



Internet Governance

Asia-Pacific Perspectives

Edited by **Danny Butt**
Foreword by **Nitin Desai**

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The Legacy of the Working Group on Internet Governance

—Peng Hwa Ang¹

It has taken almost 10 years since the mass public availability of the Internet in about 1994 for an international group to be formed to look into the issue of regulation and governance. Even as recently as at the turn of the century, just a few years ago, the idea that such a group could ever be formed was difficult if not impossible to imagine. After all, in the early days, scholars and promoters alike declared the Internet beyond the realm of government.²

There are many reasons for the perception that the Internet is beyond control.³ One of the key reasons is the decentralized nature of the architecture of the Internet. This decentralized nature means that there is no central authority over all aspects of the Internet; there are various bodies and agencies that have some control over some aspects of the Internet, but no one authority over *all* aspects of the Internet. It explains why it is difficult, though not impossible, to censor the Internet.

In the early 1990s, researcher Harry Bouwman observed that decentralized networks were more successful in diffusion than were centralized networks. In his 1993 study of videotext systems in the United Kingdom, France and Germany, Bouwman found that the French version called Minitel was the most decentralized in its architecture. Information providers used Minitel as a conduit to purvey their wares; the French telecommunication company, the owners of Minitel, merely facilitated the transaction. That is a simplification of the process but the distinction is key: the videotext systems creators and owners in all the other countries also tried to be the information providers.⁴ It was, after all, the era of the Information Age where information was the gold of the future.

¹ Peng Hwa Ang was a member of WGIG. The views expressed are his own.

² See David R. Johnson and David G. Post, (1996), Law and borders – the rise of law in cyberspace. *Stanford Law Review*, 48(2), 1367, and John Perry Barlow, (1996), *Cyberspace Independence Declaration*. Davos, Switzerland. 8 February. *WIRED* 4.06. See Peng Hwa Ang, (2005). *Ordering Chaos: Regulating the Internet*. Thomson, Singapore, especially pp. 35-38 for a history of these “first-generation scholars”.

³ In fact, *Beyond Our Control* (2001, MIT Press) is the title of a book by Stuart Biegel of UCLA discussing regulations of the Internet.

⁴ Harry Bouwman, 1995. Videotext in Europe: Success and Failure. In *Videotex Development in the Asia-Pacific: Policy, Marketing and Implications*, (Eds.) Eddie Kuo and K. C. Ho. Singapore: AMIC. 18-34.

Counter intuitively, the decentralized French Minitel was the one videotext service that thrived. But if Minitel was decentralized, the Internet is even more so. The telecommunication companies that used to provide videotext services are now reduced to being mere conduits of the information. They are not needed in the transactional process between the provider and the consumer of any information or service online.

So if decentralization was a key factor in the success of the Internet, why is there a need for centralization in its regulation?

There are a few reasons. First, a decade after the Internet was introduced to the public, it has become too important not to have some form of government involvement in its running. Second, governments and international agencies have come to realize that it is important to have governance at the international level. And third, governments and international agencies have come to realize that, in fact, it is the developed world that has done the most by way of regulating the Internet.

As the WGIG report has shown, there is much that can and needs to be done by way of governance. The notion of governance, as the Group has defined it, is sweeping: it encompasses all aspects of rule-, standard- and norm-making surrounding the Internet. It goes beyond issues related to the Domain Name System (DNS) under the watch of ICANN. The Working Group's proposals surrounding governance do not amount to anything resembling a take-over of the Internet. On a day-to-day basis, the Internet works – the WGIG Report recognizes that. However, decentralization as an end in itself is not necessarily a good form of governance. There are many areas that would help the Internet if there were, at the very least, more coordination among governments, international agencies and other stakeholders. An obvious example of such an area is spam. As the WGIG Report observes, it has reached the stage where, in developing countries, spam is now the bulk of email traffic. There are technical solutions to spam but they can only go so far and, fundamentally, they impose the cost of spam on the receivers. Without disincentives, spammers grow bolder. The only way to stop spam is to stop the spammer; international coordination among agencies with enforcement powers is therefore the best way to stop spam.

