Towards a Common Understanding of the Roles and Responsibilities of all Stakeholders in Internet Governance

1.   Introduction

The Working Group on Internet Governance (WGIG) has as one of its terms of reference to: "develop a common understanding of the respective roles and responsibilities of governments, existing intergovernmental and international organisations and other forums as well as the private sector and civil society from both developing and developed countries"[1].

This paper is a first attempt towards developing such a common understanding on the respective roles and responsibilities of all actors involved in Internet governance arrangements. It is to be seen as a contribution to a discussion on this issue and as a work in progress. In order to gain a better understanding of the roles and responsibilities of the different stakeholders, the paper examines to what extent the criteria set out by the WSIS Documents apply to these actors.

The paper tries to include all views put forward by various WGIG members in the course of its work and to reflect the plurality of opinions held within the WGIG. Thus, not all views are shared by all members. The paper's objective is to stimulate the discussion among all stakeholders with a view to developing such a common understanding.

2.   Approach

The paper provides a framework for assessing existing Internet governance arrangements against four sets of criteria derived from the WSIS Declaration of Principles and Plan of Action:

Process criteria – the extent to which existing arrangements ensure the full involvement of governments, the private sector, civil society and international organizations in a process which is multilateral, transparent and democratic;

Roles and responsibilities criteria – the extent to which all stakeholders and relevant intergovernmental and international organizations are able to fulfill the different roles and responsibilities recognized by WSIS, by providing the following inputs to the governance process:

- public policy inputs from governments;

- technical and economic inputs from the private sector;

- community inputs from civil society;

- coordination and facilitation inputs from intergovernmental organizations;

- Internet-related technical standards and relevant policy inputs by international organizations.

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[1] WSIS Declaration of Principles, Paragraphs 48 – 50, WSIS-03/GENEVA/DOC/0004; WSIS Plan of Action, Paragraph 13 b), WSIS-03/GENEVA/DOC/0005

<u>Outcomes criteria</u> – the extent to which existing arrangements have contributed to achieving an equitable distribution of Internet resources, providing access for all, ensuring a stable and securing functioning of the Internet, and multilingualism;

<u>Coordination criteria</u> – the extent to which governance of Internet-related issues are addressed in a coordinated manner.

These different sets of criteria are linked – at least conceptually – in the sense that open, participatory governance processes that enable all stakeholders to fulfill their roles and responsibilities effectively and in a coordinated manner should result in better outcomes. Conversely, deficiencies in governance processes and/or weaknesses in the capacity of stakeholder groups to fulfill their roles and responsibilities will likely result in outcomes that fall short of the WSIS targets.

This paper examines some of the criteria for good Internet governance expressed in paragraph 48 of the WSIS Geneva Declaration of Principles: "multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations". In assessing existing mechanisms against these criteria, it is important to remember that some of the institutions responsible for governing the issues are intergovernmental organizations founded on treaty agreements between nation States. The intergovernmental nature of these institutions shapes the extent to which the WSIS criteria for good Internet governance can reasonably be expected to be applied, particularly in relation to decision-making structures and processes, as well as in relation to the roles and responsibilities of different stakeholder groups.

3.   <u>Types of Governance Mechanisms</u>

Within different organizations, very different kinds of governance decisions, using very different kinds of mechanisms, are made in relation to Internet governance issues. These decisions and the underlying mechanisms can be conceived as running on a scale from "hard" to "soft" forms of governance, in terms of the results they achieve and the obligations they generate.[2]

As a result, there are significant differences among intergovernmental organizations – and in some cases within them – on the extent to which the WSIS criteria for good Internet governance can reasonably be expected to be applied to specific issues. It all depends on the nature of the governance decision being taken.

(a)   <u>Treaty-Making Mechanisms</u>

"regulatory treaties with teeth" – i.e. intergovernmental agreements which are subject to national ratification, which create regulatory obligations in national and international law, and which can be enforced through binding international dispute resolution mechanisms. The degree to which such treaties have "teeth" vary. On the one hand, the WTO is able to make determinations on trade issues which are internationally enforceable. Through its Dispute Settlement mechanism it has the power to authorize retaliation when a country does not comply with a ruling. On the other hand there is the more common example of WIPO where IPR regimes depend on national legal systems, and are consequently only implemented to a limited extent.

