A WCIT Proposal Primer

What Participants Need to Know For Dubai

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Introduction

After a nearly a year of regional preparatory meetings, the World Conference on International Telecommunications (WCIT) will take place in Dubai December 3 – 14. The conference, which will convene government delegations from 194 countries, will attempt to revise the International Telecommunication Regulations (ITRs) that govern the way nations handle telecommunications network traffic as it crosses their borders.

Throughout this debate, much criticism of the economic implications of new proposed ITR revisions was leveled at the European Telecommunications Network Operators Association's (ETNO) proposal; ETNO proposed replacing the current market-based mechanism that governs Internet interconnection payments between international carriers. The proposed scheme would designate Internet content providers as "call originators" and subject them to a "sending party network pays" rule, thereby allowing telecom operators to charge rates they believe are commensurate with the bandwidth their content consumes; ETNO proposed that this principle be given the force of an international treaty administered by the International Telecommunications Union (ITU).

While ETNO is not a Member State and therefore its proposal has not been formally submitted to the conference, a number of troubling proposals remain before the WCIT, including some that have resuscitated provisions or concepts from ETNO. Such proposals would have deeply problematic effects on the developing world's ability to access low-priced online content.

This analysis outlines four key areas that should be of interest to international observers and government delegations during the WCIT.

1) ***Arab States & African Telecommunication Union– New Regulations on Access Charges***

The proposals of the Group of Arab States and the African Telecommunication Union Administrations seek to fundamentally alter the nature of the Internet's infrastructure by imposing fees for content coming into networks.

Here's how this would work. A young person in, say, Cameroon requests a YouTube video. A small amount of data goes out to wherever the server is; a large amount of data flows in into the Cameroon network, a large net inflow. According to the proposals, the sending network would have to pay an "access charge" that is considered appropriate by the various governments, thereby elevating government jurisdiction over the international flow of Internet traffic. That a payment has to be made for responding to a request made by a customer of the network benefitting from the payment is patently illogical. It also creates a perverse incentive for network to generate requests by its customers so that it can extract payments from foreign networks hosting content.

Specifically, the Arab States and African proposals for Article 6.0.6 would mandate Member States to take "measures to ensure that operating agencies have the right to charge providers of international communication applications and services appropriate access charges based on the agreed quality of service."

Definitions of "quality of service" are already addressed in the ITRs treaty and would therefore be a duplicative regulation. The regulation of "access charges" as mandated in the treaty could also impose new fees on developing-world Internet users or result in them being deprived of content in a Balkanized Internet. This proposal could make unsustainable the free content business models that have driven innovation on the Internet. Government determination of whether charges are "appropriate" constitutes heavy-handed regulation that is contrary to the commitments made by many countries under the General Agreement on Trade in Services (GATS).

2) Arab States, African Telecommunication Union, & Regional Commonwealth in the field of Communications – Regulating Private Entities

The Arab States, African Telecommunication Union Administrations, and Regional Commonwealth in the field of Communications (RCC) proposals, among others, similarly set out revisions that would result in new economic regulation of the Internet. Specifically, these proposals would expand the scope of entities covered by the ITRs. For example, proposed revisions to Article 1.1 would replace references to "administrations" (another term for regulators) with "member states and *operating agencies*" (own italics).

Under such proposals, the scope of the treaty has been expanded to address mostly private companies, including entities that are not directly engaged in international telecommunication, and possibly even individual users of telecommunications services. National laws currently permit States to impose legal obligations on private entities operating within their territories, and this new provision would therefore be a duplicative regulation in an international treaty.

Even more problematic, the revised Article 1.7 in the Arab proposal states, "these Regulations recognize the right of any Member State, subject to national law and should it decide to do so, to require that operating agencies, which operate in its territory or provide an international telecommunication/ICT service to the public in its territory, be authorized by that Member State."

