

INTERNET GOVERNANCE: THE ROLE OF MULTISTAKEHOLDER ORGANIZATIONS

JOE WAZ AND PHIL WEISER*

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The unique characteristics of the Internet—its openness, its global interconnectedness, its decentralized nature, and the interrelationships among the “layers” that comprise it—have made it remarkably resistant to traditional tools of state governance. This is both good and bad.

Because the Internet often works around and beyond political boundaries, efforts to censor Internet speech have proven difficult, as the global tumult in repressive government regimes bears witness. The same characteristics, however, can frustrate efforts by governments that want to pursue legitimate social goals, such as combating child exploitation on the Internet, reducing the use of the Internet to promote piracy and counterfeiting, or ensuring the security of networks.¹

* Joe Waz, president of Altura West LLC, a consulting firm based in Los Angeles, is a retired communications industry executive and Senior Fellow at the Silicon Flatirons Center for Law, Technology, and Entrepreneurship at the University of Colorado Law School. Phil Weiser is the Dean and Thompson Professor of Law at the University of Colorado Law School as well as Executive Director of the Silicon Flatirons Center on Law, Technology, and Entrepreneurship. The authors thank the participants (see Appendix A) in the August 2011 roundtable on Internet governance for their many contributions, including helpful editorial comments on earlier drafts. The authors also thank Kaleb Sieh for his research and editorial support, and Elizabeth Hartman for her assistance in assembling preparatory readings for the roundtable.

1. Establishing the norms that governments should use in determining which goals are “legitimate” and how they are to be carried out will be an important and difficult public policy challenge that is beyond the scope of this article..

Much of the “governance” of the Internet is in fact carried out by so-called “multistakeholder (“MSH”) organizations” such as the Internet Society and the World Wide Web Consortium.² Over the last two decades, these entities have largely established the norms and standards for the global Internet, but they are little known to the general public and even to most regulators and legislators. Most governments do not understand the essential role of MSH organizations. To develop an effective Internet governance strategy, the origin, role, and operation of MSH organizations must be better understood, as must the limits of such organizations for “governing” an ever more complex Internet ecosystem.

It is important to ponder the meaning of “governance” when applied to such MSH organizations. In a domestic context, to “govern” implies the ability to enforce mandates. That is too limited a view in the context of Internet governance as performed by MSH processes, which can range from the “soft” power of rough consensus to the “hard” power of international law and binding treaties.

The future of this unusual and largely successful form of Internet governance is far from assured. In the fall of 2011, for example, the government of India issued its call to place Internet governance under the auspices of the UN, or, as some have characterized it, “in a box with a UN label stamped on the side.”³ Other major countries, including Russia, have offered similar suggestions.⁴ Whether this effort succeeds, or whether the Internet’s current governance model is permitted to develop to meet new challenges, will, in the view of some observers, “very likely decide the future ability of the Internet to continue on its extraordinary

2. The Internet Society—celebrating its 20th anniversary in April 2012—has under its auspices the Internet Engineering Task Force, the Internet Architecture Board, and other related bodies operate. See *Celebrating 20 Years of Accomplishments*, INTERNET SOCIETY, <http://www.isoc.org/isoc/20th/> (last visited July 21, 2012). The World Wide Web Consortium (W3C) develops standards for the web and recently announced a first draft standard for online privacy. See *W3C Announces First Draft of Standard for Online Privacy*, W3C, <http://www.w3.org/2011/11/dnt-pr.html.en> (last visited July 21, 2012).

3. Kieren McCarthy, *India Formally Proposes Government Takeover of Internet*, .NXT (Oct. 27, 2011), <http://news.dot-nxt.com/2011/10/27/india-proposes-government-control-internet>; See also *U.S. Calls for Internet Freedom Amid India Plan*, GOOGLE NEWS (Dec. 7, 2011), <http://www.google.com/hostednews/afp/article/ALeqM5h0BfQkpJMZIS Tc3fjs3VgH7orciw?docId=CNG.8dc3992299cb598cecd0fffb1db8bcd.1c1>.

4. Bill Gertz, *Cybercommand Chief Opposes U.N. Net Control*, THE WASH. TIMES (Oct. 20, 2011), <http://www.washingtontimes.com/news/2011/oct/20/cybercommand-chief-opposes-un-net-control/?page=all>. (“Last month, Russia, China, Uzbekistan and Tajikistan submitted a resolution to the U.N. General Assembly calling for giving individual states the right to control the Internet. The resolution, submitted Sept. 14, calls for ‘an international code of conduct for information security.’”); see *International code of conduct for information security*, 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, available at <http://www.rusemb.org.uk/policycontact/49>.

path.”⁵

I. INTRODUCTION

As the Internet grows increasingly central to commerce and communications, the debate on Internet governance is likely to become more intense. Consider, for example, how *The Economist* framed the issue:

For something so central to the modern world, the Internet is shambolically governed. It is run by a hotch-potch of organisations with three- to five-letter acronyms. Many of their meetings, both online and offline, are open to the public. Some—like the Internet Governance Forum...are just talking shops. Decision-making is slow and often unpredictable.

