

# Arresting the decline of multi-stakeholderism in Internet governance

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## **Abstract**

The last decade was marked by significant new opportunities for civil society to represent the public interest within existing public institutions involved in information and communications policy development, such as the OECD and WIPO, as well as within new public and private institutions such as the Internet Governance Forum and ICANN.

But the turn of the decade has seen regression, as governments have begun to push back against civil society claims for equal representation in policy fora, have shifted key discussions to less inclusive fora, and raised questions over whether the multi-stakeholder model is “working” if it does not give primacy to governmental interests.

Concurrently, some activists too have given up hope of having their interests represented within public policy institutions, and have resorted to unilateral and extra-legal methods of voicing dissent, as seen in the campaigns of groups like Anonymous. As for the private sector, its support for the multi-stakeholder governance model remains as tentative as it has always been.

Does the retreat of all stakeholder groups from multi-stakeholder engagement with each other suggest the failure of the multi-stakeholder experiment, or just a temporary roadbump? This paper addresses this question by mapping the decline of the multi-stakeholder model over the past several years within the specific context of the Internet governance regime, and considering options for civil society to intervene to prevent its disintegration.

Strategies considered include work on a framework document for public participation in Internet governance, more efficient targeting of civil society’s representational capacity, campaigning to reform institutions that currently do not provide effective mechanisms for public interest representation, and forging strategic alliances between civil society and powerful private and public actors with financial or political interests in the success of the multi-stakeholder model.

# 1 Introduction

The last decade promised significant strengthening of institutional support for public interest representation in information and communications policy development. As the decade opened, the United Nations General Assembly had just endorsed the proposal of the ITU (International Telecommunications Union) for a World Summit on the Information Society (WSIS), encouraging “non-governmental organizations, civil society and the private sector to contribute to, and actively participate in, the intergovernmental preparatory process of the Summit and the Summit itself.”<sup>1</sup> At around the same time, ICANN (the Internet Corporation for Assigned Names and Numbers) undertook the most significant reforms of its own representative structures to date.<sup>2</sup> So too at this time WIPO (the World Intellectual Property Organisation) expanded the criteria by which NGOs could be accredited to participate in its activities as observers, having six years earlier opened its doors to the general public to participate in intergovernmental negotiations on a major new pair of Internet-related copyright treaties.<sup>3</sup>

Certainly, none of the above initiatives were perfectly executed; WSIS in the end was not particularly participatory,<sup>4</sup> ICANN’s reforms actually decreased the direct representation of end user interests,<sup>5</sup> and complaints about the difficulty for NGOs seeking to become accredited at WIPO continued.<sup>6</sup> Even so, it is important that by mid-decade each of the core institutions of information and communications policy had publicly committed to the fuller implementation of participatory structures and processes for public interest representation. WSIS, having established at the level of principle that governance of the Internet should be “a transparent, democratic, and multilateral process, with the participation of governments, private sector, civil society and international organisations, in their respective roles,”<sup>7</sup> formed the Internet Governance Forum (IGF) in 2006 to allow for such participation in an open, non-binding forum.

In the same year, ICANN began to describe its own developing participatory processes as “multi-stakeholder” rather than just “private sector management.”<sup>8</sup>

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<sup>1</sup>General Assembly of the United Nations. *World Summit on the Information Society*. 2001. URL: [http://www.itu.int/wsis/docs/background/resolutions/56\\_183\\_unga\\_2002.pdf](http://www.itu.int/wsis/docs/background/resolutions/56_183_unga_2002.pdf).

<sup>2</sup>ICANN. *Evolution and Reform Committee’s Final Implementation Report and Recommendations*. 2002. URL: <http://www.icann.org/committees/evol-reform/final-implementation-report-02oct02.htm>.

<sup>3</sup>WIPO. *Four National NGOs Gain Observer Status at WIPO*. en. Nov. 2002. URL: [http://www.wipo.int/pressroom/en/prdocs/2002/wipo\\_pr\\_2002\\_328.html](http://www.wipo.int/pressroom/en/prdocs/2002/wipo_pr_2002_328.html).

<sup>4</sup>Jeremy Malcolm. *Multi-Stakeholder Governance and the Internet Governance Forum*. Perth: Terminus Press, 2008, pp. 324-326.

<sup>5</sup>John G Palfrey Jr. *The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed*. 2004. URL: [http://cyber.law.harvard.edu/publications/2004/The\\_End\\_of\\_the\\_Experiment](http://cyber.law.harvard.edu/publications/2004/The_End_of_the_Experiment).

<sup>6</sup>William New. *WIPO Asked To Explain NGO Accreditation Process*. 2005. URL: <http://www.ip-watch.org/weblog/2005/02/23/wipo-asked-to-explain-ngo-accreditation-process/>.

<sup>7</sup>WSIS. *Tunis Agenda for the Information Society*. 2005. URL: <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>, paragraph 61.

<sup>8</sup>ICANN. *Affirmation of Responsibilities for ICANN’s Private Sector Management*. 2006.

As for WIPO, in September 2007 it adopted a “Development Agenda,” which committed the organisation to “enhance measures that ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review.”<sup>9</sup> Thus it least it can be said that by the second half of the last decade, signs were promising for the continued broadening and deepening of multi-stakeholder participation in the major institutions of information and communications policy governance.

But more recently, there are significant indications of backsliding towards an earlier state of unilateralism in the public policy engagement of stakeholders in public policy processes. This includes both a return to governmentalism by powerful states, as well as the disengagement of the private sector and civil society activists from multi-stakeholder processes that are perceived as weak or failing. This is evidenced in the use of techniques such as forum-shifting by powerful governments and private sector actors, in the active obstruction by such actors of the development of effective fora for multi-stakeholder policy development, and in the recourse of all stakeholders (including civil society) to extra-legal methods for advancing their policy goals.

This short paper will describe the signs of this shift, beginning with the WSIS outcome processes including the IGF, and then considering other institutions and processes inside and outside the United Nations system. The underlying causes of this apparent retreat of stakeholders from multi-stakeholder participatory institutions and processes are next considered. Finally some suggestions will be made for some strategies that could address this decline. Throughout, the focus of the paper will be on public policy institutions for the information society: that is, Internet governance in the broadest sense, or information and communications policy. Whilst the evolution of participatory governance models in other regimes such as that of environmental governance are also notable and potentially instructive, there has so far been little cross-fertilisation of practices between governance regimes.<sup>10</sup>

## 2 The shaky foundations of UN multi-stakeholderism

The recent decline of multi-stakeholderism is exemplified by the case of its poster child, the IGF. Whilst established as a multi-stakeholder body, the capacity of its stakeholders to actually influence policy development processes has been circumscribed by the very narrow interpretation of its mandate made by its Secretariat and by the most powerful voices within its Multistakeholder Advisory Group (MAG). Opportunities to address this deficiency, such as by placing conditions on the renewal of the IGF’s mandate for a second term, or once that

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URL: <http://www.icann.org/en/announcements/responsibilities-affirmation-28sep06.htm>.

<sup>9</sup>WIPO. *The 45 Adopted Recommendations under the WIPO Development Agenda*. 2007. URL: <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>, article 42.

<sup>10</sup>Jeremy Malcolm. *Public Interest Representation in Global IP Policy Institutions*. 2010.

had been decided, to recommend how it should improve its format, functions and operations during that second term, have also been systematically withdrawn from multi-stakeholder bodies and processes, and reserved to those that favour governments. This section will recount and provide some background to these events.

In doing so, the intent of this section is not to overlook that certain parallel multi-stakeholder processes have developed elsewhere in the Internet governance regime, alongside those that had their genesis at WSIS (notably those of ICANN, which will be briefly mentioned in the following section), and indeed outside that regime altogether (such as under the Aarhus Convention in the regime of environmental governance).<sup>11</sup> The current status of those multi-stakeholder processes may or may not be so dire, but they are not the focus of this paper.

