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Multilayer governance as a theoretical foundation of enhanced cooperation

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Multilayer Governance as a Theoretical Foundation of Enhanced Cooperation

Discussion Topic: what does enhanced cooperation mean and what is its contribution to multistakeholder participation in particular and Internet Governance in general?

Key words: Democracy, Enhanced Cooperation, Internet Governance, Multilayer Governance, Multistakeholder Participation

Abstract:

For strengthening public confidence in the decision-building processes, Internet governance needs to involve more actors, traditionally not granted with sovereign powers, such as business entities, non-governmental organizations, and civil society. In the recent past, the details of this much-debated multistakeholder concept have been amended by the "enhanced cooperation" approach. Actors from many fields have acknowledged that structural concepts dealing with the involvement of stakeholders having different backgrounds and functions are not yet established; therefore, new extended concepts beyond the classic realm are needed, encompassing different layers of decision-building procedures and realizing a higher degree of democratic participation.

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I. Introduction

As experience has shown, Internet governance needs to involve more actors, traditionally not granted with sovereign powers, such as business entities, non-governmental organizations, and civil society. The joint involvement of all stakeholders strengthens public confidence in the decision-making processes. The details of the multistakeholderism concept, however, are hotly debated and have recently been amended by the "enhanced cooperation" approach.

In view of these developments the general foundations of enhanced cooperation are to be analyzed in more detail. This assessment will be done on the basis of the multilayer governance concept which appears to constitute the most appropriate framework for an adequate structuring of enhanced cooperation regimes.

II. Concept of Multilayer Governance

A. Decentralized Government Networks

During the last few years newly structured concepts of decision-building emerged on the basis of different networks approaches, encompassing elements such as flexibility, problem-solving capacity and efficiency. Thereby, from a theoretical perspective, normative institutionalism has been replaced by a functionally oriented concept.[1]

The new approach of transgovernmental networks leading to sectorial legal rules is based on sets of direct interactions among sub-units of different governments which are not controlled by the decision-making bodies of the nation states.[2] Since networks have an effect on this aggregation, the actual cooperation and achievement of a solution occurs on the basis of a "disaggregated sovereignty".[3]

Slaughter, in her well-known book "A New World Order", tackles the "governance dilemma" by referring to "governmental networks", being "relatively loose, cooperative arrangements across borders between and among like agencies that seek to respond to global issues"[4] and that manage to close gaps through coordination among governments from different states, "creating a new sort of power, authority, and legitimacy".[5]

This model presupposes disaggregated states, each with its own powers, mandates, incentives, motivations, and abilities; contrary to the perception of unitary states according to traditional international law, Slaughter proposes that national governments should delegate their responsibilities and "actual sovereign

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[1] See RAINER NICKEL, Participatory Transnational Governance, in: CHRISTIAN JOERGES/ERNST-ULRICH PETERSMANN (eds.) Constitutionalism, Multilevel Trade Governance and Social Regulation, Oxford 2006, 157-198, at p. 167; see also ROLF H. WEBER, New Sovereignty Concepts in the Age of Internet?, Journal of Internet Law 14(8) (2010), 12-20, at pp. 16-18.

[2] ROLF H. WEBER, Multilayered Governance in International Financial Regulation and Supervision, Journal of International Economic Law 13(3) (2010), 683-704, at p. 688.

[3] KAL R. RAUSTIALA, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, Virginia Journal of International Law 43(1) (2002), at p. 11.

[4] KENNETH ANDERSON, Book Review: Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Network, Harvard Law Review 118(4) (2005), 1255-1312, at p. 1257; see also ANNE-MARIE SLAUGHTER, A New World Order, Princeton and Oxford 2004, at p. 14.

[5] ANDERSON (fn 4), at p. 1257.

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power to a limited number of supra-national government officials",[6] who would then have to engage in intensive interactions as well as in the elaboration and adoption of codes of best practice and agreements on coordinated solutions to common problems.