It is in short a bit chaotic. But sometimes chaos, even one that adherents like to claim somewhat disingenuously is a “multi-stakeholder” approach, is not disastrous: the Internet mostly works. And the shambles is a lot better than the alternative—which nearly always in this case means governments bringing the Internet under their control.⁶

Even if a bit hyperbolic, *The Economist*'s depiction is not far off the mark and highlights a series of important basic questions. For example, what are these “multistakeholder” organizations? Where do they come from, and how do they work? What have they accomplished? Do they live up to the core Internet principles of openness, transparency, and accountability? What are the limits of their abilities to effectively govern? Are they, in fact, “better than the alternative” of giving governments more direct control over the Internet, or must some balance be struck between the role of MSH organizations and the role of sovereign governments?

These questions relate to a set of concerns now being raised about the future of Internet governance. The request by India for United Nations' oversight of the Internet likely reflects the concern that the Internet is simply becoming too important to remain outside of sovereign authority. Another concern may be that many governments in both the developed and developing worlds perceive that the United States—directly or indirectly—“runs the Internet” through the dominant participation of its companies and stakeholders in MSH organizations.

5. McCarthy, *supra* note 3.

6. *In Praise Of Chaos: Governments' Attempts To Control The Internet Should Be Resisted*, THE ECONOMIST (Oct. 1, 2011), <http://www.economist.com/node/21531011>.

Whatever the motivation, it is clear that the calls for change from the current model of Internet governance are becoming more intense and that the legacy model built around MSH organizations needs further definition and development.

One crucial forum for discussing these issues will be at the World Conference on International Telecommunications (WCIT) under the auspices of the International Telecommunications Union (ITU), to be held in Dubai in December 2012.⁷ At this conference, the ITU will, among other things, renegotiate the international telecommunications regulations dating from the 1988 World Administrative Telegraph and Telephone Conference in Melbourne.⁸ In so doing, it may well determine whether and how traditional governmental regulation of telecommunications will extend into the Internet age.

Given the global importance of the debate over the relative roles of sovereign governments and MSH organizations in Internet governance, the Silicon Flatirons Center is in the process of developing a research agenda intended to foster a better understanding of these critical questions. The answers will unquestionably determine the operation and culture of the Internet in the 21st century.

In an initial effort to flesh out the parameters of this research agenda, the Silicon Flatirons Center convened a roundtable discussion on August 24-25, 2011, bringing together an array of thought leaders from industry, government, civil society, multistakeholder organizations, and other stakeholders in the Internet ecosystem.⁹ The authors have distilled the primary themes into this essay that frames a research agenda for the coming years.

This essay proceeds in four parts. After this Introduction, Part II discusses how MSH organizations operate. Part III frames the research agenda for the role of MSH in Internet governance. Part IV offers a brief conclusion.

7. See *World Conference on International Telecommunications (WCIT-12)*, ITU, <http://www.itu.int/en/wcit-12/Pages/default.aspx> (last visited July 21, 2012); see also *What are the ITRs?*, ISOC, <http://www.isoc.org/pubpolpillar/community/itr.shtml> (last visited July 21, 2012) (A brief background on International Telecommunication Regulations prepared by the Internet Society).

8. ITU, <http://www.itu.int/en/wcit-12/Pages/default.aspx> (last visited July 21, 2012); see also Richard Hill & Tony Rutkowski, *World Administrative Telegraph and Telephone Conference (Melbourne, 1988)*, ITU, <http://www.itu.int/en/history/administrativeconferences/Pages/1988Melbourne.aspx> (last visited July 21, 2012).

9. The authors note that the bulk of the roundtable participants were U.S.-based. As will become apparent, the success of the research agenda depends in significant part on broadening global engagement and execution of this research agenda.

II. WHAT ARE “MULTISTAKEHOLDER ORGANIZATIONS?”

The organizations that “govern” the Internet are as unique as the Internet itself. The open, global, decentralized nature of the “network of networks” is reflected in the types of organizations that help to direct its evolution and operation.

As one roundtable participant put it, the Internet grew up around a common culture of cooperation, “coming together to solve problems.”¹⁰ The governing institutions that emerged reflect that culture.

For the most part, MSH organizations do not operate under or pursuant to formal government authority.¹¹ MSH organizations have tended to evolve organically, an outgrowth of various discussions and conversations in various forums among some of the Internet’s earliest leaders. As the Internet has developed, these organizations have matured by adopting more or less formal organizational structures to advance certain identified interests of the Internet community.¹²

In some cases, an MSH organization was created to manage an important Internet resource, e.g., ICANN’s role in assigning Internet domain names.¹³ In many cases, an MSH organization attempts to drive “rough consensus”¹⁴ through processes that emphasize openness and

