E-LEGISLATION POLICY DEVELOPMENT INITIATIVE FOR THE EAST AFRICAN COMMUNITY – KENYA CYBER LAW MODEL

Deliverable No. 6 – Final Report and Final e-Legislation Policies

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Afrika ICT Strategies Inc.

1.0 EXECUTIVE SUMMARY

1.1. Overview

The Kenya e-Legislation Policy Development Initiative is funded by USAID/Washington's EGAT/IT&E Bureau, through the dot-ORG Cooperative Agreement. The Academy for Educational Development (AED) is the prime implementer of the dot-ORG Cooperative Agreement. Afrika ICT Strategies Inc is the subcontractor to AED under this dot-ORG project and is the primary implementing partner for this activity, in cooperation with the Directorate of e-Government, Government of Kenya (GOK).

1.1.1 Overall Rationale for the Activity

The primary objective of the project is to create model electronic transactions laws ("e-Transactions Bill") piloted in Kenya that can be customized for the East African Community partner states of Uganda, Tanzania, Rwanda and Burundi.

The draft e-Transactions Bill has the potential to generate significant economic and political development for Kenya and East Africa as a whole. For example, the e-Transactions Bill is critical to the Central Bank of Kenya (CBK) as it will regulate electronic funds transfers like *M-Pesa, Sokoletu,* and other electronic transactions like Business Process Outsourcing (BPO) and Call Centers which GOK is promoting Kenya as a destination. The e-Transactions Bill will also improve the capacity of the Higher Education Loans Board, in the Ministry of Education to collect loans from beneficiaries, especially in the Diaspora.

For the e-Transactions Bill to become law in Kenya, the legislative process requires the Bill to be vetted, debated and supported by Parliament, the private sector, the civil society and the general public.

1.1.2 Benefits of a Stand-Alone E-Transactions Bill for Kenya (E-Commerce Development)

As Kenya positions itself as an e-commerce hub, there is need to provide a comprehensive one-stop-shop e-Transactions law which is consistent with international best practices.

Under one of the key activities in the e-Legislation Policy Development Initiative project, from December 2006 to March 2007 Afrika ICT Strategies Inc conducted research on digital laws for 13 countries i.e. Malaysia, Singapore, South Africa, United Arab Emirates, Pakistan, India, New Zealand, Namibia, Botswana, Zambia, Egypt and Australia. The research indicated that the countries that have succeeded in utilizing e-commerce as an economic growth engine enacted stand alone e-Transactions laws.

Kenya has been positively identified as a BPO and call center destination and the country needs to demonstrate its ability to compete with India, Philippines and China which are the leading BPO and contact center destination by deliberately creating an enabling legal environment.

The current Kenya Communication Amendment Bill, 2007's inclusion of e-transactions is a great step in the right direction. It demonstrates the Ministry of Information and Communication's commitment to e-transactions. By including e-Transactions in the converged Bill, the Ministry rightly recognizes the technology convergence that has occurred in the digital world.

While this convergence is a reality that has been recognized globally, most of the countries Kenya will be competing with in the BPO and contact center industry have not converged their laws. They all have stand-alone laws that regulate e-transactions.

Below is a list of Kenya's competitors in the BPO and Contact Center industry with stand-alone laws:

- South Africa's Electronic Communication and Transactions Act, 2002
- Dubai's Electronic Transactions and Commerce Law No. 2/2002
- India's Information Technology Act, 2002 amended in 2006
- Singapore Electronic Transactions Act, 2001
- Malaysia Electronic Commerce Bill, 2006
- Philippines Electronic Commerce Act 8792, 2000
- Namibia Electronic Communication and Transactions Bill, 2006
- Egypt's e-Signature Law No. 15/2004

It is worth noting that despite the technology convergence, India and Malaysia have amended their e-Transactions laws as recently as 2006.

<u>Pros of stand-alone e-Transactions law</u>

- **Comprehensive:** They comprehensively address all areas of e-Transactions i.e. e-signatures, privacy and security, e-contracts, cyber crime, offences and punishments relevant to e-transactions

- **Provide Legal Clarity:** Outsourcing countries appear to favor stand-alone laws. Kenya will not be sidelined in favor of countries with more mature BPO industries because of lack of stand-alone laws

- **Boost Investor Confidence:** Investors have a one-stop shop Act that only addresses e-Transactions. This enforces GOK's great emphasis on ICT as an economic growth engine.

- **Competitive Advantage:** All Kenya's competitors in the BPO and Contact Center have stand-alone laws

- **Captures e-Commerce across Sectors:** The stand-alone law cuts across sectors that have the capacity to produce 500,000 jobs annually i.e. tourism, M-Pesa, BPO and Contact Centers.

Recommendation

Based on the results of this activity, it is recommended that the Ministry of Information and Communication considers replacing the Information Technology Part of the KC Amendment Bill, 2007, with a comprehensive e-Transactions Bill. The Bill should build on various East African Community and Kenya stakeholder forums. This Bill can be sponsored by the Ministry of Info Com, Trade, Treasury or Tourism.

The important thing is that Kenya requires a stand-alone e-Transactions law without forgetting the need for regional trade integration. If Uganda, Tanzania, Rwanda or Burundi enacts stand alone e-transactions laws, they will become the preferred outsourcing destination and Kenya could lose its competitive advantage.

1.1.3 Overview of Activity Design and Implementation

At the inception of the project, USAID/W, AED, the Directorate of e-Government and the Afrika ICT Strategies Inc. developed a work plan to achieve five project activities namely:

(a) Desk Study: Focus will be on review of Egypt's e-Legislation laws to determine their usability as best practice laws for Kenya and the East African Community countries more generally;

(b) Based on results of activity #1, draft model e-Legislation policies with a focus on cyber laws, digital signatures, privacy & security;

(c) Solicit feedback from various stakeholders in Kenya and the East Africa Community Secretariat, through workshops and meetings;

(d) Advocacy/lobbying for passage of the e-Legislation bill through the GOK's Parliament; and

(e) Revise as necessary the draft e-Legislation policies ready for tabling in Kenya's Parliament, and lobbying parliament to support the e-Legislation bill that will be finalized and submitted to the Cabinet by the Attorney General's Office.

The original work plan involved the following activities that would be reviewed periodically based on the realities on the ground:

Activity	Timeline
Desk Study of model laws including e-legislations (a SADC country, UAE, Egypt)	Feb 7-19, 2007
Constitute Technical Team	Feb 26-28, 2007
Technical Team introductory meeting	March 1, 2007
Technical Team Retreat	March 8-10, 2007
Stakeholder workshop	March 29-30, 2007
Constitute a regional legislation Drafting Team	April 2-4, 2007
Retreat for the drafting team to develop regional cyber law model for Kenya and EAC	April 11-14, 2007
Public Consultative forum	May 4, 2007
Lobby policymakers for adoption, adaptation and enaction of cyberlaws in the EAC countries based on the Model	May-July, 2007

1.2 Work Plan Changes Based on Realities on the Ground

1.2.1 Tabling of the Kenya Communication Amendment (KCA) Bill

At the inception of the project, as required in the Kenya legislative process, it was envisaged that upon the design and development of the draft e-Legislation policies, the policies would be submitted to the Cabinet of the Government of Kenya (GOK). The policies would be articulated within a Cabinet Memo for onward submission to the GOK's Attorney General's Chambers to convert the draft policies into a Bill. The Attorney General's Chambers would table the Bill in Parliament on behalf of the Directorate of e-Government, and publish it on the Public Gazette.

As part of the legislative process, during the 14 day period when the Bill is open to public debate, the original plan was to target the ICT and Legal Issues Parliamentary Committees for advocacy sessions to enhance their awareness on the draft policies and garner their support for the passage of the Bill during the three readings in Parliament.

However, immediately upon completion of developing Version 1.0 of the Kenya e-Transactions Bill in early May 2007, the Kenya Communication Amendment (KCA) Bill, 2007 was tabled in

Parliament under the sponsorship of the Ministry of Information and Communication. The Bill was published in the Public Gazette on May 18, 2007. The Bill was debated in Parliament went through the 1st Reading. It was due for the 2nd Reading on July 18, 2007. The Bill contained significant reference to e-transactions.

