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| **The APT Preparatory Group for PP-14** | | **Document**  **PP14-3/OUT-01** | |
|  | | **05 June 2014** | |

**PRELIMINARY APT COMMON PROPOSAL: ITU STABLE CONSTITUITON**

**1. Introduction**

The Asia Pacific Telecommunity (APT) discussed the stable Constitution process at its second and third preparatory meetings for PP-14. Pursuant to Resolution 163 (Guadalajara, 2010), the extraordinary session of Council in 2010 established a Council Working Group on a Stable ITU Constitution (the “Group”), open to all Member States of the Union.

Key issues identified by the Group

The following key issues were identified by the Group:

***a. Will the Stable Constitution be a new treaty or an amendment to the current Constitution?***

* The Group noted that certain provisions of the stable Constitution would need to be further reviewed and modified, as necessary, following the relevant determination by the Plenipotentiary Conference concerning the question of whether the stable Constitution would constitute an amendment to the current Constitution or, alternatively, a new treaty that would entirely abrogate and replace the current Constitution.
* Certain Member States within the Group were of the opinion that, irrespective of the decision regarding Question A, CS21 could be modified to read as set forth below; with the proposed modifications to the current text of CS21 appearing in italics:

“a) any State which is a Member State of the International Telecommunication Union as a Party to any International Telecommunication Convention prior to the entry into force of *the* Constitution and the Convention *adopted by the Additional Plenipotentiary Conference (Geneva, 1992) and/or a Party to them prior to the entry into force of this Constitution*;”

* The Group recognized that any decisions concerning or arising from the question of whether the stable Constitution constitutes an amendment or a new treaty fell outside the mandate of the Group. Rather, these decisions should be made, as necessary, by the Plenipotentiary Conference.

***b. Should the General Provisions and Rules be regrouped, under a single document, with General Rules of Conferences, Assemblies and Meetings of the Union?***

* In light of the nature of and legal status proposed to be accorded to the General Provisions and Rules, some members of the Group were of the opinion that the current General Rules of Conferences, Assemblies and Meetings of the Union could be regrouped, within the framework of a single document, with the General Provisions and Rules.
* Furthermore, the Group remarked that, in the event of such regrouping, certain provisions of the draft stable Constitution and draft General Provisions and Rules would need to be further reviewed and modified, as necessary, by the Plenipotentiary Conference.
* The Group recognized that decisions relating to or arising from such regrouping fell outside the mandate of the Group, and should be properly made by the Plenipotentiary Conference.

***c. The nature, binding effect and order of precedence (hierarchy) of the General Provisions and Rules could be set forth in a new Article 4A of the stable Constitution.***

* The Group considered it would be advisable to create a new Article 4A, proposed to be titled “General Provisions and Rules,” under the draft stable Constitution.
* In the opinion of the Group, this proposed new Article 4A could set forth the nature, binding effect and order of precedence (i.e., hierarchy) of the General Provisions and Rules. By doing so, proposed new Article 4A would serve a similar purpose and effect as those of current Article 4 of the draft stable Constitution; which sets forth, among other things, the nature and order of precedence of the treaty instruments of the Union.
* It should be noted that one Member State within the Group was of the opinion that the binding nature of the General Provisions and Rules, as set forth in the text of current CS24 and proposed new Article 4A of the draft stable Constitution, could be worded with a spirit similar to Article 26 of the General Provisions and Rules.
* The Group recognized that the making of any modifications (other than necessary consequential changes) to the text of the current Constitution and Convention fell outside the mandate of the Group.

***d. Possible unintended consequences of requiring compliance with the General Provisions and Rules.***

* In Annex II to its Report, the Group retained within square brackets the following provisions (or portions thereof) of the draft stable Constitution: CS92, CS115, CS142, CS145A, CS147, CS193, CS194 and CS207.
* If each reference to the Convention contained in the above-mentioned provisions were substituted with a reference to the General Provisions and Rules, then decisions of conferences and assemblies of the Sectors, as well as decisions of world conferences on international telecommunications (CS147) and special and regional arrangements between Member States (CS193 and CS194), would be subject to compliance and conformity with, and thereby would become subordinate to, a non-treaty instrument (i.e., the General Provisions and Rules).
* The Group decided to keep these provisions in square brackets in order to highlight the need for additional guidance from the Plenipotentiary Conference concerning possible unintended consequences of requiring compliance with the General Provisions and Rules under the provisions identified.