B. Notion of Multilayer Governance

Globalization and regionalization increasingly call into question the traditional divide between state authority and private actors; moreover, different layers of governance (supra-national, regional, national, intra-national, and local) are developed in order to properly assess the regulatory interventions and their enforcement. Private regimes are part of the overall legal design and have a place in a multi-layer-structure, if developed with the objective of establishing an appropriate institutionalization, based on broad initiation and wide building support.[7]

Consequently, legal scholars and political scientists increasingly focus on the allocation and the interaction of powers among different levels of governance as well as on the problem-solving capacity of multilayer governance.[8]

The allocation of regulatory powers to, and the balance within different levels of governance has become a crucial topic in the discussions about sovereignty; it features the nationstate context and even more the international setting.[9] In fact, the definition of the proper interaction of the different levels has a direct impact on an ideally coherent regulatory architecture of multilayer governance; in other words, multilayer governance proposes a process and direction.[10]

The concept of multilayer governance requires common foundations applicable to all relevant layers, while at the same time it must respect diversity and pluralism in order to be commensurate with the respective level of integration.[11] Consequently, multilayer governance needs to develop normative guidance as to how relations between different layers of governance should be framed in a coherent and not fragmented manner, encompassing both analytical and prospective issues in building upon observations of legal phenomena.[12]

In a nutshell, multilayer governance relies upon a common and shared body of underlying values and normative principles, which penetrate all layers of governance.[13] Thereby, the core values shared by the international community are to be identified by directing the attention to the legal rights and obligations accepted by the major part of civil

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[6] SLAUGHTER (fn 4), at p. 263.
[7] STEVEN BERNSTEIN/BENJAMIN CASHORE, Can non-state global governance be legitimate? An analytical framework, Regulation and Governance 1 (2007), 347-371.
[8] For a general overview see THOMAS COTTIER, Multilayered Governance, Pluralism, and Moral Conflict, Indiana Journal of Global Legal Studies 16(2) (2009), 647-679, at pp. 655-73; FRITZ W. SCHARPF, Introduction: The Problem-Solving Capacity of Multi-Level Governance, Journal of European Public Policy 4(4) (1997), 520-538.

[9]   WEBER (fn 2), at p. 689.
[10] COTTIER (fn 8), at p. 656.
[11] COTTIER (fn 8), at p. 656/7.
[12] WEBER (fn 2), at p. 689.
[13] COTTIER (fn 8), at p. 657; for a discussion of rights-based constitutionalism see also ERNST-ULRICH PETERSMANN, Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism, in: CHRISTIAN JOERGES/ERNST-ULRICH PETERSMANN (eds.) Constitutionalism, Multilevel Trade Governance and Social Regulation, Oxford 2006, 5-58, at p. 5.

society.[14] In case of a proper assessment of these values, the ensuing legal framework possesses special legitimacy which is essential for the operation and effectiveness of law.[15]

C. Multilayer Governance and Globalization

In the context of the globalization debates, social scientists mainly refer to two models, namely universalism, stressing the existence and the normative potential of shared values on the one hand, and to cosmopolitanism, including the moral and political doctrine which extends to legal and institutional dimensions on the other hand.[16] Different actors can institute processes by producing and disseminating rules that determine the behavioral patterns of the "participants".[17]

Multilayer governance leads to polycentric regulations occurring in multiple sites, shaped by practical issues and events.[18] In an order of polycentric regulation the different communities involved in the rule-making processes are becoming important actors. The weakness of the formal concept of polycentric regulation consists in the fact that the problems of rule-making pluralism and fragmentation are not (critically) assessed.

As the information exchanges and the decision-making processes are moved to the most concerned participants of a specific market segment or the concerned regulatory regime a multistakeholder approach should be chosen and an enhanced cooperation concept must be developed.[19]

Even if, over the years, different institutions and organizations are expanding their activities to new levels, the enhanced cooperation approach invites the adoption of a cooperative attitude towards the inclusion of non-governmental organizations and interest groups in the rulemaking processes.[20] While it is clear that the multiplicity of regulatory actors carries the substantial risk of incoherent rulemaking, such an approach would not necessarily entail an additional fragmentation of regulatory powers. In contrast, the aim of a more balanced allocation of powers could be achieved by mandating the regulatory actors to cooperate and consult with the various stakeholders.[21]

III. Enhanced Cooperation Based on Multistakeholder Participation

A. Notion of Enhanced Cooperation

Enhanced cooperation is not a completely new concept but its importance recently increased in the Internet governance context by way of establishing new policy-making bodies.