10. Paul Liao, President and CEO, CableLabs, Roundtable Discussion at the Silicon Flatirons Center (Aug. 24, 2011).

11. The functions of the Internet Corporation for Assigned Names and Numbers (ICANN) were originally conducted by the U.S.-controlled Internet Assigned Numbers Authority (IANA). In 1998, ICANN took on the duties formerly assigned to the then separate U.S.-controlled IANA, through a Memorandum of Understanding (MOU) between the U.S. Department of Commerce and ICANN to transition management of the Domain Name System (DNS) from the U.S. government to the global community. See Request for Comments on the Internet Assigned Numbers Authority (IANA) Functions, 76 Fed. Reg. 10,569 (Feb. 25, 2011), available at <http://www.ntia.doc.gov/federal-register-notices/2011/request-comments-internet-assigned-numbers-authority-iana-functions>; see also The Internet Assigned Numbers Authority (IANA) Functions, 76 Fed. Reg. 34658 (June 14, 2011), available at <http://www.ntia.doc.gov/federal-register-notice/2011/internet-assigned-numbers-authority-iana-functions-further-notice-inqui>; See, *infra* note 15.

12. For example, the Internet Society was formed to provide an institutional home and financial support for the Internet Engineering Task Force (IETF) and its standard-setting activities were moved out from under the control and support of agencies of the U.S. government. See Vint Cerf, *Histories of the Internet: IETF and the Internet Society*, INTERNETSOCIETY.ORG, (July 18, 1995), <http://www.isoc.org/internet/history/ietfhis.shtml>.

13. ICANN’s mission is to, among other things, globally coordinate and ensure the secure operation of the Internet’s systems of “unique identifiers” (domain names, IP addresses and autonomous system numbers, and protocol port and parameter assignments) and to coordinate the policy development related to these technical functions. See *Bylaws for Internet Corporation for Assigned Names and Numbers: A California Nonprofit Public-Benefit Corporation*, ICANN (Mar. 16, 2012), <http://www.icann.org/en/general/bylaws.htm#I>.

14. For example, the IETF’s working groups operate using “rough consensus” rather than any formal voting—meaning that a “very large majority of those who care must agree”—but the exact method of determining consensus can vary from working group to working group. See P. Hoffman, *The Tao of IETF: A Novice’s Guide to the Internet Engineering Task*

inclusiveness over formalities. In most cases, the authority of an MSH organization derives from “the consent of those who choose to be governed,” and is not derivative of a sovereign authority.¹⁵

For the most part, MSH organizations bring some degree of order to how the Internet operates by employing fact-finding and dialogue to develop voluntary norms and best practices. Their power derives from respect for their processes—the openness, the flexibility, and the ability for all voices that can credibly articulate their positions to be heard—and the quality of their outputs, which are intended to represent broad stakeholder consensus.

These MSH organizations demonstrate striking heterogeneity, which makes “defining” an MSH a challenging task. No manual dictates how to organize or operate an MSH organization. The Silicon Flatirons roundtable discussion provided an opportunity to develop an initial understanding of the broad range of Internet-related MSH organizations and their characteristics, and whether and how these organizations interrelate. It also provided an opportunity to evaluate whether and why an individual MSH organization, and the MSH process as a whole, is successful. Those discussions are summarized below.

The concept of “multistakeholder”: The term does not lend itself to simple definition, and its application will vary from case to case, but one would generally expect to see at least two things in a “multistakeholder” organization: (i) representation (or, at a minimum, openness to representation) from a diversity of economic and social interests (and not limited to a single economic perspective), and (ii) a representational role for civil society, generally defined as relevant stakeholders other than government and industry. “Diverse” does not necessarily mean “open” (see below), but it does suggest that a significant breadth of viewpoints should be represented within the body of participants. And there may be MSH organizations that do not formally accommodate or engage civil society because of their highly specialized nature. While there are no bright lines, these are two

Force, IETF, § 5.2 (Oct. 25, 2011), <http://www.ietf.org/tao.html>.

15. Some MSHs have either directly or indirectly come about through, are proposed to be brought into existence by, or are deputized by, government. For example, compare organizations such as the Broadband Internet Technical Advisory Group (BITAG)—brought about indirectly as a response to regulatory interest in Net Neutrality rules with the goal of bringing greater “clarity to network management process”—with the multistakeholder entities proposed by the Obama Administration in areas such as privacy and cybersecurity. See *BITAG History*, BITAG, http://www.bitag.org/bitag_organization.php?action=history (last visited July 22, 2012); see also Howard A. Schmidt, *The Administration Unveils its Cybersecurity Legislative Proposal*, THE WHITE HOUSE BLOG (May 12, 2011, 2:00 PM), <http://www.whitehouse.gov/blog/2011/05/12/administration-unveils-its-cybersecurity-legislative-proposal>.

important criteria in assessing whether an organization is truly “multistakeholder.”

