

Kenya at the 2012 World Conference on the International Telecommunication Regulations (WCIT)

Introduction

Kenya has seen great socio-economic, political, cultural and individual benefits of mobile and Internet. Recognizing these benefits, Kenya has a goal of 100% Internet penetration by 2017 and is well on its way. In 2012, Kenyan mobile phone usage jumped 19%. Moreover, the Kenya Internet Exchange Point (KIXP) currently localizes more than 1Gbit/s of peak traffic, dramatically reducing latency (from 200-600ms to 2-10ms on average), while allowing ISPs to save almost \$1.5 million per year on international connectivity. The IXP also increases mobile data revenues by an estimated \$6 million for operators having generated at least an additional traffic of 100Mbit/s per year; helps the localization of content in the country; is critical to raising government tax revenues, and increasingly acts as a regional hub for traffic from neighboring countries with over 50 regional networks accessible directly from KIXP.

On matters pertaining to security, the Communications Commission of Kenya has established the National Computer Security and Incident Response Team (CSIRT) that coordinates the dissemination of information from various industry-specific CSIRTs. The Internet Service providers have a functional CSIRT that provides information that is relevant to resolve potential security threats and vulnerabilities to its members.

The International Telecommunications Regulations (ITRs)

In early December 2012, a global treaty conference, the World Conference on the International Telecommunication Regulations (WCIT), was held under the auspices of the International Telecommunication Union (ITU). The treaty, called the International Telecommunication Regulations (ITRs), was developed at the 1988 World Administrative Telegraph and Telephone Conference (WATTC-88) and had not been revised since that time. The ITRs are intended to facilitate “global interconnection and interoperability” of telecommunications traffic across national borders. The regulations provide a framework for international cooperation in which global interoperability of telecommunications networks is achieved.

Kenya’s national consultations process leading to the WCIT12

Kenya held several multi stakeholder national consultations leading up to the WCIT meeting in Dubai:

- Kenya IGF, which commenced with online discussions conducted on three local lists serves namely the Kenya ICT Action Network (KICTANet) ¹, skunkworks and ISOC Kenya and culminated in a face to face meeting that took place on July 6, 2012²
- The 2012 East African Internet Governance Forum (EAIGF), which took place in July 17-18, 2012³ and held in collaboration with the African Telecommunications Union (ATU) with the second day, 18th July fully dedicated to discussing the ITRs.

¹ <http://www.kictanet.or.ke/wp-content/uploads/2012/07/KENYA-IGF-2012-ONLINE-REPORT.pdf>

² Kenya IGF 2012 Programme: <http://www.kictanet.or.ke/?p=10217>

³ EAIGF 2012 Programme: http://www.eaigf.or.ke/files/5th_EAIGF_Programme_July_17_18_2012.pdf

- Kenya ITRs National Consultations convened by the CCK took place on November 13, 2012. On September 24, 2012, the CCK had released the ‘African Common Proposals, for public consultations.⁴ It had been expected that after the public consultations, Kenya would develop a national position.

This multi stakeholder model of policy making is enshrined in Kenya’s 2010 Constitution where article 10 provides for the participation of citizens as one of the national values and principles of governance. It provides inter alia that: -

10. (1) the national values and principles of governance in this Article binds all State organs, State officers, public officers and all persons Whenever any of them--

- (a) Applies or interprets this Constitution;
- (b) Enacts, applies or interprets any law; or
- (c) Makes or implements public policy decisions.

(2) The national values and principles of governance include--

- (a) Patriotism, national unity, sharing and devolution of power, The rule of law, democracy and participation of the people

In the spirit of the new constitution, the Kenya delegation to WCIT 2012 was multi-stakeholder in nature and consisted of representatives from industry, technical community, civil society, media, academia and government. The head of delegation was the Permanent Secretary, Ministry of Information and Communications Dr. Bitange Ndemo.

