Why Internet Governance Remains an Important Issue

A formal definition of Internet governance appears in the 2005 report of the Working Group on Internet Governance (WGIG), established by the 2003 UN World Summit on the Information Society (WSIS).

Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.¹

The WGIG report proposed the creation of an Internet Governance Forum (IGF) which was established by WSIS in 2005. The stage was set to make Internet governance an internationally significant issue as governments began to realise the importance of the Internet to their societies. In parallel, many cyber activists oppose what they see as unwarranted and unwelcome pressure from governments on the issue. In reality, there has always been a multi-stakeholder assembly of interests in the Internet, whether it comes from user groups, programmers, Internet engineers, network operators, content providers, NGOs or governments. As Laura DeNardis, professor of Communications at the American University in Washington, points out:

When someone asks ‘who controls the Internet’ the question does not make any sense at all because there are so many points of control...The Internet has an efficient open governance system that incorporates valuable input from a broad range of participants. Everyone has a voice. Governance is distributed, decentralized and shared. The Internet is actually governed, but it’s not governance in the usual sense of how we view that term. It’s not necessarily about traditional nation-states.² (emphasis added)

As Prof. DeNardis poses it, the question now is how a transition will take place from the current governance model to “bring previously underrepresented voices to the governance table.” Internet governance covers a broad range of issues, and in a paper for the Centre for International Governance Innovation, Prof. DeNardis itemizes six themes.³

- Architecture-based intellectual property rights enforcement;
- Policies enacted by information intermediaries;
- Cyber security governance;
- Governance of routing and interconnection;
- Internet standards governance;
- Control of critical Internet resources

In a further paper, Dave Clemente cites “as noted by James Lewis (2012) ‘there are four centres of power in cyberspace - technical, economic, government and civil society. They

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² Why is Internet Governance so Important? https://openinternet.state.gov/internet-governance-important
don’t fit together very well.’.... the vast majority of states have historically given little thought to the governance of the Internet, content instead to implicitly or explicitly encourage greater digital connectivity.”

That is now changing.

A Year of Decision for Internet Governance

The current contract between the U.S. Department of Commerce (US DOC) and ICANN for the management of the Internet Assigned Numbers Authority (IANA) expires September 2015. The National Telecommunications and Information Administration (NTIA) acts as the responsible executive agency of the US DOC and a process is now underway for proposals “for the transition of the stewardship of the IANA functions from NTIA to the global multi-stakeholder community.”

A final agreement on the transition of stewardship of the IANA is not expected to be ready by September, but ICANN and the US DOC are at least aiming for a series of accountability mechanisms to be in place, notably for the generation of new names, but for all the executive decision-making processes. The Generic Names Supporting Organization (GNSO) has unanimously supported this idea. Overseeing the whole process is the IANA Stewardship Transition Coordinating Group (ICG).

Dozens of stakeholder groups have been submitting and discussing proposals for the future governance and procedures of IANA. The submission closing date was 15th January 2015 and at the time of writing the most favoured proposals have yet to be released. Simultaneously, ICANN chartered a cross-community working group to focus on recommendations to be agreed before, and those to be implemented after September. Crucial to the final outcomes will be close liaison with the Government Advisory Committee (GAC) as to the future role and procedures of engagement with ICANN. A number of states have expressed dissatisfaction with the current consultation process which they feel is too remote to allow them to have much influence.

State actors, the Internet and a post-Westphalian process

The lack of a governance process integrated into the Westphalian framework of international law and practice among nation-states has serious implications for authority, stability and legitimacy. Some of the tension in the transition of Internet governance arises as governments displace the informal communities that dominated Internet governance through a gradual extension of control through various states - none of this is immediate, drastic or balkanizing, but the long-term trend is clear. The contest between governments and incumbent non-state stakeholders, who will seek to preserve their existing influence and control, will shape how Internet governance is transformed.