“Open”: Consistent with the Internet ethos, many MSH organizations place a premium on “openness” of membership and participation. For example, the Internet Engineering Task Force¹⁶ (“IETF”), a global MSH organization, is open to whomever wishes to participate and has no formal membership.¹⁷ ICANN is also open to all and does not charge any fees to participate in its meetings or bottom-up policy development and related activities.¹⁸

But “openness” is always relative, as participation in many of these organizations is frequently gated by resources—not every potential stakeholder has the financial wherewithal, the technical expertise, or the ability to commit time and talent to participate in the large and growing number of MSH organizations. Notably, some sovereign governments (particularly developing nations) and some in civil society have cited this concern. Moreover, some significant stakeholder segments—notably, the content community—have not engaged in MSH processes as fully as might be expected, in part because of their wariness about some of the cultural norms of the Internet that they may perceive as inimical to the protection of intellectual property rights.

In some cases, membership organizations attempt to provide resources to ensure participation by otherwise qualified stakeholder interests that might lack sufficient funding. For instance, the Broadband Internet Technical Advisory Group¹⁹ (“BITAG”) sets aside funds from its general treasury to reimburse engineering and technical representatives of “community organizations” (i.e., organizations representing civil society as defined above) to enable them to participate in committees of BITAG’s Technical Working Group.

Another challenge to “openness” is the risk of capture, which can happen in an MSH no less than in a more formal regulatory body. For example, efforts to “pack” working groups with stakeholders advocating a particular point of view can skew the direction of a group in ways beyond the merits of the argument.

“Geographic reach”: Many of the established MSH organizations fashion themselves as global in reach, and a large number of them can point to board structures that include members from several continents, as well as a commitment to bring their gatherings to different nations

16. *The Internet Engineering Task Force*, IETF, <http://www.ietf.org/> (last visited July 22, 2012).

17. Hoffman, *supra* note 14, at § 1.

18. *See About ICANN*, ICANN, <http://www.icann.org/en/about/> (last visited July 22, 2012).

19. *See BITAG*, <http://www.bitag.org/> (last visited July 22, 2012).

each year. But numerous MSH organizations are primarily, if not exclusively, focused on Internet operations in one or a small number of nations. BITAG, for example, focuses chiefly on Internet issues with potential public policy implications within the U.S. The Copyright Alert System²⁰ (overseen by the Center for Copyright Information) is a cooperative effort among U.S. Internet service providers on the one hand, and video and music content providers (some of which are based outside the U.S.) on the other, to address piracy that uses peer-to-peer networks. Because the Internet is a global network, there are strong arguments in favor of MSH organizations having a global focus and inclusiveness. Nonetheless, the MSH model is an effective tool for addressing legitimate Internet-related policy issues within specific territories, such as privacy, piracy, and cybersecurity. It is thus important to reconcile the role and outputs of both types of MSH organizations.

Process and Outputs: MSH organizations have a wide range of potential outputs and use a variety of processes to develop those outputs. In some cases, effective management of Internet resources (e.g., the Internet root zone file and IP numbering resources by ICANN) is the primary output. In other cases, the output may be standards-setting, “best practices” recommendations, or codes of conduct. Given that many MSH organizations are consensus-based, products of those bodies generally have a powerful claim to legitimacy. But consensus can take time, and stalemates are possible. Some MSH organizations define “consensus” based on some form of voting as a primary or fallback mechanism for approving outputs. Voting necessarily introduces elements of politics and puts dissent on the record. Where consensus processes can result in agreed-upon best practices and recommendations, the “soft power” governance model of many MSH organizations can have the significant advantage of building support for the agreed-upon approach.

Relationship to sovereign governments: Should MSH organizations work with sovereign governments, and, if so, when and how? There are wide variations in how they currently do so. In some cases, an MSH organization derives its power from sovereign governments; in many cases, its power derives solely from the consent of those who agree to be governed. In some cases, the MSH exercises its

20. Press Release, Center for Copyright Information, Music, Movie, TV and Broadband Leaders Team to Curb Online Content Theft: Announce Common Framework for “Copyright Alerts” (July 7, 2011), *available at* <http://www.copyrightinformation.org/node/704>. The Center for Copyright Information assists in the implementation and enforcement of a new Copyright Alert System intended to reduce theft of digital goods through the use of peer-to-peer protocols. *Id.* CCI has its genesis in discussions convened by then-Attorney General Andrew Cuomo (D-NY) that brought together Internet Service Providers and representatives of the motion picture and music industries to discuss more effective enforcement against such theft. *Id.*

power on behalf of a sovereign government to further a government-identified policy goal; in many cases, the MSH exercises its power through and on behalf of the aggregate body of participating stakeholders who agree to be bound to one another through the consensus guidelines and may also voluntarily adopt the resulting standards and practices.

For example, governments have a formal role within ICANN through its Governmental Advisory Committee (GAC).²¹ ICANN's bylaws require the Board to consider GAC advice and, in the event that it decides to take action inconsistent with that advice, to work with the GAC to find a mutually satisfactory solution.²² The IETF, consistent with its philosophy of "openness," welcomes representatives of sovereign governments, but treats their perspective as only "one voice among many." They are not accorded any particular deference and are expected to have the technical skills to engage and earn their credibility, as must any participating stakeholder. BITAG, as a U.S.-based membership organization, currently provides membership opportunities to five categories of stakeholders: Internet connectivity providers, content companies, technology and software companies, equipment companies, and community representatives (including representatives of academia, advocacy organizations, and other MSHs). The group's charter neither precludes nor formally provides for government participation.