The ITU Secretary General had encouraged member states to hold multi-stakeholder consultations to help form their national positions and encouraged delegations to include members from civil society, academia and the private sector. He was proud of this as an innovation in the ITU, recognizing, in conformance with the Tunis Agenda, “the need for the development of public policy by governments in consultation with all stakeholders.” The Kenya national multi stakeholder processes produced results that were not compatible with the current state of the 2012 treaty. During various consultations stakeholders recommended that the ITRs remain high-level principles and the scope be limited to telecommunications. However, during the WCIT other subjects were included that unacceptably altered the nature of the discussions, and ultimately of the ITRs. Kenya's national multi stakeholder consultations produced several viewpoints and recommendations, this process should be respected and the revised treaty must therefore be considered at the national level before signing is considered. There is a need to hold further multi stakeholder consultations before we sign or take reservations and sign, or not sign. Particularly when there were issues that clashed with the national position.

While the African block, (based on political interests and lack of foresight on the unintended consequences)-supported positions throughout the conference that may cause damage to our economy. For instance, two proposals that were in the African Common Proposal that would have had significant unintended consequences for Kenya are as follows:

⁴ http://www.cck.go.ke/links/consultations/current_consultations/Africa_T09-CWG_WCIT12-C-0116xMSW-E1.pdf

1. The definition of Operating Agencies which would have potentially caused all communications providers, from mobile operators to ISPS and website providers to be subject to the provisions of the treaty. This would have caused instability in our communications market, with even the potential for MPESA (it is an international system now) coming under the provisions of ITRs.

2. The addition of article 41K, which proposed a fair compensation for, carried traffic (Sending party pays for traffic termination). This proposal was prescriptive of business models for member states to apply. This business model while beneficial in the short term for less developed countries, those that have made significant development such as Kenya and are exporting traffic, would suffer in the long term through such a provision. The unintended consequence would be a rise in the cost of services to end users attributed to the change in the business models.

In addition, the treaty in its current state is inconsistent with the multi-stakeholder model of Internet governance. It is Kenya's long-standing position that ICT and Internet policy must be multi-stakeholder driven and should not be determined by governments, rather by broader society, citizens and communities. Such consultations must be multi-stakeholder in nature including civil society, private sector, technical community and others.

Delaying the decision to sign the 2012 ITRs was the right decision both because of the unprecedented expansion of "human rights" language in the treaty that is inconsistent with international human rights standards, and the encroachment of the treaty into regulation of the Internet that could endanger Kenya's efforts to grow its Internet-based industries. Our decision to not sign at WCIT-12 is reinforced by the fact that, to the extent there are positive aspects to the treaty, Kenya and its businesses will still enjoy many of their benefits in the global international telecommunications ecosystem. We should take the decision to sign, take reservations, or not sign after further national multi stakeholder consultations and careful consideration of Kenya's national interest. Kenya is not alone in making this determination; indeed 55 countries did not sign the Final Acts of the Conference in Dubai, including both developing and developed countries, and Member States from every continent. It is normal for many countries to sign such important and binding documents like treaties after a round of consultation at the national level.

Contentious issues

Preamble *"These Regulations recognize the right of access of Member States to international telecommunication services"*

This unprecedented new human rights language is inconsistent with established principles of international law. It is a dilution of human rights as applied to the individual and a shift towards towards collective, state rights. This language was added to the Preamble of the treaty as a supplement to the commitment made by Member States to implement the revised Regulations "in a manner that respects and upholds their human rights obligations." The new language - (which was added on the last working day of the conference pursuant to a vote called for by Iran, and supported by various African and other nations) - appears to recognize a unique international human right that is inconsistent with established human rights precedents.

Regardless of whether Kenya agrees with the underlying sentiment of the provision, the ITU and telecoms sector are not appropriate venues for the creation and recognition of new human rights. Kenya, like other countries, should carefully and fully consult with all relevant legal experts and national stakeholders (especially those in other, non-telecoms parts of the government), the private sector, and civil society to determine if this radical expansion of “human rights” to include governments is appropriate and lawful.

Kenya remains committed to upholding human rights obligations and to the values of freedom of expression and the free flow of information and ideas on the Internet. Kenya will continue to work with the ITU and others to achieve universal affordable access.

-**Recognized operating agencies** versus operating agencies “authorized operating agencies,” this is a category that could include a large number of new entities such as Internet access service providers (ISPs). To the extent regulatory solutions are required in these areas, they can be implemented on the national level without this revised treaty. Ultimately, Kenya - with vibrant and growing ICT and Internet content industries - should see this expansion of international regulation as adverse to its national economic interests.