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[14] See COTTIER (fn 8), at pp. 659/60.
[15] WEBER (fn 2), at p. 690.
[16] See COTTIER (fn 8), at p. 660; see also JOSEPH H. H. WEILER, Democratic or Technocratic Governance?, Jean Monnet Working Paper No 6/01 (2001), at pp. 5/6.
[17] See ROLF H. WEBER, Mapping and Structuring International Financial Regulation – A Theoretical Approach, European Banking Law Review 20(5) (2009), 651-688, at p. 682.
[18] JULIA BLACK, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, Regulation and Governance 2(2) (2008), 137-164, at pp. 139-41.

[19] ROLF H. WEBER, Shaping Internet Governance: Regulatory Challenges, Zurich 2009, at pp. 88/9.
[20] WEBER (fn 2), at p. 691.
[21] WEBER (fn 2), at p. 691.

In general, multistakeholder participation and enhanced cooperation are confronted with the problem that structural concepts dealing with the involvement of many actors having different backgrounds and functions are not yet established. Foucault refers to the governmentality paradox with unclear institutional powers due to political and economic power shifts that effect governance institutions and practices in a global and digital era.[22] Furthermore, a shift towards a "post-Westphalian mode of frame-setting" (Fraser) emanating from the emergence of other structures, both extra- and non-territorial, can be observed.[23]

These developments call for new extended concepts beyond the classical realm, encompassing different layers of governance (supra-national, regional, national, local). An increased focus on the interaction and the allocation of powers among different levels of governance are needed and the problem-solving capacity of such multilayer governance must be acknowledged.

B. Principles of Bottom-up Participation

1. Democratic Foundation

Already Aristotle explained the best regime to be a combination of various features for the sake of the commons, however, he did not perceive democracy as the mandatory best regime, but rather aristocracy.[24] In aristocratic regimes, only a few are able to act as representatives for the benefit of the community; these ruling persons should act "with a view to what is best for the city and for those who participate in it".[25]

This (historic) perception shows that the bottom-up process may be implemented in practice by establishing a partly hierarchical order encompassing representatives from various fields of civil society and/or from different regions who themselves can elect legitimate individuals for the participation in the final decision-building processes.[26]

As mentioned, inclusion of civil society calls for a bottom-up process. Even if the various actors of civil society are independently organized, common strategies and goals can be developed; the bottom-up approach also enables the creation of new networks and facilitates the enlargement of the fundament for active participation of Internet users.[27] The multistakeholder models must rely on ever increasing participation by those with interests, capacities, and needs.[28]

[22] MICHEL FOUCAULT, Naissance de la biopolitique: Cours au Collège de France (1978-1979), Paris 2004, at p. 312 et seq.; MARIANNE I. FRANKLIN, Digital Dilemmas. Power, Resistance, and the Internet, Oxford 2013, at pp. 11, 176

[23] NANCY FRASER, Reframing Justice in a Globalizing World, New Left Review 36 (2005), 69-88, at pp. 82/3.

[24] ARISTOTLE, The Politics of Aristotle, translated by BENJAMIN JOWETT, Oxford 1885, Vol. 1, Book III, Chapter 7, at p. 1279b.

[25] Ibid, at p. 1279a.

[26] See also ROLF H. WEBER/ROMANA WEBER, Social Contract for the Internet Community? Historical and Philosophical Theories as Basis for the Inclusion of Civil Society in Internet Governance?, SCRIPT-ed 6 (2009), 90-105, at pp. 94/5.

[27] WEBER/WEBER (fn 26), at p. 94.

[28] AVRI DORIA, Use [and Abuse] of Multistakeholderism in the Internet, in: ROXANA RADU/JEAN-MARIE CHENOU/ROLF H. WEBER (eds.) The Evolution of Global Internet Governance: Principles and Policies in the Making, Zurich 2013, 115-138, at p. 135.

2. Substantive Issues of Participation

In elaborating the substantive issues of multistakeholder participation in more detail, the following factors should be taken into account:[29]

(i) *Openness:* Access to discussions, negotiations and decisions must be open for interested and concerned persons.

(ii) *Transparency:* Procedures have to be transparent in formal and substantive respects allowing to make an appropriate picture of the situations.

(iii) *Accessibility:* Information sources need to be accessible for interested and concerned persons.

(iv) *Accountability:* Decision-makers must be accountable to those being exposed to the respective decisions, i.e. responsibility is an important element in corporate structures.

(v) *Credibility:* Decision-makers should seek to achieve an acknowledgment of their credibility by the concerned persons.

(vi) *Adequately resourced:* Multi-stakeholder involvement and participation requires sufficient human and financial resources in order to enable the respective processes.

