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Secretary-General of the
International Telecommunication Union
Place des Nations – 1211 Geneva 20
Switzerland

São Paulo, November 3rd, 2012

Subject: *Brazilian Institute for Consumer Defense and Internet Society Brazil Chapter Contribution to the World Conference on International Communications – WCIT-12*

Dear Mr. Secretary-General,

It is our pleasure to present you the Brazilian Institute for Consumer Defense and Internet Society Brazil Chapter contribution to the World Conference on International Communications – WCIT-12. This contribution explores the review process of International Telecommunication Regulations (ITRs), which defines the general principles for the provision and operation of international telecommunications. As regards the **process itself**, this contribution aims to highlight some points concerning the access as well as the time to discuss to the presented proposals. Furthermore, from a **substantive standpoint**, this contribution expresses a couple of concerns related to the future of telecommunications and Internet governance. Before analyzing these aspects, the text quickly presents its authors.

The Brazilian Institute for Consumer Defense (*Instituto Brasileiro de Defesa do Consumidor* – IDEC) is a Brazilian non-profit consumer's organization, founded in 1987. It has no ties with any corporations, governmental entities or political parties. Idec's main objectives are to contribute to: the balance of market relationships; to the enforcement and enhancement of consumer's legislation; to promote a better quality of

life, especially regarding access to and quality of services and products; to improve the standards of sustainable consumption; and to strength democracy, by stimulating citizen awareness and participation. For Idec, the concept of consumer is not restricted to those who participate in the market, exercising their purchasing power, but also those who can not access to essential goods and services, because of their lack of purchasing power.

The Institute conducts studies and research, promotes campaigns, and mobilizes public opinion and pressures companies and governments in order to improve consumer relations in the country. It also participates in national and international forums that define public policies in the area of consumer relations. It publishes a monthly magazine, “Revista do Idec”, information on its website (www.idec.org.br) and numerous other publications. Furthermore, it presents and accompanies legal procedures to defend collective and diffuse interests of consumers in general and the Institute’s members. Idec is also directly involved with Internet Governance issues. One of its members is part of the Brazilian Internet Steering Committee (<http://www.cgi.br/>), as one of the four third sector representatives.

The monitoring and intervention activities conducted by Idec on a regular basis are part of a broader strategy for political intervention. The strategy aims to coordinate actions to pressure decision-makers, to defend and represent consumers’ rights and interests, to produce information, provide training, to intervene in the media, and to coordinate and mobilize the consumer movement. All of these activities are orientated by guidelines developed from research on each of these issues: food, health, public services (telecommunications, electricity and water and sanitation), Internet, access to knowledge, quality and safety of products and services, banking services, education on consumption. Sustainable consumption, international trade, corporate social responsibilities are cross cutting issues.

The Internet Society Brazil Chapter (hereinafter called ISOC Brasil) is a Brazilian nonprofit association created in 1998 and rejuvenated in 201-2012, and it is a recognized a chapter from Internet Society, a well-known civil society organization established since 1992 under the US laws of the federal state of Washington. Both entities share the common mission to assure the beneficial, open evolution of the global Internet and its related internetworking technologies through leadership in standards, issues and education. And it has the specific purposes such as: (i) provide reliable information for societal, educational, technical and political issues related to Internet; (ii) promote and lead educational and research projects related to Internet and internetworking; (iii) serve as a focal point for knowledge sharing and professional networking to ISOC members that lives in Brazil, fostering participation in areas important to the evolution of the Internet; (iv) to develop initiatives for expansion of broad community access and infrastructure development; among others.

PROCEDURAL REMARKS

As announced above, we will stress at first a couple of procedural remarks. And here we may point that these remarks concerns essentially the processes conducted both by the ITU at the international level and by Anatel, the Brazilian Regulation Authority, at

the national level.