"regulatory treaties without teeth" – intergovernmental agreements which are subject to national ratification, which create regulatory obligations in national and international law, but which do not include

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[2] See MacLean, D.J., "Herding Schrödinger's Cats: Some Conceptual Tools for Thinking About Internet Governance", in MacLean, D.J. (ed.), <u>Internet Governance: A Grand Collaboration</u>, New York, UN ICT Task Force (2004) for a more detailed mapping of governance forms and issue areas. Available as a free pdf download at http://www.unicttaskforce.org.

binding dispute resolution mechanisms (e.g. the ITU Radio Regulations and International Telecommunication Regulations);

"policy treaties" – conventions and other intergovernmental agreements which are subject to national ratification, and which generate policy commitments at the national and international levels without creating legal obligations (e.g. UNESCO Conventions, ITU Plenipotentiary Conference Resolutions);

(b)   Standards-Making Mechanisms

intergovernmental arrangements which establish norms and standards, but which are not subject to national ratification and which do not create obligations in national or international law (e.g. ITU Technical Recommendations);

(c)   Policy Coordination Mechanisms

intergovernmental arrangements aimed as coordinating national policies and providing direction to international organizations, but which do not create agreed norms or standards (e.g. UNCTAD Conferences, UNCITRAL model laws, OECD and APEC policy frameworks).

(d)   Development Assistance Mechanisms

intergovernmental arrangements for providing assistance to developing countries with respect to particular issues (e.g. UNCTAD, International Trade Centre UNCTAD/WTO, UN/CEFACT);

(e)   Non-Governmental Mechanisms

non-governmental organizations (NGOs): private corporations established to carry out, or tasked with responsibility for, management of certain functions. The prime example of such an organization is ICANN, incorporated under Californian law as a non-profit corporation and with an MOU with the US Department of Commerce for ensuring that certain key functions on which the present-day Internet is critically dependent.

arrangements between non-governmental stakeholders, or between multiple stakeholders including governments, for developing public policy recommendations, developing standards, or providing assistance to developing countries (e.g. IETF standards).

4.   Applying the WSIS Criteria: A General Assessment

There is a wide range of organizations, types and scope of issues, and governance mechanisms available for dealing with these. From an operational point of view, the WSIS criteria of multilateralism, transparency, democracy and full involvement of all stakeholder groups have somewhat different meanings, possibilities, and limits in relation to these different types of governance mechanisms.

(a)   *Multilateralism* is well understood in the international context to apply to organizations formally constituted by more than two governments. In the context of the WSIS criteria it stands alongside the need for "full involvement of all stakeholder groups" and should not be taken to exclude multistakeholderism. This is discussed more fully in the next section.

(b)   *Transparency* is understood in different ways by different stakeholders. It is agreed that transparency includes such criteria as requiring that bylaws and mandate of the organization are clearly defined and published, that meetings and meeting agendas are announced well in advance, and that meeting minutes and documents are promptly published. Some believe that documents should be made freely available on the Web, that proceedings are webcast etc. and that transparency also requires that to the greatest extent possible, any member of an affected stakeholder group be allowed to physically observe meetings where decisions are taken. Others

believe that the key requirement is that any affected stakeholder be represented, for example through national or industry representatives, and note that webcasting is useful only for those that have access to the Internet. While some argue that it is not so clear to what extent the concept includes, for example, multilingualism, others believe that multilingualism is a criterion in its own right and should be a basic requirement for transparency. They hold the view that, because many of the concerned stakeholders do not understand English, key criteria include availability of documents in more than one language, preferably in all UN languages. Governments in turn should translate them into national languages. Similarly, because many do not have access to the Web, publication should be by a range of mechanisms (including both electronic and paper distribution), and national governments should publish by national means such as national web sites, official registers, etc. Others believe that publication in English only and free availability on the Web is sufficient, at least in the case of standards documentation, because the concerned stakeholders speak (or at least understand) English and have access to the Web. They hold the view that one of the characteristics of language diversity is the fact that the nuance and meaning one can achieve in one language can often not be achieved in any other language. While they see this as a great asset to literature or philosophy, they think this may be a liability in technical standards where a requirement for all translated technical standards to have equal authority might actually be a barrier to the interoperability that is the goal of standardization.