(vii) *Consensus-based:* Acceptability for decisions taken will increase if they are reached by consensus of all concerned persons and not by (sharp) majority votes.

(viii) *Opportunity for appeal/challenge:* An entity of any nature should provide for a possibility to file a complaint against a given decision to an independent panel of "judges".

(ix) *Ability to resist capture:* Decision-making bodies must avoid to be captured by lobbying groups.

3. Impact Perspectives

A specific problem related to responsiveness and participation of civil society concerns the scope of impact actually reached. Obviously, a multistakeholder regime is not accomplished by merely providing the preconditions for the participation of civil society; moreover, the provision of a real and timely opportunity to shape policy output is needed.[30]

As a consequence, an evaluation of the influence that the voices of the various stakeholders have on the decision-making process should be conducted; listening to the voices of the members of civil society may not become an alibi since in such case the outcome of the deliberations will not result in everyone's welfare.[31]

Even if there is not one single multistakeholder model, the concept encompasses different forms of participatory democracy that allows those who have a stake in a policy to take part in crafting the policy. The composition of the stakeholder groups may vary but generally all actors being involved in advocating the interests of the global public good are eligible for participation.

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[29] JOE WAZ/PHILIP J. WEISER, Internet Governance: The Role of Multistakeholder Organizations, Journal of Telecommunications & High Technological Law 10 (2012), 331-350, at pp. 242/3.

[30] CHARLOTTE DANY, Civil Society Participation under Most Favorable Conditions: Assessing the Deliberative Quality of the WSIS, in: JENS STEFFEK/CLAUDIA KISSLING/PATRIZIA NANZ (eds.) Civil Society Participation in European and Global Governance, Paul Grave 2008, 53-70, at p. 61.

[31] WEBER/WEBER (fn 26), at p. 101.

C. Structuring of the Processes

1. Different Typological Approaches

From a theoretical perspective, differentiations need to be made between the groups of involved actors and the authority relations between these actors. A possible approach is to be structured as follows:

Often four different groups of actors are distinguished playing a role in the multistakeholder debates related to cyberspace regulation, namely (i) States, (ii) formal intergovernmental organizations (IGO), (iii) business entities, and (iv) non-governmental organizations (NGO), technical and academic community, civil society and the individuals acting on their own behalf. The last group obviously combines a wide variety of actors but a further refine would lead to a unmanageably complicated typology.[32]

Apart from the distinction of different actors governance arrangements can also vary according to the authority relations between these actors. Four ideal-typical possibilities are available for consideration, namely (i) hierarchy, (ii) homogeneous polyarchy, (iii) heterogeneous polyarchy, and (iv) anarchy.[33] Hierarchy entails relations of super- and subordination (command and obey structure), usually given in the context of states, polyarchy encompasses situation where the authority is distributed among several actors, having either (homogeneously) similar formal powers or (heterogeneously) different formal powers. In case of anarchy no authority relations exist.

Apart from the more theoretical aspects practical considerations must also gain importance, for example on the following questions: (i) How can greater transparency and dialogue between different civil society groups and standards experts be introduced? (ii) How can it be ensured that the benefits of rapid standard making are maintained even with the additional scrutiny due to increasing multistakeholder arrangements?[34]

2. Changing Roles in Processes

A key issue of the multistakeholder participation approach concerns the identification of the roles executed by the manifold stakeholders. The Report of the Working Group on Internet Governance (WGIG) of June 2005 and the Tunis Agenda are silent on the term of the "respective roles".[35] The problems for the interpretation of this term due to its ambiguity have caused substantive drawbacks during the last few years.[36]

Obviously, the definition of the respective roles is a complex (and so far in Internet governance "unfinished"[37]) task, depending on the

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[32] See also LAURA DENARDIS/MARK RAYMOND, Thinking Clearly about Multistakeholder Governance, GigaNet, November 2013, at p. 9, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354377.

[33] DENARDIS/RAYMOND (fn 32), at p. 10.

[34] See also IAN BROWN/CHRISTOPHER T. MARSDEN, Regulating Code: Good Governance and better Regulation in the Information Age, Cambridge MA/London 2013, at p. 202.

[35] For more details see DORIA (fn 28), at pp. 123-127.

[36] See BERTRAND DE LA CHAPELLE, Multistakeholder Governance, MIND No. 2, September 2011, 14-25, at p. 15, calling the wording "in their respective roles" a perfect example of what diplomats usually describe as constructive ambiguity, namely an agreement on terms that conceal a disagreement of substance.

