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Internet Governance and International Law: The Controversy Concerning Revision of the International Telecommunication Regulations

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Introduction

In December 2012, the International Telecommunication Union (ITU) convened the World Conference on International Telecommunications (WCIT-12) to amend the International Telecommunication Regulations (ITRs), an ITU treaty adopted in 1988. The WCIT-12 negotiations failed to reach consensus, particularly about whether the revised ITRs should apply to the Internet and its governance. This *Insight* analyzes the WCIT-12, the revised ITRs,[1] implications of these developments for future Internet governance, and international law's role in such governance.

Background

When ITU members adopted the ITRs in 1988, the Internet had not yet become a global communications, social, economic, and political phenomenon. The ITRs focused on the interconnection and interoperability of existing communication services and replaced the Telegraph Regulations and Telephone Regulations the ITU adopted in 1973.[2] The ITRs contained general principles rather than detailed rules that formed a pragmatic, flexible framework for international cooperation.

The Internet's emergence radically changed international telecommunications. The Internet developed and spread without direction from intergovernmental processes, such as the ITU, and without generating rules of international law, as found in the ITRs. Instead, Internet governance evolved through multi-stakeholder processes in which state and non-state actors collaborated on managing technical and operational tasks, such as standardizing communication protocols and managing names and numerical addresses on the Internet.[3]

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As the Internet expanded, many countries expressed concerns about multi-stakeholder governance, including that it gave the United States dominance over the Internet and its development. These countries sought to bring Internet governance within intergovernmental processes and international law. In the lead-up to the first phase of World Summit on the Information Society (WSIS) in December 2003, China, with support from developing countries, proposed creating an international Internet organization and adopting an Internet treaty.[4]

Disagreements at the WSIS in 2003 between proponents of the multi-stakeholder approach and advocates of more governmental and intergovernmental control led the WSIS to ask the UN Secretary-General to establish a Working Group on Internet Governance (WGIG) in 2004. When confronted by the same disagreements, the WGIG recommended creation of an Internet Governance Forum (IGF). The second phase of the WSIS in 2005 established the IGF as a multi-stakeholder discussion forum with no decision-making authority. The ITU decided in 2006 to review the ITRs in light of the changed international telecommunications environment and to hold a World Conference on International Telecommunications in 2012 to amend the ITRs.[5]

The World Conference on International Telecommunications

In the lead-up to the WCIT-12, proponents of the multi-stakeholder model argued that the ITU and certain ITU members were using the WCIT-12 to bring Internet governance under governmental and intergovernmental control, with dire consequences for innovation, commerce, development, democracy, and human rights.[6] One of the “fathers of the Internet,” Vint Cerf, declared that WCIT-12 decisions “have the potential to put government handcuffs on the Net. To prevent that—and keep the Internet open and free for the next generations—we need to prevent a fundamental shift in how the Internet is governed.”[7]

Although ITU Secretary-General Hamadoun Touré stated the WCIT-12 would not address Internet governance, proposals by ITU members included changes focused on the Internet and how it is governed. For example, Russia proposed a new article on the Internet, which included a provision aimed at the multi-stakeholder model: “Member States shall have equal rights to manage the Internet, including in regard to the allotment, assignment and reclamation of Internet numbering, naming, addressing and identification resources and to support for the operation and development of the basic Internet infrastructure.”[8] Other proposed revisions included financing Internet communications, dealing with spam, and addressing computer and network security.[9]

The WCIT-12 ended without consensus. Of the 144 delegations with voting rights at the WCIT-12, eighty-nine signed the revised ITRs, including many African countries, Brazil, China, Indonesia, Iran, and Russia, while fifty-five did not, including Australia, members of the European Union (EU), Canada, Japan, and the United States.[10] Before negotiations ended, the United States announced its opposition, based on what the revised ITRs contained concerning the Internet.[11] Although the ITU Secretary-General indicated that the WCIT-12 would make decisions by consensus,[12] active opposition by prominent countries demonstrated a lack of consensus, leaving the ITU with an amended treaty both supported and opposed by powerful countries and a significant proportion of its membership.[13]

The Revised International Telecommunication Regulations and Resolution 3

As the WCIT-12 ended, the ITU Secretary-General emphasized that the revised ITRs never mention the Internet.[14] However, the negotiating schism does relate to provisions in the

revised ITRs and a resolution that the WCIT-12 adopted.

