent abuses in the access to and use of radio frequencies and orbital positions. Consequently, a large majority of countries, especially developing countries, remains at a disadvantage regarding access to appropriate radio frequencies and orbital positions. In order to address these problems and concerns, it is essential to modernise and strengthen the ITU procedures and to give to the organisation more enforcement powers regarding the distribution of radio frequencies and orbital positions.

III. Access To International Operators: Effect Of Privatisation

Not all countries need national satellite systems for their national communication requirements. Therefore, from the beginning of the space age, international consortia were created to provide global communication access on a universal and non-discriminatory basis. In 1961, the most fundamental legal principle of global public interest in the field of satellite communications was adopted by the UN General Assembly under Resolution 1721 (D).[26] According to this principle, satellite telecommunication services were to be made available on a global and non-discriminatory basis. The 1963 (as well as the 1971) INTELSAT Agreement specified that "satellite telecommunications should be organised in such a way as to permit all peoples to have access to the global satellite system." Moreover, INTELSAT's prime objective was designed to provide "international public telecommunications services

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of countries and their citizens and for the delivery of new ICT-based services. Support technical, regulatory and operational studies by the International Telecommunication Union (ITU) and, as appropriate, other relevant international organizations in order to:
i) broaden access to orbital resources, global frequency harmonization and global systems standardization;
ii) encourage public/private partnership;
iii) promote the provision of global high-speed satellite services for underserved areas such as remote and sparsely populated areas;
iv) explore other systems that can provide high-speed connectivity;
v) Encourage the use of unused wireless capacity, including satellite, in developed countries and in particular in developing countries, to provide access in remote areas, especially in developing countries and countries with economies in transition, and to improve low-cost connectivity in developing countries. Special concern should be given to the Least Developed Countries in their efforts in establishing telecommunication infrastructure".

24 "Declaration of Principles", *World Summit on the Information Society*, 12 December 2003 (WSIS 03/GENEVA/DOC/0004), online: ITU <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!MSW-E.doc> [*Declaration of Principles*].

25 See *infra* notes 35 and 36 and accompanying text.

26 The *International Co-operation in the Peaceful Uses of Outer Space*, GA Res. 1721(XVI)(D), UN GAOR, 16th Sess., (1961) states that "communication by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis".

of high quality and reliability to be available on a non-discriminatory basis to all areas of the world."[27] Similar provisions had been made in the INMARSAT Convention with respect to a global and non-discriminatory access to its space segment[28] and non-discriminatory charges for its services.[29] Lyall correctly asserts that the principle of global public interest in the field of satellite communications has been eliminated with the privatisation of INTELSAT as well as INMARSAT.[30] The INTELSAT Agreement had guaranteed to many countries the availability of the so-called life-line services which had low revenue generating potential. "Strict commercial logic would indicate either that these services are terminated, or that their cost is immediately reflected in an increase in their charges."[31] A good number of the countries, particularly developing countries, could be marginalised and would thus not benefit from the advent of global communication services.

Therefore, the possibility of establishing another international operator, such as INTELSAT, for developing countries should be explored, taking into account the changing international regulatory environment. In this regard, the suggestion for the creation of a Global Broadband Satellite System for Development could serve as a starting point.[32] In Tunis, the WSIS should adopt a principle urging States to undertake to start considering, and eventually adopting, an international treaty, in co-operation with the WTO, ITU and other international organisations, for the purpose of establishing an international communication service provider capable of addressing global public interest concerns in the exploitation and development of ICTs. The rationale for such an action is that global problems need global solutions adopted through global governance fora. The WSIS *Declaration of Principles*, in paragraph 18, recognises "the principles of universal and non-discriminatory access to ICTs for all nations."[33] More importantly, the Tunis Phase of the WSIS[34], by reiterating the

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27 *Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)*, 20 August 1971, 1220 U.N.T.S. 21, 23 U.S.T. 3813, T.I.A.S. 7532, 10 I.L.M. 1909, art. III.