The legislative implication was that submission of the Cabinet Memo for the Kenyan e-Transactions Bill and tabling of the Kenyan e-Transactions Bill in Parliament was dependent on the Ministry of Information and Communication's retraction from the KCA Bill, 2007 of any reference to electronic transactions.

Upon tabling of the KCA Bill, 2007 The Ministry of Information and Communication began lobbying the two Parliamentary Committees that were targeted in the project, to support the passage of the KCA, Bill 2007. As pointed out by the Deputy Solicitor General, at that point, any attempts to lobby parliamentarians to support the e-Transactions Bill, 2007 would not have been viable.

Under the circumstances surrounding the tabling of the KCA, Bill 2007, the Deputy Clerk of Parliament suggested to the Subcontractor that a more effective strategy was to use the ICT stakeholders in the private and NGO sectors to lobby policy makers to give them a stand-alone e-Transactions Bill and to wait until the Bill is tabled in Parliament before holding the parliamentary lobbying sessions.

Further discussions with the Central Bank of Kenya who had been expressed strong interest in sponsoring the e-Transactions Bill through the Treasury, indicated that the Kenya Institute of Public Policy Research and Analysis (KIPPRA) can play a critical role of lobbying parliamentarians to support the e-Transactions Bill, once it is tabled in Parliament.

1.2.1 Withdrawal of KCA Bill, 2007 from Parliament

The AG Chambers and KLRC had strongly advised the Minister for Information and Communication to withdraw any reference to electronic transactions in the KC Amendment Bill and facilitate the tabling of the e-Transactions Bill separately. As noted elsewhere in this document, the Minister went ahead and tabled the KC Amendment Bill, 2007 with significant reference to electronic transactions.

The Bill was highly criticized by industry players and the public in general, for combining telecom, broadcasting, radio, ICT and postal services in a single bill. Industry lobbyists advised parliamentarians to reject the Bill by requesting the Minister to submit separate smaller bills for each of the sectors.

Beyond verbal acceptance, the Ministry of Information and Communication needed to be convinced beyond reasonable doubt, that the precursor to targeted economic growth through BPOs, call centers and M-Pesa transactions can only be achieved by tabling the e-Transactions Bill as a stand alone bill. The Ministry must further be convinced of the need to have one-stop-shop regulations to govern implementation of e-Government and e-Commerce applications.

The AG Chambers and KLRC had also advised Dr. Okech to avoid undue publicity on the e-Transactions Bill, 2007 until the Ministry agrees to have it tabled separately by retracting any e-transactions reference in the KC Amendment Bill, 2007.

On August 23, 2007, the Kenya Minister for Information and Communication Hon. Mutahi Kagwe withdrew the KCA Bill, 2007 from Parliament. The Minister said that Kenya Communications (Amendment) Bill had left out crucial issues, including cyber crimes and punishment for those who damage fibre optic cables.

Withdrawal of the KCA Bill, 2007 from Parliament provided the Directorate of e-Government an excellent opportunity to finalize the e-Transactions Bill in preparation for tabling in Parliament as soon as a decision is made on the most appropriate Ministry to sponsor the Bill.

Below is a summary of the process that was followed in developing the e-Transactions Bill. The process reflects the revised work plan.

1.3 Summary of e-Transactions Bill Development Process

- **December, 2006**: Program design activities undertaken to prioritize the steps necessary to develop e-Legislation policy model laws for Kenya that would be customized for the East African Community partner states. Previous e-Legislation activities undertaken under the auspices of the East African Community were reviewed and their relevance to the proposed e-Legislation project.

- **February, 2007**: Afrika ICT Strategies Inc. carried out Desk Study research on cyber laws for four countries i.e. Egypt, United Arab Emirates (UAE), Botswana and Namibia. These countries were chosen to take advantage of ongoing relationship between Kenya's e-Government Directorate and these countries, with the ultimate goal of using them as best practices by Kenya in enacting cyber laws.

- **March 2007:** Directorate of e-Government convened a workshop to share results of the desk study research with Government of Kenya (GOK) Ministries including, Judiciary, Attorney General's Office, Communications Commission of Kenya (CCK), Kenya Police, Ministry of East African Community, Kenya Law Reform Commission (KLRC).

  During the Desk Study workshop Deputy Solicitor General from the Attorney General's Office advised the Directorate of e-Government to develop e-Legislation layman's draft with input from key stakeholders from GOK. This document would undergo various revisions prior to submission by the Directorate of e-Government, to the Attorney General's office for conversion of the document into the Bill that would be tabled in Parliament for three readings, potential revisions, and hopefully final passage.

- **March 2007:** Dr. Juma Okech, ICT Secretary, Directorate of e-Government in the Office of the President appointed a Technical Team to develop the e-Legislation layman's draft. The team was comprised of GOK officers from CCK, Attorney General's Office, Judiciary, Central Bank of Kenya, Kenya Police, Ministry of East

African Community, Kenya Law Reform Commission, Directorate of e-Government and the Ministry of Information and Communication. The Technical Team was joined by five consultants from Afrika ICT Strategies Inc.

- **April 2007:** Directorate of e-Government convened a Technical Team Workshop to develop the e-Legislation layman's draft. After one week of a very consultative and inclusive process, the team developed Version 1.0 Draft Electronic Transactions Bill. Besides the four countries covered in the Desk Study, additional research was conducted on cyber laws for South Africa, Australia, New Zealand, Malaysia, Zambia, Pakistan and India. The Kenya Bill borrows heavily from the Namibia Electronic Communication and Transactions Bill that was tabled in Parliament in 2006.

- **May 2007:** Directorate of e-Government convened several stakeholder forums to share the draft e-Transactions Bill. On the Attorney General's advice and CCK stakeholder forums were limited to KLRC, Central Bank of Kenya (CBK), Treasury and Kenya Institute for Public Policy Research and Analysis (KIPPRA). Central Bank through Treasury will sponsor the Bill in Parliament.

- **July 2007:** Directorate of e-Government convened a Technical Team workshop to revise the draft e-Transactions Bill, 2007 based on the outcome of the limited stakeholder forums. Version 2.0 of the Bill was produced on July 31, 2007.

- **September 2007:** Directorate of e-Government convened a Technical Team workshop to revise Version 2.5 draft e-Transactions Bill, 2007 to address comments and questions raised on Version 2.5 and develop Version 3.0. At the end of the workshop and subsequent meetings, Version 3.0 draft 5a was produced on September 24, 2007.

1.4 Lessons Learned

Based on this activity, several key lessons learned can be observed about policy and regulatory reform efforts involved in e-Transactions:

- **Political Factors:** By nature, the passing of any legislation in every country including Kenya is highly politicized. Passing of the e-Transactions Bill, 2007 is totally dependent on the goodwill of parliamentarians who must see the importance of the Bill, particularly its perceived economic value on the electorate. In addition, the passing of legislation is dictated by Parliament's calendar, based on a prioritization process. While the Directorate of e-Government and Central Bank see the Bill as a top priority, it might not be a priority of the parliamentarians. Even after the withdrawal of the KCA Bill from Parliament in late August, due to Parliament's election year calendar, the e-Transactions Bill could not be tabled as Parliament's calendar does not provide sufficient time for the 3 mandatory readings and the 2 week mandatory public debate period.

- **Legal and Institutional Factors:** Crafting of legislation is mandated to the Attorney General's Office with assistance from the Kenya Law Reform Commission. These offices are responsible for making any revisions to any Bill that is tabled in Parliament, following the 3 readings. The offices are also responsible for advising the relevant Ministry on when to submit relevant documents to the Cabinet and Parliament. Any advice from these offices is critical as it is provided from a point of authority. Therefore, the Directorate of e-Government has no control on when the Bill will be submitted to the Cabinet and Parliament. The Directorate of e-Government stayed in constant touch with the Attorney General's Office and the Kenya Law Reform Commission and followed every advice they gave on the Bill. Their advice on keeping a low profile while the KCA Bill was in Parliament had to be followed to the letter.