(c)   ***Democracy*** is defined in different ways in a multilateral context and by different stakeholders according to their particular perspectives. Governments generally hold to a view based on national sovereignty with equal say for all countries and decisions reached through consensus. Each citizen is held to be represented and to be able to influence decisions through national consultation and decision-making mechanisms. Some are of the view that most governments include members of their civil society in their delegations to the extent practical and in any case they take into account the interests of their civil societies when establishing agreements at multilateral bodies. Civil society advocates on the other hand would argue that the term goes beyond this, requiring direct full participation in decision-making by many non-governmental groups from the private sector and civil society. Furthermore, they have expressed the view that governments are not actively or consistently consulting with other sectors of society prior to establishing agreements within multilateral bodies. Due to what they see as failure of accountability whilst negotiating at the level of international institutions, civil society advocates now argue that the need and hence the definition must go beyond the government view of democracy and must include direct full and meaningful participation in decision-making by many non-governmental groups from the private sector and from civil society. Common requirements in all contexts would include the need to ensure non-discriminatory accreditation rules and to ensure that within each constituency all members are equal. Additionally it would include the requirement that adequate instruments and facilitations are provided to reach, educate and ensure the participation of disadvantaged stakeholders (e.g. developing countries, civil society).

5.   Assessing the Actors Against the WSIS Criteria

There is a wide range of types of international and intergovernmental organizations involved in governance arrangements. The extent to which each of these meets, or attempts to meet, the WSIS criteria varies between intergovernmental organizations and private sector organizations but there is also a large degree of commonality.

(a)   <u>Intergovernmental Organizations</u>

Some of the institutions that have governance responsibilities are <u>multilateral</u> in the traditional sense, meaning that only national governments are members, and that only national governments have full rights in decision-making processes. However, to varying degrees, these institutions have accreditation processes and rules of procedure that allow other stakeholder groups to participate in their work as observers or, in the case of the ITU, as sector members and associates. In general, the scope for participation by non-governmental stakeholders in their own right (i.e. not as members of national delegations) is tightly circumscribed in the case of treaty-making processes, but more open in other kinds of governance processes that do not result in legally binding outcomes. These less formal processes typically provide opportunities for input from the private sector, civil society, and other intergovernmental and international organizations on standards-making and policy coordination activities, through consultative mechanisms or, in the case of the ITU, through direct participation in non-binding decision-making processes.

Use of the Internet has improved the <u>transparency</u> of all of the organizations that have governance responsibilities. Their web sites now generally provide information on the organization, the issues it is dealing with, its structure and decision-making processes, its meetings and their results – sometimes via web casts. The web sites of these organizations also provide access to meeting agendas, background papers, contributions, and working documents, as well as to publications – although practices vary in terms of how much information is publicly available, and how much is free of charge. In some cases, the transparency of institutions is enhanced by the activities of "satellite organizations" which represent the interests of specific stakeholder groups (e.g. business, civil society, developing countries), and which monitor the activities of intergovernmental organizations and provide policy analysis and advice to their members.

The intergovernmental organizations responsible for governing Internet-related issues are generally <u>democratic</u> in the traditional international relations sense that each member country has one vote, that decisions are made by consensus as much as possible, and that geographic/demographic factors are taken into account when elected and appointed offices are being filled. In the case of organizations that are members of the United Nations family, membership is open to any state that wishes to join and assume the rights and obligations of membership through relatively simple accession procedures. The WTO, the OECD, and regional organizations have different and more restrictive membership rules, although they generally allow countries that do not meet their membership criteria to participate in their work as observers, if there is a mutual interest in doing so.

The scope for <u>full participation</u> by different stakeholder groups in the decision-making processes of intergovernmental organizations generally varies according to the nature of the governance mechanism. As pointed out above, the scope for involvement by non-governmental actors tends to greatest at the "soft" end of the governance scale, where "Private Public Partnerships (PPPs)" and other multi-stakeholder initiatives have emerged as new governance models. In contrast, it tends most restricted at the "hard" end of the scale, particularly in areas where enforceable international laws that provide significant sanctions are being created.

(b)   <u>Non-Governmental Organizations</u>

ICANN is the prime example of a non-governmental mechanism, as described in Section 3 e). The very nature of this legal set up is the reason why some hold the view that ICANN is in contradiction with the WSIS criterion that recognizes policy authority for Internet-related public policy issues as the sovereign right of States.

From the outset, ICANN has attempted to be fully inclusive of all recognized stakeholder groups, although there has been considerable debate over the degree to which it has succeeded in this and this debate has resulted in substantial reform of ICANN's Board, in the recent restructuring. Civil Society is represented to the extent that groups are included in the stakeholder groups and mechanisms for Board member selection. ICANN provides unrestricted access to its meetings and, through public fora, encourages open discussion of issues. It has attempted to make provision on its Board for representatives of the 'at large' constituency without so far achieving this aim.

The IETF sits under the umbrella of ISOC, a professional membership organization that has open and free membership for individuals and organizational membership options for corporations, non-profit, trade and professional organizations, foundations, educational institutions, government agencies and other international organizations. The financial administration of the IETF is currently being reorganized as an ISOC responsibility, shared with democratically selected IETF participants.

