Contribution to the ITU CWG-Internet Open Consultation (February-September 2016)

23 March 2016

Just Net Coalition[1]

Abstract

In our view, the main goal is to create and enabling environment for use of the Internet. Facilitating access is a necessary but not sufficient activity. It is not disputed that it is important to build an enabling environment for use of and access to the Internet and that states have obligations to facilitate, or at least not to impede, use of and access to the Internet. Since this consultation focuses on access, this submission will also focus on access, but we suggest that the enabling use of the Internet be the topic of a future open consultation.

A number of ITU instruments, resolutions and recommendations relate to building an enabling environment for access to the Internet. This contribution outlines those instruments, resolutions, and recommendations, proposes amendments to certain instruments, proposes changes to current Internet governance arrangements, and highlights relevant provisions of the 2012 International Telecommunication Regulations (ITRs).

A significant number of states did not sign the ITRs in Dubai in 2012. Almost all of those states indicated that they required additional time in order to consider the implications of certain provisions, in particular those that were approved at the last minute.

Accession to the ITRs will help to build an enabling environment for access to the Internet, and accession by non-signatories would appear feasible because legal analysis of the provisions that required further consideration indicates that they do not actually have the effects that had raised concerns during the conference in Dubai. For greater clarity, we propose a declaration that can be made by states that accede to the ITRs.

Background and Introduction

On 18 February 2016 the Council Working Group decided that Open Consultations would be convened on the following topic:

> **Building an enabling environment for access to the Internet**
>
> 1. What are the elements of an enabling environment to promote Internet connectivity?
>
> 2. What are the elements of an enabling environment to promote an affordable Internet?
>
> 3. What are the elements of an enabling environment to promote the quality of access to the Internet?
>
> 4. What are the elements of an enabling environment to build confidence and security in the use of the Internet?
>
> 5. What is the role of Governments in building an enabling environment?

[1] http://www.justnetcoalition.org

This contribution focuses on the role of governments in building an enabling environment for access to the Internet. It outlines relevant provisions of ITU instruments, resolutions and recommendations; proposes amendments to certain instruments; and argues that accession to the 2012 International Telecommunication Regulations (ITRs) will help to build the desired enabling environment.

The contribution is based on the observation[2] that the Internet is reorganising public institutions, including those related to governance, welfare, health, and education, as well as key sectors such as media, communications, transport and finance. It has transformed the way we do many things; however the benefits promised for all have not been adequately realized. On the contrary - we have seen mass surveillance, abusive use of personal data and their use as a means of social and political control; the monopolization, commodification and monetisation of information and knowledge; inequitable flows of finances between poor and rich countries; and erosion of cultural diversity. Many technical, and thus purportedly "neutral", decisions have in reality led to social injustice as technology architectures, often developed to promote vested interests, increasingly determine social, economic, cultural and political relationships and processes.

However, as a preliminary remark we note that surely the goal is to facilitate effective and productive Internet ***use***. Internet access is about building infrastructure—a necessary but not sufficient activity. Internet use is about creating or facilitating the variety of pre-conditions for being able to use the Internet to achieve one's goals. While the provision of "access" is something that might primarily benefit the access provider, enabling "Internet use" unequivocably benefits the end user/citizen. These issues are discussed at:

http://firstmonday.org/article/view/1107/1027

We propose that a future open consultation focus on building an enabling environment for **use** of the Internet.

1. What are the elements of an enabling environment to promote Internet connectivity?

1.1 According to paragraphs 28 ff. of the outcome[3] of the WSIS+10 review, the elements of an enabling environment include:

a) free flow of information and knowledge

b) open access to data

c) the fostering of competition

d) the creation of transparent, predictable, independent and non-discriminatory regulatory and legal systems

e) proportionate taxation and licensing fees

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[2] This paragraph is taken from the Delhi Declaration, see http://justnetcoalition.org/delhi-declaration

[3] UN Resolution A/RES/70/125, at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/125

f) access to finance, facilitation of public-private partnerships

g) multi-stakeholder cooperation

h) national and regional broadband strategies

i) efficient allocation of the radio frequency spectrum

j) Infrastructure sharing models

k) community-based approaches

l) public access facilities

1.2 Furthermore, “all efforts should be deployed to reduce the price of information and communications technologies and broadband access, bearing in mind that deliberate interventions, including through research and development and technology transfer on mutually agreed terms, may be necessary to spur lower-cost connectivity options”.