- **Bill Sponsorship Factors:** Like many countries, due to its cross-cutting nature, the Kenya e-Government program is anchored in the Office of the President. At the inception of the project it was understood that the Office of the President through the Cabinet Office could sponsor the e-Transactions Bill in Parliament. However on further review, it was revealed that the legislative process in Kenya bars the Office of the President from sponsoring a Bill in Parliament. Identification of a potential sponsor indicated that the Ministry of Finance would be ready to sponsor the Bill in support of Central Bank of Kenya who influenced the withdrawal of the Electronic Funds Transfer (EFT) Bill from Parliament, in favor of the more comprehensive e-Transactions Bill. The political factors however, appear to have changed at the last minute and all indication is pointing at the Ministry of Information and Communication as being the preferred sponsor of the Bill. The ability to clearly interpret political factors surrounding Bill sponsorship is important to allow for the necessary adjustments. At one point during the drafting of the Bill, the Directorate of e-Government and the Subcontractor deemed it necessary to have two administrators of the Bill when it becomes law to factor strong sponsorship sentiments expressed by CBK and CCK. The last minute political changes raised an interesting dimension that required some behind the scenes informal meetings to understand the new political environment. Convincing some of the team members to accept the new political environment was a tall order.

- **Human Factors:** The crafting of a Bill requires strong leadership, goodwill and focus from the Government entity facilitating the process and the implementing entity representing the funding agencies. While the Government entity can put up a great team at the beginning of the crafting process, the implementing entity must keep the team fully motivated and focused on delivering a well researched Bill, while anticipating and addressing any critical human factors. Getting the buy-in and ownership of every technical committee member was very critical as each one of the members especially from GOK was representing the interests of an important Government department. There were incidents where well meaning members got over zealous and could have derailed the process and they needed to be persuaded to support their breakout teams' decisions on critical section issues. The Subcontractor was careful in ensuring that decisions on sections made by breakout teams were only changed with consent of at least one team member from the break out team. The major lesson learned is the need for both the

Government and implementing entities to be prepared with backup plans to address any unforeseen human factors likely to derail the process. The ability to anticipate and manage expectations, while keeping all the players on course is critical. The team did a great job of sticking together and agreeing to support decisions in a collective manner which demonstrated people's ability to rise above self interests in support of national interests.

The tabling of the KCA Bill, 2007 could have easily derailed the e-Transactions Bill but Dr. Okech kept the team on course by insisting that even if the KCA Bill was passed it could be amended through the e-Transactions Bill. The withdrawal of the KCA Bill from Parliament could easily have overwhelmed the technical team due to all the publicity the Directorate of e-Government was receiving on the e-Transactions Bill both from the media and donors. The Subcontractor kept the team on course by insisting on the need to complete the process by developing Version 3.0 and documenting the process. During the final workshop there was tremendous pressure to release Version 3.0 to the media and at some point the Subcontractor had to be firm with the media to avoid hijacking of the process and leaking the unfinished Version 3.0 to the public. This could have resulted in disharmony between Government Ministries that felt they were being pitied against each other, as the decision on the sponsoring Ministry has not been officially reached.

- **The Need Strategic Flexibility:** The most important lesson learnt was the need for flexibility in dealing with all the above factors. A strategy requires continuous evaluation to determine if it is helping achieve the goal. If it is not then one needs to devise a new strategy. The dynamic factors mentioned above required the flexibility of devising new strategies at all stages. This was the biggest challenge as some of the factors required very quick and effective strategies. In designing future e-Transactions projects, it will be critical to evaluate the above factors and be ready to have multiple strategies to achieve the objectives and ultimate goal of developing a well researched e-Transactions Bill. Lack of flexibility should be avoided at all costs as it is the one factor that could result in developing a bad Bill. Political factors can emanate from donors, Governments, general public or even the team. Implementers must be flexible to address these factors as quickly as possible to avoid losing momentum.

- **Capacity Building/Enforcement:** Discussions with industry players, GOK officials and administrators of other laws indicated significant understanding on the need for an e-Transactions Law. Detailed discussions with some of the policy makers however suggested some level of reservation in accepting GOK's lack of capacity to deal with Cybercrime that is already taking place. There was also some level of hesitance in accepting that the Judiciary will require enhanced capacity to deal with Cybercrime. Policy makers were keen to underplay the potential looming crisis surrounding implementation of M-Pesa prior to enacting appropriate legislation. In fact this looming crisis is the major single motivator that could lead to the quick passing of the e-Transactions Bill, partly why the Central Bank of Kenya is keen to have this Bill passed sooner than later. Currently key industry players are questioning the rationale of rolling out such a key application and licensing players without a legal framework. These questions may not augur well with policy makers who may want to interfere with law enforcement in a bid to downplay the legal framework gaps.

While the Kenya Police has already established an efficient Cybercrime Department that was very actively represented in all the drafting meetings, cultural and political factors could drastically impede implementation of the law once it is passed, due to very limited capacity of Police Prosecutors and Investigators, who may be intimidated by technological issues, not to mention the acute shortage of Police Prosecutors that has hit most courts in the country. The current perception is that technology is for the younger officers who possess higher academic qualifications. As a matter of fact, this cultural factor also exists in the Judiciary where younger and more technology savvy Judges and Magistrates tend to intimidate their superiors. The technology divide could easily translate into power interests where the superior Prosecutors, Investigators, Judges and Magistrates downplay or totally ignore Cybercrime cases.

This calls for appropriate capacity building, consensus building and keeping the Judiciary and Police Force fully abreast of the drafting process. Obtaining their input on potential training programs, and addressing their needs in a very courteous and tactful environment will make or break implementation of the law. Dr. Juma Okech anticipated some of these potential setbacks and he met with key Judicial Officials for a whole week in a retreat to discuss technology crimes. Facilitating training through the ICT Officers in these institutions where high level officials can ask questions without embarrassment could be a good strategy.

2.0 DETAILED e-TRANSACTIONS BILL DEVELOPMENT PROCESS

2.1 e-Government Analysis – March 2005

Since March 2005, USAID/Washington has been supporting Government of Kenya's (GOK) e-Government program.

In support of USAID and GOK's e-government objectives, in March 2005 Mary Muiruri undertook an e-Government analysis to achieve the following:

- To lay the foundation for the design and development of an e-government Program Description for Kenya, conduct consultations with GOK and USAID/K to establish the current ICT status within GOK necessary to support implementation of the e-government strategy.

  Consultations will establish past, current and future levels of ICT assistance from other donors to avoid duplication of support, and to determine if equipment necessary for the e-government strategy exists.

- Establish targeted donor concerns for the e-government strategy as they relate to funding and GOK ICT policies.

- Engage GOK and targeted donors to prioritize e-government activities and determine possible funding options for the Program Description.

2.2 Follow-up visit to U.S. by Dr. Juma Okech - June 2005

As follow-up to the e-Government Analysis for Kenya conducted in March 2005 during a trip to Washington DC, Dr. Juma Okech, GOK's ICT Secretary in charge of the e-Government Directorate in the Office of the President requested USAID/W to fund e-Legislation policies for Kenya. Dr. Okech believed that creating a strong legal framework for e-Government needed to precede implementation of the e-Government Strategy of March 2004.

Dr. Okech visited various USAID and World Bank departments in Washington DC to seek funding for creating the strong legal framework for e-Government services.

2.3 Design activities - December 2006

In December 2006, dot-ORG supported Mary Muiruri of Afrika ICT Strategies Inc. via a consultancy to design e-Legislation model policies in Kenya to be customized for the East Africa Community (EAC) countries i.e. Kenya, Uganda, Tanzania, Rwanda and Burundi. The consultancy was based on the premise that implementation of e-Government applications is dependent on enabling legal and regulatory frameworks.

As ascertained in that consultancy, the Government of Kenya's (GOK) e-Government Directorate, USAID/Kenya, USAID/East Africa and various private sector practitioners in Kenya and the East African Community, indicated the urgent need for Kenya to create an enabling legal framework to address digital communication, prior to implementation of e-Government and e-Commerce services. It was found that the creation and of the e-Legislation laws in Kenya would create a conducive environment for supporting implementation of Government-to-Business and Government-to-Citizen services.

Additionally, the East Africa Community (EAC) was determined to be keen to move as an economic bloc in the implementation of the Regional e-Government Framework that was approved by the Council of Ministers. The Community indicated that increased G2B and G2C transactions are totally dependent on harmonized e-Legislation policies in the region.