While BITAG is intended to derive consensus resolutions of technical issues with public policy implications, it has no formal relationship with any government agency. It is not formed under or governed by the U.S. Federal Advisory Committee Act;²³ therefore, it is continuing to explore exactly how it should relate to federal agencies.

In other cases, governments seek to delegate certain responsibilities to MSH organizations, or may even seek to stand up such organizations, to develop codes or standards of conduct in various subject matter areas (e.g., privacy, piracy, cybersecurity). Governments may also play a backstop role, e.g., by exercising enforcement authority over

21. ICANN, *supra* note 13, at Art. XI.

22. *Id.*; see also *Board—GAC Consultations*, ICANN, <http://newgtlds.icann.org/about/historical-documentation/board-gac-consultations> (last visited July 22, 2012); see also *ICANN's Expansion of Top Level Domains: Hearing Before the Comm. on Commerce, Science, and Transportation*, 112th Cong. (2011) (statement of Fiona M. Alexander, Assoc. Admin., Office of Internal Affairs Nat'l Telecomm. & Info. Admin., U.S. Dep't of Cong.), available at <http://ntia.doc.gov/speechtestimony/2011/testimony-associate-administrator-alexander-icann-s-expansion-top-level-domains>.

23. The Federal Advisory Committee Act governs how the Executive Branch of the U.S. government and independent agencies use committees, boards, commissions, councils, and other similar groups to gather expert advice and opinions. See *Federal Advisory Committee Act*, 5 U.S.C. App. 2 (2012), available at <http://www.archives.gov/federal-register/laws/fed-advisory-committee/>.

stakeholders who participate in the MSH organizations and who have agreed to abide by such codes or standards.²⁴

Subject matter coordination among MSH organizations: In many cases, the scope of activity of certain MSH organizations is reasonably well established (e.g., domain names under ICANN, network standards and practices under IETF, IP peering and interconnection policies under the North American Network Operators Group²⁵ (“NANOG”)). Nonetheless, even with MSH organizations such as the Internet Advisory Board and the IETF that have organizational and funding lines running back to a parent organization (in this case, the Internet Society), it is not always clear which MSH organizations have authority to act in which subject matter areas. Similarly, it is rarely clear whether and how the potentially interrelated actions of various organizations are coordinated with one another. Consider, for example, that there are some subject matters (e.g., privacy) where there is a proliferation of MSH organizations (or organizations with MSH attributes) acting as conveners, while there are other areas where no single MSH organization has a clearly identified convening role (e.g., cryptography).

As the foregoing suggests, it is challenging to adopt an authoritative definition of a multistakeholder organization. Nonetheless, the roundtable participants suggested various defining characteristics. The White House’s Danny Weitzner, himself a veteran of many years’ involvement in MSH organizations, suggested that MSH organizations—especially those that are engineering-based—are typified by “a set of values on resolving issues.” He also cited the importance of leadership, the proper tone, and the value of continuity. He suggested that a certain number of personalities have come to the fore in these organizations, establishing an open, problem-solving culture, and finding ways to propagate these character traits throughout their organizations. Michael Powell, former FCC chair and current president of the National Cable & Telecommunications Association, reinforced that “people matter,” and said the special role of MSH organizations is to acculturate “stakeholders to think in a consensus-based manner.” Jamie Hedlund of ICANN added that it is essential for an MSH organization to establish ethics rules governing matters such as disclosures and recusals early on in the process. Other roundtable participants highlighted the importance of having a clear mission statement and purpose, which is particularly important in persuading stakeholders to participate and to dedicate

24. See Schmidt, *supra* note 15; see also DEPARTMENT OF COMMERCE, *infra* note 30; see also National Advertising Review Board, *infra* note 26.

25. NANOG, <http://www.nanog.org/> (last visited July 22, 2012).

resources.

III. A RESEARCH AGENDA ON MULTISTAKEHOLDER ORGANIZATIONS

With the help of the roundtable participants, this essay outlines a research agenda on multistakeholder organizations and their interrelationship with sovereign governments. Going forward, policymakers will need to consider and address a series of important questions.

A. MSH Processes and Internet Governance

An initial challenge is addressing the fundamental task of cataloguing all of the MSH organizations that play a role in Internet governance. As noted, there is no manual or framework for organizing an MSH organization, and there likely never could be one. In the open, collaborative, and entrepreneurial spirit of the Internet, MSH organizations tend to come together when various stakeholders identify a need and create an organizational effort to fill it.

A research effort intended to identify and describe the broadest identifiable range of such organizations is a critical starting point. As this is achieved, it will be important to analyze (i) what the organizations do, (ii) how they do it, and (iii) what characteristics, values, and best practices are widely shared among these organizations. It would be useful to undertake case studies to understand the circumstances under which MSH organizations are “successful”—including how best to measure success. In conducting the survey of MSH organizations, it will be important to compare (i) each group’s stated function, (ii) the scope and scale of the problem(s) it is intended to address, (iii) the diversity of participation and the incentives to participate, (iv) the role of, or relation to, sovereign government entities, and (v) the resources available to the MSH organization and to its participants/members to carry out their charge.

