

# **Comments of the Internet Governance Project**

15 August, 2005

The Internet Governance Project, a multi-university consortium of researchers on Internet policy and global governance, respectfully offers to the World Summit on the Information Society its comments on the Report of the UN Working Group.

The comments have two sections:

The first section is an overall discussion of the WGIG Report itself.

The second section examines one particular issue, that of the role of the US Government in ICANN and the DNS root.

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## Internet Governance: Quo Vadis?

### IGP's Response to the WGIG Report

The United Nations Working Group on Internet Governance (WGIG) has issued its report. After more than eight months of work, WGIG reached consensus on only a few key matters. It remains to be seen whether the report will give governmental, private sector and civil society actors the concepts and consensus needed to navigate successfully the negotiating sessions of the World Summit on the Information Society. The question to be asked now is: *quo vadis?* Where do we go from here?

The report succeeded in supplying a consensus definition of Internet governance, one which we found useful. It also succeeded in identifying a range of important public policy issues. On the key problems of defining roles and responsibilities of actors and proposals for action, however, the WGIG Report provides less clear guidance.

### The Proposals for Action

The most important thing, of course, is the report's proposals for action. The WGIG reached a clear consensus on the creation of a new multi-stakeholder forum to deal with Internet issues. As the report states:

40. [T]here would be merit in creating such a space for dialogue among all stakeholders. This space could address these issues, as well as emerging issues, that are cross-cutting and multi-dimensional and that either affect more than one institution, are not dealt with by any institution, or are not addressed in a coordinated manner.

The report does not provide much detail about the way such a "space" could be organized, other than that it should be open to all stakeholders and involve especially those from developing countries.

In its discussion of governmental oversight and the role of governments in the Internet, the report could not reach a clear consensus. It noted that:

50. There is a wide range of governance functions that could include audit, arbitration, co-ordination, policy setting, and regulation amongst others but not including involvement in day-to-day operational management of the Internet that does not impact on public policy issues.

The report did not propose a specific set of governance functions or a specific organizational model. Instead, it set out four different organizational models in a very brief outline format, none specifying particular governance techniques or functions. Looking at the four models, it is clear that there are really only two positions expressed. One, called Model 2, says that other than creating the new multi-stakeholder discussion

forum, not much needs to be done. The second, consisting of the other three models, says that in addition to the forum there needs to be some formal intergovernmental organization to centralize public authority over global Internet governance, although there are differences among the models in the details.

### **Roles and Responsibilities**

On the fundamental issue of roles and responsibilities, the report seems to have been guided by a consensus that “public policy” is the exclusive domain of governments. Most of the proposed institutional changes would, in accord with that philosophy, give government a “leading role” in defining and implementing public policy, often excluding civil society and the private sector from direct participation except as observers and advisors. In our opinion, however, this represents a false consensus, because the report does not advance an analysis of when Internet policy becomes “public” and how one can reliably separate such “public policy” matters from operational administration, technical standardization, resource allocation and assignment, or ordinary business and social activity on the Internet. As a decentralized network of networks, Internet policies often emerge through collective action by distributed, private actors. Moreover, on the Internet, policy issues are often intimately and inextricably related to technical and operational decisions.<sup>1</sup> As a result, the report’s unelaborated conception of the role of government makes it possible that any and every aspect of the Internet might be subject to direct intergovernmental intervention, to the exclusion of civil society and the private sector.

### **Where Are We Now?**

At this point, the question can fairly be asked, has WGIG brought us much further than we were at the end of WSIS I? An analysis of the report suggests that WGIG has indeed moved us further, but we must now be more analytical if we are to know where to go.

WGIG has moved us forward by clearly demonstrating that there are Internet governance problems that need to be addressed. This consensus provides a starting point. Though one could disagree on individual items, the WGIG report offers a convincing list of public policy issues that are either unaddressed by or uncoordinated across existing international regimes. In addition to that, it is clear that there is unfinished business with respect to ICANN’s supervision that must be addressed. The unilateralism of the US government in contracting with ICANN and monitoring changes in the DNS root zone file is not consistent with WSIS principles and is correctly criticized in the WGIG Report.