Participation in the IETF is open to all individuals, including those from governments, from the private sector and from civil society. There are no membership fees, and though meeting fees are relatively expensive, there is a fee waver possibility for those who cannot afford to participate. The IETF has the goal of enabling all individuals, no matter what their employment status, to participate and influence the development of standards, although in practice it is usually restricted to experts with the capability of contributing at a well-informed level to the discussions. All decisions are made using a combination of face to face and email methods with consensus being reached on the mailing list and not in the meetings so that people without travel funds are not excluded from the decision process. This allows most who want to participate a means to do so. There is also a specific effort to make sure that all documentation is available: it is in text format to allow for ease of download and to restrict the size of download, and it is free.

(c)   The special case of the Governmental Advisory Committee (GAC)

Although the Governmental Advisory Committee (GAC) provides a mechanism for government participation in the provision of advice to the ICANN Board, it cannot be said to be truly a multilateral organization in the usual sense of the word. The GAC is open to all "national governments, multinational governmental organizations and treaty organizations, and distinct economies as recognized in international fora". However, GAC does not qualify as an organization, being a committee under the bylaws of ICANN and not having its own legal personality. In addition, its function is to advice ICANN - a private body - which is a unique situation.

6.   **Special Considerations**

(a)   Developing Country Participation

In addition to questions of process and procedure, it is very important to assess the capacity of different stakeholder groups – particularly governments, the private sector and civil society from developing countries – to participate fully and effectively in the governance processes of relevant intergovernmental and other international organizations. This is particularly relevant in the field of ICTs, where participants in international discussions are working in a fast moving technological environment that makes it difficult to keep abreast of new developments. Lack of knowledge or obsolete knowledge can be a serious impediment to meaningful developing country participation by governments and other stakeholders. Previous research on participation by developing country stakeholders in the governance processes of the ITU, WTO and ICANN has shown that factors such as lack of awareness of the relationship between ICTs and development, lack of technical, policy and financial capacity, and weak-

nesses in national and regional governance processes are serious obstacles to more effective participation by developing country stakeholders at the international level. This research concluded that, although improvements to the governance processes of these and similar intergovernmental organizations is a "necessary condition" of fuller and more effective participation, they are not a "sufficient condition" in and of themselves. In other words, to achieve full participation by all stakeholders – whatever the specific governance context – mutually reinforcing actions are needed at all levels in the governance hierarchy.[3]

Structural aspects (institutional and geographical) of existing international governance mechanisms are also obstacles to meaningful participation of developing country delegates. Internet governance issues are as many and diverse as the bodies responsible for their governance. Meaningful participation in international governance processes requires having the capacity to engage in multiple processes of multiple organizations in a diversity of geographical locations. This is often beyond the capacity of developing (and in many cases also developed) country delegates and efforts to explore mechanisms to coordinate and centralize the diversity of Internet governance policy discussions and outcomes should be encouraged.

(b)   General public participation

Direct involvement of the broad general public in the decision-making processes of international organizations is always likely to prove controversial. In the case of intergovernmental organizations the voice of the public "at large" is entirely dependent in the extent to which such representatives are included as part of national delegations. Thus such representation is a matter for national decision-making rather than organizational constitution. However, as previously indicated, the decision-making processes of intergovernmental organizations often include mechanisms for consulting non-governmental organizations and admitting them to meetings as observers.

Notwithstanding the different practical possibilities that attach to different kinds of governance mechanisms, it is clear from the WSIS Declaration of Principles that the interests of all stakeholder groups should always be consulted in a fair and balanced manner when decisions are made. It is also clear that the onus for doing this falls mainly on governments and intergovernmental organizations, since they are frequently the most influential of the stakeholders. In assessing the Internet governance mechanisms against the WSIS evaluation criteria, it therefore may be useful to analyze them not only in relation to issues, but also in relation to these different points, in particular the nature of the various forums as measured on the "governance scale", ranging from "hard" to "soft" forms of governance arrangements.