For most people, at the very minimum, there is a need for a body that comes together to meet and discuss issues pertaining to the Internet in a coordinated manner. The countries that would derive the most immediate benefits would be the developing countries. They would be brought up to speed on key Internet law and policy issues; they would be able to learn the best practices; and they would be better able to avoid the pitfalls in the diffusion of the Internet.

However, the developed countries would also benefit. The Internet after all derives its power from the network effect: the more people there are on the Internet, the more useful and, thus valuable, the network of the Internet is.

This chapter discusses the coming together of various stakeholders in the governance of the Internet. It bears repeating that I am not advocating for a coup, but for fine-tuning and adjustments as part of an attempt to improve governance in the system.

Internet governance is more about governance than the Internet

The first point to note is that the issues of Internet governance are more about governance than the Internet. To be sure, there is a need to understand the mechanics of the Internet, to understand its special characteristics, such as why many people say it is ungovernable, as well as to understand its limitations. And so the issue papers lay those characteristics and limitations out.⁵

Governance already exists on the Internet, and existed even before WGIG. The term refers to the total policies, processes and outcomes of formal and informal regulation. In fact, modern life would be impossible without governance. Etiquette, say keeping quiet when a person, no matter how boring, is speaking, is a form of governance for meetings and seminars to proceed. This simple informal rule, informal because in most settings it is not written down and the sanction is usually in the form of cold stares from others in the audience, is a form of governance.

Given that the Internet already works, how can governance be improved?

Well, it should be remembered that governance pertains to human behaviour, not technology. In other words, when laws are applied to technology, they do not so much apply to the technology as to the *use* of the technology. So legislation that, say, outlaws spam, does not bar spam from entering one's mailbox. The legislation aims to reduce spam by penalizing the spammer, assuming, of course, that the spammer can be caught and prosecuted.

Once the passage of law is an important factor, then one enters the realm of how the laws are made. And here, WGIG has made the recommendation that any government or agency making laws and policies concerning the Internet should be **transparent, democratic, multi-stakeholder** and **multilateral**. The recommendation addresses the process of governance by recommending the parties who should be involved and the manner in which they should be involved. So governments, the private sector and civil society (multi-stakeholders) from many countries (multilateral) should be open (transparent) in their meetings and consultative in acknowledging the majority's interests (democratic) in their decisions. Merely having these four factors present in a governance mechanism does not necessarily guarantee the best decision. However, not having them is more likely to lead to a poorer decision.

Multilateralism

Multilateralism, or the participation of many countries, assumes the participation of governments with equal capacity and interest to handle the issues at hand. The interests of governments do not coincide so perfectly. For example, while the larger developing countries such as China, India and Brazil want to have a larger say on the world stage, smaller developing countries are prepared to let the USA take the lead in policy formulation concerning the Internet. Informal comments from officials of some of these countries to the author indicate that many

⁵The issue papers are available on the WGIG website - <http://www.wgig.org>.

are privately pleased with the “generosity” of the USA in allowing the rest of the world to connect to the Internet, which was, after all, invented by the Americans.

This disparity between the public and private faces highlights the inevitable politics that accompany multilateral meetings. Having such a meeting under the UN system would bring in the geo-politics of the UN. For example, Taiwan, with its .tw country code Top-Level Domain (ccTLD) name is not officially recognized by the UN.

Nevertheless, the process of being multilateral in governance necessitates a common forum because that is the means for multilateralism to work. And for all its flaws, the UN has enough influence and goodwill to be the host of the umbrella organization of the forum that is among the four forum proposals of WGIG.