Preamble

The revised ITRs include new preamble language. First, ITU members "affirm their commitment to implement these Regulations in a manner that respects and upholds their human rights obligations." Although human rights, such as freedom of expression, apply to all communication technologies,[15] this new language is specifically responsive to debates over human rights and the Internet, especially regarding censorship.[16]

Second, the new preamble states that ITU members "recognize the right of access of Member States to international telecommunication services." This language—adopted by vote rather than consensus—appears to acknowledge that governments have an international legal right to access international telecommunication services, something not previously part of international law on telecommunications. What this government "right of access" means is not clear, creating concerns in an environment permeated with controversies about government power *vis-á-vis* Internet content, services, and governance.

Whether these new preamble provisions apply to the Internet depends on the scope of the revised ITRs. This issue, analyzed next, contributed to the WCIT's failure to achieve consensus.

Article 1: Purpose and Scope of the Regulations

The WCIT-12 added a provision to Article 1 that was controversial:

> These Regulations also contain provisions applicable to those operating agencies, authorized or recognized by a Member States, to establish, operate and engage in international telecommunications services to the public, hereinafter referred to as "authorized operating agencies." (Article 1.1 (a *bis*)

The United States opposed this provision, arguing that it broadened the scope of the revised ITRs to include private sector Internet service providers and government network operators.[17] The United States did not support expanding the ITRs beyond their traditional scope, particularly because expansion appeared designed to reach Internet issues.

The WCIT-12 also added language to Article 1.1(a), providing that the revised ITRs "do not address the content-related aspects of telecommunications." However, this provision is in tension with the preamble's human rights language, which—to be taken seriously—includes content-related issues within freedom of expression. This provision also failed to decrease opposition to new parts in the revised ITRs on security and spam that potentially support government efforts to regulate content indirectly, as the next section discusses.

Article 5A: Security and Robustness of Networks and Article 5B: Unsolicited Bulk Electronic Communications

The revised ITRs included a new Article 5A obliging states parties to "endeavour to ensure the security and robustness of international telecommunication networks[.]" Opposition arose because this requirement relates to "information security" or "cybersecurity" and brings this Internet-based problem into the revised ITRs. The United States argued that the ITU and the ITRs are not appropriate venues for security issues.[18] In addition, the manner in which some countries, including China, Russia, and other signatories of the revised ITRs, approach information security as including threats from the content of communications means that Article 5A could provide international legal cover for security measures that

infringe on human rights.[19]

The WCIT-12 also added Article 5B: “Member States should endeavour to take necessary measures to prevent the propagation of unsolicited bulk electronic communications and minimize its impact on international telecommunication services.” The spam problem is so closely associated with electronic mail distributed over the Internet that interpreting Article 5B as applying only to non-Internet communications is difficult, which again highlights the controversy about the scope of the revised ITRs. In addition, the United States opposed Article 5B because it opened another avenue for governments to regulate the content of electronic communications.[20] The use of “should” rather than “shall” in Article 5B did not lessen opposition to its inclusion.[21]

Resolution 3: To Foster an Enabling Environment for the Greater Growth of the Internet

The WCIT-12 adopted non-binding Resolution 3 on the Internet, which contributed to Internet-related controversies in the negotiations. The WCIT-12 adopted Resolution 3 in contentious circumstances, with accusations that adoption occurred with procedural irregularities.[22] Substantively, Resolution 3 echoed language in the Russian proposal on Internet governance, stating that “all governments should have an equal role and responsibility for international internet governance[.]”[23] Resolution 3 also emphasized that the ITU should remain engaged on Internet governance questions.

Resolution 3 contained nothing new legally or politically because it is not part of the revised ITRs and because the ITU has discussed Internet governance for years and was likely to continue to do so whatever happened at the WCIT-12. However, for the United States, Resolution 3 was “a direct extension of the scope [of the WCIT-12] into the internet and of the ITU’s role therein despite earlier assertions from Secretary[-]General Hamadoun Touré that the WCIT would not address internet issues.”[24] Opponents feared that ITU members could use this resolution in applying the revised ITRs to Internet issues and in pushing for more governmental and intergovernmental influence over Internet governance.

After the WCIT-12: What’s Next?

For countries that agree to be bound, the revised ITRs take effect on January 1, 2015 (Article 10.1). It remains to be seen how many ITU members ratify or otherwise approve them, and whether states make reservations. ITU members that do not accept the revised ITRs remain bound by the original ITRs.