In terms of how to solve these problems, the report’s definition of Internet governance provides a useful starting point. The report says

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<sup>1</sup> A good example of the latter is ICANN’s authority to add top-level domains to the DNS root. It is not at all clear how the “public policy” aspects of a TLD award can be extracted from ICANN’s role of assigning technical resources. As an example, would the governments who criticize the <.xxx> decision as an incursion on their territory prefer that they evaluate and vet every TLD application directly? In that case, ICANN is redundant and governments would have to take over its functions completely. Or would they grant to themselves the right to change TLD awards, after the fact? In that case, the unpredictability we would probably get might be the worst of both worlds.

10. 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.

The term governance is appropriate. It is derived from the Latin word “gubernare” – the action of steering a ship” – and suggests a softer form of governance than the kind of government that takes place at the national level. At the global level many actors who are either sovereign or independent must be part of the steering process. Steering in that sense is agreeing on what rules of the road should be followed to avoid collisions and then letting all of the parties embark on the voyage.

Still, global governance must be based on authoritative agreements among governments. Authoritative agreements not only have to be legitimate, they have to be *justiciable*. In international law, justiciable agreements are those that are included in conventions -- legally-binding international treaties. Thus, if Internet governance is to be obtained, it must be treaty-based. And the treaties must have universal adherence to be fully effective.

We acknowledge the widespread reluctance of almost all parties in this process to take up the burden of a new international convention. We realize that everyone is looking for short cuts. We are convinced that short cuts don't really exist and won't work. They will simply defer the day of reckoning and prolong the current state of tension and lack of resolution of outstanding governance problems.

While some conventions already exist that affect isolated issues related to the Internet, like intellectual property, elements of telecommunications policy, organized crime or child pornography, there are currently none that affect the Internet as a channel or the management of Internet resources. And as the WGIG Report notes, treaties and regimes developed in specific areas may conflict with norms and principles that are important in other areas of governance.

## **Moving Forward**

The consensus notion of a multi-stakeholder forum suggests that further discussion, debate and negotiation should take place. This can build on the growing body of analysis that informed the WGIG work, but clearly must be given a greater sense of direction. *The forum, therefore, has to be seen as a preparatory element for something else.*

The three models suggesting new institutional frameworks based on new intergovernmental bodies are also premature. Until it is clear what the institutions are expected to do, and the necessity for doing it, consensus would be hard to obtain. In other words, without agreed principles and norms, there can be no agreement on rules, organizations and decision making procedures.

Yet, something must be done. The definition of Internet governance proposed by the WGIG suggests a sequence in which agreements must be made. First, there must be a definition of the principles and norms on which governance is to be based.

If the first stage is to agree authoritatively on principles and norms, the negotiation of a framework convention is clearly a reasonable, practical and feasible mechanism. Framework conventions in areas like climate change have allowed States, with the input of non-State actors, to reach agreements that will provide a legally-binding context for subsequent efforts to deal with issues. Negotiating a framework convention would provide a focus for policy analysis and discussion through a new multi-stakeholder forum – but would also provide a specific *objective* for the discussions.

Negotiation of international conventions can either take place within an existing institution, or if one cannot be agreed, can take place on an ad hoc basis reporting to a more general intergovernmental body like the United Nations General Assembly or the Economic and Social Council. Eventually, a convention would have to be adopted by the General Assembly – the only universal body whose competence covers all of the elements in Internet governance – prior to signature, ratification and entry-into-force. Secretariat support to the negotiations, including monitoring and facilitating the forum as part of the process, could be provided by an existing organizational unit, or by an ad hoc unit attached to an existing organization, much as was done with WGIG. This would keep the financial implications of the negotiation process to a minimum.

Once a framework convention has entered into force, its periodic meetings of States parties would constitute a general intergovernmental body in which issues could be resolved. This would provide intergovernmental oversight to the Internet without the creation of a more complex and definitive structure, unless, as rules and procedures were worked out in subsequent negotiations, a more formal institutional structure was found necessary at some future time.

So, this can provide an answer the question: Quo Vadis? Set in motion a time-limited process for negotiating a set of authoritative agreements that will determine the basic principles and norms for global Internet governance. Focus policy research, dialogue and negotiation on the process through a multi-stakeholder forum. Review the progress of the process on a regular basis, with the involvement of stakeholders. As problems that affect the security, stability and openness of the Internet develop whose solution cannot wait, build them into the process. Provide adequate secretariat support and use it to help focus and facilitate.

