



STRATEGY MEETING ON CATALYZING REFORM OF TRADE NEGOTIATION PROCESSES

Background document

1. [Introduction](#)
2. [Trade negotiation practices](#)
 - 2.1. [World Trade Organization](#)
 - 2.2. [Plurilateral trade agreements](#)
3. [Internet-related public policy issues](#)
 - 3.1. [In trade negotiations](#)
 - 3.2. [Other venues for these issues](#)
4. [Multi-stakeholder process norms](#)
 - 4.1. [Internet governance principles](#)
 - 4.2. [Internet governance institutions](#)
5. [Possible global institutional homes for work on opening trade negotiations](#)
 - 5.1. [Open Government Partnership](#)
 - 5.2. [UN Commission on International Trade Law](#)
 - 5.3. [UN Economic Commission for Europe](#)
 - 5.4. [UN Conference on Trade and Development](#)
 - 5.5. [World Trade Organization](#)
 - 5.6. [International Trade Centre](#)
 - 5.7. [NETmundial Initiative](#)
 - 5.8. [Freedom Online Coalition](#)
 - 5.9. [World Intellectual Property Organization](#)
6. [Possible outcomes](#)
 - 6.1. [Ideas from preparatory meetings](#)
 - 6.2. [Questions to address](#)
7. [References](#)

1. Introduction

The main purpose of this meeting is to determine what it would take to achieve a transparent and participatory process in all phases of Internet-related public policymaking that currently take place behind closed doors in trade negotiations.

The meeting does not presuppose any method for doing that; we may decide that the best course of action is reforming trade negotiation processes to make them more transparent

and participatory. Or we may decide that it would be better to ensure that Internet-related public policies are no longer decided in trade agreements, but in other more transparent and participatory fora (either existing or not yet existing).

As the convenor of this meeting, the Electronic Frontier Foundation (EFF) does not have the answers to these questions, or even necessarily hold firm positions on them. But what we do have is a network of experts who care deeply about answering them, in a way that upholds democratic legitimacy and human rights. The core of that network is present at this meeting.

The only starting point that we suggest is that the solutions that we may discuss at the meeting will probably require more than just civil society and academic advocacy. Most likely they will require the support of existing powerful and morally persuasive international institutions. We suggest prioritizing ideas that involve partnerships with such institutions, some of which are described below.

The methodology being employed at the meeting is an open one, designed to allow for the free exchange of ideas and to expose those ideas to robust criticism and debate through a recursive, deliberative process, centered around the use of [Idea Rating Sheets](#). We hope that through that process, we will be left with only the best informed, most cogent and most actionable ideas.

This briefing document does not seek to constrain or direct those ideas. Its purpose is rather to collect some key background facts that will assist our mutual deliberations, by ensuring that they begin from a common base of shared basic knowledge. It complements a series of short presentations that will be given on the morning of the first day of the meeting. Neither of these aspire to completeness.

Following the conclusion of the meeting, we will draft a report that summarizes the learning that has taken place and the strategies that have been agreed. We will circulate this to the participants, who will be invited to jointly build (and to resource) one or more action-oriented coalitions to execute the reforms that we have agreed to pursue.

2. Trade negotiation practices

Civil society is systematically excluded from trade negotiations, except at a far remove where their influence over actual policy development and drafting can be carefully directed and minimized. This is true both at the full multilateral level, and even more so in smaller plurilateral and bilateral negotiations, where lack of transparency and access to negotiations serves to insulate these from public influence and scrutiny.

2.1. World Trade Organization

As of 2016, the World Trade Organization (WTO) has 162 members and is headquartered in Geneva, where the most influential countries have permanent delegations. The peak body of the WTO is its Ministerial Conference which meets every two years. Most of the work of the WTO however is done in between Ministerial Conferences by the General Council, also

sitting as the Dispute Settlement Body and the Trade Policy Review Body, amongst others. A Goods Council, Services Council, and TRIPS Council report to the General Council.

The WTO is not a body of the United Nations (UN), but operates parallel to it, having the principal responsibility of administering all multilateral trade agreements and arbitrating disputes that arise under them. (However, there are UN bodies, most notably UNCTAD discussed below, which also have a mandate that encompasses some global trade issues.)

The WTO agreements include those dealing with trade in goods (GATT), trade in services (GATS), intellectual property (TRIPS), dispute settlement, and review of national trade policies. Intellectual property which falls under TRIPS, and data flows which fall under GATS, are the principal substantive issue areas that are relevant to the Internet.

As will be further explained below, the passage of TRIPS in 1994 marked the first inclusion of intellectual property (IP) in the global trading system, on the theory that failure to protect IP is an unfair trade barrier. Although the substantive content of TRIPS mostly mirrors the pre-existing World Intellectual Property Organization (WIPO) treaties, the most important change is that TRIPS renders compliance subject to the WTO's enforcement mechanisms.

The inclusion of IP as a trade issue can be considered odd, in that IP is inherently protectionist and its inclusion does not pass the mutual advantage test. It was only in exchange for obligations on technology transfer on the part of developed countries that developing countries agreed to TRIPS at all. (Those technology transfer commitments have been largely disregarded in practice.)

As WTO rules regulate governments and are between governments, there is no official role for business and civil society. Even so, compared with most of the bodies of the UN system, the WTO is much less open to civil society participation (Steffek and Kissling 2006). This has spurred some anti-WTO protests, most memorably the [1999 Seattle protests](#), particularly in the wake of a series of WTO dispute rulings such as the controversial [Dolphin Tuna case](#) with impacts on environmental issues outside of the WTO's mandate.