## 2.1 The Internet Governance Forum

At the time that the Internet Governance Forum was first proposed by the Working Group on Internet Governance (WGIG) in 2004, it was expected to be able to be able to discuss international public policies regarding the Internet that fell outside the scope of existing bodies, and to make recommendations on such emerging issues where appropriate, in accordance with what would become its mandate in the Tunis Agenda.<sup>12</sup> It did not seem at all outlandish at the time to suggest that “The Forum should be able to pass recommendations on to the concerned parties, and may also invite – or recommend that the United Nations invites – member states to discuss a certain issue in an official capacity, or via a vote in the United Nations General Assembly.”<sup>13</sup>

In practice the IGF never took on such a role, due to early decisions made by its Secretariat and Multistakeholder Advisory Group (MAG) that limited its capacity to engage in the process of developing such policy recommendations. In particular, the IGF was constituted as an atomistic annual conference, without an agenda of specific issues to address, suitable processes for addressing them, or institutional structures to support such an exercise.<sup>14</sup> At every turn when reforms to the IGF’s structures and processes were proposed within the MAG or at open consultation meetings that would render it better suited to the fulfilment of its mandate, these were strongly opposed by those same stakeholders who had originally spoken against the IGF’s formation at WSIS (rich countries such as the USA, technical community groups such as ISOC and business groups such

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<sup>11</sup>Malcolm, *Public Interest Representation in Global IP Policy Institutions*, see n. 10.

<sup>12</sup>WSIS, see n. 7, paras 72(b) and (g).

<sup>13</sup>Charles Sha’aban. “Reforming Internet Governance: Perspectives from the Working Group on Internet Governance (WGIG)”. In: ed. by William J Drake. New York: UNICTTF, 2005. Chap. Proposal for the Establishment of an Internet Governance Forum, p. 235. URL: [http://www.wgig.org/docs/book/WGIG\\_book.pdf](http://www.wgig.org/docs/book/WGIG_book.pdf), p. 236.

<sup>14</sup>Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, see n. 4, pp. 442-444.

as the ICC),<sup>15</sup> and often also by its incumbent Secretariat.<sup>16</sup>

However as the IGF's initial five year mandate neared an end, a more independent review of the IGF's strengths and shortcomings was called for by the Tunis Agenda.<sup>17</sup> This review was conducted by the Secretary-General, drawing upon responses to a questionnaire that had been prepared by the IGF Secretariat and comments made at a special session held for this purpose at the fourth meeting of the IGF at Sharm el Sheikh, Egypt in September 2009.

In May 2010, the Secretary-General of the United Nations accordingly issued a note on the renewal of the IGF's mandate.<sup>18</sup> The United Nations Department of Economic and Social Affairs (DESA), which hosts the IGF Secretariat and drafted the note, had been criticised in February for its decision to issue it directly to ECOSOC, rather than first forwarding it to the May meeting of the Commission on Science and Technology for Development (CSTD) for its comment.<sup>19</sup> The CSTD advises ECOSOC and the General Assembly on technology issues and was tasked with responsibility for system-wide follow-up of the WSIS outcomes, using a multi-stakeholder approach.<sup>20</sup> That is, whilst the CSTD is still an intergovernmental body, it has until now maintained a relatively liberal policy of allowing civil society and business representatives as active observers of its meetings.<sup>21</sup> Thus the exclusion of the CSTD from substantively considering the continuation of the IGF was one of the first signs of the tide turning against multi-stakeholderism in Internet governance in the new decade.

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<sup>15</sup>Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, see n. 4, pp. 350, 356, 372, 381, 387. At one point, an Internet technical community leader, Chris Disspain of auDA, even suggested that the community would withdraw its financial support for the IGF if it were to begin to issue recommendations as its mandate required: *ibid.*, p. 387.

<sup>16</sup>Nitin Desai, Special Advisor to the Secretary-General on WSIS and MAG Chair until 2010, had from the IGF's inception cautioned that "there's no way it can ever become a decision-making body," and maintained this firm position during his tenure: see *ibid.*, pp. 289, 363, 423, 446. Similarly, Markus Kummer, Executive Coordinator of the IGF from 2006 to 2010 – and who took up a position with ISOC in early 2011 – intervened on the MAG mailing list in March 2010 to forestall further discussion on reforms to the IGF that could allow it to issue "messages" – which had been proposed as a lesser form of recommendation: Jeremy Malcolm. *My take away from Vilnius – if the IGF won't change itself, others will*. 2010. URL: <http://igfwatch.org/discussion-board/my-take-away-from-vilnius---if-the-igf-won-t-change-itself-others-will>.

<sup>17</sup>WSIS, see n. 7, para 76.

<sup>18</sup>United Nations Secretary-General. *Continuation of the Internet Governance Forum*. 2010. URL: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan039400.pdf>.

<sup>19</sup>Such criticisms were made at the February 2010 open consultation meeting of the IGF, and in a subsequent letter from the Civil Society Internet Governance Caucus (IGC): Internet Governance Caucus. *An Open Letter from the Internet Governance Caucus to the United Nations Secretary-General, Ban Ki-Moon*. 2010. URL: <http://www.igcaucus.org/node/35>. DESA's response was given in March 2010: Sha Zukang. *Statement at the Briefing for Member States on matters Related to the Continuation of the Internet Governance Forum*. 2010. URL: <http://www.un.org/en/development/desa/usg/statements/internet-governance-forum-2.shtml>. In the end, the CSTD did receive, but did not substantively discuss, an advance copy of the note at its May 2010 meeting.

<sup>20</sup>WSIS, see n. 7, para 105.

<sup>21</sup>Pursuant to a series of ECOSOC decisions cited in Internet Governance Caucus, *An Open Letter from the Internet Governance Caucus to the United Nations Secretary-General, Ban Ki-Moon*, see n. 19.

This controversy aside, the Secretary-General’s note acknowledged criticisms that “that the IGF had not provided concrete advice to intergovernmental bodies and other entities involved in Internet governance,” and “that the contribution of the IGF to public policy-making is difficult to assess and appears to be weak.” Suggesting that such criticisms may point “to a desire for more tangible progress on the issues at hand,” the note recommended that “improvements to the format, functions and operations of the Forum be considered at the Forum’s sixth meeting, in 2011.” A press release accompanying the note also suggested that the MAG “make proposals with regard to its own future, should the mandate be renewed.”<sup>22</sup>

In response, and pending a formal decision on the continuation of the IGF by the General Assembly, processes to consider improvements to the IGF and its MAG were put in place during 2010. As to the MAG, it issued a questionnaire on its own performance and possible improvement following its May 2010 meeting, and considered (though in general did not recommend implementing) the suggestions given at its subsequent meeting in November.<sup>23</sup> As to the IGF as a whole, on 29 July the Economic and Social Council (ECOSOC) invited the Chair of the CSTD to form

in an open and inclusive manner, a working group which would seek, compile and review inputs from all Member States and all other stakeholders on improvements to the Internet Governance Forum ...<sup>24</sup>

Following on from the Secretary-General’s note and pending the CSTD working group’s report, the General Assembly issued a resolution in December that extended the IGF’s mandate for a further term of five years, noting “the importance of the Internet Governance Forum . . . while recognizing at the same time the need to improve it, with a view to linking it to the broader dialogue on global Internet governance” and also “acknowledging the calls for improvements in its working methods.”<sup>25</sup> Despite the earlier (and rightful) criticisms of the lack of multi-stakeholder participation in the development of this resolution, in the end the resolution complemented the CSTD process of discussion of IGF improvements, which will be considered in more detail next.

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<sup>22</sup>United Nations Department of Public Information. *Multistakeholder Advisory Group Renewed to Prepare Internet Governance Forum Meeting in Vilnius, Lithuania, 14–17 September*. 2010. URL: <http://www.un.org/News/Press/docs/2010/pi1936.doc.htm>.

<sup>23</sup>Internet Governance Forum. *Multistakeholder Advisory Group Meeting Geneva, 23 November 2010 Summary Report*. 2010. URL: [http://intgovforum.org/cms/2010/MAG\\_Summary.23.11.2010.pdf](http://intgovforum.org/cms/2010/MAG_Summary.23.11.2010.pdf).

<sup>24</sup>United Nations Economic and Social Council. *Resolutions and decisions adopted by the Economic and Social Council at its substantive session of 2010*. 2010. URL: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan041407.pdf>.

<sup>25</sup>United Nations General Assembly. *Information and communications technologies for development*. 2011. URL: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan045268.pdf>.

### 2.1.1 Working Group on Improvements to the IGF

A further sign of the weakening of commitment to a multi-stakeholder process for Internet governance, by governments in particular, came at a December extraordinary meeting of the CSTD, which resolved to establish the Working Group on Improvements to the IGF that ECOSOC had called for as a government-only group. This came as a surprise to many, as apart from apparently diverging from ECOSOC's directive that the working group be "open and inclusive," it also departed from earlier indications made during an open meeting held by the CSTD at the Vilnius IGF meeting that the group would be an open, multi-stakeholder taskforce on the model of the WGIG.