[37] DORIA (fn 28), at pp.126/7.

capabilities and needs of the stakeholders. A reasonable model should recognize that the respective roles differ at different times in the process of governance. An analysis could break the process into a set of stages, namely framing, drafting, validation, implementation and disputes.

A proper treatment of these aspects needs to enlarge the scope of traditional research. A multidisciplinary examination of the relevant questions is unavoidable, incorporating socio-legal, economic, policy-oriented and game theory studies as well as interdisciplinary information studies drawing on socio-economic and political analyses.[38] For the time being, an integrated approach has not been developed: the disciplines still remain "somewhat stove-piped in different silos"[39] without bringing together the many approaches into a holistic and coherent scientific framework and associated evaluative and design methodologies.

Developing a multidisciplinary catalogue of methodologies as well as the corresponding multidisciplinary tools can improve comprehension of challenges to better participative decision-making, including consideration of governance concepts.[40]

D. Need for Improved Institutionalization

Recently, the European Commission has also taken up the multistakeholder concept and proposes in its Communication of February 2014 as a basis for a common European vision

for Internet governance the principle "to defend and promote fundamental rights and democratic values, and multistakeholder governance structures that are based on clear rules that respect those rights and values",[41] " (…) governed by a genuine multistakeholder model (…) where the necessary inter-governmental discussions are anchored in a multistakeholder context in the full understanding that the Internet is built and maintained by a variety of stakeholders, as well as governments; (…) where decisions are taken on the basis of principles of good governance, including transparency, accountability, and inclusiveness of all relevant stakeholders".[42] In No. 5 of the mentioned Communication, the European Commission describes the multistakeholder process under the headings of transparency, inclusiveness and balance, and accountability.[43]

The multistakeholder concept should not be viewed as value in itself to be applied homogenously to a multiple of governance functions.[44] Moreover, for example in respect of cyberspace regulation, an appropriate and efficacious approach should attempt to determine what types of governance are optimal for promoting a suitable regime in any particular functional and political context. Such concept would lead to a granular taxonomy and would most likely achieve different results in

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38 BROWN/MARSDEN (fn 34), at p. 200.
39 BROWN/MARSDEN (fn 34), at p. 200.
40 BROWN/MARSDEN (fn 34), at p. 201.

41 EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Internet Policy and Governance, Europe's Role in shaping the future of Internet Governance, COM(2014) 72 final of February 12, 2014, at p. 2.
42 EUROPEAN COMMISSION (fn 41), at p. 3.
43 EUROPEAN COMMISSION (fn 41), at p. 6.
44 DENARDIS/RAYMOND (fn 32), at p. 2.

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respect of the manifold substantive topics such as freedom of expression, cybersecurity, standard setting (protocols, routers), interoperability, operational stability, treatment of Internet service providers, etc.[45]

IV. Multilayer Governance for Enhanced Cooperation

Based on the discussed considerations, the concept of multilayer governance should be made fruitful in the concretization of the multistakeholder participation and enhanced cooperation approach since this concept helps to understand governance and makes it a more productively apprehended iteration of the governmentality paradox. The concept of the multilayer governance also allows to understand enhanced cooperation as an opportunity focussing on end users and fundamental (human) rights that allow to challenge the attempts of allocating more power to authoritarian regimes.

A. Examples of Enhanced Cooperation

In the meantime, a number of bodies have been established which realize the enhanced cooperation approach to a certain extent:

(i) The most obvious body, using "enhanced cooperation" in its name, is the Working Group on Enhanced Cooperation (WGEC) which has been established in 2012 with the objective to examine the mandate of the World Summit on the Information Society (WSIS) having introduced the multistakeholder concept and to prepare recommendations on how to

fully implement this mandate.[46] The WGEC is composed of twenty-two governmental officers and five representatives from the different communities at stake. The activities of the WGEC are relatively transparent and this body seeks to get the input from manifold sources.

(ii) In the context of Internet governance the earliest and still most well-known body establishing enhanced cooperation is the Internet Governance Forum (IGF). Already the Tunis Agenda (Paras. 68/69)[47] recognizes the "need for enhanced cooperation" and mandates the UN Secretary-General to start the "process towards enhanced cooperation" (Para. 71) with the involvement of all stakeholders. The tasks directly contributing to the enhanced cooperation are described in detail in the Tunis Agenda (Paras. 72 and 77).