1.3 It is worth comparing the above to the top three priority issues[4] identified in 2005 by the Working Group on Internet Governance (WGIG):

> 1. Unilateral control by the one government of administration of the root zone file and systems.
>
> 2. Uneven distribution of Internet interconnection costs.
>
> 3. Internet stability, security and cybercrime, including lack of multilateral mechanisms to ensure the network stability and security of Internet infrastructure services and applications; and including lack of a unified, coordinated approach to combating spam.

1.4 As outlined in more detail below, none of those issues have been resolved. That is, the current governance mechanisms have failed to create an enabling environment that was able to resolve the three priority issues identified by WGIG.

1.5 Furthermore, the enabling environment must counter the threats to the development of the information society that are posed by government censorship and mass surveillance, but also the failure of governments to control rampant industry concentration and commercial exploitation of personal data, which increasingly takes the form of providing “free” services in exchange for personal information that is resold at a profit, or used to provide targeted advertising, also at a profit.

1.6 These challenges are exacerbated by the present ICT governance arrangements that suffer from a lack of democracy; an absence of legitimacy, accountability and transparency; excessive corporate influence and regulatory capture; and too few opportunities for effective participation by people, especially those from developing countries and disadvantaged populations in developed countries.

1.7 Thus, changes to Internet governance are required in order to achieve an enabling environment that will resolve the WGIG priority issues and also address the elements listed above.

1.8 It is urgent to reform cyberspace governance so that it is fully and pervasively underpinned by values of democracy, human rights and social justice; so that it will

[4] See paragraphs 15-18 of http://www.wgig.org/docs/WGIGREPORT.pdf

stand for participatory policy-making and promote people's control of social technologies; and so that it will result in truly decentralised architectures based on people's full rights to and control over data, information, knowledge and other 'commons' that ICTs must enable the world community to generate and share.

1.9 We will propose specific changes to the current Internet governance structures in the subsequent sections of this paper. And we refer here to the general framework that we have proposed in our Delhi Declaration:

http://justnetcoalition.org/delhi-declaration

1.10 We note here that at least one government has recently made proposals that are consistent with the above. Those proposals are discussed in more detail in section 5 below.

Free flow of information

1.11 It is not disputed that the free flow of information is an essential element of an enabling environment to promote Internet connectivity. Thus we reiterate the proposal contained in our previous submissions to modify paragraph 2 of Article 34 of the ITU Constitution as follows:

> 2 Member States also reserve the right to cut off, in accordance with their national law, any other private telecommunication which is~~may appear~~ dangerous to the security of the State or contrary ~~to its laws,~~ to public order~~ or to decency~~. However, any such cut off shall take place only if it is held to be necessary and proportionate by an independent and impartial judge.

Free flow of knowledge and intellectual property rights

1.12 It is also not disputed that the free flow of knowledge is an an essential element of an enabling environment to promote Internet connectivity. Access to much of the information society is limited by excessively stringent intellectual property laws, in particular copyright. Indeed, the current copyright regime might run counter to human rights[5]. Thus we supportreiterate our proposal contained in our previous submission[6] to this group for significant copyright reform as proposed by the Pirate Party, see:

http://www.copyrightreform.eu/sites/copyrightreform.eu/files/The_Case_for_Copyright_Reform.pdf

1.13 The price of mobile telephones and other end-user equipment is significantly affected by patents. While we support the concept of patents for hardware but not for software, we are of the view that the current patent system is dysfunctional, in particular because of the activities of "patent trolls"[7]. It is our view that significant reform of the current patent system would contribute to affordable access to the Internet, and thus be a component of an enabling environment to promote Internet connectivity.