It was only after strenuous objection by non-governmental stakeholders,<sup>26</sup> and intense negotiations at the following general meeting of the CSTD, later in December 2010, that its earlier decision was softened to allow 15 non-governmental observers (out of a total of 42) to "interactively participate" in the group's meetings and "remain fully engaged throughout the process."<sup>27</sup> In the WGIG, by comparison, non-governmental representatives had taken 21 of its 40 seats, as full and equal members.

But the presence of non-governmental stakeholders in the room was not enough to ensure that the work of the CSTD Working Group was conducted on a full multi-stakeholder basis. Were this to have been the case, the text of the group's recommendations would have been developed by one or more multi-stakeholder drafting groups, as had been the case with the WGIG. Indeed, this is what civil society stakeholders and developing country governments pressed for at the group's first meeting in Montreux in February 2011. However this was opposed by the familiar coalition of rich countries, technical community and private sector stakeholders (the same that had been blocking improvements to the IGF within its MAG), who prevailed in moving that the CSTD Secretariat attempt to draft the group's recommendations instead.

Unfortunately the Secretariat had little material to work with in undertaking this task. The Working Group was poorly managed, without the kind of active facilitation that could have assisted the stakeholders to come to agreement on contentious issues. Consequently much of its first meeting was taken up in procedural disagreements, and much of its second with the tabling of proposals and counter-proposals by members, none of which were comprehensively discussed.<sup>28</sup> As a result, although a text summarising the various proposals was

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<sup>26</sup>Internet Society Internet Governance Caucus and International Chamber of Commerce. *Joint statement with ICC, ISOC et al. on composition of CSTD working group on IGF improvements*. 2010. URL: <http://www.igcaucus.org/joint-statement-icc-isoc-et-al-composition-cstd-working-group-igf-improvements-9-december-2010>.

<sup>27</sup>Commission on Science and Technology for Development. *Panel on "Follow-up to the World Summit on the Information Society – Working Group on the Internet Governance Forum (IGF)" Meeting report*. 2010. URL: [http://www.unctad.org/sections/un\\_cstd/docs/cstd2010d19\\_report-wsis\\_en.pdf](http://www.unctad.org/sections/un_cstd/docs/cstd2010d19_report-wsis_en.pdf).

<sup>28</sup>Marilia Maciel. *Second meeting of the Working Group on improvements to the Internet Governance Forum ends with no final report*. 2011. URL: <http://observatoriodainternet.br/second-meeting-of-the-working-group-on-improvements-to-the-internet-governance-forum-ends-with-no-final-report>.

prepared by the Secretariat, it contained no agreed recommendations.<sup>29</sup>

Disagreements centered on three main issues: the addition of a UN budget line to provide stable public funding for the IGF in addition to stakeholders' voluntary contributions, the establishment of a democratic and transparent process for selection of members of the IGF's MAG, and, most contentious of all, how the IGF could produce more tangible outcomes, in fulfilment of its mandate in the Tunis Agenda. Although the proposals on each of these issues were detailed, the lines along which disagreement fell were familiarly simple: in general, those most opposed to disturbing the *status quo* continued to be the developed countries, the technical community and the private sector.

In view of the group's failure to reach agreement, at its 14th session in May 2011, the CSTD resolved to extend the mandate of its Working Group until the 15th session in May 2012. This resolution was made against the wishes of the United States which would have preferred the group end without having proposed any improvements;<sup>30</sup> however the United States, along with Europe, did at least succeed in stymieing a further proposal from India to include timelines and the election of a chair for the Working Group in the CSTD's resolution.

Regardless of the failure of the CSTD Working Group, it could still have been possible to fulfil the Secretary-General's injunction given in May 2010 that improvements to the IGF be discussed at its sixth meeting,<sup>31</sup> if either the IGF's Secretariat or MAG, or indeed the CSTD, had chosen to schedule a discussion of such improvements at that meeting. But as none of them did so, the only such discussions that took place in Nairobi were those independently arranged by stakeholders. Indeed, at the time of writing (September 2011), no further meeting of the CSTD Working Group at which for it to continue its consideration of improvements to the IGF has yet been scheduled.

## 2.2 Enhanced cooperation

The IGF was not the only institutional reform to the Internet governance regime that was approved at WSIS, though it was the best-formed. Also agreed was the need for "enhanced cooperation in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet," but without neglecting to "involve all stakeholders in their respective roles" and "be responsive to innovation."<sup>32</sup> Intentionally, this formulation was capable of differing interpretations, with those supportive of the *status quo* preferring to think in terms of loose and voluntary cooperative arrangements between existing institutions, whilst those favouring

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<sup>29</sup>Commission on Science and Technology for Development. *Working Group on Improvements to the Internet Governance Forum*. 2011. URL: [http://www.unctad.org/en/docs/a66d67\\_en.pdf](http://www.unctad.org/en/docs/a66d67_en.pdf).

<sup>30</sup>Betty E King. *Untitled correspondence*. 2011. URL: [http://www.unctad.org/sections/un\\_cstd/docs/UN\\_WGIGF2011d09\\_usa\\_en.pdf](http://www.unctad.org/sections/un_cstd/docs/UN_WGIGF2011d09_usa_en.pdf).

<sup>31</sup>United Nations Secretary-General, *Continuation of the Internet Governance Forum*, see n. 18.

<sup>32</sup>WSIS, see n. 7, paras 69, 71.



reform looked forward to a new overarching policy development framework that would be more inclusive of hitherto excluded stakeholders.<sup>33</sup>

Although the Tunis Agenda had specified a deadline of 2006 for the commencement of the process towards enhanced cooperation, the UN's early approach was far from proactive, essentially leaving the process to evolve spontaneously. Nitin Desai, as Special Advisor to the Secretary-General on Internet governance issues, undertook a limited and closed set of consultations with incumbent Internet governance institutions that year about their own attitudes towards the process, but his private report to the Secretary-General gathered dust over the following years. In the interim, Desai specified firmly that enhanced cooperation was not a matter to be discussed at the IGF or within its MAG – a curious contention, as the Tunis Agenda suggests (and it has since been widely accepted) that the IGF is an integral component of the enhanced cooperation process.<sup>34</sup>

In 2009 the Secretary-General finally published a report on the progress taken towards enhanced cooperation to that date, based around a 2008 series of follow-up consultations with ten selected organisations. As this narrow set of respondents each enjoyed existing authority in the Internet governance regime, it was unsurprising that the views they reported supported a minimalist interpretation of enhanced cooperation that supported the *status quo*.<sup>35</sup> At the 2008 IGF meeting in Hyderabad enhanced cooperation finally also made the agenda – shoehorned into the session on critical Internet resources – where most of the panelists now took the view that the IGF and other existing processes *were* enhanced cooperation, and that no institutional reforms were needed.<sup>36</sup>

While this may have seemed to spell the end of enhanced cooperation as an independent process, it survived as a result of one defining event: that ECOSOC referred the Secretary-General's report to the CSTD for consideration at its May 2010 meeting. Since a range of civil society representatives and developing country governments had the opportunity to comment on the issue at that meeting, a much broader view of enhanced cooperation was taken there. The CSTD considered that “the Internet governance-related outcomes of the World Summit, namely, the process towards enhanced cooperation and the convening of the Internet Governance Forum, are . . . two distinct processes and also recognizes that the two processes may be complementary,” and recommended ECOSOC to invite “the Secretary-General to convene open and inclusive consultations involving all Member States and all other stakeholders with a view to assisting the process towards enhanced cooperation.”<sup>37</sup>

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<sup>33</sup>United Nations Secretary-General, *Continuation of the Internet Governance Forum*, see n. 18, p. 8.

<sup>34</sup>United Nations Secretary-General. *Enhanced cooperation on public policy issues pertaining to the Internet*. 2011. URL: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan045826.pdf>; Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, see n. 4, pp. 344-349.

<sup>35</sup>United Nations Secretary-General. *Enhanced cooperation on public policy issues pertaining to the Internet*. 2009. URL: [http://www.unctad.org/en/docs/e2009d92\\_en.pdf](http://www.unctad.org/en/docs/e2009d92_en.pdf).

<sup>36</sup>The transcript is at [http://www.intgovforum.org/cms/hyderabad\\_prog/AfIGGN.html](http://www.intgovforum.org/cms/hyderabad_prog/AfIGGN.html).