Without any doubt the IGF does have an impact on the development of public policies even if the degree of influence is partly differently assessed. Over the years governments also realized that the IGF is a factor in policy-driving which makes it advisable to actively participate in the deliberations.

On other geographic levels, bodies similar to the IGF have been established; practically each region incorporated a multistakeholder forum, for example the EuroDIG exists for Europe since 2008, and many countries got a national forum. Since these regional bodies are dealing with Internet issues more closely related the

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[45] See also DENARDIS/RAYMOND (fn 32), at p. 2.

[46] For more detailed information see http://unctad.org/en/Pages/CSTD/WGEC.aspx.
[47] Tunis Agenda for the Information Society, 18 November 2005, available at http://www.itu.int/wsis/docs2/tunis/off/6rev1.html.

actual politics, their impact can be quite substantial.

(iii) On the national level Brazil has made a remarkable experience of multistakeholder cooperation in relation to Internet issues, embodied in the Brazilian Internet Steering Committee (CGI. br). The outcome of the multistakeholder dialogue can be seen in several initiatives which have been carried out by CGI. br.[48]

(iv) Under the auspices of the United Nation, the Commission on Science and Technology for Development (CSTD) having been created in 1992 promotes dialog and fosters partnership between intergovernmental organizations and non-governmental organizations (NGO) that have, however, only a consultative status.[49] The main concretization of the enhanced cooperation model consists in the establishment of the already mentioned WGEC.

(v) In the framework of ICANN, the international domain names ccTLD Fast Track can be qualified as an example of an enhanced cooperation process within the set of organizations managing the technical functions of the Internet.[50] In contrast to the CSTD incorporating enhanced cooperation from the perspective of the public side,

the ccTLD Fast Track is designed from the perspective of a private regime.

B. Insights from the ISOC Questionnaire on Multistakeholder Governance

Bearing in mind that multistakeholderism is not a static concept but a phenomenon in constant transition, the Internet Society (ISOC) launched a multiphased process to understand how the Internet community is thinking about multistakeholder governance and the associated notion of "enhanced cooperation". The process´ first phase included a questionnaire,[51] asking for feedback regarding (i) multistakeholder governance, (ii) enhanced cooperation and (iii) challenges ahead. During the questionnaire´s time frame for reply of two months[52] around 300 individuals from more than 50 countries together with a variety of stakeholder groups participated in the survey.[53]

With regard to the aspect of "enhanced cooperation", the questionnaire´s evaluation revealed that the compatibility between the multistakeholder principles and the "enhanced cooperation"-model is still an essential question; whereas in the past the process of "enhanced cooperation" has been presented as a "threat to multistakeholderism and a return to intergovernmental forms of

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[48] For further details SAMANTHA DICKINSON/WILLIAM H. DUTTON/MARILIA MACIEL/DESIREE MILOSHEVIC/VLADIMIR RADUNOVIC, Enhanced Cooperation in Governance, Oxford Internet Institute (OII) Forum Discussion Paper, University of Oxford, 7 January 2014, at p. 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376807.

[49] For further information see DICKINSON/DUTTON/MACIEL/MILOSHEVIC/ RADUNOVIC (fn 48), at p. 16.

[50] For further information see DICKINSON/DUTTON/MACIEL/MILOSHEVIC/ RADUNOVIC (fn 48), at p. 19.

[51] See INTERNET SOCIETY, Questionnaire on Multistakeholder Governance, Report and Summary, October 2013, available at http://www.internetsociety.org/doc/internet-society-questionnaire-multistakeholder-governance-report-and-summary-results-october.

[52] The questionnaire stayed open for reply starting August 2 - September 30, 2014.

[53] Internet Society (fn 51), at p. 3.

governance",[54] the questionnaire´s respondents are now of the opinion that "enhanced cooperation" might be "an opportunity to strengthen and improve multistakeholder governance".[55]

In this context, two different perspectives have emerged:[56] On the one hand, respondents see "enhanced cooperation" as a United Nations and/or governments´ hidden attempt for taking over the Internet at the expense of existing multistakeholder arrangements; the respondents´ majority on the other hand viewed the process of "enhanced cooperation" as being an opportunity for improved Internet governance mechanisms and the development of multistakeholder practices.[57]

This academic paper is part of the process´s second phase consisting in preparing research outputs on a variety of issues such as (i) tracking the historical evolution of multistakeholder governance, (ii) identifying the parameters of "enhanced cooperation" or (iii) identifying the potential impact of multistakeholderism in the overall Internet governance landscape.[58] In particular, this paper analyzes the multi-layer model as foundation of a practically established enhanced cooperation.