Transparency and the commitment with a **multi-stakeholder participation** are two principles to guide the development of our Information Society. These principles are repeatedly mentioned on the Tunis Agenda¹ as in items (a) 29, where is stated that the “international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations”, (b) 61, where “a need to initiate, and reinforce, as appropriate, a transparent, democratic, and multilateral process, with the participation of governments, private sector, civil society and international organizations, in their respective roles” is affirmed, (c) 83, where “building an inclusive development-oriented Information Society will require unremitting multi-stakeholder effort” and (d) 96, where the signing parties “recall the importance of creating a trustworthy, transparent and non-discriminatory legal, regulatory and policy environment”. Moreover, the outcomes of the World Summit of the Information Society (WSIS) were endorsed by the General Assembly of the United Nations through Resolution 60/252², which implies that must these principles must be taken in due consideration under international law.

As Member States, ITU itself shall undertake the commitments of the WSIS, specially with regards to the World Conference on International Telecommunications, which – as presented by ITU – will consider a review of the International Telecommunication Regulations (ITRs), which are a global treaty and which aims to establish general principles relating to the provision and operation of international telecoms; to facilitate global interconnection and interoperability; to underpin harmonious development and efficient operation of technical facilities; to promote efficiency, usefulness, and availability of international telecommunication services, and which treaty-level provisions are required with respect to international telecommunication networks and services³. We are of opinion that given the magnitude and relevance of the conference that aims to officially rewrite the International Telecommunications Regulations, immediately followed by signatures of members States, and taking into account the previous WSIS commitments among which are transparency and multi-stakeholder participation, the above mentioned ITRs review process ought to be discussed much more broadly.

Inclusive, open and transparent debates on public issues are fundamental for our democracies; the earlier we start them, the better. And with regards to ITRs review process we are especially sensitive to the concerns already expressed by various civil society organizations in the letter sent to you the last May 17th:

“Yet there has been scant participation by civil society in the Council Working Group’s preparatory process for the WCIT so far, even as media reports indicate that some Member States have proposed amending the International Telecommunication Regulations to address issues that could impact the exercise of human rights in the digital age, including freedom of expression, access to information, and privacy rights. Under the current process, civil society participation is severely limited by restrictions on sharing of preparatory documents, high barriers for ITU membership (including cost), and lack of

¹ www.itu.int/wsis/docs2/tunis/off/6rev1.html.

² www.itu.int/wsis/docs/background/resolutions/60-252.pdf.

³ www.itu.int/en/wcit-12/Pages/overview.aspx.

mechanisms for remote participation in preparatory meetings”⁴.

We endorse these concerns since the paces taken in the review process at the international level have also clear consequences at the national level. And among these consequences, the most relevant is the insufficient time left to public discussion. The “Draft of the future ITRs” was made publicly accessible only on 11 July 2012⁵, what has left less than three months to acknowledge, reflect on and debate about the document and contribute to the process. Such a short delay gives no chance to promote open, inclusive debates among the multiple actors of telecommunication and Internet services, public authorities and civil society organizations. To this severe limitation we add that (a) the participation in the discussions in Brazil is strict to some few actors and the great majority of participants are representatives either of the regulation authority, either of the telecommunication companies⁶; (b) Anatel gave no particular publicity on the WCIT in Brazil; also, no emphasis to WCIT was given on the authority’s website and the access to the documents is not evident⁷; (c) two documents produced by the Brazilian regulation authority concerning the WCIT are not publicly available either on the ITU website⁸ or on the Anatel website⁹. From the point-of-view of Brazilian Freedom of Information Act this omission is illegal, from the point-of-view of the transparency principle guiding multilateral discussions the omission is simply unacceptable.