With regard to what the organizations do and how they do it, there are a number of potential roles for MSH groups—they may set best practices, norms and standards with no direct government involvement (e.g., IETF), they may seek to inform the Internet community and government entities by providing declaratory judgments and providing guidance on “safe harbors” (under delegated authority, with sovereign oversight or backstop), or they may engage in certification or adjudication/enforcement activities (e.g., the National Advertising

Review Board in the U.S.).²⁶ In some cases, an MSH organization may both legislate (establish norms or practices) and enforce or certify, though some roundtable participants representing MSH organizations made strong arguments for keeping these functions separate.

An important and related issue is the need to develop a clear understanding of the limits of MSH governance. While the format has utility in dealing with many aspects of Internet governance and policy, there is a case to be made that certain roles played by sovereign government cannot be appropriately abandoned or delegated, in whole or in part. Later in this section, we present some key questions about the interrelationship of MSH organizations and government.

In considering how MSH organizations work, the roles and functions of organizations may be carried out in a variety of ways. Some organizations place a premium on “openness” of process and may seek to accommodate active participation by every interested stakeholder. Some are “membership” organizations with varying board and membership structures. Structures may vary with the charter and goals of the group, and the heterogeneity of structures is worth exploring and understanding with an eye towards their strengths and weaknesses.

With regard to the characteristics, values, and best practices of MSH organizations, roundtable participants identified the following factors as a useful starting point for further examination:

- Openness (to diverse and divergent interests, facilitating direct participation or appropriate representation of all interested and impacted parties);
- Transparency (of the decision-making process, of documents, of outcomes);
- Accessibility (creating mechanisms for all potentially affected stakeholders to have meaningful substantive engagement);
- Accountability and measurement (the capacity to demonstrate that the MSH process works fairly and consistent with its mission, and it is yielding results);
- Credibility (widespread recognition and acceptance of the MSH organization’s processes and outcomes);
- Data-driven (decisions are based to the greatest possible extent on objective data and evidence);
- Adequately resourced (both the MSH organization itself and the stakeholder participants);

26. The National Advertising Review Board (NARB) is the “appeal division of the advertising industry’s self-regulatory system.” See *National Advertising Review Board*, NARB, <http://www.narreview.org/> (last visited July 22, 2012).

- Consensus-based (a priority on wrangling issues until meaningful consensus is reached, with the possibility of a backstop “voting process” when necessary to avoid stalemate);
- Governed by clear and acceptable intellectual property policies (in those circumstances where the adoption of standards may implicate patents);
- Opportunity for appeal/challenge (some appropriate intra- or extra-organizational level of review intended to bolster confidence in the MSH process and seek corrections where justified);
- Ability to resist capture (balanced against “openness,” ensuring that decisional meetings cannot be packed, and that the process cannot otherwise be unfairly skewed to favor certain participants); and
- Endorsement, recognition, or direct participation by sovereign governments (while this very notion may be anathema to some MSH organizations—which sometimes wear their separateness from governments as a badge of honor—winning respect from sovereign governments can build credibility and participation and makes it more likely that the “Internet culture” will be accepted by governments).

It is also useful to determine whether the line can appropriately be drawn between MSH organizations, on the one hand, and “self-regulatory” organizations, on the other. The latter are generally organized by a particular industry or industry segment, often as membership organizations, that develop codes or best practices and hold participating/signatory companies accountable for compliance. They can generally be distinguished from MSH organizations that do not limit input or participation to members of the self-policing industry segment. Indeed, a defining characteristic of MSH organization bodies is that they welcome broader input and participation. In some cases, MSH bodies can, unlike pure self-regulatory efforts, operate with the approval of or in coordination with governmental policy initiatives.²⁷

The preceding research agenda lays the ground for an assessment of the purpose, best use, and role MSH organizations and processes play to advance Internet governance. Three critical questions to ask in evaluating the case for relying on an MSH organization to serve a governing role are whether it can (i) build trust, knowledge, and expertise among a

27. For a discussion of this issue, see Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529 (2009).

diverse set of interests, (ii) bring the characteristics and values outlined above to the process of Internet governance, and (iii) bring greater flexibility, adaptability, speed, or efficiency to the governance process than is possible using traditional tools of government—thereby fostering innovation in policy-making.²⁸

At the same time, the challenges or barriers to the success of an MSH organization should be identified, and the means for meeting the challenges should be developed. Research that demonstrates when and how the MSH process plays a legitimate role could be instrumental in persuading governments to overcome their concerns about legitimacy.²⁹

Some formative challenges that MSH organizations face are easily identified. Notably, the success of such bodies depends upon their ability to build a culture of trust, cooperation, and leadership, which can become more difficult as the stakeholder base becomes broader and more diverse. With greater openness to members, MSH bodies must also minimize the risk of forum-packing, which can become a challenge when an organization's ground rules permit disproportionate representation that may introduce dimensions of politics into its processes. When an MSH body succeeds in generating broad industry participation, it consequently must manage potential antitrust and competition concerns and avoid intentionally or inadvertently overstepping appropriate bounds of cooperation. Given that governments generally do not provide funding for such bodies (whether and when they should do so is another appropriate inquiry), MSH bodies are presented with the challenge of securing an adequate and sustainable funding base in ways that do not create the appearance or the reality of capture or undue influence. Finally, such bodies must address intellectual property issues, particularly where the process of setting norms or standards could give a stakeholder an unfair advantage, put the property holder's rights at risk, or adversely affect the community of adopters.