This unrest also stimulated a few concrete reforms, although mostly in relation to the WTO's transparency rather than its openness to civil society participation. As a result, the WTO today is much more transparent than any of the free-standing plurilateral trade negotiations that have followed it. Specifically, by a 2002 decision, the General Council of the WTO decided to de-restrict all official WTO documents and make them available online. Minutes of meetings are derestricted automatically 45 days after their circulation. However most negotiating texts are not formally released.

On the other hand, meaningful civil society participation at the WTO remains impossible. Commencing in Singapore in 1996, qualifying NGOs could become accredited to attend Ministerial Conferences, but they were not permitted to speak at them nor even to circulate documents. That lasted until 1998 when the WTO began to circulate a monthly list of civil society position papers to its members, and to accept amicus curiae briefs from NGOs to its Dispute Settlement Body on broader issues engaged by disputes, such as environmental or

human rights concerns. In 2001 the General Council agreed to increase its briefings to civil society and to hear presentations from selected NGOs.

Actual trade negotiations do not even take place in the plenary sittings of such bodies anyway, but in closed “Green Room” and “Mini-ministerial” negotiations within and between regional blocs, particularly the so-called “Quad”—the United States, the European Union, Japan, and Canada. These meetings too are closed. The lack of inclusiveness and transparency associated with the closed-door informal meetings has engendered much criticism from less powerful WTO members, some of whom have made their own alliances through which to oppose the quad.

2.2. Plurilateral trade agreements

The breakdown in negotiations of the Doha development round at the WTO is one of the factors that has accelerated the forum shifting of trade negotiations to smaller-n, sometimes called “minilateral” trade negotiations such as the Anti-Counterfeiting Trade Agreement (ACTA), the Trade in Services Agreement (TISA), the Trans-Pacific Partnership Agreement (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).

Country participation can be defined by geographic region, such as in TTIP and the TPP, both of which will touch upon a wide range of policy issues. However, they can also transcend geographic area when countries coalesce around a more narrow policy objective, such as in ACTA (on IP enforcement) and TISA (on trade in services). Despite their differences in structure, both types are as unjust in their construction as they are in their content.

The first problem is procedural: the extent to which these trade negotiations are secretive and closed-off to the public on the one hand, and on the other, how receptive trade delegates are to the interests of politically influential industries. Governments have almost always championed their dominant domestic industries' concerns in trade agreements. This leads all other policy objectives—such as the protection of human rights, enabling public access to culture and knowledge, and upholding autonomy of individuals' rights over their own digital devices—to be left by the wayside.

For instance, the TPP's draft text was kept classified for the full five-plus years of negotiations and the final full draft was only released once the deliberations were over. That left civil society and the public to rely on leaked, unofficial portions of the agreement to analyze and advocate to policymakers regarding their consequences and negative effects.

There have been some efforts to increase transparency and public participation in these processes. The European Commission, for example, releases the EU's negotiating texts on an online portal and gives members of the European Parliament access to all TTIP drafts. This was a significant step towards creating sufficient transparency in these ongoing negotiations.

However, these initiatives can often end up as more of a superficial gesture towards public oversight rather than enabling it in practice. The Office of the U.S. Trade Representative (USTR) for example, created Trade Advisory Committees whose members are given access

to view and comment on live drafts of its various trade agreements under the condition that they take an oath of confidentiality. Due to this requirement, they are now largely composed of industry representatives. As part of their primary mission to share information with the public, civil society organizations have been unable to accept these confidentiality conditions and have therefore refused to take up membership. This differs from the much more clear participatory process in domestic rule making.

The second problem is the expansion of the scope of trade agreements into regulatory, arguably non-trade-related, issues. Although this trend dates at least to 1974 when the U.S. Congress first instituted Fast Track authority, it has accelerated and expanded since then. Due to the exclusionary negotiation process mentioned above, the determination of what policy areas these agreements end up incorporating is obscure, nor does the inclusion of these new issues undergo any public comment or review process.

This has meant that these recent plurilateral trade agreements have increasingly entered the domain of Internet governance, touching upon issues ranging from intermediary liability to data protection. We will go further into depth on the scope of issues covered by these deals below.

3. Internet-related public policy issues

3.1. In trade negotiations

The trade agreement to first regulate the digital policy realm most explicitly was TRIPS. Its passage in the mid-1990's opened the floodgates to trade negotiations that sought to establish binding international rules on the online enforcement of copyright, including the WIPO Internet Treaties (namely the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) a few years later, and a deluge of bilateral trade agreements.

At first it was mainly the United States that advocated for the most stringent rules with its negotiating partners, which always went beyond existing obligations under TRIPS and WIPO. But most of the core enforcement mechanisms took on a life of their own and the Digital Millennium Copyright Act (DMCA)—the United States' WIPO+ implementation of the WIPO Copyright Treaty—began to look more and more like a template for copyright enforcement worldwide.

Trade agreements have continued to expand their regulatory scope into more Internet-related issues beyond the realm of copyright enforcement. Below is an overview of some of the topics that trade agreement have regulated under the pretense of liberalizing trade in digital goods.

- **Intermediary Liability:** This governs the legal liability of Internet Service Providers (ISPs) and online platforms for their users' communications. Trade agreements most conspicuously regulate this area in obligating signatory countries to provide legal incentives for ISPs to privately enforce copyright protection rules. The U.S. derived

DMCA notice-and-takedown system is most prevalent in trade agreements, despite how readily it is used to silence legitimate online speech.