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[5] See Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, A/HRC/28/57 of December 2014, at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_57_ENG.doc

[6]

[7] See for example https://en.wikipedia.org/wiki/Patent_troll

2. What are the elements of an enabling environment to promote an affordable Internet?

2.1 According to the 2015 report[8] of The Alliance for an Affordable Internet[9]:

> "Bold steps are needed to accelerate connectivity among women, the poor, and other marginalised populations. Overcoming the challenges to access posed by income and gender inequalities will require policies designed with these populations in mind. Market forces cannot connect everyone — free or subsidised public access in tandem with digital education will be critical to enabling connectivity for populations left behind." (Emphasis added)

2.2 We agree that bold steps are needed. Thos bold steps must include publicly funded backbones and community owned last mile as the key model for achieving universal connectivity. Nobody questions that roads, power distribution systems, water distribution systems, etc. require public funding. The same is the case for backbone telecommunication infrastructure. At the local level, such infrastructure should be provided by local governments and local communities.

2.3 Further, many steps, albeit not bold steps, are described in Supplement 2 of Recommendation ITU-T D.50[10]. A somewhat bolder step is proposed in Recommendation ITU-T D.156[11]. WTSA-12 Opinion 1[12] invites Member States "to take all measures necessary for the effective implementation of Recommendation ITU-T D.156."

2.4 In our view, the elements of an enabling environment to promote affordable Internet access include implementation of D.156 and of the measures described in Supplement 2 of D.50.

2.5 Functional separation is also an important element and we endorse section 8 of a previous submission to this group, available at:

http://www.itu.int/en/Lists/CWGContributionmar2014/Attachments/25//CWG-March.pdf

2.6 Furthermore, we are of the view that the fostering of competition is an important element of an enabling environment to promote and affordable Internet, and that visibility and transparency of prices, in particular wholesales prices promotes competition. We would thus support proposals, such as those made in the preparatory process of the 2012 World Conference on International Telecommunications (WCIT) to encourage greater transparency in the pricing of international Internet interconnections.

3. What are the elements of an enabling environment to promote the quality of access to the Internet?

Network neutrality

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[8] http://a4ai.org/affordability-report/

[9] See the press release at http://1e8q3q16vyc81g8l3h3md6q5f5e.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2015-16AffordabilityReport_PressRelease.pdf

[10] https://www.itu.int/rec/T-REC-D.50/e

[11] https://www.itu.int/rec/T-REC-D.156/e

[12] http://www.itu.int/pub/T-RES-T.1000-2012

3.1 It is generally recognized, at least within civil society, that violations of network neutrality degrade access to the Internet. While certain forms of traffic management are legitimate means to improve quality of access, other forms are not. This is well explained in the recent rulings on network neutrality in the USA[13] and in India[14].

3.2 Consequently, enactment of appropriate network neutrality regulations is a key element of an enabling environment to promote the quality of access to the Internet.

Combating spam

3.3 Spam continues to constitute a significant proportion of E-Mail traffic and, in countries where there is limited bandwidth, it can result in a degradation of quality of access.

3.4 Consequently, effective measures to prevent spam are also element of an enabling environment to promote the quality of access to the Internet. In this context, it must be recalled that the 2012 International Telecommunication Regulations (ITRs) contain a provision regarding spam, so all states that wish to implement an enabling environment to promote the quality of access to the Internet should accede to the 2012 ITRs, see section 6 below. For memory, article 7 of the 2012 ITRs reads:

> Member States should endeavour to take necessary measures to prevent the propagation of unsolicited bulk electronic communications and minimize its impact on international telecommunication services.
>
> Member States are encouraged to cooperate in that sense.

3.5 WTSA Resolution 52[15] is also relevant, since it invites Member States "to take appropriate steps to ensure that appropriate and effective measures are taken within their national and legal frameworks to combat spam and its propagation". Further, Member States should encourage implementation of best practices to combat spam such as those outlined in Recommendations ITU-T X.1231, X.1240, X.1241, X.1242, X.1243, X.1244, X.1245.

Blocking of advertising

3.6 A more difficult question is how to deal with Internet advertising, which some have referred to as the Internet's original sin[16]. Some Internet Service Providers (ISPs) have started to propose services that block ads, so as to reduce the consumption of bandwidth. To the extent that such blocking is imposed on users by ISPs, and/or can be circumvented if advertisers pay fees to the ISP, it would appear to violate network neutrality. But what about blocking that is controlled entirely by the end-user and that does not result in additional revenue for the ISP?