By expanding the scope of the provision to cover companies that operate in a territory *or* "provide an international telecommunication/ICT service to the public in its territory," this revision appears to endorse mandatory national licensing for any member of a broadly defined class of provider of services that are accessible within the national territory, even if the service provider is located outside the country. This new provision undermines the ability to practice cross border trade and ignores the impracticality of authorizing entities outside national borders. Because the provision refers to "operating agencies" as well as "telecommunication/ICT service," this provision arguably endorses a Member State licensing all providers of online ICT services that can be accessed from within their

country. This increase in the regulatory authority of Member States over companies and individuals located far outside their borders could undermine the unity and utility of the global Internet. It also is contrary to the commitments made by many countries to the GATS.

3) India's Infringement of National Sovereignty

The proposal from the Indian government – a country with some of the fastest Internet penetration rates in the world – lays out new provisions to increase international regulations in ways that would undermine India's sovereign right and ability to manage its Internet infrastructure.

The Indian government's proposal uses mandatory language (e.g., "Member States shall") that would create binding obligations on ITU Member States such as India. This would specifically affect areas of tariff/tax information, informing roamers of the emergency calling number, and fraud/calling party identity obligations. However, many countries already regulate these activities and may choose to implement their own approaches that are more closely tailored to the needs their citizens.

For example, a new Article 3 provision on calling party identification states, "International calling party number delivery shall be provided in accordance with the relevant ITU-T Recommendations." This line effectively elevates ITU-T Recommendations to mandatory treaty status with regard to calling party identification. Additionally, a new Article 6 provision regarding pricing states, "Member States shall promote cost-oriented pricing." National governments already adopt policies with respect to technical standards, calling party origination information, and commercial activities within their territories. Adopting new provisions in these areas could therefore interfere with established national policy and commercially-negotiated agreements.

Opening the door to the use of mandatory language in the treaty could force India to agree to policy agendas of other counties that may have divergent interests to India's with respect to the Internet or telecommunications, for example on issues related to content regulation. Therefore, the use of mandatory language, which could infringe on Member States' national sovereignty, should be avoided. Furthermore, it should be noted that India's ICT industry has reportedly opposed the Indian government's proposal. An Internet & Mobile Association of India (IAMAI) official recently stated, "We represent a vast majority of Internet companies but have not been consulted by the DoT. We are completely opposed to ITU's jurisdiction in any area related to Internet policy." For India to adopt new policies elevating the ITU's jurisdictional role would be to go against the interests of India's ICT industry.

4) International Warnings Against ITU Jurisdiction

International organizations including UNESCO and OECD have rightly recognized the powerful role of the Internet to provide greater freedom of expression and open up Emerging Markets.

UNESCO and ITU are working together on the Broadband Commission. In an unprecedented intervention the UNESCO's Director for Freedom of Expression and Media Development, Professor Guy Berger, has warned ITU that the amended ITRs will not only "threaten freedom of expression" but may also "incur extensive public criticism that could impact upon the UN more broadly."

The OECD recently released a new study, "Internet Traffic Exchange; Market Developments and Policy Challenges." This report examines how the Internet is reaching new developing world communities at unprecedented levels. The OECD notes that "The Internet has expanded to cover the globe, with many emerging economies growing at a faster pace and closing the "digital divide" gap with OECD countries… Evidence shows that, when allowed to do so, market participants will self-organize efficient Internet exchange points, producing Internet bandwidth to the benefit of the local economy and significantly reducing their costs, including in foreign currency." Such progress should not limited by a few governments seeking to elevate the ITU for their own purposes.

Conclusions

The Internet is a wonderful platform for innovation and entrepreneurship. In the developing world, young people are busy developing mobile apps because they believe that the barriers to entry are low. Government policy can help or hinder the ease with which Internet users can benefit from this innovation. By standing up for market liberalization and the inclusive multi-stakeholder process that currently governs the Internet, whereby all parties collaborate to shape the Internet, governments can help the growth of the Internet.

By voting for "access charges" and other ill-considered proposals that elevate ITU jurisdiction at the WCIT in Dubai, they can hinder such progress. The first principle of public policy is "do no harm." The "access charge" proposals that are being proposed by the African and Arab States will do harm. More can be done to unleash the innovative energies of our people. But let us begin by doing no harm.