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The 2012 World Conference on International Telecommunications: Another Brewing Storm Over Potential UN Regulation of the Internet

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Who's Who Legal
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Once again, many companies in the telecoms and information and communications technology (ICT) sector are facing the spectre of a United Nations agency (in this case the International Telecommunication Union (ITU)) regulating critically important aspects of the internet as well as substantially expanding its jurisdiction over the telecoms and ICT industries.

It is important that telecoms, technology, and ICT lawyers, consultants, and advisers – both in-house and outside – carefully monitor the domestic and international preparations by governments leading up to this major international treaty conference as it will potentially have a material impact on companies throughout the entire sector.

Specifically, in December 2012, the ITU will be holding a major treaty-writing conference in Dubai that many countries would like to use to significantly expand the jurisdiction and legal authority of the ITU, even potentially giving this United Nations agency greater influence over internet governance as well as major telecoms issues such as accounting rates and termination charges for next-generation networks, data privacy, cybersecurity, international mobile roaming, and equipment specifications.

For more than two decades, the story of global economic policy has been one of promoting competition and increasing liberalisation across various industries, especially the telecoms and internet sectors. Today, however, significant government and civil society support is developing for a different policy outlook. Driven largely by the global

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financial troubles of recent years together with persistent concerns about the implications of the growth of the internet for national economies, social structures and cultures, some governments and others are now actively reconsidering the continuing viability of liberalisation and competition-based policies.

The ITU's World Conference on International Telecommunications (WCIT) could signal a shift in the regulatory paradigm on both the international and national levels. At the conference, a major 1988 treaty known as the International Telecommunication Regulations (ITRs) will be renegotiated. Some within the ITU and among its 193 member states would like to see major changes to the treaty, particularly with respect to the internet as well as wireless, IP-based, and next-generation networks, which have historically been mostly free of intrusive economic and other regulation. Stating his belief that a substantial expansion of the scope of treaty is necessary, ITU Secretary-General Hamadoun Touré recently asserted that "[w]e need updated ITRs because without them we risk the collapse of the ICT networks which underpin all communications technologies, including the internet." Other countries, however – notably, the United States – believe instead that the WCIT should adopt only minor changes to the ITRs as necessary to modernise the existing provisions of the treaty, and that new provisions and authorities are unnecessary.

Because of the ITU's international visibility, decisions made at the conference could signal to both domestic regulators and other international intergovernmental organisations that a move toward more intrusive economic and other regulation is appropriate. It seems fair to say that the decisions made by governments at WCIT will help define the international regulatory environment for the internet and telecoms in the 21st century.

The ITU and The International Telecommunication Regulations

The ITU, established more than 100 years ago, is a specialised agency within the United Nations that focuses on telecommunications and ICT. The ITU allocates global radio spectrum and satellite orbits, develops technical standards to promote interconnection and technical interoperability, and works to improve telecommunications access for underserved communities. The ITU has historically disclaimed any authority to regulate domestic telecommunications, clearly recognising in the ITU Constitution the "sovereign right of each state to regulate its telecommunication."

While the ITU has a limited scope of regulatory authority over international radio-communication issues, it also adopts recommendations on a wide range of topics and facilitates the adoption of international treaties. ITU recommendations do not have the force of law, but rather set forth suggested regulations and requirements for national regulatory authorities. These recommendations address standardisation, economic and technical issues. By distinction, international treaties are generally binding law for all nations that are signatories to the treaty.

The ITRs are a binding 1988 treaty that established important general principles relating to international telecommunications services and transport, interconnection and interoperability of telecommunications facilities, and accounting and settlement of international voice traffic between administrations. While the ITRs provide a general framework for mutual agreements between countries regarding the exchange of

telecommunications traffic, the ITRs also allow for private agreements between non-governmental organisations (e.g., telecommunications carriers). This is the typical method for most agreements for the exchange of international traffic today.

The World Conference on International Telecommunications

Since the ITRs were adopted in 1988, the international telecommunications marketplace has experienced rapid technological change, the development of competitive and liberalised markets, and the privatisation of national telecommunication service providers. As a result, in December 2012, the ITU will host the World Conference on International Telecommunications in Dubai to revise and modernise the treaty for the first time since its adoption.

So far, there is no international consensus about the scope of appropriate modifications to the treaty. For some governments, the WCIT presents an opportunity to significantly expand the jurisdiction and role of the ITU into previously unregulated, lightly regulated or domestically regulated aspects of the emerging digital economy. Some of the proposed changes to the ITRs could position the ITU as a supra-national regulator and require signatory nations to enact conforming domestic laws. ITU Secretary-General Touré has asserted that the recent problems in the financial and banking sectors were caused by "inadequate regulation and regulatory supervision" and he has called for the international community to agree to "a framework that will avoid any catastrophe" in the telecoms sector.

Participation will be limited to representatives of national governments. However, private sector entities generally have opportunities to help inform the policymaking in advance of the conference, such as through meetings with individual governments, participation in working groups or preparatory meetings, and appearances before international or regional organisations. Many governments allow members of the private sector to be on their national delegations to ITU conferences.