Transparency

Transparency means that the process leading up to the formation of the rule or policy or guideline is evident to the stakeholders, especially the final end-user of the Internet. It does not mean that all deliberations have to be open to the public. Just as it is difficult to live in a glass house without at least some curtains, so it is difficult to have completely open meetings all the time. Even in the case of the Working Group, which was conscious that it was working under a magnifying glass, there were closed sessions to allow its members to express what has been called “premature” and “incomplete” thoughts. Closed meetings, where ideas may be quoted but without attribution (what the Group called the semi-Chatham House, after Chatham House in the UK), allow radical, even foolish, and politically sensitive ideas to surface and be tested. Transparency in meetings, at a minimum, should mean that outcomes from the meetings and reasons for the outcomes should be made public so that the interested public may be able to respond.

In itself, transparency does not ensure better decisions. It does, however, tend to reduce corruption, whether of power or money. It also empowers the general public and all stakeholders as they can understand how the law was developed, and even see their feedback taken into account in the development of the law. Finally, it holds public officials to higher standards of accountability.

On the Internet, calls for greater transparency are typically made on governments. This is understandable as governments are the chief promulgators of laws and policies. But with the Internet, technology allows for greater transparency and this is becoming the Internet community’s expectation. So, for example, WGIG meetings became more and more transparent during the course of the consultations. After the first meeting, wireless Internet access was made available at the UN building. After the second meeting, webcasts of the open consultation were made available and transcripts of the meeting posted online.

Transparency is a continuum and can always be improved. In the case of WGIG, perhaps some statements explaining why certain things were done in certain ways would have been helpful. For example, in the last meeting, the Group was cloistered in a chateau that was difficult to

access from Geneva so that there would be fewer distractions. As the Chairman had expected, the Group needed six to eight hours after dinner for debate and drafting.

Democratic process

Closely linked with transparency is the notion that good governance is marked by a democratic process. This is not merely a voting process in which the majority presents and voting wins. Instead, this embodies the spirit that outcomes are arrived at after a discussion process that takes into account the interests of the majority.

In local and national politics, the notion is readily understood because one can see the practical outcome of democracy. At the international level, where no such voting process takes place on a large scale, the notion of democracy is harder to apply. In essence, it calls for the larger nations to respect smaller ones. It does call for some give and take because democracy is antithetical to the notion that “might is right”.

As with transparency, there are limits to the application of democracy. With technological standards, for example, within IETF the rule of thumb has been “rough consensus and working code” not “democracy and working code”. Not everyone is consulted to arrive at a “rough consensus”; typically with industry standards, it is the industry players involved. Given that small group, it would be stretching the word to describe the process as democratic. The key, however, is that outcome is accepted by industry, users and governments without serious objection, a form of consensus. There is no formal definition of the term *consensus* but it is generally understood to mean the lack of serious objections: one may not fully agree but one can live with it. And should there be objectors, the process is able to incorporate the views of these critics.

Another limitation is in self-regulatory regimes. By definition, self-regulatory regimes are not democratic. The rule-making process is often confined to the industry involved. The public is typically not involved in the debate and discussion even though they may be affected; rules are often not made publicly available, presumably on the assumption that the rules are often intended to apply to industry anyway. Here the process is non-democratic but some steps can be taken to improve the process, such as, for example, making access to the rules easier and having public consultation before the promulgation of the rule.

Notwithstanding some of these limitations, a democratic process that brings together the diverse views of the community will lead to more robust outcomes.⁶

Multi-stakeholderism

Until fairly recently, it had been taken for granted that government is the only legitimate party to promulgate law and policy decisions. Indeed, in many countries, this notion is still

⁶ See James Surowiecki's (2004), *The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations*, Doubleday, New York.

widespread. The notion of multiple stakeholders is that government, the private business sector and civil society should come together in making regulatory and policy decisions. The WGIG process has shown that diverse groups can come to common agreements on many areas. To be sure, not all areas can work but there are enough common agreements. It is well-documented that a diversity of views helps the final decision.⁷

Here is another reason for a more cautious approach to legislation concerning the Internet – the tension that exists concerning the roles of government, civil society and business. To be blunt, there is mutual suspicion among all three stakeholders. This leads to a tendency to polarize on issues, with each painting themselves as white and the others as black.