<sup>37</sup>Commission on Science and Technology for Development. *Report on the thirteenth session*

In response to ECOSOC's invitation, which it made by resolution in July, the Secretary-General through the United Nations Department of Economic and Social Affairs (DESA) held a consultation meeting on enhanced cooperation in New York on 14 December 2010. Mirroring the upset at the early exclusion of non-governmental stakeholders from the CSTD's Working Group on Improvements to the IGF, a similar attempt was made to sideline these stakeholders at the enhanced cooperation discussions, prompting another joint letter of protest.<sup>38</sup> In contrast to the IGF where the floor is open to all stakeholders on an equal footing, at the enhanced cooperation consultation civil society was permitted to make only a single oral presentation, to be delivered by CONGO, an organisation which had not been active in Internet governance discussions for some years.

Furthermore, as at the CSTD, physical attendance was limited to organizations in consultative status with the Economic and Social Council and other entities accredited to the World Summit on the Information Society, which excluded (amongst others) many non-governmental actors who had actively participated at the IGF. (ECOSOC has relaxed this requirement in a string of resolutions dating from 2007 to 2011, but only in respect of the CSTD's own meetings.)<sup>39</sup> In the end, DESA relented slightly on the originally stipulated conditions for participation, and a representative of the Civil Society Internet Governance Caucus did attend and speak at the meeting.

The results of the December 2010 consultation, such as they were, fed into an updated report of the Secretary-General, issued in May 2011, which concluded rather lamely that "cooperation is already taking place in many respects, although it could be enhanced in some areas . . . and that existing cooperation mechanisms should be used to the extent that they were helpful."<sup>40</sup> The report has been transmitted to the General Assembly for consideration at its 66th session in September 2011 in New York. However it is not listed on the official agenda of that meeting, and no resolution relating to it will be made.

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(17-21 May 2010). 2010. URL: [http://www.unctad.org/en/docs/e2010d31\\_en.pdf](http://www.unctad.org/en/docs/e2010d31_en.pdf). Simultaneously in his May 2010 note on the continuation of the IGF, the Secretary-General himself also called on the General Assembly to make clarification of the meaning of the term enhanced cooperation and how it related to the IGF: (United Nations Secretary-General, *Continuation of the Internet Governance Forum*, see n. 18, p. 8).

<sup>38</sup>Internet Society Internet Governance Caucus and International Chamber of Commerce. *Joint open letter on non-governmental participation at Enhanced Cooperation consultations*. 2011. URL: <http://www.igcaucus.org/node/39>.

<sup>39</sup>Marilia Maciel. *Note on the participation of Civil Society on discussions regarding the improvement of IGF*. 2011. URL: <http://www.igcaucus.org/upload/Note%20participation%20of%20CS%20in%20IGF%20improvement.pdf>.

<sup>40</sup>United Nations Secretary-General, *Enhanced cooperation on public policy issues pertaining to the Internet*, see n. 34.

## 3 The decline of multi-stakeholderism

### 3.1 Governments defiant

Outside of the official consultations, a number of governments have been promoting a narrow intergovernmental model of enhanced cooperation. At the 2010 session of the UN General Assembly, and subsequently at the July 2011 meeting of ECOSOC, the grouping of India, Brazil and South Africa – IBSA – called for an intergovernmental mechanism for enhanced cooperation, separate from but complementary to the IGF. Further detail was presented at a Seminar on Global Internet Governance in September, at which the governmental members called for a new UN body to “be tasked to develop and establish international public policies with a view to ensuring coordination and coherence in cross-cutting Internet-related global issues,” and to “integrate and oversee the bodies responsible for technical and operational functioning of the Internet.”<sup>41</sup>

Whether and how such a body would take advice from other stakeholders in its policy development processes, and through what new mechanisms if any, is unspecified. Neither is it clear what input such stakeholders will have into the recommendations before they are finalised at the next IBSA summit in October. In any case, IBSA chose not to present the recommendations formally to the IGF (which is presently ill-equipped to consider them anyway), but has instead announced its plans to deliver them directly to the UN General Assembly.

More recently, at the 66th session of the General Assembly in September 2011, China, the Russian Federation, Tajikistan and Uzbekistan issued a draft General Assembly resolution on an international code of conduct for information security, that is explicitly open to states alone.<sup>42</sup> Amongst the pledges that a subscribing state would make are to “promote the establishment of a multilateral, transparent and democratic international Internet management system.” These are highly retrograde criteria for such an institution when compared against those specified in the Tunis Agenda, namely, “The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations.”<sup>43</sup>

The position of the developed countries is not so dissimilar, though it is less overt. Whilst the Council of Europe (which is not a body of the EU) resolved in September 2011 to accept a set of ten Internet principles that strongly favoured a balanced model of multi-stakeholder Internet governance,<sup>44</sup> this is at odds

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<sup>41</sup>IBSA. *IBSA Multi-Stakeholder Meeting on Global Internet Governance – Recommendations*. 2011. URL: [http://www.culturalivre.org.br/artigos/IBSA\\_recommendations\\_Internet\\_Governance.pdf](http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf).

<sup>42</sup>Tajikistan China Russian Federation and Uzbekistan. *Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General*. 2011. URL: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/496/56/pdf/N1149656.pdf?OpenElement>.

<sup>43</sup>WSIS, see n. 7, para 29.

<sup>44</sup>(Council of Europe. *Internet Governance Principles*. 2011. URL: <http://www.coe.int/t/t/dghl/standardsetting/media-dataprotection/conf-internet-freedom/Internet%20Governance%20Principles.pdf>) – only the draft version of that resolution was available

with the position of the European Union. It was the EU's defection from the United States' line on maintaining private sector management of the Internet that enabled the compromise language "enhanced cooperation" to be introduced into the Tunis Agenda to begin with – and the EU's original language, referring to a "new model of international cooperation", had been more explicitly intergovernmental.<sup>45</sup>

Since then, from as early as 2006, the EU has maintained its interpretation of the enhanced cooperation concept, pointedly describing it as a "process of enhanced cooperation between governments."<sup>46</sup> At Europe's 2011 regional IGF, EuroDIG, Neelie Kroes, Vice-President of the European Commission claimed that "the multi-stakeholder model of Internet Governance is needed, just that it needs to be amended to function better and take into account the voice of Governments."<sup>47</sup> She has subsequently proposed a "Compact for the Internet", in which "the role which government representing their citizens play" is brought to the fore, with the claim that it is necessary to "ensure that those views aren't ignored" in order "that the multistakeholder model doesn't fall apart."<sup>48</sup>

The immediate context for Kroes' concerns (and IBSA's) is that ICANN has failed, through the role that its Governmental Advisory Committee (GAC) plays in its multi-stakeholder processes, to provide what Europe regards as sufficient control over policies for the administration of the Internet domain name system. Reflecting these concerns, the European Commission recently produced a series of discussion papers proposing significant reforms to the domain name system, which if implemented would provide governments with veto power over new top level domains and to the right to reserve words from domain name registries, amongst other radical new powers.<sup>49</sup> The papers were not developed with the benefit of prior public consultation, and only came to public awareness after they were leaked.

But even the United States, which already possesses oversight authority over ICANN, and has been a vocal proponent of a balanced model of multi-stakeholder governance for the Internet, has begun to ask how "governments collectively, can operate within the paradigm of a multi-stakeholder environment and be satisfied that their interests are being adequately addressed."<sup>50</sup>

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online at the time of writing (26 September).

<sup>45</sup>European Union. *Proposal for Addition to Chair's Paper Sub-Com A Internet Governance on Paragraph 5 "Follow-up and Possible Arrangements"*. 2005. URL: <http://www.itu.int/wsis/docs2/pc3/working/dt21.pdf>.

<sup>46</sup>European Commission. *Internet Governance: Commission Welcomes Move Towards Full Private-Sector Management by 2009*. 2006. URL: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1297>.

<sup>47</sup>Neelie Kroes. *Internet governance – European Dialogue on Internet Governance (EuroDIG)*. 2011. URL: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/419>.

<sup>48</sup>Neelie Kroes. *I propose a "Compact for the Internet"*. 2011. URL: <http://blogs.ec.europa.eu/neelie-kroes/i-propose-a-compact-for-the-internet/>.

<sup>49</sup>Milton Mueller. *The second EC ICANN Paper: How low can they go?* 2011. URL: [http://blog.internetgovernance.org/blog/\\_archives/2011/9/4/4893009.html](http://blog.internetgovernance.org/blog/_archives/2011/9/4/4893009.html).