- Technological Protection Measures (TPMs): Such rules oblige signatory countries to enact laws banning circumvention of digital locks (AKA digital rights management [DRM]) and treat violation of those provisions as a separate offense even when no copyright infringement is involved. In practice, these [anti-circumvention rules have been used to stifle a wide array of legitimate activities](#). This language first appeared in the WIPO Internet Treaties. The U.S. implementation of the Treaties in the DMCA led to a more restrictive unlocking ban, which in turn, largely became the template for such language in bilateral and plurilateral trade agreements ever since.
- Exceptions and Limitations to Copyright: These are public rights to use, transform, and re-appropriate copyrighted content for new and varied purposes that fall outside the exclusive rights that the copyright holder has over their work. Every international copyright agreement since the Berne Convention has included some form of an exceptions and limitations regime. The permissible uses can be specific (such as fair dealing) or more broadly defined (fair use). The question of what is or is not a legal use under the applicable exceptions and limitations framework has grown complicated and ever more critical since the existence of the Internet.
- Criminal and Civil Copyright Enforcement: Rules mandating heavy penalties for copyright infringement, especially when it is not even financially-motivated, can chill speech and innovation online. Commercial-scale copyright infringement was criminalized in TRIPS (Article 61), but subsequent agreements have broadened the scope of criminality to include infringements that were not conducted for profit. These have obligated countries to enact laws to penalize file-sharers, for example, with prison time or steep fines. Civil remedies have also been increased, with signatories being required to make available financial damages that can far exceed the actual damage an infringer has caused to the rightsholder.
- Copyright Terms: Such rules set the length of rightsholders' exclusive rights over creative content. The first specification of minimum copyright terms in a multilateral trade agreement was in the North American Free Trade Agreement (NAFTA), which narrowly preceded TRIPS. It now appears in almost every bilateral and plurilateral trade agreement that has been negotiated since. Although the standard length set by the Berne Convention in 1886 is life of the author plus 50 years, recent trade agreements have set the minimum length at life of the author plus 70 years—despite opposition to these additional 20 years from law professors, tech companies, non-profits, authors' associations and users.
- Trade Secrets: These are obligations for signatories to penalize the disclosure, access, or misappropriation of confidential, proprietary information. Although such rules appear in TRIPS and are not specific to the Internet, more recent trade agreements such as the TPP impose broader liability and higher penalties for infringements committed through a computer system. For example, unlike TRIPS, the

TPP requires even the unauthorized access of proprietary information to be penalized, even if such information is not disclosed or misused.

- **Free Flow of Data:** These are provisions that are designed to subvert data localization laws such as rules that require data on citizens to be stored and processed on servers located in their own country. On the one hand, these can prevent countries from distorting Internet traffic flows and imposing unnecessary costs on platform operators—so they do have the potential to protect free expression and access to information on the Internet. On the other hand, these same rules could be used to undermine consumer protections for personal data. For example, these kinds of provisions could be used to unravel national efforts to pass legal requirements around how companies handle citizens' sensitive medical data. The same rules could also entrench the oligopoly power of US owned big Internet platforms.
- **Net Neutrality:** These provisions—which regulate how ISPs treat the data that travels over their networks and whether they are prohibited from discriminating in favor of particular apps, sites, or services—have only just begun to appear in trade agreements, such as in TISA. The net neutrality language has however so far been too weak to meaningfully protect uphold net neutrality. This could serve to defer signatory countries from taking more meaningful action to preserve the open Internet, through a more inclusive multilateral or multi-stakeholder process.
- **Ban on Source Code Auditing:** These are provisions prohibiting countries from mandating open source or code audits of software originating from another signatory country. This could prevent companies from supplying source code to enable security researchers to quickly uncover and eliminate vulnerabilities in their devices. Such rules could also prohibit any requirement that code be submitted for private review by regulatory authorities, such as a health and safety watchdog or consumer protection agency.
- **Cybersecurity and Cryptography:** We have also observed the relatively recent appearance of rules that prohibits signatory governments from mandating companies to disclose or transfer details of the cryptographic technology used in their products, as a condition of manufacturing, selling, or distributing them in their country. Such rules have been characterized as preventing state authorities from requiring a supplier of cryptographic software to provide it with a backdoor or “golden key.” However, these prohibitions have come riddled with loopholes that in practice would not discourage countries from mandating cryptographic backdoors. In the TPP for example, it is followed by an exception whereby a service provider that uses encryption can still be required to provide unencrypted communications to law enforcement agencies pursuant to “legal procedures.”
- **Domain Name Rules:** There is already a well established and highly complex multi-stakeholder international organization for developing global Internet domain name policy—the [Internet Corporation for Assigned Names and Numbers](#) (ICANN)—and similar organizations are replicated at the national level for managing country-code domains. Nonetheless, the TPP marks the first time when these

multi-stakeholder processes have been superseded by multilateral negotiations that lay down rules on domain name dispute resolution and access to the private data of domain name registrants.

This is not to say that all of the above rules are necessarily substantively negative. For example, Aaronson (2016) argues that the provisions on free flow of data, as well as the chapters on Regulatory Coherence and Transparency, could in fact have positive spillovers for Internet governance (whilst she observes shortcomings elsewhere, as in the scope of the Services chapter (pp.13-14)). Nevertheless, regardless of their uneven substantive merits, the procedural deficits of these trade negotiations mean that they do not benefit from the review of a broad range of affected interest groups, reducing their quality and rendering them susceptible to capture.

3.2. Other venues for these issues

Most of the Internet-related public policy issues described above already have more appropriate institutional homes, and in some cases a multiplicity of them. Several mapping projects exist to identify these homes:

- In 2013 a Working Group on Enhanced Cooperation of the [Commission on Science and Technology for Development](#) (CSTD) produced a spreadsheet that mapped 24 issue areas (consolidated from an original list of 200!) and the institutions and processes already dealing with them.
- The [NETmundial Solutions Map](#) is a tool to support information sharing and collaboration across Internet governance issues. As such, it is designed to facilitate a “distributed Internet governance ecosystem that can propel the Internet as a shared, neutral, and global resource for human solidarity and economic progress.”
- The [Global Internet Policy Observatory](#) aims to provide an easy-to-use tool that empowers any user to find, display, share and debate about information and documents automatically gathered for a wide set of Internet governance topics.
- The [Mapping the Internet project](#) aims to create an all-round and common understanding of the many and varied economic, social, legal and ethical aspects of the recent developments on the Internet, and their consequences for the individual and society at large.
- The Association for Progressive Communications has [produced a series of visual aids](#) mapping Internet related public policy issues and the actors responsible for governing them.