In truth, all three groups need each other. Multi-stakeholder participation is especially critical in areas of fast-changing information and where expertise and domain knowledge lie outside the government, descriptions that apply very well to new technology. It may be increasingly evident now as multi-stakeholder participation in public policy formulation has been embraced officially by groups as diverse as the Commonwealth Heads of Government (CHOGM)⁸ movement and the Islamic Development Bank.⁹

Such acceptance overcomes the question of the legitimacy of civil society: who chooses civil society groups and to whom are civil society groups accountable? It may be that the question of representation is the wrong question to ask because civil society groups are, by definition, not elected. Neither do they represent any particular segment of society. For example, civil society sometimes includes academia. But in some countries, academics are civil servants instrumental in developing and spreading the use of the Internet. Perhaps they might be seen as stakeholders highly interested in the development and use of the Internet for larger social goals, such as economic well-being, or freedom of expression, or gender equality. The early development of the Internet was shaped by activists interested in no more than the well-being of the Internet.

As is clear from the WGIG Report, each of the groups has a role to play. For governments, it is passage and enforcement of the legislation. The call for legislation is strongest where the social harm is greatest in areas such as cybercrime: phishing, online fraud and scams. But legislation may also be appropriate in areas where there is social nuisance that has been difficult to rectify, such as spam, which has reached proportions such that it is no longer possible for governments to ignore.

Even in self-regulatory regimes, a government backstop is essential for self-regulation to be effective. Indeed an attempt to create the Internet Law and Policy Forum (ILPF) has met with, at best, very limited success. In contrast to the similarly named IETF, the ILPF is open only to paying entities; its annual membership costs US\$ 20,000 a year.¹⁰ Its schedule of activities has

⁷ Surowiecki's *The Wisdom of Crowds* concludes on this note.

⁸ The Commonwealth Secretariat has a section on its website on civil society at <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=142018&int1stParentNodeID=20639>.

⁹ Closing address by Dr Ahmad Mohamed Ali, President of the Islamic Development Bank, 23-24 June 2005, Kuala Lumpur, Malaysia available at <http://www.isdb.org/annualmeeting/eng/p821.php>

¹⁰ Information from the Internet Law and Policy Forum at <http://www.ilpf.org/join/application.htm>

been sporadic, especially after 2002¹¹ while its 2005 membership roll comprised a total of 17 companies.¹² The incentives for rule-formation are simply much weaker.

Government intervention may also be necessary to create the infrastructure, legal and otherwise, to facilitate Internet diffusion and development. So, for example, laws to recognize electronic evidence, online contracts and digital signatures are essential for e-commerce to develop and thrive. Business and civil society may come together to adopt norms and standards but without the legal sanction from the courts, such standards will not go far enough.

Because the Internet is a new technology, government legislation should be slow on the uptake. The expertise concerning the use and development of fast-changing new technologies lies with business and civil society. Already, there are examples where hasty legislation has been made obsolete by technology such as the early digital signature laws that were technology-specific. Such legislation will need to be updated to be technology-neutral on the means of creating digital signatures.

Forum

Given these diverse interests and needs, it seems obvious that a forum is the best way to exchange ideas and best practices, and coordinate cooperation that would enhance the development of the Internet. Seen in this light, therefore, it is difficult to understand objections against a forum that will, after all, have no enforcement powers. And in the WGIG report, we have proposed such a forum in the four models.

The WGIG process has shown that diverse groups, ably led and with the intention to arrive at solutions, can come to agreements. In fact, there were some thoughts that the WGIG might develop into a forum but that idea was quickly rejected. Besides being immodest, it just would not be a good model of governance for WGIG to perpetuate itself.