<sup>50</sup>Department of Commerce. "The Internet Assigned Numbers Authority (IANA) Functions". In: *Federal Register* 76.114 (2011), pp. 34658–34667. URL: <http://www.ntia.doc.gov/>

This illustrates that whilst developed countries pay lip service to the multi-stakeholder model of policy development and make much of their opposition to greater intergovernmental control over the Internet when proposed by developing countries, this has more to do with the fact that they (and the United States in particular) already possess substantial power over Internet policy development, which the developing countries lack.

In reality, there is little to distinguish governments from either side of the economic divide in their desire either to gain or to maintain power over Internet policy development. Perhaps all that has changed since the turn of the decade is that as calls for a balanced multi-stakeholder policy development model of enhanced cooperation have continued to resonate, governments who at first took refuge in the vagaries of the Tunis Agenda's language, have been forced to make their bottom line more explicit.

### 3.2 Intergovernmentalism rampant

The United States is careful with the image that it presents to its citizens and the rest of the world about its support for the multi-stakeholder governance model for Internet governance. In a 2011 strategy document on cyberspace policy it expressed full enthusiasm for that model,<sup>51</sup> and has revealed its reservations only indirectly, for example through its attempt to prematurely terminate the work of the CSTD Working Group,<sup>52</sup> and its retention of unilateral oversight of ICANN through a permanent Affirmation of Commitments following the expiry of its earlier Joint Project Agreement.<sup>53</sup>

But the United States, and other countries too, feel more freedom to depart from their expressed multi-stakeholder principles when they can do so in a manner that allows them a degree of distance from their actions. The main way in which they can do this is by means of forum shifting to less inclusive intergovernmental organisations, or by entering into new bilateral or multilateral agreements that provide limited representation of other stakeholders.

In a sense, the efforts of governments to create a home for Internet policy development outside of the IGF cannot accurately be described as forum shifting, since as explained in the first section of this paper, the IGF is not yet a forum capable of usefully contribute to the process of developing such policies, having been held back from acquiring that capacity as explained in section 2. The main exception is in the case of intellectual property policy, which already has a natural, and relatively broadly consultative, home in WIPO.<sup>54</sup> As such the attempts of business and governments to use bilateral trade negotiations, as well as multi-lateral negotiations such as TRIPS, ACTA (the Anti-Counterfeiting Trade

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[files/ntia/publications/fr\\_iana\\_furthernoi\\_06142011.pdf](#), p. 34660.

<sup>51</sup>Barack Obama. *International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World*. 2011. URL: [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/international\\_strategy\\_for\\_cyberspace.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf).

<sup>52</sup>King, see n. 30.

<sup>53</sup>Milton Mueller. *Is the U.S. turning its back on innovation in Internet governance?* 2011. URL: [http://blog.internetgovernance.org/blog/\\_archives/2011/6/14/4838065.html](http://blog.internetgovernance.org/blog/_archives/2011/6/14/4838065.html).

<sup>54</sup>Malcolm, *Public Interest Representation in Global IP Policy Institutions*, see n. 10, p. 16.

Agreement) and the TPPA (Trans-Pacific Partnership Agreement) to develop and promulgate intellectual property norms and raise enforcement standards have been well studied as examples of forum shifting,<sup>55</sup> and are also a good example of the multi-stakeholder principle in decline.

Less well studied to date, and the focus of attention here, are three more directly Internet-related intergovernmental policy-making institutions which governments have favoured as loci for Internet policy development in recent months, but which in comparison to a potential empowered IGF or a future fully multi-stakeholder enhanced cooperation framework, lack openness to either multilateral or multi-stakeholder input, or both. These three institutions are the ITU, the G8 and the OECD.

The intergovernmental forum in which governments disenamoured of the multi-stakeholder model have most loudly voiced their views is the ITU. The ITU formed a government-only working group in 2007 to review whether any reforms to its own structure were required in order to bring it into compliance with the multi-stakeholder standard set at WSIS. Although ITU membership and meetings are almost completely closed to civil society, the review concluded in 2009 that no changes were needed.<sup>56</sup>

At its plenipotentiary conference in 2010, renewed calls were made by some delegates for the ITU “to take on itself a leading role in internet governance within the scope of its competence”,<sup>57</sup> though as with earlier similar efforts to shift Internet governance roles into that forum,<sup>58</sup> these failed. However at the same meeting the ITU did confirm that its Dedicated Group on international Internet-related public policy issues would be maintained as a body “limited to member states, with open consultation to all stakeholders.”<sup>59</sup>

Whereas WGIG had rejected the ITU as a suitable institution within which for governments to address Internet governance issues, largely because of the deficits in its accessibility to civil society as noted above,<sup>60</sup> alternative institutional options have since emerged that are more open to the participation of other stakeholders, but in a more controlled way than at the IGF, and possessing a clearer intergovernmental mandate for policy development.

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<sup>55</sup>Laurence R Helfer. “Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking”. In: *Yale Journal of International Law* 29 (2004), p. 1.

<sup>56</sup>(ITU. *Draft Final Report of the Council Working Group on the Study on the Participation of all relevant stakeholders in ITU Activities related to the World Summit on the Information Society (WSIS)*. 2009. URL: <http://www.itu.int/council/groups/stakeholders/pd/Drafftinalreport.doc>). In a further irony, the report is only accessible to ITU members.

<sup>57</sup>Monika Emert. “UN And Internet Governance: Better Cooperation Or Bigger Role?” In: *Intellectual Property Watch* 7.11 (2010), pp. 4–5. URL: <http://www.ip-watch.org/weblog/2010/10/27/un-and-internet-governance-next-four-years-better-cooperation-or-bigger-role/>.

<sup>58</sup>Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, see n. 4, p. 61.

<sup>59</sup>ITU. *ITU’s role with regard to international public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses*. 2010. URL: [http://www.itu.int/osg/csd/intgov/resolutions\\_2010/PP-10/RESOLUTION\\_102.pdf](http://www.itu.int/osg/csd/intgov/resolutions_2010/PP-10/RESOLUTION_102.pdf).

<sup>60</sup>Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, see n. 4, p. 344.

One of these is the G8. In 2009, European Commission Vice-President Vivian Reding had called for the establishment of a “G-12 for Internet Governance,” being “a multilateral forum available for governments to discuss general internet governance policy issues.”<sup>61</sup> She got her wish in 2011, when the G8 under the Presidency of French President Nicolas Sarkozy, convened an invitation-only e-G8 Forum in Deauville, from which civil society was largely excluded.<sup>62</sup> The meeting notionally provided non-governmental delegates an opportunity to contribute their views to the formal G8 summit (though in fact the Deauville Declaration eventually issued at the summit had been drafted beforehand).<sup>63</sup>

According to one commentator who was present, Sarkozy “sees the role of the e-G8 very much in the same context as the national CNN (Conseil National du Numérique, composed only of business): create a space for business and states to start a conversation, but not a real advisory body and not multi-stakeholder.”<sup>64</sup>

Falling somewhere in between the open yet ineffectual multi-stakeholderism of the IGF and the tokenism of the intergovernmental e-G8 stands the OECD. Since 2008, the OECD’s Committee for Information, Computer and Communication Policy (CICCP), which is attached to the intergovernmental OECD Council, has taken advice from a Civil Society Information Society Advisory Council (CSISAC). It stands alongside two similar advisory committees for the business and technical communities.<sup>65</sup>

In June 2011, the CICCP endeavoured to reach agreement between the Council and its advisory committees on a Communiqué on Principles for Internet Policy-Making.<sup>66</sup> Although the communiqué expressed support for “multi-stakeholder co-operation in policy development processes,” and contained a number of other provisions to which CSISAC had contributed and with which it agreed, in the end CSISAC chose not to endorse it on the grounds that

several of these principles are not compatible with CSISAC core values including respect for fundamental human rights and freedoms and, the rule of law, promotion of access to knowledge, promotion of open standards, Net Neutrality and balanced intellectual property policies and regimes.<sup>67</sup>

In itself, this indicates no failure of the multi-stakeholder model, nor can be cited as evidence of that model in decline. But if consensus could not be reached

<sup>61</sup>Rene Beekman. *Reding wants globally responsible, privatised ICANN*. 2009. URL: [http://sofiaecho.com/2009/05/04/714195\\_reding-wants-globally-responsible-privatised-icann](http://sofiaecho.com/2009/05/04/714195_reding-wants-globally-responsible-privatised-icann).