- **Article 3.7 “Implementation of regional telecommunication exchange points”**: This is a new introduction to the ITRs. There is no definition of “Regional telecommunication exchange points” in the telecommunications sector or ITRs. As such, this may imply “regional Internet exchange points”. The growth of regional “Internet” exchange points is driven by social economic factors. Kenya has strategically managed to develop these factors in its favor hence the growth of the Kenya Internet Exchange Point (KIXP) and Mombasa Internet Exchange Point (IXP). The unintended consequence of this article will be eliciting discussion on the location of the regional telecommunications exchange point, at regional level, since each country cannot have one. Such a process is likely to hamper national efforts, growth or emergence of a regional exchange point driven by the fundamentals.

-**Article 5A “Security and robustness of networks”**: ITRs is not a useful venue for addressing security issues. This would have significant implications for issues of privacy and freedom of information. Kenyan stakeholders have made significant progress in addressing security concerns through collaboration and setup of industry specific CSIRTs coordinated by the CCK. We therefore encourage national, regional and international collaboration and cooperation to further enhance the effectiveness of the efforts made thus far. Kenya is an active and committed participant in such efforts, for example the multi stakeholder commonwealth Cybercrime (CCI) Initiative among others.

-**Article 5B: “Unsolicited bulk electronic communications”** is a new introduction to regulating spam, which is a form of content and inevitably opens the door to regulation of other forms of content, including cultural and political speech. This article introduces regulatory scope of the treaty into Internet issues and invites governments to take content-based action and moves the treaty into the realm of regulating speech on the Internet. Similar concerns are relevant to the security language adopted in Article 5A.

-**Resolution Plen/3 “To foster an enabling environment for the greater growth of the Internet”** represents a direct extension of ITUs role and scope into the Internet despite earlier assertions from ITU that the WCIT would not address

Internet issues. While the resolution is not on the body of the ITRs, and is nonbinding, it is still in the Final Acts and will therefore give the ITU the scope to assert its intergovernmental role in Internet governance processes. We also note that the highly selective references to the WSIS outcome documents do not reflect previous international agreement on Internet policy and governance. For Kenya, which has a growing ICT sector and is a regional leader in terms of connectivity and innovation, these new Internet provisions risk undermining successful multi-stakeholder mechanisms and proven strategies for growth. This Resolution, therefore presents an unbalanced view of Internet governance that is inconsistent with the principles underlying the Internet Governance Forum (successfully hosted by Kenya in 2011) and many of the provisions agreed to at the United Nations World Summit on the Information Society (WSIS) in 2003 and 2005. This Resolution - which was adopted at 1:30 AM on Thursday morning through a procedural mechanism known as “taking the temperature of the room” that strangely became a de facto vote of the Conference - focuses heavily on government involvement in the management and development of the Internet, as opposed to established, successful multi-stakeholder processes.

We are concerned that this resolution has been introduced following the ITU S.G. statements before the conference that WCIT was not about the Internet, and in a speech to the opening plenary of WCIT that "WCIT is not about taking over the Internet. And WCIT is not about Internet governance."

Recommendations and way forward

The revised ITRs contain several positive provisions, including an explicit recognition of the role of commercial agreements in determining the terms and conditions for international telecommunications services arrangements, important provisions regarding pricing transparency and quality of service in international mobile roaming, and new Member State commitments regarding the prevention of number misuse. However, because the international telecommunications ecosystem is a global market and Kenya has a conducive policy and regulatory environment that continues to provide for liberalized telecommunications environment that has spurred competition and growth, Kenya's industry/companies will continue to enjoy many of the benefits of these achievements notwithstanding its decision to not sign the treaty. In light of this and the significant concerns discussed above, there is no compelling reason for Kenya to sign the revised treaty.

In addition, the divergence of views was quite significant during the conference and since the treaty does not come into effect until January 15th, there are several activities and conferences that are going to take place before then that could change a lot of opinions. Kenya is committed to remaining engaged in global dialogue on the role of governments and other stakeholders in the growth, development and evolution of international telecommunications and the Internet sectors as we expect these discussions will continue beyond the WCIT.