***e. The General Provisions and Rules should include an article with a spirit and effect similar to those of Article 6 of the draft stable Constitution.***

* In determining consequential changes necessary to be made to Article 6 of the draft stable Constitution, the Group concluded that it would not be appropriate to mechanically replace cross-references to the Convention found in such article with cross-references to the General Provisions and Rules.
* The Group noted that Article 6 of the draft stable Constitution deals with the execution of instruments (i.e. treaties) of the Union. In light of the foregoing and of the fact that the General Provisions and Rules will not have treaty status, the Group arrived at the conclusion under paragraph 3.19 of its report.
* Notwithstanding such conclusion, certain members of the Group were of the opinion that a new article (Article 32A), with a spirit and effect similar to those of Article 6 of the draft stable Constitution, should be introduced under the General Provisions and Rules, as follows:

“Article 32A  
**Execution of these General Provisions and Rules**

The Member States are bound to abide by the relevant provisions of these General Provisions and Rules in all telecommunication offices and stations established or operated by them which engage in international services or which are capable of causing harmful interference to radio services of other countries, except in regard to services exempted from these obligations in accordance with [Article 48] of the Constitution.

The Member States are also bound to take the necessary steps to impose the observance of the relevant provisions of these General Provisions and Rules upon operating agencies authorized by them to establish and operate telecommunications and which engage in international services or which operate stations capable of causing harmful interference to the radio services of other countries.”

* The Group acknowledged that the making of any modifications (other than necessary consequential changes) to the text of the current Constitution and Convention fell outside the mandate of the Group.

***f. Should all financial provisions included in Article 28 of the current Constitution remain in the stable Constitution?***

* The following provisions of the draft General Provisions and Rules, which certain members of the Group felt were of an operational and procedural nature, were retained by the Group within square brackets in Annex II to its Report: GP&R469A to GP&R469M.
* After adoption of Annex I by the Group, other members of the Group expressed the opinion that the provisions identified above should not be separated from the remaining provisions of Article 28 of the draft stable Constitution, as that article currently appears in Annex II to the Group’s Report. Rather, all provisions under Article 28 of the current Constitution should remain under Article 28 of the stable Constitution.
* It was specifically mentioned by certain members of the Group that the provisions contained in Article 28 of the current Constitution are of specific importance both for the Union and for the Member States and the Sector Members. These members also noted that the Constitution contains specific provisions in Article 55 for the amendment and acceptance of changes to the Constitution, and that these provisions need to be maintained and applied for any change to Article 28. Finally, these members stated that the provisions of Article 42 of the current Convention (now Article 34 in the General Provisions and Rules) would not be sufficient to safeguard the interest of the Member States and the Sector Members in this case.
* Depending on the Plenipotentiary Conference’s decision concerning the question presented, the draft stable Constitution and draft General Provisions and Rules would need to be further reviewed and modified, as necessary, to give effect to such decision.

***g. What amendment procedures will apply to the stable Constitution and to the General Provisions and Rules, respectively?***

* Article 55 of the draft stable Constitution, as well as Article 42 of the current Convention (now Article 34 of the draft General Provisions and Rules), remain unchanged and within square brackets in Annex II to the Group’s Report; pending the Plenipotentiary Conference’s decision concerning the amendment procedures applicable to the stable Constitution and the General Provisions and Rules, respectively.
* Certain members of the Group considered that, to preserve the stability of the Constitution, the provisions for amending the Constitution found in Article 55 of the draft stable Constitution should be reviewed and modified by the Plenipotentiary Conference. In particular, two Member States contributing to the work of the Group submitted specific proposals concerning the manner in which Article 55 could be amended in light of such objective.
* The Group recognized that the making of any modifications to the text of the current Constitution (including its Article 55) and the current Convention (including its Article 42) fell outside the mandate of the Group, and properly correspond to the Plenipotentiary Conference.

***h. Will the “Settlement of Disputes” provisions contained in CS233 of the draft stable Constitution apply to the General Provisions and Rules?***

* In Annex II to its Report, the Group retained within square brackets the cross-references to the General Provisions and Rules which are found in CS233.
* Certain Member States within the Group were of the opinion that CS233 of the draft stable Constitution would apply to the settlement of disputes among Member States relating to the interpretation or application of treaty instruments of the Union, only. By contrast, these Member States considered that CS233 would not apply to the settlement of disputes among Member States relating to the interpretation or application of non-treaty documents of the Union, such as the General Provisions and Rules.
* The Group recognized, however, that any decision concerning whether or not the scope of CS233 extends to non-treaty documents, such as the General Provisions and Rules, was beyond the mandate of the Group, and should be properly made by the Plenipotentiary Conference.