C. Enhanced Cooperation and Democracy

Already the WGIG-Report[59] of 2005 has addressed the question to what extent enhanced cooperation and multistakeholderism could contribute to participatory democracy, taking into account that democracy is defined in different ways, mainly in a multilateral context and by different stakeholders according to their particular perspectives. Whereas governments hold to a view which is based on national sovereignty and the participation of (qualified) citizens according to the constitutional decision-making mechanism, civil society advocates usually argue that participatory democracy should be understood in a broader way, requiring direct and full participation in the decision-building by many non-governmental groups from the private sector and the population.

The origins of democracy can be traced back to the Greek words "demos" meaning "people", and "kratos", referring to "rule" and "strength", thus the "rule of people", also called "politeia" by Aristotle, meaning the "rule of many".[60] In this sense, democracy complies with the functions expected from governance which acknowledges individual civil as well as political rights. This assessment, in turn, emphasizes the fundamental assumption that citizens' freedom of self-determination is the basis of the democratic state per se;

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[54] Internet Society (fn 51), at p. 3.
[55] Internet Society (fn 51), at p. 3.
[56] Internet Society (fn 51), at p. 8.
[57] For more detailed information regarding the two different perspectives see Internet Society (fn 51), at pp. 8/9.
[58] Internet Society (fn 51), at p. 4.

[59] Report of the Working Group on Internet Goveranance, Juni 2005, available at http://www.wgig.org/docs/WGIGREPORT.pdf.
[60] WEBER (fn 19), at p. 112.

such an interpretation is also referred to as "the democratic principle".[61]

Adopting democracy as a legitimizing concept for international governance, thus expanding its scope beyond national states, raises several questions; therefore, scholars have addressed international democracy rather differently.[62] Whereas one approach envisions the gradual disappearance of the states' system and its replacement by a world-wide democratic government,[63] representatives of the "pan-national democracy" picture the achievements of global democracy through democratization at the level of each state.[64] Additionally, the concept of "cosmopolitan democratic law" has been developed, encompassing the establishment of "a democratic public law entrenched within and across borders"[65] and making democracy within states and democracy in international affairs mutually supportive developments. [66]

As far as representatives of civil society are concerned, basic legitimacy problems cause questions, namely: Who does in fact represent civil society? How have the representatives been selected? In the context of the recent NetMundial some voices have been raised that "speakers" of civil

society have not really been mandated in a proper way and did not fully take into consideration all opinions expressed by members of civil society.

More general questions to legitimacy elements could read as follows:[67] Who can be the legitimate stakeholder in a multi-layer framework (for which layer)? Do the same criteria for legitimacy apply in a multi-layer regime than in the traditional regime? What importance does legitimacy have in a multi-layer environment? Is not the inclusion of many stakeholders legitimizing enough?

A specific aspect in the Internet governance context concerns the problem that each individual is situated in a complex world of capabilities and needs and that each individual usually belongs to several stakeholder groups. As a consequence, the sole representation of an individual as citizen, while necessary, is often not sufficient; however, the voices of many groups will lead to myriads of interests. No single type of stakeholder group can serve all of the aspects of global population in cyberspace. Therefore, new processes enshrining legitimacy issues and participation requirements need to be developed.

D. Enhanced Cooperation through Fair Processes of Consensus-Building

Multi-stakeholderism as a general concept should not conceal the fact that rather big differences among the very different players remain since influential states will remain very powerful players in a multi-stakeholder setting as compared to developing states or individual representatives of

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[61] JEREMY MALCOLM, Multi-Stakeholder Governance and the Internet Governance Forum, Perth 2008, at p. 227.
[62] WEBER (fn 19), at p. 115.
[63] WEBER (fn 19), at p. 115.
[64] SUSAN MARKS, Democracy and International Governance, in: JEAN-MARC COICAUD/VEIJO HEISKANEN (eds), The Legitimacy of International Organizations, Tokyo/New York/Paris 2001, 45-68, at p. 52.
[65] DAVID HELD, Democracy and the Global Order, From the Modern State to Cosmopolitan Governance, Cambridge/Oxford 1995, at p. 227; see als MALCOLM (fn 61), at pp. 236 et seq. and 243 et seq.
[66] MARKS (fn 64), at p. 53.

