

Comments on briefing note by Access on the ITU Plenipotentiary Conference

Richard Hill¹

2 November 2014

Access has published a paper² titled “What to Watch at the ITU Plenipotentiary Conference 2014”. In this paper, we comment on some portions of that paper.

The Access paper starts by referring to the 2012 World Conference on International Telecommunications (WCIT) and provides a reference to a web site that contains material regarding WCIT and the 2012 International Telecommunication Regulations (ITRs). The material dates back to early 2013 and does not take into account published legal analysis³ that shows that much criticism of the ITRs is not justified from a legal point of view. Further, the material does not take into account published scholarly work⁴ on WCIT and thus it perpetuates various incorrect statements regarding WCIT.

The paper proceeds to state, as a procedural concern, that “For at least the past decade, the ITU has been seeking to expand its mandate to cover more internet-related public policy issues.” The first explicit recognition of ITU’s role regarding Internet matters was Resolution 101, adopted in 1998. Since then, the scope of ITU’s activities regarding Internet has been specified in various Plenipotentiary and Council resolutions, all agreed by consensus. Thus, the ITU has not “been seeking to expand its mandate”; on the contrary, the ITU members have formally agreed on what the ITU’s mandate should be regarding Internet matters.

Contrary to what the paper states, non-state members of ITU can request to speak, as observers, at the Plenipotentiary conference.

The paper states “Non-commercial organizations may also join [ITU] but few can afford the yearly fee. Recently some NGOs have been granted fee waivers”. In reality, waiver of membership fees is a long established practice and many organizations have been granted waivers. For example, the Internet Society (ISOC) was granted a waiver from payment of membership fees in 1995. Contrary to what the paper states, the positions taken by an organization are not a criterion that is considered when granting exemption, so an organization cannot lose its exempt status because of its advocacy.

However, the paper correctly notes that the ITU’s practices are too restrictive and must be reformed. See <http://www.itu.int/en/plenipotentiary/2014/Documents/Participation-of-civil-society-in-ITU.pdf>

The paper cites a call from civil society for greater transparency of the Plenipotentiary Conference, but fails to note that the requested transparency had already been partially⁵ provided for past Plenipotentiary conference, had been provided for WCIT, and has been provided for the 2014 Plenipotentiary conference (albeit the paper does mention later that such transparency has been provided for the 2014 conference).

The paper correctly notes that many ITU documents are made available only to Member States and Sector Members, and that this is not acceptable. But it fails to note that Member States are free to make the documents available as they see fit, and that some Member States

¹ President, Association for Proper Internet Governance, info@apig.ch

² <http://www.itu.int/en/plenipotentiary/2014/Documents/access-briefing-note.pdf>

³ Hill, Richard (2013), “WCIT: failure or success, impasse or way forward?”, *International Journal of Law and Information Technology*, vol. 21 no. 3, p. 313

⁴ Hill, Richard (2014) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History*, Schulthess/Springer; for additional information, see <http://www.hill-a.ch/wcit>

⁵ Public access to plenary sessions and sessions of substantive committees

have quite liberal policies regarding who can access the ITU documents. Indeed, the so-called “leaked” documents are in fact official copies obtained from Member States.

Under the heading “substantive concerns”, the paper states that “The ITU’s various governing documents give it purview over Information and Communications Technologies, or ICT, and the definition of this term has to date been understood to exclude the internet”. Actually the ITU’s governing documents do not mention ICTs, that term is used in various resolutions. And various resolutions, in particular 101, 102, and 133, make it clear that certain Internet-related matters are within the mandate of the ITU. Contrary to what the paper says, adopting a definition of the term ICTs would not expand ITU’s mandate to include Internet-related public policy issues: certain such issues are already included in ITU’s mandate pursuant to Council Resolution 1336. The list of the issues was agreed in 2009 in Council Resolution 1305⁶.

The paper states “the ITU has traditionally had a limited role in cybersecurity, specifically around capacity building, cooperation, and coordination”. This is not correct: the ITU has also had a role in standards-making. For example, Recommendation X.509, dating back to 1988, provides the basis for certain current security protocols used on the Internet (notably HTTPS). And numerous more recent ITU-T Recommendations also relate to Internet security issues.

The paper refers to “Russia’s historic leadership in the ITU’s cybersecurity efforts”. In fact, Russia has recently provided a chairman for 8 years for one of the ITU-T Study Groups dealing with security. That is hardly a “historic leadership” role.

The paper states that “There are also calls for a treaty that would likely threaten content on the internet and further erode privacy on the internet.” This is a rehash of the invalid criticism made regarding the ITRs. In fact, as shown in the previously cited works regarding the ITRs, nothing that the ITU does could override instruments such as the Universal Declaration of Human Rights, or the equivalent provision in the ITU Constitution.

More tellingly, contrary to what the paper says, there are numerous proposals that would enhance privacy and that seek to end mass surveillance. One wonders why Access did not address this issue, which is surely within the mandate of the ITU, given that secrecy (meaning privacy) has been recognized as a fundamental element of international telecommunications since the ITU was founded in 1865, in an article in the ITU Constitution. At present, the provision is found in Article 37.

The paper calls on the ITU to “to open the WSIS+10 review to all stakeholders on an equal footing”. The modalities for the WSIS+10 review have been set by the UN General Assembly, not the ITU. The WSIS+10 High Level Event, coordinated by ITU, was indeed open to all stakeholders on an equal footing. But it must be stressed that outline of the roles and responsibilities defined in the Tunis Agenda still represents a consensus: those roles and responsibilities were reaffirmed both at Netmundial⁷ and at the WSIS+10 High Level Event⁸.

⁶ <http://www.itu.int/en/council/cwg-internet/Documents/Council-2009-Resolution1305Annex1.pdf>

⁷ <http://justnetcoalition.org/jnc-response-netmundial-outcome-document>

⁸ http://www.justnetcoalition.org/sites/default/files/WSIS10_statement_5.pdf