The principle of Westphalian sovereignty is the sovereignty of states, the legal equality between states, and the non-intervention of one state in the internal affairs of another. It was enshrined in the Peace of Westphalia, signed in 1648 between the Dutch Republic, France, the Holy Roman Empire, Spain and Sweden to bring an end to the Thirty Years’ War in Europe. Neither the concept of democracy nor of human rights are included, both

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5 Alissa Cooper, Distinguished Engineer, ICG Chair (Jan 2015) ‘IANA Transition Planning Proceeding in Fine Internet Style’ [http://www.circleid.com/posts/20150120_iana_transition_planning_proceeding_in_fine_internet_style]

of which would be considered domestic issues for each state. This is the basis of what today is referred to as ‘political realism’.7

But it is widely considered unrealistic in an age of globalization, and especially in the age of the Internet. International trade, international security, cross-border flows of information, off-shore manufacturing and finance all require sovereign states to accept some degree of “post-Westphalian” jurisdiction. The model of post-Westphalian sovereignty is a voluntary agreement by states to give up some sovereignty, for example, to be bound by UN rules and procedures, sign up to the WTO and other international treaties, in order to achieve international stability and the rule of law and the freedoms of each state to pursue its own interests within that structure. In reality this is evidently only very partially achieved. The question for the future of Internet governance is can an ideal level of multi-stakeholder agreement be achieved that preserves both the interests of states that see the Internet increasingly as the core of their digital economies in which they claim a legitimate interest, and the many user community groups who cut across jurisdictions.

Among the issues raised at ICANN 51 in Los Angeles, were concerns from several countries about ICANN’s status as a corporation registered in California under U.S. jurisdiction. Besides issues of national prestige and politicization as in “who controls the Internet?” there are practical legal issues. Where disputes arise, for example over conditions that may apply to the use of top-level domains (TLDs, such as .com or .net), the jurisdiction is US law in US courts. For that reason, it has been suggested, by countries including Brazil and Indonesia, moving the registration of ICANN to a more “neutral” location, such as Geneva. Between the World Conference on International Telecommunications in 2012 (WCIT-12 in Dubai) and 2014 (WCIT-14 in Mexico) and reviews of its International Telecommunication Regulations (ITRs), the Geneva-based ITU, which is always on the lookout for ways to cross boundaries to keep itself relevant, was seriously considering altering its Constitution to include a remit for the Internet alongside telephony, but that idea, first raised a decade ago at WSIS, seems to have been abandoned, not least owing to considerable opposition from the USA and other open societies.

The Question of Legitimacy?

The issue of Internet governance has been on the global agenda at least since the 2003-2005 World Summit on the Information Society (WSIS) process, when countries including China, Russia and the Arab states pressed for a change. At that time, and at least until 2014, there was talk of a governance role for the ITU, widely regarded at the time as more of a political than a practical proposal - and a somewhat ironic one given the history of the Internet as working along very different principles: a difference that has been characterised in recent debates as the difference between a multilateral (with an emphasis on the role of states) and a multi-stakeholder approach. Nevertheless, many observers argue that the legitimacy of the current multi-stakeholder model is now in doubt, which paradoxically could be attributed to it having being so successful that is has outgrown its origins.

The current approach to Internet governance is politically untenable because it lacks legitimacy in the eyes of many new Internet users. Legitimacy is a central issue for Internet governance. The source of legitimacy in the existing governance model was technical expertise. This is now being displaced by political processes. While the current, informal multi-stakeholder model must be transformed, both

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7 “The main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power.” Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace, Fifth Edition, Revised, (New York: Alfred A. Knopf, 1978, pp. 4-15)

https://www.mtholyoke.edu/acad/intrel/morg6.htm
trade and political pressures could distort any outcome. What will replace these processes remain unclear, and there is real risk that any transition could lead to an Internet that is less free, less innovative and less valuable to the nations of the world.8

Back to Basics
While there is no escaping the high octane debates in the media, at international forums and in the community user groups, when the smoke clears there remain issues of fundamental practical importance for the efficient functioning of the Internet globally. And efficient functioning also encapsulates dispute resolution procedures as conflicts over property rights to names and addresses, for example, are inherent in any system of ownership.

International interest in the governance of the Internet has inevitably grown in parallel with the Internet itself, and in particular with the rise of social media and its impact upon society. But equally so because of cyber-security issues and increasing threats of cyber-terrorism and cyber-warfare - and in that sense, the politicization of the Internet is unavoidable. The trick now for ICANN is to disentangle the purely political issues, which are beyond the remit of ICANN, from the administrative issues. Whatever the politics of the Internet may be, every user needs a global Internet that works, irrespective of whether individual states decide to block it or degrade it for their own reasons. Needless to say, when the internet is blocked or degraded for political reasons, this does have an impact upon its global functioning with consequences for both business and civil society.