Proposed Changes to the ITRS

Typically, international telecommunications issues such as international mobile roaming, internet peering, and internet governance are handled today through a combination of negotiated agreements between private parties, bilateral and multilateral trade agreements, and non-governmental technical or civil society organisations. Some countries, however – particularly within the developing world – object to the current situation on the grounds that the system does not pay sufficient regard to their economic and other needs, that it disproportionately favours major international telecom and technology companies, and that the United States government has too much direct influence in decision-making. To address these perceived inequities, several new provisions and modifications for the ITRs have been proposed:

Internet management

Several countries have proposed to move oversight or "control" of aspects of the internet and internet development from the non-governmental multi-stakeholder mechanisms such as ICANN and replace them with the ITU.

Internet charges

Some governments would also like the ITU to play a greater role in regulating peering, termination charges for data traffic, and other internet-related rate issues to, among other things, potentially lower certain internet backbone costs and to capture for domestic coffers some of the value of international VoIP services entering their countries.

Mandated application of ITU recommendations

The ITU has issued non-binding recommendations on topics ranging from accounting rates and tariff issues to the construction, installation and protection of telecommunications cables, to the power flux density of wireless transmitters. While these recommendations are only advisory at the moment, some proposals could transform some or all of these recommendations into mandatory treaty provisions with the force of law.

International regulation of roaming

The ITU currently does not have legal authority to directly regulate either retail or wholesale international mobile roaming rates, but WCIT could expand the ITU's authority over international roaming, especially regarding wholesale rates.

Cybersecurity

Some countries are seeking to include cybersecurity and cybercrime provisions into this treaty so that the ITU can impose new regulations and establish itself as the organisational home for international cybersecurity policymaking. Included within this could be broad new data privacy, spam, and child protection regulations.

Developing country issues

Some developing world countries suggest that the ITRs be modified to allow them to charge carriers from the developed world higher rates. In addition, some countries also would like to modify the ITRs to lower the costs for developing world countries when they bargain with commercial carriers for international telecoms and internet services, as well as to ensure "transparency" for retail and wholesale prices and quality of service.

These and the other changes proposed in the WCIT preparatory process could greatly expand the scope of the ITRs and grant the ITU substantial new regulatory powers, thereby radically changing the regulatory landscape. The effects of these revisions could affect the fundamental economic structure of the entire ICT sector. For example, making the ITU Recommendations mandatory would effectively supersede established industry practice and domestic regulations with respect to core aspects of equipment design and network operations. Similarly, proposals related to how companies can collect and use customer data, cybersecurity,

or child protection would interject an international intergovernmental organisation into the relationship between service providers and their customers. Additionally, the combined effect of the proposals would be to bring under ITU authority the core functions of many established and effective international non-governmental organisations such as IEEE, ISOC, ICANN, and W3C, particularly with respect to the design of systems and infrastructure, the development of protocols, and the management of domain and numbering resources.

Other Proposals for Increased International Regulation of the Internet

Perhaps even more significant than the specific reform proposals being considered in the run up to the WCIT is what these proposals represent in terms of the broader regulatory paradigm. The outcome of the 2012 WCIT may signal to regulators on both the international and national levels what the appropriate role of government should be in the 21st century regarding the internet and telecoms generally. Governments, particularly in the developing world, could interpret the introduction of new interventionist regulations through the ITRs as signalling that increased regulation of the ICT sectors is appropriate, which could ultimately hinder investment and competition in these markets.

Indeed, discussions regarding international internet policymaking are already gaining momentum within the UN and various other international forums. Some of these proposals are more specific than others, and they each have different likelihoods of producing real results, but taken together, they demonstrate the widespread attention these issues are receiving by governments around the world. To illustrate:

India's proposal for a new UN agency

In late October 2011, India submitted to the UN a proposal for the establishment of a new mechanism for internet-related public policy activities to be called the United Nations Committee for Internet-Related Policies (CIRP). As proposed, the CIRP would oversee the bodies responsible for operational functioning of the internet and global standard setting, as well as crisis management and international public policy matters.

International Convention on Cybercrime

Russia has long sought UN action regarding cybersecurity and internet-transmitted information. In September 2011, Russia, China, Tajikistan and Uzbekistan submitted to the UN General Assembly a proposal for the adoption of an International Code of Conduct for Information Security. Among other things, this Code would commit signatories to cooperating in "curbing the dissemination of information that incites terrorism, secessionism or extremism or that undermines other countries' political, economic and social stability."

World Technology Policy Forum

In 2013, the ITU will convene the 5th World Telecommunication/Information and Communication Technology Policy Forum to discuss internet issues related to the ITU's involvement in internet-related public policy. Unlike the WCIT, this Policy Forum will not create binding international treaty documents, and therefore it may be a more comfortable forum for some of these discussions.

London Conference

In early November 2011, the United Kingdom hosted an international Conference on Cyberspace in London, which emphasised the development of uniform international norms for private and governmental behaviour online. This conference is expected to become an annual forum for policy discussions among high-level ministers and other governmental representatives, with meetings already being planned for the next two years.

Despite the broad and dramatic scope of various governmental proposals – which could affect core aspects of running an ICT, telecoms, or internet-based business – the WCIT preparatory process is not receiving sufficient attention from most businesses and others. The WCIT could lead to new regulations governing how these businesses are run and how such businesses may interact with their customers, partners, and vendors, as well as how they can innovate and provide new and improved services. Moreover, because of the implicit attacks on established mechanisms of internet governance, the WCIT has the potential to destabilise and politicise standardisation processes and the management of the internet architecture in a way that could also hinder innovation and efficiency. Many national delegations are interested in hearing the concerns of industry and others. Interested companies and other groups should take steps to monitor the conference preparatory processes and should be on the lookout for opportunities to inform and influence the debate.