<sup>62</sup>Internet Governance Caucus. *Open letter to President Sarkozy on eG8 meeting plan*. 2011. URL: <http://www.igcaucus.org/open-letter-president-sarkozy-eg8-meeting-plan>.

<sup>63</sup>Eric Pfanner. *G-8 Leaders to Call for Tighter Internet Regulation*. 2011. URL: [http://www.nytimes.com/2011/05/25/technology/25tech.html?\\_r=1](http://www.nytimes.com/2011/05/25/technology/25tech.html?_r=1).

<sup>64</sup>Divina Meigs. *E-G8 forum: quick reporting on day 1*. 2011. URL: <http://lists.cpsr.org/lists/arc/governance/2011-05/msg00441.html>.

<sup>65</sup>Malcolm, *Public Interest Representation in Global IP Policy Institutions*, see n. 10, p. 16.

<sup>66</sup>OECD. *Communiqué on Principles for Internet Policy-Making*. 2011. URL: <http://www.oecd.org/dataoecd/40/21/48289796.pdf>.

<sup>67</sup>CSISAC. *CSISAC Declines to Support OECD Principles on Internet Policy-Making*. 2011. URL: [http://csisac.org/CSISAC\\_PR\\_06292011.pdf](http://csisac.org/CSISAC_PR_06292011.pdf).

between civil society and the other stakeholders, a full commitment to the multi-stakeholder process would have seen the OECD retracting its communiqué of principles altogether, or at the very least honestly acknowledging that those principles did not represent the views of all of the stakeholders consulted. But in fact, the withdrawal of civil society from endorsement of the communiqué has been treated as an inconvenient fact to be quietly ignored. For example, as the facts were presented by US government representatives in a Washington Post op ed:

The recent meeting called by the OECD (the international economics policy standards organization) assembled leaders from 40 governments, business and the Internet technical community. It produced a set of broad principles for safeguarding the open Internet that address three key international threats to the seamless, interconnected Web.<sup>68</sup>

Not only is civil society's abstention not admitted, but indeed civil society is not mentioned in the story at all. It as if civil society simply did not play any role in the process. The OECD cannot be regarded as adhering to the WSIS principles on multi-stakeholder participation in Internet governance if one stakeholder group's participation in that process can be trivialised in this manner.

### 3.3 Complicity of the business and technical communities

Worsening the decline of multi-stakeholderism has been the business and Internet technical communities' indifference at best, and hostility at worst, towards multi-stakeholder models that would empower broader civil society. This has taken an active form in the submissions that these communities, notably through the ICC and ISOC, have consistently put forward arguing against the reform of the IGF to enable it to develop the capacity to produce policy recommendations,<sup>69</sup> and against institutional reforms in relation to the enhanced cooperation process, which they have characterised as unnecessary in light of their own internal efforts at cooperation with other stakeholders.

By the same token, the private sector and technical communities were not seen to raise any objection to the exclusivity of the e-G8 summit, nor to the release of the OECD Communiqué without civil society's endorsement, they have actively participated in other Internet-related policy discussions from which civil society was excluded or absent (such as the ACTA negotiations),<sup>70</sup> and have proactively organised other such discussions (including a series of meetings on intermediary liability, co-hosted by ISOC and WIPO).<sup>71</sup> The result has been

<sup>68</sup>Karen Kornbluh and Daniel J. Weitzner. *Foreign policy of the Internet*. 2011. URL: [http://www.washingtonpost.com/opinions/foreign-policy-of-the-internet/2011/07/08/gIQAjFyEI\\_story.html](http://www.washingtonpost.com/opinions/foreign-policy-of-the-internet/2011/07/08/gIQAjFyEI_story.html).

<sup>69</sup>See 2.1.

<sup>70</sup>Consumers International. *2009 IP Watch List*. 2009. URL: <http://a2knetwork.org/site/default/files/ip-watchlist09.pdf>, p. 4.

<sup>71</sup>See <http://www.wipo.int/copyright/en/internet-intermediaries/index.html>.



to put multi-stakeholderism out of balance in those institutions, and to ensure that the only institution where it is more balanced – the IGF – has no capacity to efficiently channel civil society’s views to policy makers.

The motivation of the private sector in particular in perpetuating this imbalance is not difficult to understand, nor is it even particularly objectionable, since the private sector has no interest in furthering the public values that true multi-stakeholderism would promote, ahead of its own power and profits, which could be threatened by further democratising governance processes. Indeed, it has already been noted that governments have almost the same complaint as civil society about multi-stakeholderism imbalance in the context of ICANN, where governments are institutionally disempowered relative to the other stakeholders.<sup>72</sup> The technical community, to the extent that it is not composed of private sector actors, has a slightly different but also understandable interest in opposing governance reform, in it has historically enjoyed considerable independent authority over technical Internet governance, and naturally wishes to cede as little of that authority to governments or broader civil society as possible.

More objectionable, however, are cases in which private sector actors, in particular, have taken active steps to implement Internet governance policies extra-legally; that is, where such policies have been developed outside of democratic (let alone multi-stakeholder) fora, and are implemented without public oversight. A clear example is the case of the withdrawal of services by financial intermediaries to Wikileaks, thereby crippling its ability to raise funds to support the provision of access to leaked government and corporate documents on matters of public interest. This decision was made in an environment of strong political pressure, but where no legal ruling against Wikileaks or its representatives had been, or yet has been, made regarding the legality of its activities.<sup>73</sup>

Another example of the private sector straying into areas of public policy that should be subject to democratic and (at least outside of the domestic context) multi-stakeholder oversight, is in the private agreements reached between some Internet service providers (ISPs) and representatives of content owners, to implement a graduated response or “three strikes” regime whereby users of the Internet can be disconnected or otherwise penalised for alleging sharing copyright content.<sup>74</sup> The UN Human Rights Rapporteur has expressed the view that such a regime impacts upon fundamental human rights such as the right to freedom of expression,<sup>75</sup> and the Council of Europe that basic Internet access has become an essential public service.<sup>76</sup> In this context even the OECD Commu-

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<sup>72</sup>Mueller, *Is the U.S. turning its back on innovation in Internet governance?*, see n. 53.

<sup>73</sup>Steve Ragan. *Cablegate: Visa and MasterCard face legal problems over WikiLeaks blockade*. 2011. URL: <http://www.thetechherald.com/article.php/201126/7349/Cablegate-Visa-and-MasterCard-face-legal-problems-over-WikiLeaks-blockade>.

<sup>74</sup>John Collins. *Eircom to cut broadband over illegal downloads*. 2010. URL: <http://www.irishtimes.com/newspaper/frontpage/2010/0524/1224271013389.html>.

<sup>75</sup>Frank La Rue. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*. 2011. URL: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

<sup>76</sup>Council of Europe. *Declaration of the Committee of Ministers on the management of the Internet protocol address resources in the public interest*. 2010. URL: <https://wcd.coe.int/w>

niqué, in a passage to which CSISAC objected, limited the circumstances in which such a regime could be developed:

governments may choose to convene stakeholders in a transparent, multi-stakeholder process to identify the appropriate circumstances under which Internet intermediaries could take steps to . . . assist rights holders in enforcing their rights or reduce illegal content.<sup>77</sup>

Falling into the same category are agreements for the illegal filtering or interception of Internet usage by private government contractors, such as the infamous HBGary Federal,<sup>78</sup> and perhaps also the cooperation of domain name registrars to effect the “seizure” of websites at the direction of a US government agency without legislative mandate or a prior hearing.<sup>79</sup>

### 3.4 Weakness of civil society

Not only governments, the private sector and the Internet technical community are responsible for the decline of multi-stakeholderism in Internet governance. Civil society itself can also be partly held responsible for that decline. For one thing, activists have fallen into the same trap as governments and the private sector in forgoing multi-stakeholder engagement in favour of extra-legal methods of advancing their interests. Thus the banks’ extra-legal financial blockade against Wikileaks was met in kind with Distributed Denial of Service (DDOS) attacks by the distributed hacker collective Anonymous.<sup>80</sup> HBGary’s attempts to infiltrate a network of hactivists resulted in its network being infiltrated in turn, and its confidential corporate documents leaked.<sup>81</sup>

Whilst civil disobedience is sometimes necessary, and the examples given above were, in defence of Anonymous and Lulzsec, retaliatory, the danger of civil society activists having recourse to extra-legal methods for voicing dissent is that they show contempt for multi-stakeholder engagement, accountability and the rule of law. This invites a response which holds those values in similar contempt, such as that of China, the Russian Federation, Tajikistan and Uzbekistan, who propose a government-only instrument on cyber-security. If governments perceive that the Internet community’s reaction to the infringement of their rights online is to practice cyber-warfare, rather than to engage in discussion and debate on their grievances in multi-stakeholder fora that exist

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cd/ViewDoc.jsp?id=1678299.