In this regard, the EAC representatives observed that the creation of model e-Legislation laws in Kenya that would likely be adopted by the rest of the partner states would have a positive impact of improving regional trade and facilitating service delivery to the over 80 million citizens of the region. EAC further indicated that lessons learnt in enacting e-Legislation laws in Kenya would be beneficial not only to the EAC partner states, but to other African countries in the COMESA region that will be implementing e-Government and e-Commerce services in the future.

Desk Study Research – February 7-19, 2007

In February 2007, USAID/Washington formally responded to Dr. Okech's request by approving funding for the e-Legislation model laws for Kenya that will be customized for the East African Community partner states at a different phase of the project. dot-ORG subcontracted Afrika ICT Strategies, Inc. (AIS) to implement five activities that were critical to the process of enacting the e-Legislation laws in Kenya.

The first activity was undertaking a Desk Study research that focused on reviewing digital laws for Egypt, United Arab Emirates (UAE), Botswana and Namibia, to determine their usability as best practice laws for Kenya and the East African Community countries.

In undertaking this Desk Study research, AIS analyzed and reviewed secondary data on country portals for Egypt, United Arab Emirates (UAE), Namibia and Botswana. The secondary data reviewed included e-Government policy documents and digital laws for the four countries.

Selection of Egypt, Botswana and Namibia was based on ongoing relationship between Kenya's e-Government Directorate and these countries, specifically various visits that have been made to these three countries to understudy their e-Government programs, with the ultimate goal of using them as best practices by Kenya in enacting cyber laws. Initially, Rwanda and Romania had been cited as potential countries to be included in the Desk Study. There was little information available online on Rwanda's e-Legislation Laws. Attempts to obtain information from the Rwanda Information Technology Agency (RITA) on the status of e-Legislation were not successful.

Upon several discussions with the Government of Kenya it was determined that the experiences of United Arab Emirates were more relevant to Kenya than Romania, that was originally to be included in the Desk Study. Dubai in particular is well known to the majority of the business communities in the East African region who frequently travel to Dubai to procure merchandize. While the experiences in Romania will continue to be considered in the background, the Subcontractor determined not to undertake in depth of Romania.

In addition to these four countries, AIS reviewed data on Romania's e-Government program, the UNCITRAL model laws on e-Signature, and e-Commerce Laws in Asian countries compiled by the Trade and Investment Division, UNESCAP.1

Several researchers with various backgrounds in the U.S. and Kenya participated in this exercise, to increase diversity of perspectives. Research participants were drawn from the Government of Kenya, Kenyan academia and private sector, and U.S. NGO and private sector.

2.4 Desk Study Sharing Workshop – March 9-11, 2007

The Directorate of e-Government convened a workshop from March 9-11, 2007 in Nairobi, Kenya where AIS presented the Desk Study results to a GOK forum that was attended by relevant members from GOK Ministries. Additionally, AIS facilitated detailed discussions on the Desk Study that included break out sessions to discuss the various country laws covered in the Desk Study, and collection of feedback on the usability of these country laws as best practices in the development of Kenya's e-Legislation policies.

During the March 9-11, 2007 retreat, Ms. Christine Agimba, GOK's Deputy Solicitor General in the Attorney General's (AG) Chambers informed the participants that the AG's Chambers requires any Ministry sponsoring a Bill in Parliament to develop a layman's draft that is presented to the AG's Chambers, with a Cabinet Memorandum requesting the AG's Chambers to convert the layman's draft to a Bill. The participants were informed that a good layman's draft with all the accompanying documents can be converted into a Bill within three days.

At the end of the workshop, the participants recommended two reports to guide the development of Kenya's e-Legislation policies namely:

- The Legislative Reforms for Electronic Transactions in Kenya – Policy and Strategic Options, popularly known as the Mombasa Workshop Report

- The Desk Study Report and its recommendations particularly recommendation No. 4 i.e. "That the e-Government Secretariat consider comprehensively reviewing the Namibia ECT Bill alongside the various laws and policies in Kenya that address e-Government and e-Commerce, to determine the viability of customizing the ECT Bill in Kenya."

In addition, the participants recommended the immediate appointment of a Technical Team comprised of Legal and IT experts from Key GOK Ministries to develop e-Legislation layman's draft at the earliest.

1 http://www.unescap.org/tid

2.5 Constituting Technical Team – March 12-16, 2007

Between March 12-16, 2007, as recommended by the participants in the Desk Study review retreat Dr. Juma Okech formally appointed a technical team comprised of Legal and IT experts from Key GOK Ministries to develop the required e-Legislation layman's draft by the Attorney General's Chambers. The team appointed consisted of the following:

Ms. Mercy Wanjau, Principal Legal Advisor – Communications Commission of Kenya
Mr. Isaac Njoroge, International Treaties Dept. – State Law Office
Ms. Catherine Ochanda – Legal Drafting Dept. – State Law Office
Mr. Michael Obam – National Communications Secretariat – Ministry of Information and Communication
Ms. Patricia Gitonga – ICT Officer – Kenya Police
Mr. Duncan Odima - ICT Officer – Judiciary
Ms. Njeri Kienjeku - ICT Officer - Ministry of East African Community
Mr. Johnson Okoth Okello – Senior State Counsel, Kenya Law Reform Commission
Mr. Peter Musyimi – State Counsel, Kenya Law Reform Commission
Mr. Stephen Mwaura – National Payments System, Central Bank of Kenya
Mr. Loyford Murithi - ICT Officer – Directorate of e-Government

The above 11 person team would work with the following Subcontractor's project consultants and staff.

Mr. Andrew Gakiria – Project Coordinator, Directorate of e-Government
Ms. Garnet Maina – Legal Assistant, Afrika ICT Strategies Inc.
Mr. Harry Hare – Regional e-Government consultant and Facilitator, Afrika ICT Strategies Inc.
Ms. Wanja Ngunjiri – Logistics Coordinator, Afrika ICT Strategies Inc.
Dr. Mary Muiruri - Project Director, Afrika ICT Strategies Inc.

The key desired outcomes of this second critical activity include the following:

- Upon recommendation of the Technical Committee Retreat held in Nairobi from March 9-11, 2007, reviewing additional research conducted on digital laws for India and South Africa to determine their relevance in creating Kenya's e-Legislation policies.

- Revisiting Namibia's Electronic Communication and Transactions Bill alongside Kenya's ICT Bill 2006, and previous attempts on electronic transactions to determine the most appropriate template for developing the layman's draft e-Legislation policies.

- Developing the first draft e-Legislation policies utilizing digital country laws and other reference documents covered in the Desk Study. Additional research conducted on India and South Africa also to be factored developing the first draft e-Legislation policies.

2.6 e-Legislation Layman's Drafting – April 9-14, 2007

In response to the request for the Directorate of e-Government to provide an e-Legislation layman's draft, and the appointment of a Technical Team, the Directorate of e-Government convened a Technical Team workshop from April 9-14, 2007 to develop an e-Legislation layman's draft.

In developing the e-Legislation layman's draft bill, the Subcontractor provided each Technical Team member with a file containing the key documents that would be utilized in developing the e-Legislation layman's draft bill. The documents included the e-Government Strategy, 2004, ICT Bill 2006, The Legislative Reforms for Electronic Transactions in Kenya Policy and Strategic Options (Mombasa Workshop of November 2006) Report, The e-Legislation Desk Study report that included Namibia's Electronic Communications and Transactions Bill 2006, Egypt's e-Signature Law No. 15/2004 and United Arab Emirates Electronic Transactions and Commerce Law No 2/2002.

A broad overview of these documents was provided to bring new participants to speed on the layman's draft activity. The legal experts provided an overview of the key policy and legal documents, including the 3 country laws covered in the Desk Study research. The legal experts also took the team through the key elements of the layman's draft.

The team was officially informed by Ms. Catherine Ochanda, that the layman's draft would officially be known as the Draft Electronic Transactions Bill, and that the team should consider dropping the word layman's draft.

Following extensive discussions on the best template to use in developing the Draft Electronic Transactions Bill, the Technical Team unanimously selected Namibia's Electronic Communications and Transactions Bill, 2006 to be used not only for developing the template but also as the main guide in developing the draft Electronic Transactions Bill, 2007 for Kenya. Consistent with Kenya's legal drafting style Chapters would be replaced with Parts.