At the United Nations level, there exists a [Chief Executives Board for Coordination](#) that can serve the purpose of coordinating the work of UN and partner bodies (such as the WTO), to improve coherence and reduce duplication. This does not however currently extend to multi-stakeholder bodies, and rather notably does not include the Internet Governance Forum (IGF) as a member.

Amongst the mandates of the IGF itself are to “facilitate discourse between bodies dealing with different cross-cutting international public policies regarding the Internet and discuss issues that do not fall within the scope of any existing body” as well as to “interface with

appropriate intergovernmental organizations and other institutions on matters under their purview”, but these mandates have not been executed particularly well to date.

This deficit has been one of the factors stimulating the emergence of alternative coordinating mechanisms for Internet-related public policy issues. Most notable amongst these is the [NETmundial Initiative](#), which, as further explained below, aims to provide a platform that helps catalyze practical cooperation between all stakeholders in order to address Internet issues and advance the implementation of the NETmundial Principles and Roadmap.

4. Multi-stakeholder process norms

4.1. Internet governance principles

In stark contrast to the international trade regime, there are strong procedural norms of transparency and public participation in the parallel regime of Internet governance (coupled with somewhat less strong, but still evolving, sets of practices). To the extent that these two regimes overlap, there is an obvious disconnect that civil society actors could exploit for the reform of opaque and exclusive trade negotiation processes. This insight served as the initial rationale for this meeting.

A concise aspirational statement of these process norms is found in the [NETmundial Multistakeholder Statement](#), which was concluded in April 2014 and has since been incorporated by reference into a number of multilateral resolutions and recommendations. It relevantly provides:

The development of international Internet-related public policies and Internet governance arrangements should enable the full and balanced participation of all stakeholders from around the globe, and made by consensus, to the extent possible. ... Decisions made must be easy to understand, processes must be clearly documented and follow agreed procedures, and procedures must be developed and agreed upon through multistakeholder processes.

As explained above, the mode of negotiation of trade agreements such as the TPP, TTIP and TISA can be seen to be facially incompatible with these criteria.

Multi-stakeholder Internet governance also enjoys bipartisan U.S. government support, as recently affirmed in [Bill HR 1580](#) (“Bill to affirm the policy of the United States regarding Internet governance), which provides “It is the policy of the United States to preserve and advance the successful multistakeholder model that governs the Internet.”

Similarly, the [OECD Principles for Internet Policy Making](#) acknowledge that “the multi-stakeholder environment has underpinned the process of Internet governance” and recommend that “governments should also work within a multi-stakeholder process to achieve international public policy goals”.

Likewise, the Council of Europe adopted in 2011 a [Declaration by the Committee of Ministers on Internet governance principles](#) providing “The development of international

Internet-related public policies and Internet governance arrangements should enable full and equal participation of all stakeholders from all countries.”

Most recently a [2015 UNESCO conference](#) emphasized the importance of “ensuring that Internet policy and regulation involves the participation of all stakeholders, and integrates international human rights and gender equality.”

4.2. Internet governance institutions

The development of these principles is the culmination of a decades-long process, an early highlight of which was the World Summit on the Information Society (WSIS), a large scale United Nations summit meeting, attended by 175 governments and over 12,000 participants, which resulted in the development of several agreements. These agreements, most relevantly the Tunis Agenda on the Information Society, established the principle that “international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organisations,” and also established the [Internet Governance Forum](#) (IGF).

The Tunis Agenda states that the IGF should be multilateral, multi-stakeholder, democratic and transparent in its working and function, with a lightweight and decentralised structure that is subject to periodic review. It is not to replace other relevant fora in which Internet governance issues are discussed or to exercise oversight over them or have any binding decision making power. In particular, it is to have no involvement in day-to-day or technical operations of the Internet, but should work in parallel with those organisations that do, taking advantage of their expertise.

This mention of organisations involved in the technical operation of the Internet is principally a reference to ICANN, which at around the same time also began to describe itself as a body founded on principles of multi-stakeholder participation. Although its mandate does not extend to most of the Internet public policy issues covered in trade agreements, ICANN’s processes are, indeed, exceptionally transparent and open in comparison to any of the other bodies discussed here.

With technical bodies such as ICANN as an exception, it can be observed that the more empowered an Internet governance body is, the less participatory it tends to be. Thus the IGF is highly participatory, but the linkage between its work and formal public policy development processes is very weak; and suggestions have frequently been made (most recently at the [WSIS+10 high-level meeting](#) in December 2015) that it needs to improve its working modalities. Conversely, bodies such as the [International Telecommunications Union](#) (ITU) are empowered to make hard law such as treaties, but they are far less open to civil society participation than the IGF.

Thus Internet governance processes are not created equal, and it would not be to civil society’s benefit if Internet-related public policy issues were shifted from closed trade negotiation processes to alternatives that were more multi-stakeholder in name, but were no more inclusive or participatory in practice. To this end, a set of criteria for distinguishing

multi-stakeholder processes that meaningfully promote stakeholder inclusion from those that do not has been proposed (Malcolm, 2015b):

- The body should have access to the perspectives of all those with significant interests in a policy problem or its possible solutions.
- There must be mechanisms to balance the power of stakeholders to facilitate them reaching a consensus on policies that are in the public interest.
- Mechanisms of accountability must exist between the body and its stakeholders to demonstrate the legitimacy of their authority and participation respectively.
- For each stage involved in governance, the body should either be directly empowered to execute it, or linked to external institutions that have the authority to do so, as appropriate.