The WCIT-12 controversy produces fragmentation in international law on international telecommunications, which could adversely affect business conditions, planning, decision making, and other practices in this sector. Behind this fragmentation are deepening disagreements about Internet governance—where such governance should take place, what issues should be addressed, and what outcomes should be sought. These issues will continue to be part of ITU diplomacy, including at the ITU World Telecommunication Policy Forum in May 2013 and the ITU plenipotentiary conference in 2014. However, the WCIT-12’s lack of consensus suggests that positions have become entrenched, making meaningful compromise unlikely. In this context, concerns about a “digital cold war” and the political “balkanization” of the Internet and cyberspace are emerging.

In terms of international law, the WCIT-12 involved attempts to bring Internet governance into a negotiated set of international rules. Opposition to this shift did not focus on international law as such, but rather identified dangers in creating international legal rules that allow states to justify controversial policies, including censorship. Governments do not need the revised ITRs to implement Internet governance within their jurisdictions as they see fit. Given differences on Internet governance from the WSIS to the WCIT-12, however,

revision of the ITRs offered some governments an opportunity to use international law to advance their positions.

Sensing the opposition's consolidation at the WCIT-12 and in the revised ITRs, the U.S. ambassador to the WCIT-12 argued that the United States must support the multi-stakeholder approach by leveraging partners in Europe (e.g., EU and NATO), industry, and civil society, and by helping developing countries to benefit from an open, global Internet, to participate in multi-stakeholder processes, and to address Internet-related problems, such as cybersecurity.[25]Whether countries that support the WCIT-12's outcome deploy the revised ITRs and Resolution 3 against this U.S. strategy remains to be seen, but, if nothing else, the WCIT-12 made clear that international competition to shape Internet governance has entered a more contentious phase with escalating stakes.

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Endnotes:

[1] *International Telecommunication Regulations*, in Final Acts of the World Conference on International Telecommunications (Dubai, 2012) [hereinafter Revised ITRs], pp. 1-15.

[2] Int'l Telecomm. Union, International Telecommunication Regulations, Dec. 9, 1988, *available at* http://www.itu.int/dms_pub/itu-s/oth/02/01/S02010000214002PDFE.pdf [hereinafter ITRs]. Under the ITU Constitution, the ITRs, along with the Radio Regulations, form the ITU's Administration Regulations and are, thus, a legal instrument of the ITU. ITU Const., Article 4(3).

[3] Today, the Internet Engineering Task Force (IETF) oversees the process of developing and maintaining the Internet Standards, the standardized protocols for the global Internet. The IETF describes itself as "a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet. It is open to any interested individual." *About the IETF*, http://www.ietf.org/about/. The Internet Corporation for Assigned Names and Numbers (ICANN) manages the Internet's name and number addressing system. ICANN describes its approach as an inclusive one that "treats the public sector, the private sector, and technical experts as peers. In the ICANN community, you'll find registries, registrars, Internet Service Providers (ISPs), intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from more than 100 governments, and a global array of individual Internet users. . . . ICANN's fundamental belief is that all users of the Internet deserve a say in how it is run." *Welcome to ICANN*, http://www.icann.org/en/about/welcome.

[4] Wolfgang Kleinwächter, *The History of Internet Governance*, Internet Governance (Oct. 20, 2009), http://www.intgov.net/papers/35.

[5] Int'l Telecomm. Union, *Review of the International Telecommunication Regulations*, ITU Admin. Council Res. 146 (2006), *available at http://www.itu.int/ITU-T/itr-eg/files/resolution146.pdf*. Under the ITU Constitution, the ITU convenes world conferences on international telecommunications specifically to revise the ITRs. ITU Const., Article 25(1). Generally, revisions of the ITRs become binding on ITU member states when they consent to be bound by the revisions. ITU Const., Article 54(2 *bis*).

[6] A useful collection of official documents, news stories, and other resources related to the WCIT-12 was compiled by WCITLeaks, an independent effort to increase transparency about the WCIT-12. *WCITLeaks*, http://wcitleaks.org/.

[7] Vinton Cerf, *Keep the Internet Open*, N.Y. Times, May 24, 2012, http://www.nytimes.com/2012/05/25/opinion/keep-the-internet-open.html?_r=0.

[8] Int'l Telecomm. Union, *Proposals Received from ITU Member States for the Work of the Conference*, 99, Doc. WCIT12/DT/1-E,(2012), http://www.soumu.go.jp/main_content/000188223.pdf.