[67] WEBER (fn 19), at pp. 105/6.

civil society, for example.[68] Consequently, for enabling "real" consensus among all stakeholders involved, procedures need to be established giving bargaining power to and ensure equal opportunities for all stakeholders.[69]

With regard to these rather unequal starting positions of the different stakeholders involved, mechanisms are necessary to enable participation and interaction to take place in fair terms, so as to give different stakeholders a real voice.[70] Additionally, it is thus crucial that organizations governing the Internet inform their stakeholders comprehensively and in a timely manner and make effective use of the information flow on the Internet. As a consequence, the involvement in decision-making processes should strengthen public confidence in the decisions taken and enhance their legitimacy.[71]

With the affected stakeholders delineated, legitimacy could be improved by adhering to particular architectural principles reflecting the multilayer governance approach; such key principles need to be considered as a source for legislation and a guideline for governing different aspects of the Internet.[72] Consensus on "architectural" values would be of

help for establishing a particular form of stability.[73]

V. Outlook

A model of enhanced cooperation including a large number of stakeholders will have benefits if the governance environment is going to change in order to adapt to the new circumstances:[74]

(i) Governmental officials will need to learn to sit at the table with other stakeholders on an equal footing (as already practiced in certain situations).

(ii) Businesses will need to become more transparent; instead of lobbying in governmental and parliamentarian circles, commercial entities will have to present their arguments in multistakeholder fora.

(iii) Civil society should move away from ideological purity and develop flexible mechanisms in the organizational structure securing appropriate legitimacy and participation. Civil society should also give up the so-called "victim mantra" by trying to work inside the system with those who have power.

(iv) Technological experts need to give up the comfort of believing that science and technology are free of financial and political aspects, i.a. technologists need to learn to communicate and cooperate with policy concerns. Conversely, policy advocates have to learn to understand and cope with technological realities.

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[68] KONSTANTINOS KOMAITIS, Aristotle, Europe and Internet Governance, Pacific McGeorge Global Business and Development Law Journal 21 (2008), 57-77, at p. 57.
[69] JONATHAN WEINBERG, ICANN and the Problem of Legitimacy, Duke Law Journal 50 (2000), 187-260, at pp. 255/6.
[70] WEBER (fn 19), at p. 118.
[71] ROLF H. WEBER/ROMANA WEBER, Inclusion of the Civil Society in the Governance of the Internet, Can Lessons be Drawn from the Environmental Legal Framework?, Computer Law Review International 1 (2009), 9-15, at p. 9.
[72] WEBER (fn 19), at p. 119.

[73] IAN CLARK, Legitimacy in International Society, New York 2005, at pp. 15-17.
[74] DORIA (fn 28), at pp. 135/6, as phrased in respect of multistakeholder participation.

The need to improve and implement the concept of "enhanced cooperation" is widely acknowledged in the meantime. Most available fora such as the IGF and the WGEC, however, lack so far decision-making power, only allowing discussions and deliberations without including the right to release binding motions.[75] This fact does not mean that fora such as the IGF or the WGEC should be vested with sovereign power. Moreover, the principle of a multilayer regime requires accepting different forms of rulemaking by different institutions.

But the principles agreed upon in the manifold fora need to be linked into a comprehensive structure. This objective can be achieved if legal interoperability is improved; legal interoperability is the process of making legal rules work together across jurisdiction.[76] In view of the increasing fragmentation of the Internet efforts should be undertaken to achieve higher levels of legal interoperability in order to facilitate informational and commercial exchanges.[77]

Even with improved legal operability, some variability continues to be caused by the enforcement mechanisms ("law in action") that might drive the decision on implementing a top-down approach or a bottom-up process.[78] The multilayer concept attempting to achieve the suitable legal interoperability can insofar be seen as example of a hybrid regulation.

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[75] See WEBER (fn 19), at pp. 70/71, FRANKLIN (fn 22), at pp. 154 et seq.

[76] JOHN PALFREY/URS GASSER, Interop: the Promise and Perils of Highly Interconnected Systems, New York 2012, at p. 178.

[77] PALFREY (fn 76), at pp. 178/179.

[78] PALFREY (fn 76), at pp. 184/185.