28. A number of roundtable participants stressed the particular value of MSH organizations at a time when many governments are increasingly challenged to find consensus and make important policy decisions "in Internet time."

29. In a speech on this topic, Assistant Secretary of Commerce for Communications and Information Larry Strickling stated, "The United States strongly supports the use of a multistakeholder process as the preferred means of addressing Internet policy issues. We have been active in promoting the multistakeholder model in the international arena through our work at ICANN and the Organization for Economic Cooperation and Development (OECD)." Lawrence E. Strickling, Assistant Sec. of Commerce for Comm'n and Info., Remarks at the Practising Law Institute's 29th Annual Telecom. Policy & Reg. Conf. (Dec. 9, 2011), *available at* <http://ntia.doc.gov/speechtestimony/2011/remarks-assistant-secretary-strickling-practising-law-institutes-29th-annual-te>.

B. *Governments and MSH Institutions and Processes*

The U.S. Government and fellow nation-state members of the the Organization for Economic Cooperation and Development (OECD) have actively embraced the role of MSH organizations as appropriate, and generally superior, tools of Internet governance as compared to traditional models of regulation. In the United States, confidence in such processes can explain why the Obama Administration has called for the government to create or empower existing MSH organizations to conduct norm-setting, certification, or enforcement activities around issues such as privacy and cybersecurity.³⁰

The research agenda set forth above can provide important guidance to the governments of the U.S. and the OECD member states in determining whether, when, and how to encourage the use of MSH organizations. Related research can provide better strategies for strengthening the role of MSH institutions in those situations where they are the best choice, including exploration of the following approaches:

- “Nudging” stakeholders to engage in existing MSH organizations, or to help create new ones, through the bully pulpit or informal pressure (though some roundtable participants raised the concern that, in some cases, a regulator’s nudge may be based on a whim rather than official, formal Administration or agency policy);
- Providing recognition or encouragement (official or semi-official reassurance that the success of the MSH process obviates the need for unnecessarily intrusive government involvement in the issue);
- Providing “a role at the table” in policy development (in circumstances where government feels it must act and cannot defer to the MSH process, giving standing to an MSH organization to help shape the policy);
- Procurement policy (conditioning purchases on participation in or compliance with norms established by an MSH organization);
- Post-hoc enforcement (providing a “regulatory backstop” in the event that compliance by a party with an MSH organization’s norms or standards cannot otherwise be enforced);

30. See Schmidt, *supra* note 15; see also DEPARTMENT OF COMMERCE, INTERNET POLICY TASK FORCE, CYBERSECURITY, INNOVATION AND THE ECONOMY (JUNE 2011) (the Commerce Department’s proposal for a new policy framework to strengthen cybersecurity protections for businesses online), available at http://www.commerce.gov/sites/default/files/documents/2011/june/cybersecurity_green_paper_finalversion_0.pdf.

- Standard-setting or rulemaking (formally embracing the norms and standards developed by an MSH organization as a standard or rule); and
- Research and development funding (similarly conditioning such grants on compliance with an MSH organization's norms).

C. MSH Organizations and Global Legitimacy

In the wake of the OECD's Statement of Principles on Internet policy,³¹ it bears consideration whether and how MSH bodies can provide a superior forum for governance and an alternative to traditional command-and-control regulation. The OECD's conclusion reflects the view that stakeholders can establish and propagate Internet norms on a global basis that are more legitimate, and yield better results, than attempting to govern the Internet through treaties or territorial regulations that undermine the notion of "one Internet." To be sure, such a view allows for the possibility that government entities such as the UN (and its subsidiary, the ITU) can play an important and legitimate role in certain Internet-related issues in a fashion that seeks to minimize the role of government in the Internet.

For the OECD's vision of Internet governance to become a reality, there are a number of important challenges, such as those discussed above, that must be addressed and overcome. It is self-evidently not sufficient to simply try to appeal to notions of "limited government" to win a global debate on Internet governance. Therefore, for the OECD vision to prevail, a core challenge is to gain acceptance by all nations of the role of MSH organizations.

As policymakers and researchers evaluate how to develop a more robust understanding of, and the case for, the MSH mode of governance, a threshold step is to document and demonstrate results from such a process. By so doing, they can demonstrate why an open, transparent, multistakeholder process can address Internet-related issues in a manner that is, in many or most cases, more efficient, more effective, more legitimate, and more global than the effort of governments (or even international governmental bodies) while addressing legitimate governmental concerns.