[9] Controversial proposals about financing Internet traffic, such as the "sending-party-pays" principle, were not included in the Revised ITRs. On proposals concerning spam, see *Proposals Received from ITU Member States for the Work of the Conference*, *supra* note 10, at 124. The WCIT-12 also addressed some non-Internet issues, such as challenges related to roaming charges for mobile telephone use, reducing electronic waste, and increasing accessibility to international telecommunication services for persons with disabilities.

[10] ITU, *WCIT 2012: Signatories of the Final Acts*, http://www.itu.int/osg/wcit-12/highlights/signatories.html.

[11] Terry Kramer, U.S. Ambassador and Head of Delegation, World Conference on International Telecommunications, Remarks, Dec. 13, 2012, http://www.state.gov/e/eb/rls/rm/2012/202040.htm.

[12] Although consensus is preferred, ITU legal instruments provide for ITU member states to vote in world conferences on international telecommunications convened to revise the ITRs. *See, e.g.,* ITU Const., Article 32A (on the right to vote at conferences) and General Rules of Conferences, Assemblies, and Meetings of the ITU, Rule 21 (on voting).

[13] As Paul Rosenzweig put it, the ITRs were essentially "amended by majority vote—a vote in which the United States and other nations declined to participate." Paul Rosenzweig, *WCIT Treaty Breakdown—A Summary and Some Analysis*, Lawfare, Dec. 14, 2013, http://www.lawfareblog.com/2012/12/wcit-treaty-breakdown-a-summary-and-some-analysis/.

[14] *89 Nations Sign Revised ITRs at WCCIT, 55 Opposed or "May Sign Later,"* Communications Daily, Dec. 17, 2012 (quoting Touré as stating "[t]he treaty text does not include the Internet"). The Revised ITRs included new provisions not connected with Internet issues. *See*, *e.g.*, Revised ITRs, *supra* note 1, at 8 (Article 8A on energy efficiency and e-waste and Article 8B on accessibility to international telecommunication services or persons with disabilities).

[15] Universal Declaration of Human Rights art. 19, G.A. Res. 217 A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.ohchr.org/en/udhr/pages/introduction.aspx.

[16] *See, e.g.,* Human Rights Council Res. 17/27, Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 17th Sess., May 16, 2012, U.N. Doc. A/HRC/17/27, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf (exploring challenges to these rights concerning use of the Internet).

[17] Kramer, *supra* note 11.

[18] *Id*.

[19] *See, e.g.,* People's Republic of China, Ministry of Foreign Affairs, *China, Russia, and Other Countries Submit the International Code of Conduct for Information Security to the United Nations*, Sept. 13, 2011, http://www.fmprc.gov.cn/eng/zxxx/t858978.htm# (including in the proposed International Code the need to curb "dissemination of information which incites terrorism, secessionism, extremism or undermines other countries' political, economic and social stability, as well as their spiritual and cultural environment"); and Agreement between the Governments of the Shanghai Cooperation Organization on Cooperation in the Field of Information Security (Dec. 2008), Annex 2 (identifying as a threat to information security the "dissemination of information harmful to the sociopolitical and socioeconomic systems, spiritual, moral and cultural environment of other states").

[20] Kramer, *supra* note 11.

[21] Some commentators challenged how the United States and its allies interpreted Articles 5A and 5B. For example, Milton Mueller argued that the United States and its supporters made "ridiculous claims . . . that the ITR revisions constituted an aggressive new push into Internet regulation by states" that represented "ITU-phobia . . . a feverish, diseased way of thinking about the ITU's role in Internet governance." Milton Mueller, *ITU Phobia: Why the WCIT was Derailed*, Internet Governance Project, Dec. 18, 2013, http://www.internetgovernance.org/2012/12/18/itu-phobia-why-wcit-was-derailed/#comment-4224.

[22] For a description of what happened in the WCIT-12 negotiations on Resolution 3, see Wolfgang Kleinwächter, *WCIT and Internet Governance: Harmless Resolution or Trojan Horse*?, CircleID.com, Dec. 17, 2012, http://www.circleid.com/posts/20121217_wcit_and_internet_governance_harmless_resolution_or_trojan_horse/.

[23] *Resolution 3: To Foster an Enabling Environment for the Greater Growth of the Internet*, in Final Acts of the World Conference on International Telecommunications (Dubai, 2012), p. 20.

[24] Kramer, *supra* note 11.

[25] *Ambassador to WCIT Says U.S. Should Enhance Engagement Globally, Assist on Operational Issues*, Telecomm. Reports Daily (Jan. 18, 2013).