The forum must meet the criteria of being transparent, democratic, multilateral, and multi-stakeholder. It could use the WGIG model of having a mix of open and closed meetings. The open meetings should allow all interested parties to participate. There should be no cost, other than the cost of getting to the location, for participation. The proceedings should be webcasted.

Such a forum may, in the end, report directly to the UN Secretary-General instead of coming under any existent UN body to avoid legacy issues.

Inputs for the forum would be through the various agencies that currently exist. ICANN, IETF, governments, civil society groups, etc. would give their inputs. There could be sub-sections of the forum to deal with specific issues. It would then be up to governments to decide on implementation.

¹¹ Information from the Internet Law and Policy Forum at <http://www.ilpf.org/about/press.htm>

¹² Information from the Internet Law and Policy Forum at <http://www.ilpf.org/about/members.htm>

The forum would issue recommendations on best practices. Such recommendations, while not having the force of law, would be persuasive and make it easier for organizations and agencies to cooperate on such issues as spam, child pornography and cybercrime such as phishing. Governments that do not have the capacity to develop their own laws and policies would be able to look to the forum as a pacesetter for their own practices.

There is of course the hurdle in the form of the US Government which disapproves the idea of a forum, preferring instead to let matters stay at status quo, where matters are discussed at multiple fora.¹³ This is not entirely unexpected as the United States has not participated in dozens of international treaties on human rights and social development. It has not endorsed the International Criminal Court nor, ironically, earlier treaties on terrorism. Without the support of the world's most powerful nation and the one that invented and has great influence over the Internet, such a forum will not be truly effective.

Next steps

Today, the Internet works. It is not broken. Nevertheless the governance of the Internet can be improved both in substance and process. Much work has been done by the more developed countries in substantive areas such as spam, online fraud, privacy protection and online child pornography. International coordination and cooperation in these areas will help the developing countries. And with the network effect, where the value of a network rises in geometric progression as the network size increases, such coordination and cooperation will also benefit the developed world.

At the international, regional and national levels, Internet governance can be improved by being more transparent, democratic, multilateral and multi-stakeholder. Here it is ironic that the US Department of Commerce (DoC), in shooting down the idea of a forum, has given itself a black eye in public opinion. Until then, it seemed quite evident that ICANN was well-managed. Against the yardstick of being transparent, democratic, multilateral and multi-stakeholder, ICANN measured up very well. In fact, many international organizations would pale in comparison to ICANN in this regard. And the US Government, having given birth to ICANN, would have earned kudos for its boldness in cutting the final apron strings of ICANN when its contract with the DoC expires in 2006.

Furthermore, governments are much more aware of the importance of the Internet and of Internet governance for their affairs, and therefore want a larger say, notwithstanding that the Internet was not invented on their soil.

Optimistically, one way of looking at the US position against such a forum is to treat it as a bargaining position. Just as one quotes high when selling and low when buying, so the US is uttering its position before "negotiations" begin for the WSIS meeting in Tunis. Hopefully by then, it will be clearer that the Internet is beyond the control of one government and that all governments do want to have their say in the governance of the most important communication technology today.

¹³ Michael Gallagher, (2005) U.S. Principles on the Internet's Domain Name and Addressing System available at http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm

Post Script

The WSIS meeting in Tunis decided to create the Internet Governance Forum (IGF), a light weight (minimal cost) structure with no decision-making powers. Oversight of the root zone, however, would remain in the hands of the US Government. Interestingly, the decision mirrors that of the WGIG Report. The Summit got stuck at exactly the same points where WGIG got stuck. WGIG agreed on the forum but WGIG could not settle on one model of oversight. To be precise, the US delegation did concede a key sticking point with Paragraph 63 of the Tunis Agenda: "Countries should not be involved in decisions regarding another country's country-code Top-Level Domain (ccTLD)." The first meeting of the IGF is to be held within the first half of 2006, in Greece.

(Peng Hwa Ang, December 2005)

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