28 *Convention on International Maritime Satellite Organization* (INMARSAT), 3 September 1976, 1143 U.N.T.S. 105, 15 I.L.M. 1051, art. 7(1).

29 See *Convention Establishing International Maritime Satellite Organization*, *ibid*., art. 19.

30 Francis Lyall, "On the Privatisation of INTELSAT" (2000) 28 J. Space L. 101.

31 *Ibid. at 127.*

32 Ahmed Toumi, "A Global Broadband Satellite System to Serve Development," online: ITU <http://www.itu.int/newsroom/wrc03/documents/broadband.html>: "Currently, one of the chief priorities for the international telecommunications community is to bridge the 'digital divide,' a gap primarily due to the unequal distribution of telecommunications infrastructure between regions and countries, and between urban and rural areas. A possible way to redress this infrastructure imbalance afflicting underdeveloped countries and accelerate the advent of a global, connected information and communication society (ICT) would be through an innovative public-private sector partnership that would lead to the establishment of a global broadband satellite system".

33 *Declaration of Principles*, *supra* note 24, para. 21 states that: "Connectivity is a central enabling agent in building the Information Society. Universal, ubiquitous, equitable and affordable access to ICT infrastructure and services constitutes one of the challenges of the Information Society and should be an objective of all stakeholders involved in building it. Connectivity also involves access to energy and postal services, which should be assured in conformity with the domestic legislation of each country".

34 The World Summit on the Information Society was convened on 10th December 2003, with the aim of adopting a global plan to ensure everyone has access to information and communications. Unfortunately, even a few days before the start, it has already witnessing political wrangling which could mar this very important global initiative. See Alfred Hermida "Rifts Mar Digital Divide Summit"

UNGA Resolution No. 1721 (D), should urge the imposition of a requirement on all communication satellite systems, whether operated by intergovernmental organisations or private international service providers, to give effect to the principle of non-discriminatory access by countries. Recently, a Draft Resolution presented to the ITU Council with respect to various matters related to ITU's involvement in the Tunis Phase of the WSIS contained several principles that needed to be adopted by the Tunis Phase.[35] One of the principles, which was in square brackets, was aimed at encouraging ITU Member States "[to make proposals, to adapt the Decisions and Resolutions of the next Plenipotentiary Conference in order that the core mission of ITU be consistent with the WSIS process]." However, the adopted version of the Resolution contains a much weaker directive as it encourages ITU Member States "to make proposals to the next Plenipotentiary Conference on how the ITU might further adapt itself to the Information Society and the changing telecommunications environment, taking into account the results of the WSIS."[36] The decision of the Council shows that Member States of the ITU are not willing to take important and concrete steps to adapt legally binding treaties in order to align them with the decisions of the WSIS. It is suggested that the Tunis Phase of the WSIS should take up this matter and urge States and appropriate international organisations to undertake to change the provisions of the relevant and applicable treaties, thus effectively implementing the results of the WSIS.

IV. Foreign Operators To Provide Domestic Service: The Role Of Wto In Universal Service

It is interesting to note that privatisation, commercialisation, liberalisation and globalisation are being recognised and promoted as means for expansion in the ICT sector. But it is also becoming a generally accepted fact that they will not be sufficient to achieve desirable social goals and might not serve global public interest in information and communications. Therefore, efforts are being made to safeguard public interest, primarily in the form of national regulatory policies to implement the principle of universal service. It has generally been argued that foreign operators would be only interested in the profit-making sectors of the market. Once the market is open, however, it is difficult to prevent cream skimming practices unless vigorous national regulatory measures are taken. Therefore, the WTO agreement (particularly the *Reference Paper*)[37] allows countries to impose universal service obligations on all

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BBC News (2 December 2003), online: BBC News <http://news.bbc.co.uk/2/hi/technology/3253870.stm>. See also, "US Ready for Battle at Information Summit" (3 December 2003), online: SpaceDaily <http://www.spacedaily.com/2003/031203204121.3rn8ml9j.html>.