***i. Definitions contained in Annexes to the draft stable Constitution and draft General Provisions and Rules should be further reviewed and transferred to the appropriate document.***

* Article 5 of the draft stable Constitution, as well as the respective Annexes to the draft stable Constitution and draft General Provisions and Rules, were maintained unchanged and within square brackets in Annex II to the Group’s Report.
* The Group adopted this approach in order to highlight that such Article 5 and Annexes would need to be carefully reviewed and modified, as necessary, by the Plenipotentiary Conference once it had agreed upon the substantially final texts of the stable Constitution and of the General Provision and Rules.
* Certain members of the Group were of the opinion that all definitions contained in the respective Annexes to the current Constitution and the current Convention should be transferred, in their entirety, to an Annex to the stable Constitution. Meanwhile, other members of the Group considered that only those definitions for terms used in the Constitution or the Administrative Regulations should be transferred to an Annex to the stable Constitution; however, definitions for terms used only in the General Provisions and Rules (but not in any treaty instruments of the Union) should be retained in an Annex to the General Provisions and Rules.
* The Group nevertheless noted that any revisions of the type proposed to the definitions contained in the draft stable Constitution and draft General Provisions and Rules fell outside the mandate of the Group, and should be properly decided upon by the Plenipotentiary Conference.

***j. Should all dispositions included in new Chapter VII of the General Provisions and Rules be transferred to the stable Constitution?***

* The new Chapter VII (“Various Provisions Related to the Operation of Telecommunication Services”) of the draft General Provisions and Rules was retained by the Group within square brackets in Annex II to the Group’s Report.
* After adoption of Annex I by the Group, certain members of the Group expressed the opinion that all provisions under new Chapter VII of the General Provisions and Rules should be transferred to the stable Constitution.
* Depending on the Plenipotentiary Conference’s decision concerning the question presented, the draft stable Constitution and draft General Provisions and Rules would need to be further reviewed and modified, as necessary, to give effect to such decision.

Discussion at Council 2013 Session

The APT noted that Council 2013 considered the Report of the Council Working Group on Stable Constitution as well as submissions from a few Member States but no decision was made except to forward the Report of the Group to ITU Membership together with cross references to the four contribution from Member States and the summary record of the Council in that regard.

**2. Proposal**

The APT appreciates the efforts of the CWG-STB-CS, established pursuant to Resolution 163 (Guadalajara, 2010), recommending ways and means to ensure the stability of the Constitution. However, the outcome of this Council Working Group reveals that the efforts aimed at stabilization could in fact create less stable legal instruments. APT further believes that moving fundamental and stable texts into a new “Stable Constitution” and moving all other texts to a new non-treaty and non-binding document in fact, will undermine the stability of a set of treaties that have endured since their adoption in 1992.

Moreover, Article 4 establishes that the Constitution is the Basic Instrument of the Union and that it is complemented by the Convention and the Administrative Regulations. It also establishes the hierarchy among the various instruments so that it is certain which instruments would prevail in case of inconsistencies. Article 4, as it is currently in force, provides a stable legal framework for the Union. Breaking this very clear, stable hierarchical link by compromising a sort of totally unclear and vague hierarchy between the proposed Draft Stable Constitution and the Second Document (existing Convention which is proposed to be labeled as General Provisions and Rules) will further create an unprecedented legal gap in the Basic Instrument of the Union which would be detrimental to the purposes of the Union as stipulated in the Constitution. For this reason, the APT proposes No Change to this important Article. The APT further proposes that Resolution 163 (Guadalajara, 2010) be suppressed.

In summary APT proposes the following:

**PACP/01**

* **No change to the General Structure of the Basic Instrument of the Union** as currently contained in the Constitution and the Convention in force i.e. All Chapters and Articles of the two Instruments are kept as they are.

**PACP/02**

* **No change to the Status of the Constitution and the Convention** i.e. Both Instruments will continue to have the treaty nature and legally binding and require Ratification, Approval, Acceptance or Accession. In other words, the current hierarchy, relation and status of the Basic Instruments of the Union to be maintained as currently described in Article 4 of the Constitution.

**PACP/03**

* **No change to Article 4 of the Constitution** (the Hierarchical relation between the Constitution and the Convention and the Administrative Regulations should be maintained as they are to date).

**PACP/04**

* **Suppression of Resolution 163 (Guadalajara, 2010)**