Although there is a growing literature and practice of multi-stakeholder models of Internet governance, less work has been done in relating these multi-stakeholder process norms to the trade regime; and this is one of the lacunae that this meeting intends to help address. Perhaps the closest attempt at extending multi-stakeholder norms to the trade regime, although not explicitly drawing that link, is the Max Planck institute's [Principles for Intellectual Property Provisions in Bilateral and Regional Agreements](#), which provide, amongst other relevant provisions:

The negotiations should be conducted, as far as their nature makes it possible, in an open and transparent manner. They should allow for participation by all stakeholders in the negotiating countries that are potentially affected by the agreement in an open and non-discriminatory manner. In particular, right-holder and industry groups should not enjoy preferential treatment over other stakeholders.

5. Possible global institutional homes for work on opening trade negotiations

As noted above, it is posited that it lies beyond the competence of civil society and academic actors alone to accomplish significant improvement of trade negotiation practices, or to shift Internet public policy issues from trade negotiations to more open and participatory venues. An assumption that we hold in convening this meeting is that enlisting the support of one or more influential global institutions will be a vital precondition of achieving the desired change. Here we outline relevant attributes of a few such candidate institutions. This list is not exclusive.

5.1. Open Government Partnership

The Open Government Partnership (OGP) is a multilateral body through which member governments make periodic public commitments to improve their transparency and

openness. Civil society takes a role in shaping these commitments and in reviewing the independent assessment of states' compliance.

51 countries are due to submit new OGP National Action Plans by the end of June 2016. This represents a major opportunity for civil society organisations around the world to advocate for ambitious open government reforms to be included in their country's plan. You can find the [list of countries making new plans here](#). You can also find the contact details of [national government OGP coordinators here](#).

The United States' [third and current National Action Plan](#) was already finalized in 2015, and representations were made by a civil society coalition (joined by meeting participants EFF and Susan Aaronson) to have [trade transparency included as a topic](#). This drew some support from the United States Office of Science and Technology Policy, but the commitments reflected in the NAP that the U.S. ultimately put forward [were very disappointing](#).

Because of the soft, voluntary nature of OGP commitments, and because it is very focused on national-level transparency, and not the transparency of multilateral processes, the OGP appears not be up to the task at hand—or at least, is only a part of the solution.

5.2. UN Commission on International Trade Law

UNCITRAL, the United Nations Commission on International Trade Law, is another intergovernmental body dealing with international trade in conjunction with the WTO. UNCITRAL's particular focus is on the modernisation and harmonisation of laws bearing on international business. Amongst the relevant issue areas on which UNCITRAL works are intellectual property and electronic commerce.

UNCITRAL developed a set of [Rules on Transparency in Treaty-based Investor-State Arbitration](#) and even a related [2014 Convention on the topic](#). On the surface, it seems plausible that this might lay the groundwork for an instrument on transparency in trade negotiations.

At the least, UNCITRAL does undertake work, such as studies and seminars, in conjunction with other international organizations, both governmental and non-governmental, such as the International Bar Association. Working with civil society to develop joint standards on trade negotiation processes is therefore worth exploring.

On the other hand, UNCITRAL does not have a background in norm setting for trade negotiations, so this would be breaking new ground.

5.3. UN Economic Commission for Europe

The United Nations Economic Commission for Europe (UNECE) is home of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

The parties to the Aarhus Convention are over 40 European and Central Asian members of the UNECE, including the European Union. The United States, although a member of the

UNECE, is not a party to the Convention. It did however attend the first conference of the parties in 1992 to voice its exception to the significant role that the Convention accorded to NGOs, stating that it would “not regard this regime as precedent”.

That said, the Convention is indeed somewhat remarkable. Whereas most international agreements grant rights only to states, the Aarhus Convention provides significant rights to the public, including:

- The right to access environmental information (Article 4), coupled with a duty upon each party to collect and disseminate such information (Article 5).
- The right to public participation in decisions with environmental impact:
 - relating to specific environmentally-sensitive activities such as mineral extraction or refinement (Article 6);
 - concerning plans, programmes and policies relating to the environment (Article 7); and
 - during the preparation of executive regulations and/or generally applicable legally binding normative instruments (Article 8).
- Access to justice -- that is, to independent review of a party's decisions (Article 9).

In the case of non-compliance by a state party, any member of the public may make a communication about this to the Convention's Compliance Committee, which will make a recommendation on the merits of the case to a full Meeting of the Parties. Meetings of the Compliance Committee are completely open to the public, and NGOs are readily accredited to attend Meetings of the Parties.

We could liaise with the Committee on Economic Cooperation and Integration, which has a program to develop standards for Public-Private Partnerships. We could propose such a standard on public participation in Internet-related trade negotiations, and draw on the Aarhus Convention.

5.4. UN Conference on Trade and Development

The UN Conference on Trade and Development (UNCTAD) is the only development-focused UN body devoted to trade, and as such has often taken a more critical view of the global trading system and the merits of trade liberalization compared with the WTO and the Bretton Woods institutions (the World Bank and International Monetary Fund (IMF)).

This critical eye has extended to the Investor-State Dispute Settlement (ISDS) system. Reforms that are needed to the ISDS system [have been promoted](#) by the International Investment Agreements section of UNCTAD.

Although UNCTAD has not yet turned a similar critical eye to other practices in the global trading system such as the processes for negotiating agreements, it is possible that its International Investment Agreements Section could develop an inquiry to analyze trade negotiation practices and recommend improvements.

On the other hand, investment agreements are a narrower class of agreement than the trade agreements in which Internet-related public policy issues are found, and there will be resistance to UNCTAD taking on work with a broader scope.

