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Cluster Three Assessment Report

1. Issue: E-Commerce, Taxation, Trade

2. Institutions

A number of intergovernmental and other international institutions have governance responsibilities related to this issue:

- World Trade Organization (WTO)
- World Intellectual Property Organisation (WIPO)
- United Nations Commission on International Trade-Related Law (UNCITRAL)
- United Nations Conference on Trade and Development (UNCTAD)
- International Trade Centre (ITC), which is jointly sponsored by WTO and UNCTAD
- United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT)
- Telecommunication Standardization Sector (ITU-T) of the International Telecommunication Union
- Internet Engineering Task Force (IETF)

As pointed out in the *chapeau* paper, “Towards a Common Understanding of the Roles and Responsibilities of all Stakeholders in Internet Governance”, in an increasingly liberalized environment, the private sector is playing an ever stronger role in governing international markets for ICT goods and services. Governance is being ‘privatized’ through a variety of mechanisms that include:

- traditional business organizations established to represent the interests of the private sector as a whole (e.g. Chambers of Commerce) or specific industry sectors (e.g. the Business Software Alliance) to government policy-makers and regulators, at the international, regional and national levels;
- newer-style organizations established to support and facilitate private sector “self-regulation”, either in relation to horizontal policy themes (e.g. the Global Business Dialogue on e-Commerce) or vertical industry sectors – e.g. through the development of codes of conduct and recommended business practices;

- organizations that provide Alternative Dispute Resolution services (ADR), which mediate and arbitrate commercial disputes outside the bounds of the public justice system;
- forums and consortia established to develop technical standards for ICT products and services;
- individual firms with significant market power, whether derived from proprietary technologies (e.g. Microsoft) or industry structures (e.g. Tier 1 Internet backbone providers).

Public and private governance mechanisms have different goals, different structures, and different working methods. Many private governance mechanisms that play very significant roles in shaping global markets for ICTs operate more or less independently of intergovernmental structures. In other cases, private governance mechanisms actively interface with intergovernmental structures and seek to influence their decisions. In some cases, they are called to account by intergovernmental organizations (e.g. for violations of competition law).

This note does not attempt to assess these different kinds of private governance mechanisms, in relation either to the Internet or to the WSIS criteria. There appears to be a lack of comprehensive, systematic, easily accessible, and publicly-available information about private sector governance mechanisms that help shape the Internet. However, this is clearly a gap that needs to be filled, particularly in relation to the issues of e-commerce and trade.

3. Relationship to the Internet

The Internet raises new governance issues for all of these institutions.

For institutions that have governance responsibilities directly related to international trade, the Internet provides new ways of trading goods and services through e-commerce. Two basic questions face institutions with governance responsibilities in this area:

- whether the rules and practices that have been developed to govern trade in physical goods and services can and should be applied to e-commerce;
- how the growth of international e-commerce can be encouraged and its benefits extended to and shared by all countries.

The answers to these questions generally are seen as interdependent in the sense that, while there is concern that the application to e-commerce of rules and practices that were developed to govern the movement of physical goods and services may unduly inhibit the growth of e-commerce, which it is still in its infancy, there is also recognition that rules will likely be required to govern e-commerce as it develops and matures, in order to ensure fair trading on a global basis.

For these reasons, institutions that have direct responsibilities for governing international trade have tended to take a cautious approach to the governance of Internet-based e-commerce. This approach

- gives e-commerce a 'breathing space' from conventional trade rules so that it has room to grow (e.g. through the WTO-agreed moratorium on imposing customs duties on electronic transactions);

- examines the impact of e-commerce on existing patterns of trade, as well as its implications for current rules and practices (e.g. the WTO e-commerce program);
- analyses the potential benefits of e-commerce for developing countries, identifies practices and develops models that will facilitate the growth of e-commerce within and between countries, raises awareness of the potential benefits of e-commerce and builds capacity in developing countries (e.g. the work done by UNCTAD and the ITC, the model laws on e-commerce and electronic signatures developed by UNCITRAL, the electronic document interchange (EDI) models and recommendations developed by UN/CEFACT).

In addition, the Internet raises trade-related issues for institutions that do not have a direct responsibility for governing international trade, but which can affect the development of e-commerce through the decisions they take in their primary areas of responsibility. For example,

- The decisions embodied in the 1996 WIPO Copyright Treaty and Performances and Phonograms Treaty (collectively known as the WIPO “Internet treaties”) have important implications for e-commerce, since they essentially extend the rules that have been developed to balance the rights of creators and users in other media into the world of the Internet. The implications of these decisions and their relevance to the WTO Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement resulted in a formal cooperation agreement between the two organizations. In addition, as part of its ‘digital agenda’ WIPO assists its members, particularly developing countries, in leveraging IPR assets in e-commerce.
- Both the IETF and ITU-T have developed standards that facilitate e-commerce, e.g. through electronic authentication techniques.