35 ITU, *Draft ITU Council Resolution on ITU activities relevant to WSIS,* 10 June 2004, ITU Doc. C04/DT/5-E.

36 ITU, *ITU Council Resolution 1222 on ITU Activities relevant to WSIS,* 17 June 2004, ITU Doc. C04/76-E.

37 The WTO has 135 Members countries that account for over 90% of world trade. (WTO, *Members*, online: WTO <http://www.wto.org/wto/about/organsn6.htm>). The General Agreement on Trade in Services is the first ever set of multilateral, legally-enforceable rules covering international trade in all services except those provided in the exercise of governmental authority (WTO, *Status of acceptances*

communications operators so that all people and all parts of a country are served fairly.

The right of each country to impose a self-defined universal service obligation on service providers is an important tool for countries to effectively achieve universal service when they are obliged to open up their communication markets to competition from foreign operators. The *Plan of Action* adopted by the WSIS Geneva Phase, under sub-paragraph 27 (D)(2)(g), also recommends as follows: "Countries should consider establishing national mechanisms to achieve universal access in both underserved rural and urban areas, in order to bridge the digital divide." Since the imposition of a universal service obligation is left to individual countries, in practice, that would leave most of developing countries at a disadvantage as they do not have extensive, detailed and precise national regulatory frameworks requiring the imposition of such an obligation. They also have unequal bargaining power as compared to powerful multinational communications operators. Therefore, the goal of universal service remains unachievable in almost all developing countries, whose populations remain without reasonable access to adequate information and affordable means of communication. Unfortunately, there is currently no clear indication or serious step being taken in international legal fora that would change the status quo in the near future.

V. Lack of appropriate national regulatory frameworks

The WSIS *Declaration of Principles* in paragraph 39, lays emphasis on the need for appropriate regulatory national frameworks and the role of the national government:

> The rule of law, accompanied by a supportive, transparent, pro-competitive, technologically neutral and predictable policy and regulatory framework reflecting national realities, is essential for building a people-centered Information Society. Governments should intervene, as appropriate, to correct market failures, to maintain fair competition, to attract investment, to enhance the development of the ICT infrastructure and applications, to maximize economic and social benefits, and to serve national priorities.

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of the 4th Protocol, online: WTO <http://www.wto.org/wto/services/tel.htm>). The Agreement on Basic Telecommunications annexed to the GATS was concluded on 15 February 1997, took effect on 1 January 1998, and involves over 80 countries which account for more than 90 percent of global telecommunications service revenues. During the negotiations on telecommunications in the WTO, regulatory disciplines inscribed as additional commitments in schedules (an approach made possible by GATS Article XVIII) were elaborated a set of principles in a document called the *Reference Paper* covering matters such as competition safeguards, interconnection guarantees, transparent licensing processes, and the independence of regulators (WTO, Negotiating Group on Basic Telecommunications*, Reference Paper on Regulatory Principles* (24 April 1996), online: WTO <http://www.wto.org/wto/ services/tel23.htm>).

The WTO agreements (especially the *Reference Paper*) impose clear and fairly detailed requirements concerning the scope and nature of national ICT regulatory approaches and structures, to the effect that ICT facilities and services reflect technological advances and pro-competitive practices in this sector. Other provisions deal with competition safeguards, interconnection guarantees, universal service and independent regulation. The WTO agreements oblige countries to regulate all ICT services reasonably, objectively and impartially. Therefore, national ICT regulatory frameworks must be in accordance with the WTO agreements and principles.

Telecommunication equipment, telecommunication network services, computer hardware, computer operating software, audiovisual distribution networks, and audiovisual content industries are now converging, both in technology and in the marketplace.[38] We are also witnessing the convergence of various forms of carriage as well as content. The challenge then is to design a sustainable regulatory framework or approach that is tailored to this rapidly converging environment in order to achieve social, cultural and economic benefits for society as whole. At the same time, human resources at the national level need to be fully and adequately trained to design and administer national regulatory regimes within a complex and competitive environment.