5.5. World Trade Organization

There is an obvious irony in considering the WTO, as one of the subjects of our critique of participation and transparency in trade negotiations, as a venue for further developing that critique. On the other hand, there are also reasons why we should not rule it out. Large scale plurilateral trade agreements are, after all, a threat to the completion of the WTO's Doha round. The WTO already can already claim certain advantages (such as transparency, as explained above) over these agreements. And not least of all, several of the powerful countries who have been excluded from these smaller scale agreements [have voiced their criticisms](#) of the same at the WTO.

Therefore we might investigate the possible merits of forming an informal (and eventually, perhaps, formal) plurilateral WTO conference or working group on best practices in trade negotiation, hosted by countries critical of the shift away from multilateral trade negotiations to more exclusive regional arrangements.

On the other hand, apart from the other challenges to this approach already mentioned, many of the countries excluded from the large scale regional agreements are hardly bastions of transparency and civic engagement at the domestic level, and therefore may be unlikely to support very ambitious standards.

5.6. International Trade Centre

The [International Trade Centre](#) (ITC) is the joint agency of the World Trade Organization and the United Nations. Its aim is for businesses in developing countries to become more competitive in global markets, speeding economic development and contributing to the achievement of the United Nations Global Goals for sustainable development.

ITC is a key part of Geneva's trade institutions; unlike the negotiating fora they focus on helping use the existing trade rules to facilitate SMEs exporting from developing countries. Since SMEs are universally popular their work and ideas get a lot of visibility. Despite this, it would certainly be a departure for the ITC to enter into developing recommendations on the mechanisms for trade negotiation.

5.7. NETmundial Initiative

The NETmundial Initiative is an attempt at creating a multi-stakeholder community to collaboratively develop operational solutions to Internet-related problems, anchored in a set of broadly agreed principles.

Given the focus of this meeting on drawing upon Internet governance process principles to improve the way in which Internet-related issues are dealt with in trade negotiations, it would be quite a good fit to form a coalition under the auspices of the NETmundial Initiative, which could, for example, write a whitepaper containing recommendations for reform of the trade negotiation system in its Internet-related aspects.

On the positive side, this would be fairly easy to do as NETmundial Initiative is already multi-stakeholder and its activities are self-organised through an [open collaboration platform](#). On the down-side, the Initiative remains young and relatively unknown. Therefore, in

contrast to better established organizations such as the WTO, the quality of the partners who participate in its activities will determine how cogent the outputs of those activities become.

5.8. Freedom Online Coalition

The Freedom Online Coalition is an intergovernmental coalition of 29 members, that also contains a platform for multistakeholder engagement. It works on trying to develop and disseminate norms for the rule of law online.

None of its existing three working groups is quite appropriate for work on trade negotiations, although notably its existing working group “Privacy and Transparency Online” does focus on transparency—however, this is transparency of information & communications technology (ICT) companies, rather than of governmental negotiations.

However, there may be scope to advocate for the formation of a new multi-stakeholder working group under the auspices of the Freedom Online Coalition that would promote best practices for trade negotiations that cover Internet-related issues. This would accord with the Coalition’s Tallinn Agenda, which includes a commitment “to preserve and strengthen the multi-stakeholder model of internet governance and increased participation in multi-stakeholder fora, such as the Internet Governance Forum”.

5.9. World Intellectual Property Organization

The World Intellectual Property Organization (WIPO) is the intergovernmental organisation that administers the major global treaties on copyright and related rights (the Berne and Rome Conventions and the WIPO Internet Treaties) as well as on patents and trade marks (the Paris Convention). Like the WTO, it is in a sense threatened by the trend to develop WIPO+ global intellectual property norms in external trade negotiations.

WIPO is an example of how, even in traditional multilateral fora for developing rules on Internet-related public policy issues, much higher standards of transparency and participation apply than those followed in trade negotiations. For example, at WIPO meetings both official documents and negotiating texts are distributed to the public, and non-governmental organizations are readily accredited to attend and speak at negotiating sessions.

This may provide an opportunity for WIPO to develop its own critique of trade negotiation processes that deal with intellectual property issues, and to build upon its own processes as an example of how these issues should be dealt with more inclusively and transparently. A first step could be a joint meeting held on the sidelines of an upcoming WIPO meeting, held by civil society organizations in partnership with interested governments and other stakeholders.

On the other hand, WIPO has no competence to talk about the development of norms on global Internet-related public policy issues more broadly.

6. Possible outcomes

6.1. Ideas from preparatory meetings

The following 50 ideas were generated by the participants at a series of two preparatory sessions for this meeting, at which a similar (but abbreviated) Idea Rating Sheets methodology was employed. The first of these sessions took place at a meeting of the Best Bits civil society network ahead of the 2015 Internet Governance Forum in João Pessoa, Brazil on November 8. The second was a workshop at the 2015 Global Congress on Intellectual Property and the Public Interest held in New Delhi on December 15. Each was attended by about 30 participants, who arranged their own attendance.

The table below is just a summary of the full data set which is [available online](#) (anonymized). The summary does not give a full picture of the results; in particular, the number of respondents who expressed their views on each idea is not shown (the maximum was 20, but some received fewer responses), the granularity of support for each idea has been collapsed from six levels in the original data set into two, and no comments that identify strengths, opportunities, weaknesses and threats associated with each idea are shown. These comments are available in the resource linked above and also in the original paper and online forms, which are available on request.

The same 50 ideas are sorted in two parallel columns: by those that received the most strong support or support, and those that received the most strong opposition or opposition. These do not necessarily total to 100% because neutral opinions, and confusion, are not indicated. The “hottest” (most supported) and “coldest” (most opposed) ideas are also highlighted by color, for convenience. The data are not statistically relevant, but simply indicate possible fruitful ideas for further consideration, as identified by the experts who attended each preparatory meeting.