These concerns form the backdrop to the increasingly high-level of representation at meetings of the GAC. However, despite the political tensions, there are genuine issues of substance that states feel they need to be concerned about. Part of the problem for the GAC has been the appearance of strains between states that feel that up to date TLDs have been handled without sufficient regard to national interests. The following list borrows from a recent Bloomberg BNA paper.9

- **Country code TLDs** - most have now been reclaimed by governments after having been registered to private individuals. A popular one, for example, was .tv for Tuvalu that become worth a lot of money. Several African countries are waiting re-designation of their country codes with delays due to the “instrumentalities of their governments.”
- **Category 1 Safeguards** - some members of the GAC want much more stringent registration procedures for TLDs related to heavily regulated industries such as health care and law, requiring applicants to show their credentials rather than merely attest to them.
- **Geographical name protection** - for example, the Belgium city of Spa has objected to the creation of .spa as a gTLD and likewise governments along the Amazon river have opposed a push by Amazon.com to make .amazon a generic TLD (gTLD).
- **IGO/INGO name protection** - the GNSO has been working on giving International Governmental Organizations (IGOs) and International Non-Governmental Organizations (INGOs) curative rights to protect themselves against cyber squatters as they currently are excluded from the Uniform Dispute Resolution

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8 James A. Lewis (2013) ‘Internet Governance: Inevitable Transitions’ CIGI Internet Governance Paper No.4 - October 2013

http://www.bna.com/dns-policy-notes-b17179921944
Policy and Uniform Rapid Suspension processes, but this isn’t coming fast enough for some members of the GAC.

- **GNSO proxy server accreditation** - besides issues of administration, such as contact points and relay of complaints to customers, the most controversial issue is the level of details customers are required to reveal about themselves before accreditation, especially where IGOs and INGO domain names are involved. Current rules only require customer attestation. (Also see Category 1 Safeguards above)

- **Other gTLDs controversies** - there is an ongoing controversy over a failed application for the gTLD .gay, and the European Commission is strongly opposing ICANN’s support for .wine and .vin. As the number of gTLDs grows over coming years, the number of conflicts could well grow in tandem.

- **Underserved regions** - there is a debate whether Africa should be assigned more domain name registries or whether resellers can cater for the growing demand.

- **WHOIS issues** - a registry of assigned domain names is run by WHOIS and as the Bloomberg puts it, “the “GAC is also expected to seek earlier engagement in issues that naturally affect national sovereignty, such as WHOIS policy conflicts with national law.” Who runs the registry could become one of the most contentious issues going forward.

### Ways Forward

The Internet has come of age. The Internet economy already accounts for 3-4% of gross domestic product (GDP) in countries with good basic Internet connectivity, as estimated by McKinsey. From what idealists might regard as its sweet innocence of youth, the Internet developed a dark side in adolescence and today is as useful to criminals and terrorists as it is to ordinary citizens and businesses. It has also become the foundation for a much wider digital economy as it becomes part of the embedded infrastructure of every sector of a modern society. For these reasons, states of all complexions now stand up and take an interest.

The continued expansion of the Internet will involve the further issuing of TLDs. This is a property market in cyberspace, subject to speculation and disputes while at the same time being vital to investment, business and social welfare. While 2015 will see more TLDs being agreed for auction, there is also a chance that some existing TLDs will fold. As Michele Neylon, CEO of registrar Blacknight Solutions, says, quoted by Bloomberg, “A lot of the new TLD registries have spent a lot of money on this, so they obviously want to succeed, but they may be overly optimistic.” The auction process allows private companies to own and sell gTLDs, and as they grow in number there is also bound to be a growth in litigation and disputes around copyright, IPRs, unfair competition issues, deceptive trade practices, etc. These are in addition to the issues listed above, such as customer authentication procedures.

These are some of the nuts and bolts issues that affect all stakeholders and the user community. ICANN has set up two new regional hubs in Istanbul and Singapore to address them for their respective region, although it is still early days yet to know exactly their roles and levels of responsibility. Resolution of these issues need an impartial and politically-neutral process to handle them, and it is to be hoped that all state actors may come to recognize this.

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11 Dotgay LLC [http://dotgay.com/about/#section=Mission](http://dotgay.com/about/#section=Mission)

For solutions to the way forward, several options seem logically possible, if perhaps not probable. First, the NTIA/DOC accepts the transitional proposals and hands stewardship over to a multi-stakeholder community; second, stewardship is handed over to a new global body, possibly with UN oversight, as proposed by some GAC members; third, the existing contract is renewed, as is permitted in the current terms, and the whole process, not quite starting again, continues on. Between now and the summer of 2015 the debate continues, and it won’t stop even then.
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