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[13] https://www.fcc.gov/general/open-internet

[14] http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf . The shorter press release version is at http://trai.gov.in/WriteReadData/PressRealease/Document/Press_Release_No_13%20.pdf

[15] http://www.itu.int/en/ITU-T/wtsa12/Documents/resolutions/Resolution%2052.pdf

[16] http://www.theatlantic.com/technology/archive/2014/08/advertising-is-the-internets-original-sin/376041/

3.7 We are of the view that ad blocking is an emerging issue that needs discussion in the context of creating an enabling environment to promote the quality of access to the Internet.

4. What are the elements of an enabling environment to build confidence and security in the use of the Internet?

Necessity and proportionality requirements for surveillance

4.1 Civil society has consistently stated that implementation of the principles of necessity and proportionality in government surveillance programs is an essential element of an enabling environment to build confidence and security in the use of the Internet. Those principles are enunciated at:

https://necessaryandproportionate.org/

4.2 The principles of necessity and proportionality have been endorsed by the Inter-Parliamentary Union[17] and by the Council of Europe[18].

4.3 We call again, as we did in our previous submissions, on all states to endorse those principles – which are essential elements of an enabling environment to build confidence and security in the use of the Internet – and to enshrine them in the ITU Constitution. Article 37 of the ITU Constitution covers the secrecy of telecommunications. The current provisions appear to be too weak and should be strengthened. Thus, governments should agree to amend paragraph 2 of Article 37 as follows:

> 2 Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their national laws or the execution of international conventions to which they are parties. However, any such communication shall take place only if it is held to be necessary and proportionate by an independent and impartial judge. Further, and independent oversight body shall ensure transparency and accountability of any such communications, and the frequency and extent of such communications shall be publicly reported at least annually.

4.4 Further, states must agree to respect the privacy expectations of citizens of other states, even if a citizen's data flows through a state with lower privacy protection. That is, the data for a citizen of state X must be protected in accordance with the laws of state X, even if it flows through state Y which has a lower level of privacy protection. Further, third parties should not be required to retain data or metatdate. This could be achieved by adding two new paragraphs to Article 37 of the ITU Constitutions as follows:

> 3 Member States shall respect the secrecy of telecommunications in accordance with both their own laws and the laws of the state of the originator of such correspondence, applying whichever has the stronger privacy protections.
>
> 4 Third parties shall not be required to retain telecommunications data or metadata.

[17] http://www.ipu.org/conf-e/133/Res-1.htm

[18] See art. 4.1 of https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2016)1

The proposed new paragraph 4 recognizes that mandatory third-party data retention is neither necessary nor proportionate, and thus violates human rights. Of course law enforcement authorities have a legitimate right to seek information in certain cases, but that right should be enforced through existing laws, on the basis of the principle that "offline laws apply equally online". For example, there are obligations to retain records for tax compliance, compliance with accounting rules, etc.: the citizen is responsible to keep certain (but not all) records and to produce them upon request; of course, a citizen can refuse to produce the data, in particular if he or she knows that producing the data will incriminate him or her. That is, we propose that retention of telecommunications data and metadata be treated exactly the same as retention of other data: there should be no general requirement for systematic retention of records of all electronic communication, just as there is no general requirement for systematic retention of all correspondence.

Strong encryption

4.5 More recently, civil society has called on governments to stop attempting to compromise encryption, see:

https://www.securetheinternet.org/

4.6 We call on all states to stop attempts to weaken or to compromise encryption, since strong encryption is an essential element of an enabling environment to build confidence and security in the use of the Internet.

Cooperation to improve security

4.7 Further, we call on all states to cooperate to improve security, and we note in this context that Article 6 of the 2012 ITRs states:

> Member States shall individually and collectively endeavour to ensure the security and robustness of international telecommunication networks in order to achieve effective use thereof and avoidance of technical harm thereto, as well as the harmonious development of international telecommunication services offered to the public.