A second critical step in the effort to bolster the case for the MSH mode of governance is to remove the mystery from the MSH process. While the Internet has fueled a proliferation of MSH organizations, the

31. OECD, Communiqué on Principles for Internet Policy-Making (June 2011), available at www.oecd.org/dataoecd/33/12/48387430.pdf.

notion of such organizations certainly predates the Internet. Working to analogize organizations that help govern the Internet to other familiar types of MSH organizations would give governments a better basis for understanding and trusting MSH processes.

A third step is to identify ways for the MSH processes to truly scale globally. This is vital both to overcome the perception (and oftentimes the reality) that MSH organizations are U.S.-centric, and to find ways to mentor stakeholder involvement from nations (particularly, but not only, developing nations) whose participation in MSH organizations has been limited due to resources or other constraints.

Finally, the very term “multistakeholder organization” may create a cultural barrier to understanding and acceptance. Particularly in the developing world, the notion of convening a richly representative gathering of industry, government, and civil society to develop norms, discuss problems, and seek consensus solutions may literally be foreign.³² It may be necessary to develop an alternate term to bridge that barrier, while also educating leaders of sovereign governments in the operations and successes of the MSH approach.

IV. CONCLUSION

Multistakeholder organizations exist in many parts of diplomacy, society, and commerce, but they are particularly integral to the culture of the Internet and its remarkably successful development. While MSH organizations rightly applaud themselves on their accomplishments and their commitment to an open, global Internet and to broad involvement by the Internet community, there are those in government, in civil society, and in elements of industry who remain skeptical of how MSH organizations work, whether they are truly representative, accountable, and responsible, and whether it remains appropriate to cede key elements of Internet governance to them, or to repose even more responsibility in them.

If the shared vision of the U.S. government and OECD member states with regard to the ongoing central role for MSH-based governance is to become broadly accepted, a new wave of research is needed to better understand how MSH organizations engage in Internet governance, where they operate effectively, and where they fall short of the mark. It is also important to determine when an MSH organization may, or may not, be the right tool for the job.³³ And to the extent that

32. While some participants noted there is substantial participation by developing countries in the Internet Governance Forum, that same level of participation does not hold true with regard to many other MSH organizations.

33. One roundtable participant, Professor Paul Ohm, observed that it is difficult to build

MSH organizations are the right tool for advancing critical public policy issues in the Internet environment, it will be important to establish an understanding as to whether, when, and how sovereign governments should defer to MSH processes, should themselves be recognized as stakeholders in such processes, and should empower or backstop such processes.

a multistakeholder organization around the issue of cybersecurity because one group of key stakeholders who will never “come to the table” and join the relevant discussions are the “evildoers.” Paul Ohm, IT/IP & Privacy Initiative Director, Silicon Flatirons Center, Roundtable Discussion at the Silicon Flatirons Center (Aug. 24, 2011).

APPENDIX A – ROUNDTABLE PARTICIPANTS

(ALPHABETICAL BY LAST NAME)

Trent Adams, The Internet Society (ISOC)
Dorothy Attwood, Walt Disney Company
Brad Bernthal, Silicon Flatirons; Colorado Law
Kathy Brown, Verizon Communications, Inc.
Jeff Brueggeman, AT&T
Mark Cooper, Silicon Flatirons; Consumer Federation of America
Andy Crain, Silicon Flatirons; ITP
Donna Dodson, National Institute of Standards & Technology
Gary Epstein, The Aspen Institute
Ray Gifford, Silicon Flatirons; Wilkinson Barker Knauer, LLP
Dick Green, Silicon Flatirons; ITP; Liberty Global
Dale Hatfield, Silicon Flatirons; ITP; Broadband Internet Technical
Advisory Group (BITAG)
Jamie Hedlund, ICANN
Brian Hendricks, Nokia Siemens Networks
Link Hoewing, Verizon Communications, Inc.
Russ Housley, Internet Engineering Task Force (IETF)
Karen Kornbluh, US Department of State
Paul Liao, CableLabs
Chris Libertelli, Skype
Jason Livingood, Comcast Cable Communications
Roger Marks, Consensii LLC
Melissa Newman, CenturyLink
Paul Ohm, Silicon Flatirons; Colorado Law
Preston Padden, Silicon Flatirons; Colorado Law; ITP
Robert Pepper, Cisco
Michael Powell, National Cable & Telecommunications Ass'n
Phil Reitingger, Sony
Jim Rottsohlk, Microsoft
Patrick Ryan, Google
Jonathan Sallet, Silicon Flatirons; O'Melveny & Myers LLP
Doug Sicker, Federal Communications Commission
Kaleb Sieh, Broadband Internet Technical Advisory Group (BITAG)
Phil Verveer, US Department of State
Scott Wallsten, Technology Policy Institute
Joe Waz, Silicon Flatirons; Altura West LLC
Phil Weiser, Silicon Flatirons; Colorado Law
Danny Weitzner, White House Office of Science and Technology Policy
Cynthia Wong, Center for Democracy & Technology
Lee Zieroth, CableLabs