4. Governance Mechanisms

Between them, the institutions that have direct and indirect governance responsibilities for e-commerce, taxation and trade have available a full range of mechanisms ranging from ‘hard’ forms of governance, including treaties with binding dispute resolution mechanisms, to ‘softer’ forms involving standard-setting and policy coordination.

However, as indicated in the preceding section, the cautious approach that has so far been taken to issues of e-commerce, taxation and trade has favoured the use of softer mechanisms, even in cases where harder alternatives are available. For example

- the members of the WTO have not attempted to develop a treaty-level agreement for e-commerce. Instead, in 1998 they established an electronic commerce work programme to explore how e-commerce affects trade in goods, services and intellectual property, and how it fits within the agreements that resulted from the Uruguay Round;¹
- UNCITRAL’s activities in the field of e-commerce have led to the development of model laws for electronic signatures and e-commerce, not to conventions.

¹ Within the WTO governance framework, it could be argued that the TRIPS Agreement, and the Trade in Services Agreement, particularly the provisions relating to trade in telecommunication services, go some distance towards putting in place the foundations of a régime for governing e-commerce

The other institutions with responsibilities directly related to international trade do not deploy ‘hard’ governance mechanisms. Instead, they aim at promoting understanding of trade-related issues and coordinating policies between their members (e.g. UNCTAD), or at recommending business practices and customs procedures designed to facilitate trade (e.g. UN/CEFACT).

In a similar fashion, the other institutions that affect the development of e-commerce, even though it is not their primary responsibility, provide softer forms of governance such as standards-setting (e.g. ITU-T and the IETF).

5. Evaluation against WSIS criteria

5.1 Process Criteria *To what extent to the institution’s Internet-related governance mechanisms meet the following criteria, given what could be reasonably expected in light of the governance mechanism used?*

- *Multilateral*
- *Transparent*
- *Democratic*
- *Full involvement of governments, the private sector, civil society and international organizations*

With the exception of the IETF, all of the institutions with direct or indirect governance responsibilities in relation to e-commerce, taxation, and trade are intergovernmental organizations founded on treaty agreements between sovereign states. In addition, with the exception of the WTO, all of these institutions are members of the United Nations family – i.e. parts of the United Nations organization itself, or U.N. Specialized Agencies.

As indicated in the *chapeau* document that introduces these assessment notes, the intergovernmental nature of these organizations colours their understanding of what it means to be “multilateral, transparent, and democratic” in the following ways:

- In general, these organizations are “multilateral” in the traditional sense that only governments are members. The exceptions are ITU-T, which has some 350 non-governmental Sector Members, and the IETF, which is composed of individuals acting in their personal capacity, whatever their institutional affiliation.
- In general, these organizations are “democratic” in the traditional sense that each country has one vote, that decisions are made by consensus as much as possible, and that balanced geographical representation is an important factor in filling both elected and appointed offices within the organization.
- In general, these organizations are “transparent” in the sense that they publish information about their activities (in this respect, the Internet has greatly improved the transparency of many of these organizations). In this respect, the IETF is the most transparent of all, since its work is done on-line.
- These organizations allow partial involvement of non-governmental actors in the sense that they generally permit accredited non-governmental organizations to attend at least some of their meetings as observers. Among intergovernmental organizations, ITU-T is again an exception to these general practices. Only non-governmental organizations that are ITU members (and have paid the necessary fees) can attend its meetings. In

addition, ITU-T restricts access to much of its most important information either by limiting access to ITU members (e.g. working documents) or by charging fees (e.g. for approved standards).

The intergovernmental nature of these organizations also puts boundaries around the extent to which the private sector, civil society, and international organizations are “fully involved” in their governance processes.

As indicated in the *chapeau*, the extent to which the rules and operating procedures of these organizations allow non-governmental actors to participate directly (i.e. in their own right, rather than as members of national delegations) in the decision-making processes of intergovernmental organizations tends to vary according to the nature of the decision being taken, being most open in the case of relatively ‘soft’ governance processes that aim at promoting understanding and coordinating policies in relation to specific issues (e.g. UNCTAD conferences) and most restricted when binding treaties are being negotiated (e.g. WTO Agreements).

The practical possibility for governments, the private sector, civil society and international organizations to participate directly in the decision-making processes of organizations that govern e-commerce, taxation and trade also varies according to the nature of the work.