Ranked by agreement		Ranked by disagreement	
Independent human rights impact report assessing trade agreements	100.00%	Limit Best Bits to a platform for idea-sharing and coalition building	61.11%
Create IGF proposal for Internet trade agreement best practices	100.00%	Trade deals should be negotiated by trade unions and not by businesses with government complicity.	44.44%
A. Release negotiation texts. B. Comments from civil society. C. Analysed by a society body with equal representation from developed & developing nations	100.00%	WTO develops standard on trade transparency and participation	36.36%

Turn (academic) papers into actions	100.00%	We need to develop corporate partners	33.33%
A WIPO treaty to ban the inclusion of IP in multilateral commercial agreements	100.00%	NETmundial Initiative maps Internet governance issues to rule which ones are inappropriate for trade agreements.	25.00%
Develop different narratives for different audiences: eg. emphasize how TPP is the opposite of free trade, it's a massive set of detailed regulations that stifle trade	100.00%	We need a way to determine whether we support free and open trade without borders or protection for trade unions and national workers.	20.00%
1. Map who supervises the key negotiators that need to be engaged with. 2. Ensure we keep investing in face time. 3. Quicker and more press + visual info. 4. Map & engage with e-commerce & startup players in emerging nations	100.00%	TPP should be canned because of total lack of transparency. Period.	18.18%
Public awareness raising	100.00%	Fund Wikileaks-style whistleblower site for trade	17.65%
Form a Dynamic Coalition on International Trade Law and Internet Governance, session @ IGF 2016	94.44%	Perfect the lobbying skills and reach out to the key decision makers for a win-win!	16.67%
Mapping of trade and related spaces - disseminate widely	90.00%	Emphasize "TPP: Made in America" and "TPP lets US write the rules" arguments to embarrass all other governments	16.67%
Increase the knowledge of the Internet governance community regarding trade agreements	89.47%	Do not trade lives – negotiate effectively for access to medicine	16.67%
Create a clickable dynamic map where trade negotiations are going on that local "direct action" campaigns can learn about and target	88.89%	Multi-stakeholder involvement in trade agreements	14.29%

Exposure and analysis of past and recent processes (better understanding gained)	88.89%	Create a template report card mechanism that can shame corporations. Doing trade deal - share in shareholder meetings.	5.88%
Inform MPs individually about treaties before they hear about them through their official channels. (Use extra-early leaks to your aid. First one is listened to a lot.)	88.89%	Develop methodology to prioritise engagements in Internet governance processes	5.88%
Advocate funders form dedicated fund for diverse civil society participation	88.89%	Form a Dynamic Coalition on International Trade Law and Internet Governance, session @ IGF 2016	5.56%
Public debates based on leaked negotiating positions.	85.00%	Freedom Online Coalition 3rd Working Group makes resolution on trade transparency.	5.26%
Connect scholars in the field of global economic governance with activists of Internet governance and foster the sharing of knowledge in this subject.	84.21%	Target each country to break ranks on secrecy, demand more publicity. eg. Parliament members should get full access.	0.00%
Travel fund for policy experts to "stalk" trade negotiators and participate in relevant policy-making fora (WIPO, etc)	83.33%	Connect scholars in the field of global economic governance with activists of Internet governance and foster the sharing of knowledge in this subject.	0.00%
WIPO as a case study in how a multilateral agency is transformed from a closed [to an open one]	83.33%	Public debates based on leaked negotiating positions.	0.00%
Emphasize "TPP: Made in America" and "TPP lets US write the rules" arguments to embarrass all other governments	83.33%	Increase the knowledge of the Internet governance community regarding trade agreements	0.00%
Best bet is for civil society to get	83.33%	Seek to leverage congressional	0.00%

key countries to change consultation process		commitment to multi-stakeholder processes vis-a-vis trade	
Create a template report card mechanism that can shame corporations. Doing trade deal - share in shareholder meetings.	82.35%	Create a clickable dynamic map where trade negotiations are going on that local "direct action" campaigns can learn about and target	0.00%
Have IGF collaborate with WTO to map Internet related provisions in WTO trade agreements	81.82%	Social media advocacy campaigns	0.00%
NETmundial Initiative maps Internet governance issues to rule which ones are inappropriate for trade agreements.	75.00%	Mapping of trade and related spaces - disseminate widely	0.00%
TPP should be canned because of total lack of transparency. Period.	72.73%	Exposure and analysis of past and recent processes (better understanding gained)	0.00%
Map current civil society participation to identify gaps	72.73%	Map current civil society participation to identify gaps	0.00%
Regional meetings on trade agreements	72.73%	Regional meetings on trade agreements	0.00%
Publish research done by groups inside Best Bits	72.73%	Publish research done by groups inside Best Bits	0.00%
Multi-stakeholder involvement in trade agreements	71.43%	Online talks by Best Bits members as outreach initiative	0.00%
Target each country to break ranks on secrecy, demand more publicity. eg. Parliament members should get full access.	68.42%	Use existing networks for collaboration	0.00%
We need to make transparent text and [open?] source technical assistance	66.67%	Turn (academic) papers into actions	0.00%
More democratic/transparent, more openness	66.67%	Inform MPs individually about treaties before they hear about them through their official	0.00%