Transparency is a normative value that talks about being open and clear and is a remedy against obscurity and opacity. Moreover, transparency promotes greater awareness among citizens and institutions and it is a powerful instrument that comes with multi-stakeholder participation. In 2009, the Brazilian Internet Steering Committee¹⁰ (hereinafter known by the acronym in Portuguese – CGI.br) has issued the Resolution nº 003 in which are listed ten Internet Principles, and its second item clearly recommends, *ipsis litteris*:: “Democratic and collaborative governance – Internet governance must be exercised in a transparent, multilateral and democratic manner, with the participation of various sectors of society, thereby preserving and encouraging its character as a collective creation”¹¹.

ITRs review process undergoes significant limitations due to time scarcity to discuss proposals as well as to a lack of transparency. These limitations put at stake the very legitimacy of the process.

Directly related to transparency is also the need to engage civil society in ITU discussions and decision-making processes. This demand involves different kinds of

⁴ www.cdt.org/letter-for-civil-society-involvement-in-WCIT.

⁵ www.cdt.org/files/pdfs/WCIT_CDT.pdf

⁶ www.anatel.gov.br/Portal/verificaDocumentos/documento.asp?numeroPublicacao=283179&assuntoPublicacao=Ata%20da%206%AA%20Reuni%3o%20Plen%1ria,%2015%20de%20agosto,%20Quarta-feira&caminhoRel=In%EDcio-Biblioteca-Apresenta%E7%E3o&filtro=1&documentoPath=283179.pdf

⁷ Idem.

⁸ See items 59 and 60, with restrict access: www.itu.int/md/meetingdoc.asp?lang=en&parent=S12-CL-C&PageLB=50

⁹ www.anatel.gov.br/Portal/exibirPortalInternet.do.

¹⁰ www.cgi.br/english/index.htm.

¹¹ <http://www.cgi.br/english/regulations/resolution2009-003.htm>

organizations, including consumer protection entities. It should be emphasized that the claim of participation is not new and its few results have not yet been effected. A report submitted to ITU-T study groups as a guideline ETSI/OCG25 (05)18 stresses the need to involve consumer representative bodies in the negotiation process. Another strong reference to remind ITU about its own resolutions regarding consumer rights protection is Resolution 64 of World Telecommunication Development Conference (WTDC, 2010 Hyderabad), which stressed the need to involve consumer representative bodies in the negotiation process.

SUBSTANTIVE REMARKS

Such time scarcity leaves no room for a comprehensive, consequent, reflected analysis of the “Draft of the Future ITRS”. Nevertheless, we will point out a couple of foremost principles to our Information Society in general and to Brazil in particular.

In accordance to a key principle for any States to enter into international relations, the Sovereignty Principle, our Federal Constitution reinforces that the National Congress has exclusive competence to decide definitively on international treaties, agreements and acts (Article 49, I). This decision is oriented by constitutional principles and rules, since to be legally binding in Brazil international obligations must observe the Constitution. In other words this means that treaties, telecom ones included, must comply with the Constitution to be enforceable in Brazil. It worth noting that the Brazilian Constitution was adopted in October 5th 1988, three years after the end of a 21years period under military dictatorship. Also known as “Constituição Cidadã” (the “Constitution of Citizenship”), the Constitution is extensive in assuring rights and liberties, from which we highlight the strong **consumer protection** and a comprehensive ruling on the **economic activity**. For instance, its text previews: that the state shall provide, as set forth by law, for the defense of consumers (Article 5º, XXXII); that the Union, federal and state governments legislate on liability for damages and consumers (Article 24, VIII); the free competition principle (Article 170, IV); the reduction of regional and social differences principle (Article 170, VII) and that the law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits (Article 173, paragraph 4º). We could also add that as elsewhere telecommunications are under public utility regime (Article 21, XI) and law establishes its price regulation (Article 175, sole paragraph, III). These constitutional principles and rules are further developed in legislation such as the Consumers’ Protection Code of 1990 and the Antitrust Act of 1994.