The Technical Team was broken into three sub teams to begin developing the draft Electronic Transactions Bill. Prior to constituting the sub-teams, drafting norms were provided as guiding principles. These included the need for every sub-team to appoint a chair, rapporteur and recorder. There were two plenary sessions every day for the sub-teams to report their writing progress, and also to bring any critical matters for discussion in the plenary.

Extensive plenary discussions took place to ensure that every section of the Bill was well customized for Kenya, with the help of the Legal experts who had brought most of Kenya's Acts that would be impacted by the Bill. These included the Criminal Procedure Code, the Penal Code and the Evidence Act.

Individuals were requested to review the template and determine the sub-teams they would prefer to work on. Below is a composition of the various sub-teams and the Parts they worked on:

Team A - Part III - Legal Recognition of Data Messages and Contract Formation
Part V - Electronic Government Services

Members Catherine Ochanda, Garnet Maina, Loyford Murithi, Njeri Kienjeku and Peter Musyimi

Team B - Part II - Administration of the Act
Part IV – Consumer Protection
Part IX - General Provisions

Members Mercy Wanjau, Harry Hare, Wanja Ngunjiri, and Stephen Mwaura

Team C - Part VI – Limitation of Liability of Service Providers
Part VII – Offences and Punishments
Part VIII – Privacy and Security

Members Patricia Gitonga, Duncan Odima, Johnson Okello, Andrew Gakiria and Mary Muiruri

2.6.1 Highlights of the Draft Electronic Transactions Bill (Version 1.0)

At the beginning of the exercise to develop the Draft Electronic Transactions Bill, the Technical Team determined the importance of carefully reviewing again, all the country laws covered in the Desk Study and the additional India and South Africa laws to ensure the development of a well balanced, comprehensive and diverse draft Electronic Transactions Bill.

In addition to the two new reference documents, the various sub-teams introduced new country laws that were reviewed in developing the Draft Electronic Transactions Bill, 2007. These country laws included Zambia, New Zealand, Malaysia, Australia and Pakistan.

Below are the major highlights of the draft Bill (Version 1.0):

a) The Draft Electronic Transactions Bill, 2007 is a reflection of extensive research on 10 country laws.

b) The Draft Electronic Transactions Bill was developed with the endorsement of the National Communications Secretariat in the Ministry of Information and Communication. The Bill acknowledges earlier attempts by NCS to develop similar Bills i.e. IT Bill 2002 and ECT Bill 2003. Wherever possible, the Bill has utilized some information from these two documents with acknowledgement of the same.

c) The final highlight of this Bill is the inclusion of Part VIII, Privacy and Security which is a major improvement on the 10 country laws reviewed.

2.7 Development of Version 2.0 e-Transactions Bill

On April 14, 2007 during the final plenary session to develop e-Legislation layman's draft, the Technical Team agreed to review Version 1.0 and provide input necessary to develop a more refined version of the e-Transactions Bill. It was agreed that document tracking would be used to make any changes on Version 1.0.

Upon return to Washington D.C. Mary Muiruri shared Version 1.0 with AED and USAID and request their input and feedback.

Upon receipt of the input by AED and USAID, and making some of the editorial changes that were requested by the technical team, Version 2.0 generated and shared with the Directorate of e-Government for dissemination to the Technical Team.

Version 2.0 contained a lot of comments and questions both from the Technical Team, AED and USAID/Washington. It was agreed that additional research would be conducted on the digital laws for the 11 countries that were used to develop Version 1.0. It was further agreed that the Technical Team would convene to revise Version 2.0.

2.8 Development of Version 2.5 e-Transactions Bill

On July 14-15, 2007 the Directorate of e-Government convened a workshop for a few members of the Technical Team to review Version 2.0 and address all the comments and questions raised by the Technical Team, AED and USAID/Washington on the Bill. There were specific questions on the content of the Bill and there was need to determine if all the parts of the Bill would stay or be merged with other sections. There were questions on identification of the various existing laws that would require to be amended to facilitate implementation of the e-Transactions Bill.

On July 17, 2007 changes to Version 2.0 were completed and Version 2.5 generated. The document was disseminated to AED and USAID/Washington for their comments and feedback.

On August 8, 2007 AED and USAID/Washington provided their feedback on Version 2.5.

2.9 Development of Version 3.0 e-Transactions Bill

From September 10-14, 2007 the Directorate of e-Government convened a Technical Team workshop to review Version 2.5 and address the remaining questions and comments. The team undertook comprehensive line by line review of the document, addressed all the questions and comments, and developed draft 1 Version 3.0. Draft 1 Version 3.0 underwent further review by incorporating new sections, deleting some and ensuring consistency with Kenya's drafting style. Draft 2 Version 3.0 was developed and it was further scrutinized to ensure that the Offences and Punishments sections was comprehensive enough. There was extensive discussions on Kenya Laws that would need to be amended to support implementation of the Bill once it is passed into law.

At the time of completing draft 3 of Version 3.0, the team was satisfied that it had done its best to produce a reasonable e-Transactions Bill, 2007 that reflected the team's input.

3.0 ADVOCACY PROCESS AND OUTCOME

While the Directorate of e-Government and the Subcontractor cannot take full credit for the withdrawal of the KCA Bill, 2007, it is worth noting that the two institutions conducted extensive discussions with key ICT stakeholders in the private and NGO sectors as a strategy of lobbying policy makers to give them a stand-alone e-Transactions Bill.

The Subcontractor held several sessions with the ICT players in the private and NGO sectors to raise their awareness on the Bill. These sessions facilitated informed contribution by the private and NGO sectors during the public debate forum on the KC Amendment Bill 2007 that was held on July 16, 2007.

The institutions targeted by the Subcontractor lobbied policy makers including key parliamentarians to reject the KC Amendment Bill 2007 in its current form, by requesting the Minister for Information and Communication to give the industry a stand-alone e-Transactions Bill, in lieu of the limited reference to e-Transactions in the KC Amendment Bill, 2007.

3.1 Details of Stakeholder Advocacy Forums

To address the changes in the parliamentary advocacy process, the Subcontractor conducted several meetings with various ICT stakeholders. The goal of the meetings was to enhance awareness on the need for a stand-alone e-Transactions Bill. The ICT stakeholders were preparing to participate in a public debate forum on the Kenya Communication Amendment Bill, 2007. The forum took place on July 16, 2007 at the Safari Park hotel. It was organized by Dr. Bitange Ndemo, the Permanent Secretary in the Ministry of Information and Communications.

Below is a list of the ICT stakeholders who met with the Subcontractor:

(a) International Commission of Jurists-Kenya (ICJ), and Article 19
(b) The BPO and Contact Centers Society,
(c) The Kenya Private Sector Association (KEPSA)
(d) The Kenya ICT Action Network (KICTANET)
(e) The Kenya ICT Federation (KIF)
(f) Kenya ICT Consumer Association

During the public debate forum, the ICT stakeholders made a strong case for a stand-alone e-Transactions law. PS Ndemo requested the stakeholders to formally provide him with written input and justification for a stand-alone e-Transactions law. The Subcontractor was requested by the stakeholder to provide a draft document that can be used in responding to the PS. The Subcontractor provided the following write-up to the stakeholders:

3.2 Outcome of Stakeholder Advocacy Forums

By the end of the stakeholder awareness forums, the need for a stand-alone e-Transactions law was widely recognized. Please see Appendix 1 for the media coverage relating to this.

4.0 CONCLUSION

Timely completion of this project was totally dependent on the Directorate of e-Government facilitating the attendance of high level GOK officials in all the drafting sessions. It is important to acknowledge GOK's financial contribution to this project by availing the Legal and ICT experts who worked tirelessly in developing all the versions of the Bill. The GOK experts provided invaluable guidance on the legislative, political and institutional procedures that needed to be followed carefully.

As the project ends, it is worth noting that development of all the versions of the Bill would not have been accomplished with the funding provided by USAID. If all the Kenyans on the project including the Project Director were compensated at market value for their services, this project would have cost a minimum of $200,000. It would therefore be realistic to assume that GOK and the citizens of Kenya provided a cost share amount of $100,000 to develop the model laws. Compensating the commitment of the Technical Team and the Directorate of e-Government for the services rendered would in fact be an uphill task.

Throughout the sessions of drafting the e-Transactions Bill, the Technical Team consistently acknowledged earlier efforts that were carried out by the National Communication Secretariat in the Ministry of Information and Communication, other Government departments, and the East Africa Community.