		channels. (Use extra-early leaks to your aid. First one is listened to a lot.)	
Do not trade lives – negotiate effectively for access to medicine	66.67%	Create IGF proposal for Internet trade agreement best practices	0.00%
Social media advocacy campaigns	63.64%	Public awareness raising	0.00%
Use existing networks for collaboration	63.64%	Advocate funders form dedicated fund for diverse civil society participation	0.00%
Seek to leverage congressional commitment to multi-stakeholder processes vis-a-vis trade	61.11%	Create model language before trade	0.00%
Develop methodology to prioritise engagements in Internet governance processes	52.94%	Have IGF collaborate with WTO to map Internet related provisions in WTO trade agreements	0.00%
Freedom Online Coalition 3rd Working Group makes resolution on trade transparency.	52.63%	Independent human rights impact report assessing trade agreements	0.00%
Online talks by Best Bits members as outreach initiative	50.00%	A. Release negotiation texts. B. Comments from civil society. C. Analysed by a society body with equal representation from developed & developing nations	0.00%
Perfect the lobbying skills and reach out to the key decision makers for a win-win!	50.00%	Develop different narratives for different audiences: eg. emphasize how TPP is the opposite of free trade, it's a massive set of detailed regulations that stifle trade	0.00%
[Paraphrase of long idea:] Discuss and offer alternatives to challenges such as ISDS, such as investor-state mediation, that may [unclear] diverse opinion	50.00%	WIPO as a case study in how a multilateral agency is transformed from a closed [to an open one]	0.00%
We need to develop corporate	50.00%	1. Map who supervises the key	0.00%

partners		negotiators that need to be engaged with. 2. Ensure we keep investing in face time. 3. Quicker and more press + visual info. 4. Map & engage with e-commerce & startup players in emerging nations	
Stalking via crowdsourcing	33.33%	[Paraphrase of long idea:] Discuss and offer alternatives to challenges such as ISDS, such as investor-state mediation, that may [unclear] diverse opinion	0.00%
Fund Wikileaks-style whistleblower site for trade	29.41%	Build a corpus of “advocatus diaboli” arguments to shield against FUD and argument attacks in public/non-public discussions	0.00%
Build a corpus of “advocatus diaboli” arguments to shield against FUD and argument attacks in public/non-public discussions	28.57%	We need to make transparent text and [open?] source technical assistance	0.00%
WTO develops standard on trade transparency and participation	27.27%	More democratic/transparent, more openness	0.00%
Create model language before trade	25.00%	Stalking via crowdsourcing	0.00%
We need a way to determine whether we support free and open trade without borders or protection for trade unions and national workers.	20.00%	Travel fund for policy experts to “stalk” trade negotiators and participate in relevant policy-making for a (WIPO, etc)	0.00%
Limit Best Bits to a platform for idea-sharing and coalition building	16.67%	A WIPO treaty to ban the inclusion of IP in multilateral commercial agreements	0.00%
Trade deals should be negotiated by trade unions and not by businesses with government complicity.	5.56%	Best bet is for civil society to get key countries to change consultation process	0.00%

6.2. Questions to address

Here we identify several possible questions to serve as a basis for our discussions at the meeting. These are not exclusive.

- What kinds of mechanisms have trade policymaking spaces introduced to increase transparency or broader public participation? How have they failed or succeeded?
- How, and with what degree of success, did civil society push into other policymaking organisations outside of the global trade regime? Which of these experiences can be replicated or improved?
- What are the relevant differences between the Internet governance regime and the global trade regime that could inhibit the transposition of practices from the former to the latter? How could these differences be overcome?
- To the extent that Internet-related issues cannot be taken out of trade negotiations, how can we improve coherence between trade policies on these issues, and broader social policies on these issues advanced by other Internet governance institutions?

7. References

- Susan Ariel Aaronson (2015). [*Memo on "Strategies to Increase Public Trust and Accountability in US Trade Policymaking"*](#). Washington, DC: GWU.
- Susan Aaronson (2016). [*The Digital Trade Imbalance and Its Implications for Internet Governance*](#). *Global Commission on Internet Governance Paper Series* no. 25.
- Commission on Science and Technology for Development (2014). [*The mapping of international Internet public policy issues*](#). Geneva: UNCTAD.
- EFF (2015). [*U.S. Open Government Commitments Fail to Improve Trade Transparency*](#). San Francisco: EFF.
- EFF (2013). [*Unintended Consequences: Fifteen Years under the DMCA*](#). San Francisco: EFF.
- Sherly Haristya and Peng Hwa Ang (2015). [*Multistakeholderism and the Problem of Democratic Deficit*](#). Singapore: NUS.
- Jeremy Malcolm (2015a). [*Time to Reconsider Intellectual Property as a Trade Issue?*](#) San Francisco: EFF.
- Jeremy Malcolm (2015b). [*Criteria of meaningful stakeholder inclusion in internet governance*](#). *Internet Policy Review*, 4(4).

- Jeremy Malcolm (2010). [Public Interest Representation in Global IP Policy Institutions](#). *PIJIP Research Paper* no. 6. Washington, DC: American University Washington College of Law.
- [Principles for Intellectual Property Provisions in Bilateral and Regional Agreements](#) (2012). Max Planck Institute for Innovation and Competition.
- Mark Raymond and Laura DeNardis (2015). [Multistakeholderism: anatomy of an inchoate global institution](#). *International Theory*, 7, pp 572-616.
- Mark Raymond (2013). [Puncturing the Myth of the Internet as a Commons](#). *Georgetown Journal for International Affairs*, 5, pp 5-15.
- Jens Steffek and Claudia Kissling (2006). [Civil Society Participation in International Governance: The UN and the WTO Compared](#). *TranState Working Papers* no. 42. Bremen: University of Bremen.
- Raymundo Valdés and Maegan McCann (2014). [Intellectual Property Provisions in Regional Trade Agreements: Revision and Update](#). Geneva: WTO.
- Craig VanGrasstek (2013). [Relations with other organizations and civil society](#), in *The History and Future of the World Trade Organization*. Geneva: WTO, ch. 5, pp.151-197.
- Sacha Wunsch-Vincent and Arno Hold (2011). [Towards coherent rules for digital trade: Building on efforts in multilateral versus preferential trade negotiations](#). Working Paper No 2011/64. Geneva: NCCR.