<sup>77</sup>OECD, see n. 66, p. 6.

<sup>78</sup>Barrett Brown. *A sinister cyber-surveillance scheme exposed*. 2011. URL: <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/22/hacking-anonymous>.

<sup>79</sup>Wendy Seltzer. *Super Bust: Due Process and Domain Name Seizure*. 2011. URL: <http://wendy.seltzer.org/blog/archives/2011/02/02/super-bust-due-process-and-domain-name-seizure.html>.

<sup>80</sup>Ashley Fantz and Atika Shubert. *WikiLeaks 'Anonymous' hackers: 'We will fight'*. 2010. URL: [http://articles.cnn.com/2010-12-09/us/hackers.wikileaks\\_1\\_julian-assange-arbor-networks-websites?\\_s=PM:US](http://articles.cnn.com/2010-12-09/us/hackers.wikileaks_1_julian-assange-arbor-networks-websites?_s=PM:US).

<sup>81</sup>Peter Bright. *Anonymous speaks: the inside story of the HBGary hack*. 2011. URL: <http://arstechnica.com/tech-policy/news/2011/02/anonymous-speaks-the-inside-story-of-the-hbgary-hack.ars>.

for that purpose, then the utility of those fora is compromised and their further decline is assured.

A second respect in which civil society should take responsibility for the decline of multi-stakeholderism is that it has not organised its participation in Internet governance processes very effectively in recent years. During WSIS, civil society self-organised itself into a plenary group, and a large number of regional, multi-stakeholder and thematic caucuses and working groups.<sup>82</sup> Of these, the only body that remains active today is the Internet Governance Caucus (IGC). Its capacity to represent civil society within Internet governance institutions is limited by a number of factors: its membership although large is relatively narrow, it is not formally incorporated, it has no staff or funding, and is not accredited to ECOSOC.

Similarly, during the last decade NGOs that were active on intellectual property issues in venues such as WIPO used to hold coordination meetings in Geneva. These meetings, too, are a thing of the past.<sup>83</sup> Increasingly it has been the funding agencies such as the Open Society Institute (OSI) and IDRC, that have taken the initiative to organise and fund occasional gathering of NGOs working on IP issues.

In comparison, business and technical community stakeholders attending meetings of institutions such as WIPO and the CSTD, and events such as the e-G8 and the European Digital Assembly, come well prepared, with joint positions discussed and agreed beforehand. Pre-event meetings are held, along with daily briefings in the mornings. It is natural, then, that such events tend to be dominated by business and technical community representatives who are much better prepared to advance their agreed positions.

In part of course, this disparity between the disorganisation of civil society and the organisation of the other stakeholder groups stems from civil society's lack of resources. But WSIS showed that even when resources were limited, it was possible to evolve quite complex organisational structures in order to interface with policy development processes institutions more effectively. This is a challenge that civil society should take up anew if it wishes to address its own part in the decline of multi-stakeholder governance.

## 4 Arresting the decline

It has been seen that both within and outside the United Nations system, civil society still lacks an effective voice in global Internet policy development, while governments and other powerful actors in the Internet governance regime continue to act unilaterally. Multi-stakeholder policy development had been put forward to cure these ills, but its implementation is faltering badly, with an

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<sup>82</sup>Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, see n. 4, pp. 326-329.

<sup>83</sup>Duncan Matthews. "The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities". In: *Chicago-Kent Law Review* 82.3 (2007), pp. 1369-1387. URL: <http://www.cklawreview.com/wp-content/uploads/vol182no3/Matthews.pdf>, p. 1385.

incapacitated IGF and a host of competing institutions and agreements that wield more power, but offer far less scope for stakeholder participation. What options, then does civil society have for arresting the observed decline in the fortunes of the multi-stakeholder principle?

#### 4.1 A framework document

The first suggestion may seem an odd one: the development of a framework of principles for Internet governance. Clearly, we already have a surfeit of such documents. The Council of Europe's code of good practice on information, participation and transparency, developed with the Association for Progressive Communications (APC) is a good example.<sup>84</sup> The OECD Communiqué, though flawed, is another. President Obama's International Strategy for Cyberspace, the EU's Internet Compact, the G8's Deauville Declaration and IBSA's recommendations are yet more. Whilst most of these are governmental in origin, civil society, too, has been busy in the Internet principles department, with the Internet Rights and Principles Dynamic Coalition having released the beta version of its Charter of Human Rights and Principles for the Internet at the Nairobi meeting of the IGF.<sup>85</sup>

But none of these documents is sufficient, because none of them are shared by all of the stakeholder groups and regions which they aspire to cover, and therefore all lack weight and legitimacy as instruments guiding the practice of Internet governance globally. It would be much more apt for the IGF itself to produce such a document, in fulfilment of its mandate to discuss international public policies regarding the Internet and to make recommendations where appropriate. Such an IGF statement of Internet principles – non-binding, of course – would be a valuable tangible output shared by all stakeholders as a guide for their individual activities in Internet governance; an unmet need that the Secretary-General, amongst others, has recognised.<sup>86</sup>

Brazil attempted to submit such a document to the Vilnius meeting of the IGF in 2010, its Principles for the Governance and Use of the Internet, developed on a multi-stakeholder basis by the Brazilian Internet Steering Committee (CGI.br).<sup>87</sup> Whilst many at that time called for the IGF to adopt the principles as a basis for a set of principles of its own,<sup>88</sup> there was then no process by which the IGF could deliberate upon such a document, in the way that the OECD was able to deliberate upon its Communiqué by submitting it to the stakeholder

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<sup>84</sup>Council of Europe. *Code of good practice on information, participation and transparency in Internet governance*. 2010. URL: [http://www.apc.org/en/system/files/COGP\\_IG\\_Version\\_1.1\\_June2010\\_EN.pdf](http://www.apc.org/en/system/files/COGP_IG_Version_1.1_June2010_EN.pdf).

<sup>85</sup>See <http://irpcharter.org/>.

<sup>86</sup>United Nations Secretary-General, *Continuation of the Internet Governance Forum*, see n. 18, p. 5.

<sup>87</sup>CGI.br. *Principles for the Governance and Use of the Internet*. 2009. URL: <http://www.cgi.br/english/regulations/resolution2009-003.htm>.

<sup>88</sup>Internet Governance Forum. *Fifth Meeting of the Internet Governance Forum (IGF) – Chairman's Summary (Expanded Version)*. 2010. URL: <http://intgovforum.org/cms/2010/Chairman%27s.Summary.Expanded.pdf>, p. 22.

groups for discussion and comment.

Thankfully, a clear road map for the IGF to develop the capacity to deliberate upon such outputs is on the table at the CSTD Working Group.<sup>89</sup> The proposal, as presented by India, involves the MAG identifying key policy questions, working groups being formed to deliberate upon them and produce background papers, these being further deliberated upon at IGF workshops, round table discussions and intersessional meetings, the output being presented to the IGF in plenary session, and a final report being prepared by the working groups. The fate of the Indian proposal, or anything like it, remains murky, given the opposition to change within the CSTD from the developed countries, business and technical communities. However, their choice is rather stark: either the IGF is to develop the capacity to produce policy outputs such as this, or it will rapidly be overtaken by rival institutions and processes. Therefore whilst change is always difficult, this particular change is long overdue for the IGF, and cannot continue to be passed up if it wishes to remain relevant. If successful, there is every chance that the statement of principles that the IGF produces will provide persuasive guidance to those other institutions and processes, and alone validate the IGF's continued existence.

## 4.2 Better use of representation options

The imbalance of power that affects civil society in comparison to other stakeholder groups within governance institutions is an inevitable consequence of the far greater economic and (thus) political power that the private sector holds. In many intergovernmental institutions – such as WIPO, for example – private sector cooperatives and lobby groups receive the same consultative status as NGOs from civil society, which results in the “crowding out” of civil society voices in consultative processes. Additionally, as noted above, civil society tends to be less well prepared and coordinated in comparison to the business and technical communities. This too has prejudiced its success in advocating for public interest outcomes in venues such as the IGF's MAG, the CSTD and the OECD.