The spirit of the team was to produce a document that was well researched, comprehensive, and customized to suit Kenya's needs. The guiding principles of UNCITRAL model laws were applied and relevant sections from other country digital laws were customized for Kenya.

While the team believes Version 3.0, draft 5a of the e-Transactions Bill is comprehensive, the team acknowledges that additional research has been carried on this important subject.

As the Directorate of e-Government prepares to table the Bill in Parliament it is possible that stakeholders might highlight new developments that were not captured by the team. This is the reality in the ICT industry.

5.0 SUGGESTED NEXT STEPS

Dr. Juma Okech will be presenting Version 3.0 of the Bill to the Cabinet Committee on ICT on October 1, 2007. This will be followed by a presentation to the Permanent Secretaries Committee on October 8, 2007. The two presentations will be covered by the press and Dr. Okech plans to release Version 3.0 to the private sector and civil society by October 15, 2007 for their input. Release of the Bill to the private sector and civil society is very important to ensure that the Government does not suffer the backlash it suffered on the Media Bill and the KCA Bill that were highly criticized by the public for not factoring their input into the two Bills.

If and when the Bill is passed and becomes law, then extensive capacity building would be required to assist the GOK in effectively enforcing the law. This proposed capacity-building program would comprise the other component of the proposed Phase II of the e-Transactions Bill project, which could commence in October 2007.

The purpose of Phase II would be to ensure that the Bill becomes passed as a law and that effective capacity building takes place once the law is passed. The concept paper then discusses the relevance of these activities to USAID. Appendix 1 contains an illustrative budget for the Phase II activities.

PROPOSED ACTIVITIES UNDER PHASE II

<u>1. Passage of the e-Transactions Bill into Law</u>

Rationale

A uniquely favorable opportunity exists to pass the e-Transactions Bill into law. Until August 23, 2007, the Ministry for Information and Communications together with the Communications Commission of Kenya (CCK) had tabled a bill in Parliament (the Kenya Communication Bill, 2007) that had contained some provisions related to e-Transactions (though by no means as comprehensive as the e-Transactions Bill). However, on August 23, the Minister for Information and Communications, Hon. Mutahi Kagwe withdrew the Kenya Communication Bill, 2007 from the floor of Parliament for redrafting.

In withdrawing the Bill, the Daily Nation reported that “Information and Communications Minister Mutahi Kagwe said the Bill had omitted crucial issues that included cyber crime and penalties to be meted on those who damage fibre optic cables. The Bill has not sufficiently addressed the internet crimes and the issue of fibre optic cable protection.” Withdrawal of the Kenya Communications Bill, 2007 has provided a window opportunity for the tabling of the e-Transactions Bill in Parliament before it adjourns for the general election that is scheduled in December, 2007.

Under Phase I of the Kenya e-Legislation Policy Development Initiative, the subcontractor has diligently worked to attain support for the e-Transactions Bill from important stakeholders, so that they might sponsor the Bill in Parliament and support its passage. Thus, it appears that several influential sponsors are prepared to push for and support the Bill’s passage, including the

Central Bank of Kenya through its parent Ministry of Finance, and the Ministry of Trade and Industry.

According to the Constitution of Kenya and recent Subcontractor discussion with parliamentary staff, Parliament is required to adjourn 90 days before the general election to allow parliamentarians ample time to focus on election activities. Accordingly Parliament will adjourn by September 30, 2007. If the Bill is tabled before Parliament adjourns and it undergoes the first and second readings, unless it undergoes the third reading, the Bill will lapse once Parliament adjourns. Any effective advocacy activities on the e-Transactions Bill can only be conducted after the Bill is tabled in Parliament and published in the Public Gazette.

Proposed Activities

Under proposed Phase II of the Kenya e-Legislation Policy Development Initiative, several activities would help facilitate the passage of the e-Transactions Bill into law, including:

1. Awareness-raising to members of Parliament (MPs): It is proposed that a group of international trade law experts from Africa and other countries host a two-day discussion for influential MPs on ‘best practices in electronic transactions and the importance of passing the e-Transactions Law;

2. Obtain Ministry Sponsors: A series of meetings would be held to secure ministerial buy-in (e.g. Trade & Industry; Finance).

3. Stakeholder Outreach and Awareness: This may include such activities as reaching out to stakeholders such as COMESA, EAC, the Judiciary and Police, the Tourism Board, and influential private sector associations like KEPSA to secure their support and request their participation in advocating the Bill’s passage; and

4. Collaboration/coordination with CCK & the Ministry for Information and Communications: If the e-Transactions Bill is to be submitted as a stand-alone bill, it will be critically important to ensure that the CCK and Ministry for Information and Communications support this initiative. To do so, extensive collaboration/coordination meetings would need to be held to show how the stand-alone Bill supports their objectives and why the expected re-tabled Kenya Communication Bill, 2007 would not need to contain reference to electronic transactions.

It is estimated that approximately $30,000 would be required to implement these advocacy initiatives successfully. Please see the budget for a proposed breakdown of investment.

2. Capacity Building

Rationale

Before Kenya can realize the full benefits of e-Commerce and regional trade integration, key institutions within the GOK need to develop the capacity to implement the e-Transactions law. This includes the Judiciary, CCK, Kenya Police, Tourism Board and the Kenya Investment Authority.

Proposed Activities

The proposed capacity building activities include:

1. Training in monitoring and enforcement: For example, the judiciary (judges and magistrates), investigators, prosecutors, CCK cyber crime team, etc will need to be trained in the specifics of the e-Transactions Law via targeted, customized workshops and training sessions.

2 Infrastructure: This includes prospective activities such as helping develop a cyber crime forensics lab within the Kenya Police and developing a secure, shared database and linked network for judiciary on relevant laws, cases.

3 Training for Kenya Investment Authority, Tourism Board and ICT Board on application of strategies to increase electronic trade in Kenya

It is estimated that approximately $160,000 would be needed to launch some or all of the capacity-building activities mentioned above. It is possible that additional resources may be necessary to ensure successful implementation of these capacity building activities, given that capacity building is a long-term and complex process, and where frequent monitoring and evaluation is necessary to ensure that the capacity building activities are attaining the desired outcome.

RELEVANCE OF THE PHASE II ACTIVITIES TO USAID

The proposed Phase II activities support USAID’s objectives in several ways, including:

2 Supporting efforts by the U.S. Embassy and USAID/Kenya in improving democracy and governance. For example:

    2.3 The U.S. Embassy has helped sponsor the development of a forensics lab, but not in the area of cyber crime, which is a rapidly growing threat to economic growth and good governance in Kenya and the region;

    2.4 The electronics transactions law has the potential to curtail illegal money laundering by making more transparent financial transactions and enabling the Central Bank of

Kenya and other banks to improve the tracking and law enforcement related to financial transactions;

2.5 Supporting USAID's efforts in the MCC Procurement Reform Project, specifically under the activity relating to e-procurement whereby businesses will be electronically linked to the GOK for tenders and contracts. It will be important for businesses and the GOK to have comprehensive and transparent legislation in place dealing with electronic transactions especially when disputes arise.

3 Supporting trade facilitation through the use of ICTs and enabling legislation.

The ultimate goal of the e-Legislation Policy Development Initiative is to create model laws in Kenya that can be customized in the EAC partner states and the COMESA region. The capacity created in Kenya will be utilized in the customization of the model laws in the EAC partner states and COMESA region. The lessons learnt in the proposed Phase II of the project will be used in designing subsequent phases that will seek to improve regional trade integration via electronic transactions. The desired end goal of this project is seamless trade integration across Africa regarding electronic transactions.

ANNEX 1 – MEDIA COVERAGE OF THE BILL

For example, the Sunday Standard Business and Technology section issued several columns relating to this (July 22, and 29, 2007). Below are the two BIZBYTES Columns:

BPO Industry Decries Lack of Proper Legislation – July 22, 2007

BIZBYTES
THE SUNDAY STANDARD · JULY 22, 2007

BPO industry decries lack of proper legislation

By Michael Ouma

PLAYERS in the country's Business Process Outsourcing (BPO) industry have expressed concern over lack of an independent e-Transactions legislation, which they say is keeping potential investors away from the country.