*This paper was drafted by John Mathiason and Milton Mueller*

## **The Future US Role in Internet Governance:**

### **7 Points in Response to the US Commerce Department's "Statement of Principles"**

#### Introduction

On June 30, 2005, the United States Department of Commerce National Telecommunications and Information Administration (NTIA) released the "US Statement of Principles on the Internet's Domain Name and Addressing System." The Internet Governance Project (IGP) has issued the following response to the NTIA's declaration.<sup>1</sup>

We applaud the attention Commerce Department officials are giving to this critical issue. The NTIA's declaration is welcome as a formalization of current US policy, in advance of the now-released report of the UN Working Group on Internet Governance. However, the debate has moved on, and so too must US policy. We make 7 points below in response to the "Statement of Principles" showing the direction we believe is in the interests of the United States and the world.

1. US policy, from the White Paper forward, has promoted internationalization of, and a leading role for non-state actors in, Domain Name System (DNS) governance.

Non-governmental internationalization of Internet administration was intended to keep the Internet's core coordinating functions free from national political rivalries and territorial jurisdiction. That choice promoted openness, accessibility and innovation, and also discouraged the fragmentation that might result from the assertion of national legislative authority. Accordingly, DNS management was privatized and internationalized through the Internet Corporation for Assigned Names and Numbers (ICANN), a 7 year-old nonprofit corporation headquartered in California. ICANN governs by means of private, globally applicable contracts and its decision making processes strive to represent civil society, business and the technical community, with consultation from governments. Both sides of the domestic political aisle supported this approach at the time.

We support the broad outlines of that policy, even if we have had vigorous disagreements with its implementation.<sup>2</sup> Globalized contractual governance, supported by transparent and objective governance processes, when implemented in a more democratic and politically balanced way, serves the interests of both US citizens and the global Internet

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<sup>1</sup> [http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples\\_06302005.htm](http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm) We note that five of the IGP's six partners are US citizens and resident in the United States.

<sup>2</sup> See the IGP paper, "What to Do About ICANN: A Proposal for Structural Reform," April 2005, <http://dcc.syr.edu/miscarticles/IGP-ICANNReform.pdf>

community. More open processes invite all stakeholders to participate while distributing power more evenly. By more narrowly focusing on technical coordination, the regime helps ensure that the vitally important security and reliability of the Internet is preserved. Freeing the Internet's resource allocation and assignment regimes from repressive political pressures was a design objective for these policy choices, one which we support.

## 2. The US Government's Current Role Contradicts its own 1998 White Paper

The US Government's exceptional role as unilateral contracting and oversight authority for ICANN, should it continue ad infinitum into the future, will directly contradict the two prongs of the 1998 White Paper policy (internationalization and privatization). Obviously, Internet governance is neither internationalized nor privatized if one national government arrogates to itself the exclusive authority to supervise ICANN, negotiate the terms of its contracts, and approve any changes in the root zone. The policy if unchanged also invites reciprocal actions by other states that may undermine the global compatibility of the Internet and the interests of users and suppliers in the United States.

## 3. The US Position is Unclear

Unfortunately, the US position on how it intends to handle the contradiction between its commitment to internationalization and privatization on the one hand, and its unilateral oversight role on the other, has never been made clear. Over the past seven years, the US government has issued inconsistent statements about its role, sometimes saying it would withdraw from DNS governance completely, at other times saying that it did not intend to give up its policy oversight over the root, and at other times indicating that it would withdraw after ICANN fulfilled the terms of its MoU. A clear path forward is not yet apparent from the "Declaration of Principles." At best, it merely reiterates the current situation; at worst it implies that it will continue forever.

We acknowledge that it is not usually best practice when playing poker to lay one's cards on the table before the hand is done. Likewise, in international negotiations we would not expect the United States to make unilateral concessions when the possible mechanisms for alternative arrangements and governance structures are only now beginning to come into focus. But the ambiguity in the US position makes it difficult for others to formulate their own positions. National interest dictates that the United States government should help lead the further evolution of global Internet governance to meet global needs for transparency, accountability and participation in decision making in a manner consistent with legitimate US policy objectives. We urge the US to forthrightly reaffirm its support for the principles of the 1998 White Paper, which include an expectation that internationalization and privatization should supersede top-down, unilateral governmental control, *including* control by the US government.