To redress this, civil society needs to make better use of the options that are already available to it to represent the public interest within Internet governance institutions. This should involve a methodical process of :

- Mapping the institutions active in the Internet governance regime, and the opportunities for participation they each offer.
- Assessing the resources that civil society groups have available to participate in these institutions, and what barriers they face.
- Coordinating the application of these resources towards the opportunities identified, and engaging in capacity building to overcome the barriers where possible.

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<sup>89</sup>Government of India. *India's Inputs to the Questionnaire circulated by the Chair of the CSTD Working Group on Improvements to Internet Governance containing broad elements of the final report*. 2011. URL: <http://www.unctad.info/upload/CSTD-IGF/Contributions/M1/India.pdf>.

In 2011, Consumers International commenced a programme titled “Consumer Representation in the Information Society” that aims to follow the above approach to help public interest representatives (most specifically consumer groups) better utilise the available options for representation of the public interest in Internet governance institutions.<sup>90</sup>

During the same year, in the related arena of intellectual property, the American University of Washington DC and the FGV Law School launched their own programme titled “International IP and the Public Interest,” to help build a global network of public interest advocates working on intellectual property issues.<sup>91</sup>

These programmes exemplify, but certainly do not exhaust, what is needed to equip global civil society to more effectively make use of the opportunities that exist to participate in multi-stakeholder Internet governance processes. More will certainly be needed to return civil society to the position of organised strength that it had during the first phase of WSIS, culminating in the leading role that it played in the multi-stakeholder Working Group on Internet Governance.

### 4.3 Reform of institutions where options lacking

Of course, a large part of the problem is not that civil society doesn’t make use of the opportunities it has for multi-stakeholder participation, but rather that those opportunities do not exist. This is particularly so in cases such as the ACTA and TPPA treaties, which have been negotiated in private with very little access being afforded to public interest representatives. The Tunis Agenda specifies that those exercising global Internet governance responsibilities should do in a manner that is “multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations.” This points to the need for reform of such processes that do not already meet those standards. An example of such reform in practice is in the case of the OECD, which following its 2008 Seoul Ministerial Meeting, formed the CISAC as a dedicated civil society advisory group alongside similar groups for business and the technical community.

Institutions that do not meet the WSIS process criteria are to be identified by the IGF, which is mandated to “Promote and assess, on an ongoing basis, the embodiment of WSIS principles in Internet governance processes.”<sup>92</sup> But given that the IGF is not presently fulfilling this paragraph of its mandate, the next best option is for civil society to study and advocate for reform in institutions that are not adequately inclusive of multi-stakeholder participation. In conducting such analysis, questions to ask are:

- Are the main barriers to participation institutional, or are they capacity issues on civil society’s part? Do they affect each of the phases of the institution’s work, or just one phase such as agenda setting or implementation?

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<sup>90</sup>See <http://A2Knetwork.org/consumer-representation-information-society>.

<sup>91</sup>See <http://infojustice.org/>.

<sup>92</sup>WSIS, see n. 7, para 72(i).

In each of these cases, the most appropriate remedies will differ.

- What reforms can be made to improve participation? Examples may include greater transparency, better support from the institution's secretariat, new formal mechanisms for public consultation, or more streamlined procedures so that issues can receive adequate consideration before the window of time for taking effective action has closed.
- What coalitions and alliances can be formed to rally support for the reforms required? As noted below, there may be other actors who have interests in increasing multi-stakeholder participation in the institution concerned, and it is likely to be critical to rally their support. A good example of this is in the cooperation between governments and civil society in introducing a Development Agenda for WIPO.
- Where will the funding come from to support this exercise? Advocating for the reform of a closed intergovernmental organisation can be a long, tiresome and expensive process. Securing public or private funding support will be important in the early phases of the reform campaign.

Finally, if institutional reform is not possible in the short term, it may still be that civil society can still influence the organisation at a lower, more informal level. According to scholar Duncan Matthews,

NGOs do not, and should not, rely on the panacea of enhanced formal participation in multilateral institutions in the future. Rather, their work is more effective at the informal level, providing advice and technical expertise in order to improve the flow of information and inform the policy-making and norm-setting process.<sup>93</sup>

#### 4.4 Strategic alliances with other actors

As noted above, the support of other actors to advance the cause of multi-stakeholder Internet governance is imperative. In the face of opposition from reactionary stakeholders, it has not been civil society that has achieved the highest profile gains, it has largely been governments such as Brazil, with the presentation of its Principles on Governance and Use of the Internet in Vilnius,<sup>94</sup> and India with its recommendations on IGF improvement at the CSTD.<sup>95</sup> It will be particularly important for civil society to engage with IBSA, to offer advice on its recommendations before they are presented to the General Assembly, and to secure an acceptable place for civil society in whatever new governance arrangements those recommendations would create.

Intergovernmental allies are also important. Amongst these will certainly be the Council of Europe, which collaborated with civil society on the development

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<sup>93</sup>Duncan Matthews. *IP-NGOs final report December 2006*. 2006. URL: <http://www.ipngos.org/Report/IP-NGOs%20final%20report%20December%202006.pdf>, p. 31.

<sup>94</sup>CGI.br, see n. 87.

<sup>95</sup>Government of India, see n. 89.

of its documents on Internet governance,<sup>96</sup> though to date has not yet attempted as Brazil did to propose these for adoption by the IGF at large.

Finally the private sector, although at large opposed to the fuller development of the IGF's role, does have some members who have strongly supported civil society interests. Google is a sponsor of the International IP and the Public Interest programme mentioned above. The Computer and Communications Industry Association (CCIA) has spoken up at WIPO in favour of civil society proposals, and held joint events with civil society stakeholders such as the Trans Atlantic Consumer Dialogue (TACD).

Amongst the most appropriate joint working methods that civil society and its allies may adopt in a given case may include:

- Joint capacity building seminars, such as IGF workshops and side-events at intergovernmental organisations such as WIPO.
- Formal or informal consultation on documents, such as those put forward by IBSA and the Council of Europe.
- Providing advice and technical expertise to governments at the informal level, where formal participation alongside them in a particular institution is not possible.
- Requesting joint meetings to raise civil society concerns, either on a formal basis or simply in the corridors of institutions like CSTD and WIPO and at negotiations like the TPPA.

## 5 Conclusion

Many will understandably doubt that multi-stakeholderism is in decline at all. Certainly as a buzzword, it still has currency amongst all the stakeholder groups. Other than the Chinese group's instrument on cyber-security, each of the Internet principles documents referred to in this paper includes reference to the importance of multi-stakeholder involvement in Internet governance. But when one compares the promise of multi-stakeholderism during the last decade with its reality today, civil society in particular is apt to feel short-changed.

It may have seemed to have been settled at WSIS that civil society would be afforded a position of equality in Internet governance arrangements alongside the other stakeholder groups, as had been the case in the WGIG and at the IGF. Yet today, civil society is fighting harder than ever to secure meaningful representation within UN bodies such as the CSTD's Working Group, the consultations on enhanced cooperation, and the IGF MAG, as well as within other multilateral institutions and meetings such as the e-G8 and ACTA. This struggle will only continue over the coming years, as new intergovernmental bodies,

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<sup>96</sup>Council of Europe, *Code of good practice on information, participation and transparency in Internet governance*, see n. 84; Council of Europe, *Internet Governance Principles*, see n. 44.



such as those proposed by IBSA and the Chinese group, are given birth while the IGF struggles for relevancy.

Civil society has more to lose from the potential demise of multi-stakeholderism than governments, the private sector of the technical community, because in its absence we have less power than they do to fall back on. It is therefore incumbent upon civil society to take the lead in ensuring that the multi-stakeholder principle survives. As suggested in this paper, some of the steps that can be taken to this end are:

- To interrupt the flurry of competing Internet principles documents being put forward by individual stakeholders in isolation, and instead work towards unifying that effort within the IGF.
- To more efficiently and effectively target our available resources towards representing the public interest within institutions where multi-stakeholder input can already be received at a formal or informal level.
- In institutions that do not facilitate civil society representation, to identify and lobby for the necessary institutional reforms.
- To form and utilise mutually beneficial alliances with other actors where this can help to strengthen multi-stakeholder processes or our participation in those processes.

Multi-stakeholderism is still a recent innovation in global governance, and it would be premature to announce its death. At the same time, it is not yet so firmly established that its survival is assured. Helping to arrest the decline of multi-stakeholderism may be the most important contribution that civil society can make to the Internet governance regime, now and for decades to come.

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