Those involved in the BPO sector say the Kenya Communications Amendment Bill 2007, which is meant to address e-Commerce and other e-Transaction concerns, is very general. The situation, they say, is causing a lot of anxiety to investors on matters to do with fraud.

During a media stakeholders meeting organised by Article 19 and the International Commission of Jurists (ICJ-Kenya) on July 12 to discuss the Kenya Communications Amendment (KCA) Bill 2007 and the Media Bill 2007, the chairperson of the newly formed Kenya BPO and Contact Society (KBPCS), Ms Gilda Odera said the industry would lobby the Ministry of Information and Communications to remove e-Transactions from the Bill.

Media stakeholders at the meeting faulted the KCA Bill, saying it "only talks about penalties to be imposed on media organisations without addressing content issues."

The Kenya Communications (Amendment) Bill 2007, contained in the Kenya Gazette Supplement No. 51 (Bills No. 22), was published on May 18. It went for its first reading before Parliament in the last week of June.

Participants also called for the enactment of an independent legislation to guide the country's e-Transactions as is the practise with other countries that have made significant progress in e-Commerce and e-Transactions.

"Every country Kenya is trying to compete with has a stand alone e-Transactions legislation. How does Kenya intend to stay competitive with a converged law that covers all four components of communications, broadcasting, postal and e-transactions?" asked Ms Mary Muiruri of Afrika ICT Strategies.

Ms Muiruri said a study on 12 leading countries on e-Commerce — among them Malaysia, UAE, Egypt, Australia and India - found that they have stand alone e-Transactions laws.

When presented before the State Law Office, the Attorney-General had advised that the KCA Bill 2007 be presented as four separate bills — communications, broadcasting, postal services and e-transactions.

Odera said the BPO and contact centre industry's growth would be stifled if an e-Transactions Bill was not enacted as the industry would be operating in a legal vacuum.

The participants at the meeting said there was need for the private sector (BPO players) to look at what was at stake for them and then lobby policy makers on the importance of necessary legal framework.

They further said that even though the KCA Bill as it stands gives the information and communications minister powers to punish e-Commerce and e-Transactions, the country's penal code does not stipulate and has no provision on how to punish cyber-crimes.

Odera, who is also managing director of SkyWeb Evans said outsourcing clients were keen on having security of their credit cards and other online transactions guaranteed, something that could not happen if cyber security was not adequately addressed.

Stakeholders also fault the KCA Bill, saying it is a derivative of the Kenya Communications Policy of 1998 which was pushed by the World Bank through its Structural Adjustment Programmes (SAP).

They claim the policy came from the bank's wave aimed at liberalisation of key sectors of developing countries' economies by splitting up monopolies, separating postal and telecoms service providers and creating an industry regulator.

"Using the same policy that was used to split up KPTC into Postal Corporation of Kenya (PCK), Telkom Kenya (TKL) and Communications Commission of Kenya (CCK) ten years ago to come up with the KCA Bill 2007 is unreasonable," said Muiruri.

She said the policy document being used now was an amendment of the initial document used to split up KPTC.

"An amendment can only affect one-third of the original bill but not two-thirds as is the case with the current KCA Bill," she said.

Already, sources say that the Central Bank of Kenya (CBK) has shown interest in sponsoring an e-Transactions Bill through the Treasury. The CBK has also withdrawn its Electronic Funds Transfer (EFT) Bill in favour of the proposed e-Transactions Bill as the latter would address issues raised in the EFT Bill.

According to sources who declined to be named, the CBK is to sponsor the proposed e-Transactions Bill when the Ministry of Information and Communications retracts section 4 of the KCA Bill.

The issue of lack of necessary legislation to guide e-Commerce in the country also came up during the e-Tourism meeting at the Coast when stakeholders in the tourism industry complained that lack of a legal framework for online payments was making the industry lose revenue to other markets with the legislation. This is because currently, one can make an online booking but is unable to make online payments.

Sunday Standard 'Bizbytes'
July 22nd 2007 (pg 3)

Give Kenya a law on e-Commerce – July 29, 2007

Last Updated on July 29, 2007, 12:00 am

By Pauline Wangui

Lack of an electronic communication and e-transaction legislation has hampered growth in the e-Commerce sub sector and also kept numerous potential investors away.

The Kenya Communications Amendment Bill 2007 is rather vague about the issue and does not adequately address electronic transaction or e-commerce issues.

The growth of the Internet and other electronic communications technologies is providing an array of opportunities and benefits for Kenyans especially in the business sector.

e-Commerce enables businesses to harness ICT to overcome distance. Businesses can use e-commerce to increase efficiency, access new markets and respond creatively and effectively to business opportunities and customer needs. Industry data indicates that e-commerce is conservatively estimated to be worth over $2 trillion and an extraordinary growth is expected in the next few years.

For the Government to boost e-Commerce, it needs to have a strategy that would ensure that the legal and regulatory environment facilitates uptake of e-commerce across the country. This is critical to the future global competitiveness of Kenya and the region as a whole.

Dubai leads the way

UAE is one country that has experienced one of the biggest economic impacts by passing their Electronic Transactions and Commerce Law in 2002.

Today Dubai is a well-known e-Commerce centre. 70 per cent of government services are offered online in Dubai and even some IT companies in East Africa have moved operations to Dubai.
In 2004 the ruler of Dubai launched the Dubai Outsourced Zone to facilitate e-trading. This is the world’s first free zone just dedicated to the outsourcing industry.

Dubai Internet City provides a strategic and cost effective platform for ICT companies and government.

Business licence application forms are processed electronically through the Dubai Internet Site.
Besides just having a world-class technical infrastructure, the Dubai government has backed e-business initiatives to support this vibrant environment.

Kenya still disadvantaged

There is dire need for a quick enactment of independent legislation to usher Kenya into the e-Commerce ship. Kenya’s competitiveness is at stake owing to lack of Electronic Communication and Transaction Bill popularly known as the e-transaction bill.

The BPO and the e-Commerce sub-sectors would be the ones that are most affected if an e-transaction bill is not enacted.

Even though the current KCA Bill gives the minister the power to punish e-Commerce and e-Transactions crimes, the current penal code does not have provisions on how to punish for instance cyber crimes.

We need to have security of credit card and other online transactions guaranteed, but cyber security has not been adequately addressed in Kenya today.

Benefits of the Bill

The transacting of business and international trade through electronic means (e-commerce) is undeniably beneficial to the Kenya economy.

E-commerce and its use of information and communication technologies makes it is very easy for information to be collected, stored, transferred, manipulated and retrieved through electronic means.
However, the legal significance of electronically stored or communicated information remains uncertain owing to the archaic nature and the inadequacy of legislation relating to storage and communication of information in the country.

The inappropriateness of the present legal framework in Kenya is such that electronic documents are not recognized in our current legal framework.

Higher risk than in countries that have legislative provision

This means that persons in Kenya who engage in e-commerce take more risk than those in countries, which have made legislative provision for recognition of electronic documents, and information and this therefore automatically puts Kenya at a disadvantage.

In order to promote consistency between the laws of Kenya and those of major foreign trading partners and to foster economy and efficiency in e-commerce, it is necessary for the government to create a legal environment that facilitates the expanded use of e-commerce and electronic information, thereby providing equal treatment to users of paper-based documents and users of computer-based information.

Another benefit is that the Bill would make it possible for Kenyans to enjoy the social and economic benefits offered by the growth of the new electronic economy.

Many of us who have engaged in e-commerce know that most third party online merchant such as PayPal will not issue online payments accounts to a Kenyan address directly, and those who do charge exorbitant fees, making it next to impossible for Kenyans to open online merchant accounts.
Sadly Kenya is not in the geographical jurisdiction of most third party providers. This is primarily caused by lack of an e-Transaction legislation in Kenya. What a pity!

Information security

The Bill would ensure information security for the conduct of e-Commerce in the country.
As e-commerce has global dimensions, it is vital for regulatory initiatives to be consonant with national and international best practice as far as security is concerned.

Overall, the Bill would facilitate and promote business and community confidence in the use of electronic transactions. It would enable business, the community and Government to deal with each other via electronic means, with the clear support of the law.

In this regard it would enable contractual dealings, such as offers, acceptances and invitations to be conducted electronically.