5. What is the role of Governments in building an enabling environment?

5.1 As outlined above, governments have an important role to play in building an enabling environment. They must enact appropriate national laws, but also cooperate at the international level. International cooperation can take a number of forms, including agreeing treaties. In this context, it is worth referencing a recent call by a European government agency proposing a charter of fundamental digital rights, see:

http://www.bmjv.de/SharedDocs/Interviews/DE/2015/Namensartikel/12092015_DieZeit_EN.html

5.2 The proposed charter includes the following elements (as noted above, these elements are consistent with those called for by civil society):

1. Every individual has the right to access the internet.
2. Each individual has the right to control his or her own personal data.
3. Each individual has the right to control his or her own digital identity. Everyone has the right to be forgotten.

4. No one should become the object of an algorithm.

5. Every individual shall have the right freely to express and disseminate his or her opinions on the internet and to inform himself or herself without hindrance from generally available sources. There shall be no censorship.

6. The right to express opinions on the internet does not release anyone from the obligation to respect generally applicable laws and the personal rights of one's fellow human beings.

7. Every individual has the right to receive reasonable remuneration for his or her work when providing or brokering services via the internet.

8. All creators of copyrightable work as well as performing artists have the right to a fair share in the proceeds earned from the digital exploitation of their work.

9. It is the duty of the State to ensure internet neutrality.

10. No one is entitled to abuse commercial market power. The State shall act to prevent monopolies and cartels, while also fostering diversity and competition.

11. Every individual has a right to data security.

12. The various nation states shall strive to reach agreement on an international law of the internet, in order to secure internet freedom all over the world.

13. Every individual has the right to an analogue world. No one is to be unfairly disadvantaged simply for opting not to use digital services.

5.3 A related matter is the call to recognize that at least some elements of the Internet are, or should be, a global public good, see:

http://www.wrr.nl/fileadmin/en/publicaties/PDF-Rapporten/The_public_core_of_the_internet_Web.pdf

Preventing fragmentation

5.4 Recognition of the public nature of some aspects of the Internet would help to prevent possible fragmentation[19]. In particular[20]:

> " … if ever leading governments or intergovernmental organizations were to implement an alternate [domain name system] root – a possibility that was sometimes raised in the highly charged geopolitical context of the WSIS negotiations – the results could be a game changer. Indeed, the establishment of an alternate root that has significant government backing arguably would be the mother of all fragmentations."

5.5 In this light, it is generally accepted that the management and administration of Internet domain names and addresses cannot continue to be subject to the unilateral supervision of the US government. We recognize that a process is taking place to restructure the links between ICANN's IANA function and the US

[19] The threat of fragmentation is well explained in http://www3.weforum.org/docs/WEF_FII_Internet_Fragmentation_An_Overview_2016.pdf

[20] Page 28 of the cited paper.

government, but the proposals to date specify that the entity performing the IANA function will remain in the USA, and thus be subject to US law and the jurisdiction of US courts. Such an arrangement cannot be considered to be satisfactory. Nor can it be considered satisfactory that the process calling for the proposals in question was unilaterally specified by the US government, that the US government unilaterally imposed preconditions, and that the decision on whether or not to implement a specific proposal will be made unilaterally by the US government.

5.6 More fundamentally, it cannot be considered to be satisfactory that the proposals to reform ICANN perpetuate the current situation in which governments (except for the US) have a purely advisory role with respect to ICANN's decisions, even for public policy matters, which is in contradiction with the Tunis Agenda, and with the reaffirmation in the outcome of the WSIS+10 review that[21] "Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues."

5.7 See in this respect the minority statement in the final report of ICANN's CCWG-Accountability of a group of governments[22]. And the specific comments and proposals regarding the IANA transition made by the Just Net Coalition at:

http://forum.icann.org/lists/icg-forum/pdfXXrCnTxCwW.pdf

5.8 We reiterate our comments on the role of governments contained in our previous submission to this group[23]. And our previous comments on management of Internet domain names and addresses[24].

5.9 In our view, the management and administration of Internet domain names and addresses must be truly international, not subject to the laws of any single country, and not dominated by any single country. In particular, the operation of the root zone file must not be subject to the jurisdiction of any single country.