- In some cases the very technical or highly specialized nature of an institution’s work limits the range of actors that can make a practical contribution to its governance process (e.g. those who are not experts in international trade law probably have very little to contribute to the work of UNCITRAL, while governments have largely withdrawn from the technical standardization work of ITU-T, including that which is related to e-commerce).
- In other cases, the e-commerce, taxation and trade-related governance issues being dealt with by an organization are broad enough to permit a wide range of actors to participate effectively in decision-making processes (e.g. UNCTAD).
- In still other cases that lie somewhere in-between (e.g. the WTO), a wide range of non-governmental actors have a direct interest in the outcome of governance processes, but have unequal opportunities and capacities to influence decision-making, with the private sector having a much greater say than civil society.

In sum, there is no easy and simple answer to the question of the extent to which the diverse governance institutions and mechanisms that currently make decisions affecting Internet-related e-commerce, taxation, and trade issues meet the WSIS process criteria of being “multilateral, transparent, democratic, and with the full involvement of governments, the private sector, civil society, and international organizations”.

It seems clear that progress has been made by many these organizations in recent years in relation to at least some of the WSIS ‘process criteria’. For example,

- Some organizations that traditionally were seen as closed to or uninterested in civil society and its concerns have instituted outreach programs and encouraged non-governmental organizations to get involved in their work (e.g. WTO and WIPO).
- The ITU has attempted to open its unique organizational structure to new players from the private sector and civil society by creating a category of “associate member”.

- As noted in the ‘chapeau’ all the organizations dealing with issues related to e-commerce, trade and taxation have used the Internet to improve their transparency to non-governmental stakeholders, by publishing information on their organizational structures, main lines of activity, meetings, and decisions, as well as background information on issues.

It is too early to judge whether greater transparency and enhanced participation by non-governmental organizations will ultimately result in governance processes that are “multilateral” and “democratic” in something more than the traditional intergovernmental sense – although it is interesting to note that a 2003 survey by One World Trust ranked the WTO fourth among 18 intergovernmental organizations, transnational corporations and international NGOs in terms of transparency and accountability.

For the moment, though, it appears that taking advantage of the greater transparency of these organizations and their apparent openness to involvement by non-governmental actors, particularly from civil society, represents the best way forward, in terms of the WSIS process criteria.

5.2 *Role and responsibility criteria* *(To what extent do the institution’s Internet-related governance mechanisms enable the different stakeholder groups to fulfill their roles and responsibilities as defined by WSIS? To what extent to the different stakeholder groups have the capacity to fulfill their roles and responsibilities?)*

- Governments
- Private Sector
- Civil society
- Intergovernmental organizations
- Other international organizations

As indicated in section 5.1, the current institutional arrangements for governing e-commerce and Internet-related taxation and trade issues are relatively open to inputs from the different stakeholder groups, since these institutions are currently focusing on ‘soft’ approaches to governance that aim at developing a shared understanding of the potential of e-commerce to benefit all countries, and at identifying models, policies and practices that will facilitate the development of e-commerce within and between countries.

5.3 *Outcome Criteria* *(How effectively to the institution’s Internet-related governance mechanisms contribute to achievement of the following goals?)*

- Equitable distribution of resources
- Access for all
- Stable and secure functioning
- Multilingualism

At the present time, there is no direct or obvious relationship between the activities of the various institutions involved in the governance of e-commerce and Internet-related taxation and trade issues, and the achievement of the WSIS outcome criteria. In fact, it might be argued that rather than contributing to the achievement of these goals, governance activities aimed at developing e-commerce on global basis will remain limited in their effect until the cluster one and cluster two activities that are directly responsible for governing the Internet have resulted in an equitable distribution of Internet resources, widespread access, a stable and secure functioning and multilingualism. In reality, however, these are two sides of the same coin: governance of the factors that generate demand for the Internet resources that are needed to develop e-commerce should work in harmony with governance of the factors that supply these resources.

6. Coordination: How effectively is governance of this issue coordinated with governance of other Internet-related issues?

As indicated in the previous section, at the present time there is no overall coordination between governance of the demand and supply sides of Internet-based economic and social development. Nor, from the demand side point of view, is there effective coordination between governance of e-commerce and governance of other factors that could help generate demand for Internet resources, with the partial exception of IPR governance.

7. Overall assessment: What are the points that most need improvement in order to meet the WSIS criteria?

- Policy vision mechanisms to identify and assess the impact and implications of the Internet for governance regimes and institutions, while encompassing the needs of all stakeholders
- Coordination mechanisms to address the horizontal, ‘barrier-breaking’ impacts of the Internet within and between governance regimes and institutions
- Innovative governance mechanisms to more fully and effectively engage non-government actors – including representatives of industry, consumers, and users – in intergovernmental decision-making processes in a fair and balanced manner, as well as to engage non-private sector actors in private sector standards-making processes
- Capacity building mechanisms to assist governments and other stakeholders in developing countries