#### 4. ICANN Does Need Oversight – But Oversight Powers must be Internationalized, Limited and Lawful.

As a private yet global organization, with regulatory and "taxing" powers over the domain name supply industry and potentially expansive powers over the users of domain names, ICANN requires some legal supervision and accountability mechanisms. However, by "oversight" we do *not* mean arbitrary reviews, vetos or second-guessing by a council of governments. That kind of "oversight" of decisions emerging from ICANN's processes is more properly called "top-down interference," and risks subjecting DNS and IP address management to the vagaries of geopolitics unrelated to the efficient and fair administration of the Internet's unique identifiers.

We believe that governments, instead of asserting a right to arbitrary oversight, should agree on clear limits to ICANN's responsibilities and agree on means of enforcing those limits. True "oversight" means that well-defined, internationally agreed rules or judicial processes should provide recourse if ICANN abuses its authority or does not follow its own administrative procedures.<sup>3</sup>

Internationalizing this oversight function makes sense. No single government can be trusted to eliminate all considerations of national self-interest from its oversight role. To ensure a more neutral and less intrusive role for governments, it is essential that the oversight function be shared and collective.

#### 5. If Interpreted as a Prospective Statement, the NTIA "Statement of Principles" Undermines the Viability and Legitimacy of ICANN.

For years, the US federal government encouraged the perception that ICANN would become independent of the USG if it fulfilled the conditions of its MoU. The June 30<sup>th</sup> statement of the NTIA, while possibly merely reiterating the *status quo*, undermined that widely held expectation. By sending the world the message that ICANN will remain under the control of the US government exclusively (until when?) the Commerce Department's statement has undermined its own efforts to institutionalize a nongovernmental, globalized steward for the DNS. If this is merely a negotiating ploy, it could be taken as a sign of bad faith in the internationalized, multistakeholder processes that created the global Internet of today. If the US does not trust other governments to play a responsible, collective role in ICANN's oversight, why should other governments trust it and participate wholeheartedly in the ICANN regime?

#### 6. Continued US Unilateralism in Internet Governance Undermines the Long-term Stability of the Internet.

Of course the Internet grew up initially in the US and a few allied nations. But with over a billion users now, US citizens are a small minority of the networked world. It is

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<sup>3</sup> The Internet Governance Project has advocated negotiation of a Framework Convention on the Internet as a means of achieving agreement on oversight roles and mechanisms.



inconsistent for the US to assert that DNS management should be free of national interests while at the same time reserving to its own national government special and exclusive powers over netizens of other nations. That inconsistency has already produced several years of increasing politicization of ICANN and its functions. If nothing changes, the US role will continue to inflame political criticism of Internet governance for years to come.

Continued US unilateral control of the Internet's domain name space does not increase the security of the Internet. On the contrary. If oversight of the DNS is seen as a US strategic asset rather than as a globally shared infrastructure, the risks of deliberate disruption and politicization of the Internet's central coordinating operations can only increase. Politicization brings with it a growing risk of fragmentation of the Internet into national and linguistic blocs insulated from US participation. Aggressive assertions of US control only increases the possibility that other nations will support policies that will de-globalize and territorialize authority over the Internet. Moreover, it is important to get the cooperation and buy-in of developing countries such as China, Brazil and India now, before they choose to go their own way according to principles and norms or technical standards that may or may not be acceptable to the US or to other Internet users.

#### 7. The US should take a leadership role in defining future a global governance framework

We understand that any transition raises short-term uncertainties, fears and risks. That is why it is essential that the US government take a cooperative and progressive role in Internet governance. The US must accept the need for change and actively put forward viable ideas for the internationalization of its oversight and supervision functions. It is better to act now than to be forced to act later when its control may be threatened by competing and hostile interests. The US should be willing and able to advocate key principles and norms of administration and governance that will preserve the freedom, openness and innovation of the Internet, and obtain the binding agreement of other governments on those principles and norms. The release of the UN Working Group on Internet Governance (WGIG) report, the recommendations of which in most respects is compatible with the enlightened policies on governance supported by many US stakeholders, offers an excellent opportunity for US federal policymakers to ponder what should come next to keep the Internet on a course that will ensure freedom and stability for decades to come.

Respectfully,

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