6. The 2012 ITRs

6.1 As noted above, the 2012 ITRs contain provisions that would contribute to building an enabling environment for the Internet. In addition to the cited provisions, we mention here article 3.7:

> Member States should create an enabling environment for the implementation of regional telecommunication traffic exchange points, with a view to improving quality, increasing the connectivity and resilience of networks, fostering competition and reducing the costs of international telecommunication interconnections.

6.2 A significant number of countries did not sign the International Telecommunications Regulations (ITRs) in Dubai in 2012. Almost all of those countries indicated that they required additional time in order to consider the implications of certain provisions, in particular those that were approved at the last

[21] 35(a) of the Tunis Agenda

[22] See paragraphs 19 ff. at https://community.icann.org/pages/viewpage.action?pageId=58723827&preview=/58723827/58726385/Appendix%20A%20-%20FINAL-Revised.pdf

[23] See the Preamble of http://www.itu.int/en/Lists/CWGContributionmar2014/Attachments/25//CWG-March.pdf

[24] See 3 of the cited previous contribution to this group.

minute. Accession by non-signatories would appear feasible because legal analysis[25] of the provisions in question indicates that they do not actually have the effects that had raised concerns.

6.3 However, interpretation of treaties is the sovereign right of states, so it may be desirable for non-signatories to clarify the implications of the controversial provisions of the ITRs by issuing a statement upon accession to the ITRs.

6.4 Many non-signatories[26] stated, at the closing session of the World Conference on International Telecommunications (WCIT) that they reserved their right to make reservations upon accession. These states can issue a statement in the form of a formal reservation.

6.5 States that did not expressly reserve their right to make reservations cannot now make a formal reservation, however they can make a unilateral declaration which, in practice, would have an effect similar to that of a formal reservation.

6.6 Thus it is proposed that non-signatories of the ITRs consider acceding to the ITRs while possibly issuing a statement (reservation or declaration) along the following lines:

> *[NAME OF STATE]* accedes to the International Telecommunication Regulations (Dubai, 2012), with the understanding that:
>
> a) The third paragraph of the Preamble, which recognizes the right of access of Member States to international telecommunication services, does not limit or otherwise prejudge the right of Member States to suspend the international telecommunication service, pursuant to Article 35 of the ITU Constitution, either generally or only for certain relations and/or for certain kinds of correspondence, outgoing, incoming or in transit. Furthermore, the Preamble does not contain operative provisions and therefore it does not modify existing rights and obligations.
>
> b) As specified under number 4 (Article 1.1a), these Regulations do not address the content-related aspects of telecommunications. This understanding applies to all provisions of the ITRs, including in particular Article 6 on Security and robustness of networks, and Article 7 on Unsolicited bulk electronic communications.
>
> c) Number 5 (Article 1.1b), which specifies that these Regulations also contain provisions applicable to authorized operating agencies, aligns the Regulations with number 38 (Article 6) of the ITU Constitution and thus does not change the scope of the Regulations regarding the entities to which they apply. Furthermore, the area covered by the Regulations, as defined in article 1, has not been changed. Thus the scope of the Regulations has not been changed compared to the 1988 version of the Regulations.

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[25] See Hill, Richard (2013) “WCIT: failure or success, impasse or way forward?”, *International Journal of Law and Information Technology,* vol. 21 no. 3, p. 313, DOI:10.1093/ijlit/eat008; and Hill, Richard (2013) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History,* Schulthess/Springer

[26] In particular, 18 members of the European Union: Austria, Croatia, Cyprus, Czech Republic, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal Slovak Republic, Slovenia, Spain.

d) Resolutions contained in the Final Acts of the World Conference on International Telecommunications (Dubai, 2012) are not part of these Regulations. They do not require any ratification, acceptance or approval by individual Member States, and they are not inherently binding on Member States. We make this declaration especially in the context of Resolution 3 on Fostering an enabling environment for the greater growth of the Internet. In doing so, we reiterate our support for a multi-stakeholder approach to Internet governance. Furthermore, we state that the cited Resolution cannot and does not change the mandate of the ITU.