The notion of establishing an information and communications regulatory body is perhaps the most important one from the regulatory and administrative perspectives.[39] There is a strong trend in the creation of regulatory bodies in all countries. However, little attention is being paid to their abilities and capabilities. The ITU's Annual Regulatory Survey indicates that 75% of all regulators lack sufficient financial, human and physical staff resources.[40] An incompetent and ill-equipped regulator may not be in a position to perform its functions, and thus the government may not be able to achieve its goals of a competitive ICT market and universal service.

In developing countries, because of the serious lack of appropriate national regulatory frameworks and the absence of effective regulators, the expansion of ICTs is being delayed and the goal of universal service in practice is not being adequately achieved. Consequently, large sections of population of these countries continue to remain without appropriate access to modern means of communications and thus unable to enjoy the advantages which the ICTs offer to the global information society.

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38 ITU, "The Changing Role of Government in an Era of Telecom Deregulation", (Paper presented to the Geneva International Telecommunication Union, Regulatory Implications of Telecommunications Convergence, Chairman's Report of the Sixth Regulatory Colloquium, 11-13 December 1996) at 8.

39 William H. Melody, "Stimulating Investment in Network Development: Roles of Telecom Regulation", (Background Paper WDR 0301, presented to the WDR Dialogue Theme, 2003).

40 ITU, News Release, "Global Telephone Access Improves As Internet Gap Widens" (15 March 2002), online: ITU <http://www.itu.int/newsroom/press_releases/2002/05.html>.

In April-May 2003, the ITU conducted a global survey on the necessity of targets, mentioned in the Introduction to this article, set for improving access and connectivity to ICTs. The results of the survey, which were consistent across all the regions, show that more than 94% of respondents

> support the belief that if the information society is to be one in which all citizens throughout the world can equally access and use information resources for sustainable economic and social development, that cyberspace should be declared a resource to be shared by all for the global public good.[41]

However, such a strong show of support from the general public across the world and the *Declaration of Principles* and *Plan of Action* adopted by the Geneva Phase of the WSIS must be matched by the above-mentioned concrete regulatory steps, both at international and national levels, in order to bridge both the international and domestic digital divides, lest everything so far done by the international community remain an idealistic dream.

Finally, the Tunis Phase of the WSIS should consider the two following matters and adopt the suggested decisions:

(a) paragraph 18 of the *Declaration of Principles* adopted by the Geneva Phase of the WSIS should be replaced by something like: "In order to effectively implement the decisions of the WSIS, all States and relevant international organisations, particularly the World Trade Organization and the International Telecommunication Union, must adapt, as soon as practical, all the applicable legal instruments to make them consistent with the results of the WSIS"; and

(b) human intellectual capacity in regulatory matters is indispensable for the expansion of information and communication facilities in the developing countries; thus there is an urgent need to achieve significant increase in such capacity. To this effect, donor institutions, both national and international, must give high priority to, and generously assist, appropriate capacity-building initiatives in policy-making and regulatory matters in developing countries, particularly by supporting programs in those countries themselves and training people from the unique social, political and legal systems of their respective countries. "One Size Can Fit All—in the Manner of Business Regulation," the regulatory philosophy and approach suggested by the World Bank,[42] must be critically assessed in the context of the needs of each country and be applied selectively, that is, only if considered appropriate.

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41 ITU, News Release, "'Global' Support for Information Society Targets - Cyberspace seen as a Shared Resource for the Global Public Good Results Released on World Telecommunication Day" (17 May 2004), online: ITU <http://www.itu.int/newsroom/press_realeases/2004/12.html>.

42 World Bank, *Summary of Doing Business in 2004: Understanding Regulation* (Washington: The World Bank, 2004) at xvi: "Many times what works in developed countries works well in developing countries, too".