Besides constitutional and legal principles and rules, non-binding although as mentioned earlier, key Internet governance principles were recommended by CGI.br’s, a genuine multi-stakeholder organization whose missions are to coordinate and integrate all Internet service initiatives in Brazil, as well as to promote technical quality, innovation and the dissemination of the services available. In addition to already mentioned the principle number two that has been already addressed in this letter, we could also highlight principles number 3, **universality** – “Internet access must be universal so that it becomes a tool for human and social development, thereby contributing to the formation of an inclusive and nondiscriminatory society, for the benefit of all”; 5, **innovation** –

“Internet governance must promote the continuous development and widespread dissemination of new technologies and models for access and use” and 6, **net neutrality** – “filtering or traffic privileges must meet ethical and technical criteria only, excluding any political, commercial, religious and cultural factors or any other form of discrimination or preferential treatment”.

ITRs draft proposes several changes, that if implemented would have substantial economic, legal and technical impacts. For instance, the controversial proposal number 116¹² raises multiple potential problems on the Internet. These problems include increasing the transaction costs and the digital divide between regions and creating barriers to newcomers. Besides, there are no safeguards to ensure that the revenue would be used for investment in infrastructure¹³. Glimpsing on Brazilian law, these outcomes would pose serious problems, especially with regards to consumer protection, economic law and the telecommunications regime in general and to universal access, pricing and the arbitrary increase of profits in particular.

Still regarding worrying and controversial contributions it is fundamental to mention the proposal number 110¹⁴. The intention of this proposal is to enable incremental revenues by end-to-end QoS pricing and content value pricing, allowing new interconnection policies based on the differentiation of the QoS parameters for specific services and types of traffic. Such differentiation would become part of the Internet ecosystem. The business model here advocated represents a severe attack on net neutrality, discourages network investment and harms the consumer. Contrary to what its advocates would have you believe, that does not mean more choice to consumers. It means rather the deepening inequalities between users and worsening the best effort delivery.

Potential issues are also concept-related such as the need of clearer distinctions between personal data, personal information and personal privacy. Furthermore the very framework of privacy and security deserves further discussion and developments. To mention just one example, ITRs are abundant in references to prevention and control of fraud but remains silent about responsibility of operating agencies in cases of data breach.

CONCLUSIONS

Governance in our Information Society has certainly changed the last years, and

¹² “Operating agencies shall endeavour to provide sufficient telecommunication facilities to meet the requirements of and demand for international telecommunication. For this purpose, and to ensure an adequate return on investment in high bandwidth infrastructures, operating agencies shall negotiate commercial agreements to achieve a sustainable system of fair compensation for telecommunications services and, where appropriate, respecting the principle of sending party network pays”.

¹³ Please find attached an analysis of the Brazilian Federal Prosecution Service on proposal 116: “NT n° 44/2012”, October 2011.

¹⁴ “Member States shall ensure that Operating Agencies cooperate in the establishment, operation and maintenance of the international network to provide satisfactory quality of service. Member States shall facilitate the development of international IP interconnections providing best effort delivery and end to end quality of service delivery”.

the paradigm of a overruling State has been placed by consensus-based binding agreements. Therefore, regulators must face the fact that in this informational, connected society, ruling is less and less unilateral. To recognize the importance of the multiple voices is to reflect a positive, inclusive attitude towards richer dialogues¹⁵.

Motivated not only by openness and transparency, but also by the protection of precious values in our Information Society in general and in Brazil in particular, we:

- urge ITU to extend ITR's review process in time, allowing more debate over the proposals in local, regional and global levels;
- recommend ITU to enlarge participation in the ITR's review process, which means to effectively receive contributions from a broad spectrum of public and private actors involved in Internet community, as well as to take into account during the whole process multiple interests and principles involved in the development of telecommunications; and
- strongly encourage *Anatel*, as the Brazilian representative in WCIT-12, not to assume obligations that may compromise with fundamental principles such as those related to consumer protection, to the economic order and to privacy, as well as those related to Internet universality, innovation and neutrality.

Yours sincerely,

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¹⁵ Here one important example to consider is certainly the Internet Governance Forum.