7.   Impact of the Private Sector on Governance

In an increasingly liberalized environment, governance is being 'privatized'. There has been a shift in many arenas away from intergovernmental measures and toward market mechanisms, especially at a global level. While the efficiency of market mechanisms is generally recognized, it has been noted that this affects the possibility for policies to serve the global public interest, rather than the interests of specific industry sectors, mostly from developed countries. The extent to which rules that shape markets and are binding for consumers are made by industry consortiums is steadily growing. These rules are enforced through business-to-business contracts, IPR licensing policies, end user agreements, private

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[3] See MacLean, D., Souter, D., Deane, J. and Lilley, S., Louder Voices: Strengthening Developing Country Participation in International ICT Decision-Making, London, Commonwealth Telecommunications Organisation (2002). Available at http://www.cto.int/publications/louder_voices_final_report.pdf.

dispute resolution mechanisms and a variety of other methods. This has the effect that developing countries, which lack the technical or financial capability to exert influence at the industry consortium or business-to-business level, feel increasingly being excluded from a 'privatized' governance environment.

There are many cases where businesses make decisions in the normal course of doing business which have more rule-like impact on the Internet than much of what happens in formal collective decision making bodies, whether public and private. While private sector collaborations to formalize collective rules can count as governance, private 'international regimes' are often not the most important sources of collective international order generated by business.   Concentrated market structures can allow powerful firms to in effect set proprietary rules that can significantly shape the security of networked systems, the privacy of users, the conduct of e-commerce, or the decisions of Tier 1 backbone providers regarding operating agreements and interconnection prices.

There is a question of legitimacy for industry self-regulation, in particular if it is 'voluntary self-regulation'. While the private sector can work quickly and flexibly in some areas, there is often a need for governments at national, regional or international levels to provide some form of sanctioned backing or enforcement of industry codes of practice or voluntary agreements. An example is provided by concerns in the private sector during the height of the '.com' boom that government over-regulation of ecommerce could reduce its potential. The result was the establishment of the Global Business Dialogue on eCommerce (GBDe), which produced in the first two meetings (Paris 1999 and Miami 2000) good and productive industry self-regulation, but failed later to continue. The GBDe had a long list of issues, very similar to WGIG, including cybersecurity, consumer confidence, trustmarks, ADR, content, IPR, privacy, digital bridges etc. Many of the Paris and Miami recommendations made their way into national and international legislation.

Other private regimes have a strong and direct impact on issues related to Internet governance. One is the Business Software Alliance (BSA), through which business software vendors have been trying to strengthen the enforcement of WIPO's instruments. BSA carries out a variety of activities in the field of ICT and Internet related IPR, including assistance in the drafting of national law, training police in how to combat IPR violation, etc. Other similar institutions also have a considerable impact in the field of international IPRs.

A few cases have already taken place where Tier 1 Internet bandwidth carriers that have a de facto monopoly have used their communication market position to influence national legal systems: MCI/WorldCom and Flashback in Sweden and Xtended Internet/Scientologists in The Netherlands.

8.   Civil Society Involvement in Global Governance Arrangements

[In preparation]

9.   Conclusion

It is apparent that there is a wide range of organizations, types and scope of issues, and governance mechanisms available for dealing with these. While there is room for improvement on all sides in endeavoring to meet the WSIS criteria, there is also room for a number of approaches and structures so that coordination of different issues may be approached in a variety of ways.

The WSIS criteria themselves may well be regarded as having different shades of meaning in different contexts. For example, it is obviously not the case that "full involvement of all" must mean that every-

body should have the same role in the development of policies, the preparation of decisions, the actual decisions and then the implementation of decisions.

Some have argued that on the global level we have to go beyond the thinking in terms of national sovereignty. They believe that although national sovereignty will remain a key principle of international law in the 21st century, it would have to be interpreted in a new and broader environment, which includes players with different legal status. Others are of the view that national sovereignty and international law must remain the keystone of any international governance system. Some developing country governments feel that their best option for participating in global decision-making processes on an equal footing with the rest of the world remains at the intergovernmental level. They point out that their industrial base is too weak and their civil society structures not advanced enough to allow their stakeholders' voices being heard in global policy making forums. However, some people from developing countries hold the view that multi-stakeholderism should be the keystone for future international governance systems, since it is the civil society and the private sector from many of those countries that engage in international forums where their governments remain absent or are not fully engaged .

This emerging new trilateralism involving governments, the private sector and civil society, would suggest the need for a new conceptual framework which is on the one hand embedded in the existing system of international law, but goes on the other hand beyond this, bringing other type of norms (for example, "soft law", self-regulation) to global governance concepts. Generally, non-government stakeholders do recognize that governments have the prerogative of decision-making for public policy, but increasingly expect to be fully involved in the process of decision-shaping. There is a however some reason for concern about the lack of participation of private sector and civil society representatives from developing countries. Some concerted capacity building efforts would seem necessary to allow for their meaningful and effective participation in trilateral global governance arrangements.