The Bill would help remove existing legal obstacles to conducting electronic transactions and put in place default rules for the time and place of sending and receipt of electronic communications.
It will allow complex administrative transactions including digital signatures to be delivered online or by any other kind of technology.

Need for a structured platform for future development

Very important is that the Bill would encourage industry to develop reliable solutions to e-commerce security issues and at the same time provide guidance guidelines in regards to facilitating Electronic Transactions, e-Taxation,e-Government services, Cryptography and Encryption provision, Authentication Service provision, Consumer Protection , Personal Information and Privacy Protection, Domain Name Authority and Administration and Cyber Crimes among others.

There is need for the Government to provide a structured platform for the future development of e-business, especially with the entrance of broadband services in the market. Internet is an asset that can be used by everybody in almost every situation. It is an asset that has the potential to usher Kenya into a new age of prosperity, if we use it well and wisely.

Having Electronic Communication and Transactions (ECT) Bill would facilitate Internet transactions, ensure the protection of intellectual property rights and also pave the way for the establishment of an institution to authenticate electronic signatures among others. The Bill would remove and prevent barriers to electronic communications and transactions in the country, as well as promote the use of e-commerce.

The author is a telecom and ICT strategy consultant Pauline@nordic.co.ke

Kenya's cyber law being developed

Published on August 5, 2007, 12:00 am

By Michael Ouma

Kenya's cyber law, when enacted, could be adopted as a model law for other countries within the East African Community (EAC) — Tanzania, Uganda, Rwanda and Burundi — which are yet to enact such kind of legislation to give regulatory direction for ICT-related transactions.

Already, a process has been initiated under the auspices of United States Agency for International Development (USAID) Washington's Economic Growth Agriculture and Trade/Information Technology and Energy (EGAT/IT&E) Bureau to guide the process leading to the development of the legislation in Kenya.

The initiative, called e-Legislation policy development initiative for the East African Community (EAC) — Kenya Cyber Law model, is facilitated through the Digital Opportunity through Technology and Communications Partnerships (DOT-COM), policy component that is managed by the Academy for Educational Development (AED).

The process is run in collaboration with Kenya's Directorate of e-Government and implemented by Afrika ICT Strategies Inc., a consulting and research firm with head offices in Washington and a subsidiary office in Kenya.

eTransactions vital to economic growth

Says Dr Mary Muiruri of Afrika ICT Strategies: "The primary objective of the project is to create model electronic transactions laws piloted in Kenya that can be customized for the East African Community partner states of Uganda, Tanzania, Rwanda and Burundi."
The initiative is in recognition of the fact that eTransactions laws have the potential to generate significant economic and political development for Kenya and East Africa as a whole.

Muiruri says that an e-Transactions law is critical to the Central Bank of Kenya (CBK) as it will regulate M-Pesa and other electronic transactions like Business Process Outsourcing (BPO) and Contact Centers in which the government is currently involved in promoting the country as a competitive destination.

"Moreover, the e-Transactions Bill will lay a strong foundation for the implementation of various eGovernment and e-Commerce applications, including e-procurement, e-taxation, e-Land Registry, e-Funds Transfer among others," she adds. Among the many benefits of an e-Commerce law for the country and fledgling e-Commerce and BPO industry is that it would enable Kenya to position itself as an ecommerce hub, by providing a comprehensive stand-alone e-Transactions law which is consistent with international best practices. This is due from the fact that under one of the key activities in the e-Legislation Policy Development Initiative project, conducted from December 2006 to March 2007, Afrika ICT Strategies Inc conducted research on digital laws for 13 countries — Malaysia, Singapore, South Africa, United Arab Emirates, Pakistan, India, New Zealand, Namibia, Botswana, Zambia, Egypt and Australia. The research indicated that the countries that have succeeded in utilizing e-commerce as an economic growth engine enacted stand alone e-Transactions laws.

"Kenya has been positively identified as a BPO and call center destination and the country needs to demonstrate its ability to compete with India, Philippines and China which are the leading BPO and contact center destinations, by deliberately creating an enabling legal environment," argues Muiruri. She commends the current Kenya Communication Amendment (KCA) Bill 2007's inclusion of e-transactions "as a great step in the right direction as it demonstrates the ministry of Information and Communication's commitment to e-transactions." She further says that by including e-Transactions in the converged Bill, the ministry rightly recognizes the technology convergence that has occurred in the digital world.

However, she is concerned that "while this convergence is a reality that has been recognized globally, most of the countries Kenya will be competing with in the BPO and contact center industry have not converged their laws but have stand-alone laws that regulate e-transactions." Among the countries that have enacted such independent laws include South Africa's Electronic Communication and Transactions Act, 2002, Dubai's Electronic Transactions and Commerce Law No. 2/2002, India's Information Technology Act, 2002 amended in 2006, Singapore's Electronic Transactions Act, 2001 and Malaysia's Electronic Commerce Bill, 2006. Others in this category are the Philippines' Electronic Commerce Act 8792, 2000, Namibia's Electronic Communication and Transactions Bill, 2006 as well as Egypt's e-Signature Law No. 15/2004 "It is worth noting that despite the technology convergence, India and Malaysia have amended their eTransactions laws as recently as 2006," said Dr Muiruri.

Other advantages of a stand-alone e-Transactions law would be its comprehensiveness as it addresses all areas of e-Transactions — e-signatures, privacy and security, econtracts, cyber crime, offences and punishments relevant to e-transactions. Such an independent legislation would provide legal clarity which are currently favoured by outsourcing countries.

This would cushion Kenya from being sidelined in favour of countries with more mature BPO industries because of lack of stand-alone laws. Other advantages include a boost to investor confidence in the country, thereby enforcing the government's commitment and emphasis on ICT as an economic growth engine.

Those involved in the e-Legislation policy development initiative for the East African Community (EAC) have recommended that the ministry of Information and Communication "considers replacing the Information Technology part of the KCA Bill, 2007, with a comprehensive e-Transactions Bill." Such a Bill should build on various EAC and Kenya stakeholder forums. The Bill can be sponsored by the ministry of Information and Communication, Trade, Treasury or Tourism.

Says Muiruri: "The important thing is that Kenya requires a stand-alone e-Transactions law without forgetting the need for regional trade integration. If Uganda, Tanzania, Rwanda or Burundi enacts stand alone e-transactions laws, they will become the preferred outsourcing destination and Kenya could lose its competitive advantage."

Kenya: State Drafts E-Commerce Bill

East African Standard (Nairobi)

7 September 2007
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Alari Alare
Nairobi

The Government is formulating legislation to fast-track Electronic- Commerce.
The proposed 'e-Transaction Bill' is expected to spur growth in the e-Commerce sub sector and attract investors.

Electronic-Commerce is a means of doing business online, typically through the World Wide Web. It implies that goods and services can be purchased online.
Speaking during the Kenya ICT Federation (KIF) meeting on Thursday, Dr Juma Okech, secretary to the e-Government Directorate at the Office of the President said the proposed Bill will address among other things the legal recognition of e-Signatures, cyber crime, data protection and privacy.

The Bill will enable businesses to harness the new Information and Communication Technologies (ICT) to overcome distances. Businesses will also use e-commerce to increase efficiency, access new markets and respond creatively and effectively to new opportunities.
At the same function, Ms Gilda Odera, chairman of the Business Process Outsourcing and Call Centres Association decried lack of a regulatory frame for data security.

She said that e-commerce and its use of information and communication technologies would make it easy for information to be collected, stored, transferred and even manipulated.
"There is an outcry to have security of credit cards data and other online transactions guaranteed; cyber security also requires to be addressed adequately," she Odera.

"However, the legal significance of electronically stored or communicated information remains uncertain owing to the archaic nature and the inadequacy of legislation relating to storage and communication of information in the country," she added.

Okech, however, warned of the need to reduce ICT related issues into one single Bill.
"We need to refocus, we don't need to have a huge document (like the Kenya Communication Amendment Bill 2007) if there is urgency for a legal framework dealing with a sub sector in the industry. We can just isolate the issue and address it either through policy formulation or draft a separate bill," said Okech.

He added; "this is the route we chose for the e-Transaction Bill; if not, it would have been merged with the Kenya Communication Amendment Bill 2007 that was thrown out last month".

ANNEX 2 – e-TRANSACTIONS BILL VERSION 3.0 DRAFT 5A

Please refer to the attached document.