

Co-Regulation for Internet Governance?

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Internet governance is an open-ended process. It does not describe a current state of affairs, nor does it refer to any specific institutional arrangement or group of actors. The Internet and its underlying technology will continue to develop further, enabling new applications and services that cannot be anticipated today. In order to make this happen, it is not only imperative to avoid the mistakes of the past but also to challenge established norms and principles.

In recent years, it has been customary to call for private sector self-regulation in the governance of the global Internet. Forming an unholy alliance, profit-oriented firms and governments of technology-dependent countries were keen to garner the fruits of an unregulated information society, while the techies just wanted to be left alone. Confronted with the collapse of the E-economy, the failure of ICANN v1.0 and various corporate scandals of Enron, MCI WorldCom and the like, the *zeitgeist* has recently changed. It is no longer political suicide to advocate some level of governmental involvement in the global coordination of the Internet. Yet the critical question persists: In the new institutional arrangement, what is the best mixture of governmental influences, private actors and representatives of civil society? This is a purely political question, however, and it runs the risk of introducing an unhealthy bias into the current debate if not handled properly. Let me explain why.

Recent deliberations within the Working Group on Internet Governance (WGIG) [MSOffice1] have made it clear that the Group favors a broad understanding of the issues that belong in the field of Internet governance. Such an approach can be helpful as it leaves enough room for issue-linkages and other tactical maneuvers in the WSIS[MSOffice2]-negotiations. This might make the task of finding a political compromise a lot easier. On the

other hand, a broad definition of Internet governance unleashes a very dangerous cycle of what I call “the dynamic of institutional Darwinism”.

For a moment, think of Internet governance as a global market in which a large number of so-called “governance providers” compete for the supply of their specific regulatory services (or coordination services, if you will[MSOffice3]). Regarding the management of the Internet’s core resources, for instance, these governance providers encompass several organizations and institutions, both governmental and non-governmental in nature: ICANN, the Regional Internet Registries, the ccTLDs, the World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU) and Internet Engineering Task Force (IETF). Because the individual governance providers act in their self-interest – which seeks the maximization of political influence or plain survival – they have every incentive to stretch their mandates as the field of Internet governance itself is being enlarged.

The ambitions to take responsibility for IPv6-numbers and ICANN’s plan to look into issues of infrastructure development provide empirical evidence for this broadening of perspective. It indicates that it is getting harder to endure in the global market for regulatory services if you remain focused and stick only to your core business.

As a consequence of the contextual opening of Internet governance, the competition among[MSOffice4] various governance providers intensifies. Increasing institutional competition, on the other hand, makes the providers of regulatory services more easily accessible for concerted lobbying efforts by special interests: If you want to survive in the global market for regulatory services, you have to align with influential and well-organized interest groups. Consistently, some observers criticize WIPO for interpreting the Uniform Dispute Resolution Policy in ways that favor trademark holders over other Internet users. A similar mechanism allowed a small group of concentrated interests to dominate the institution- building process of ICANN at the expense of large groups with diffused interests and high organizational costs, such as civil society.

If not mediated by some kind of supervising authority, such instances of regulatory capture might well lead to an excessive concentration[MSOffice5] of decision-making power into the hands of a few. This in turn would be diametrically opposed to the decentralized nature of the Internet and its inherent end-to-end principle.

In addition, we can currently witness various developing countries engaging in what I call “regime shifting”: they support regulatory institutions or international organizations that are friendly to their interests and with whom they expect to negotiate on a level playing field with the Western countries. This in itself is nothing new, particularly if you look at what happens in other fields of international politics: the United States and the European Union

practice some sort of a “novel bilateralism,” thus collaborating to globalize the regulatory frameworks that they consider as being most useful to their respective interests. From their point of view, institutions such as the World Trade Organization, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement or ICANN serve this purpose.

On the other hand, new alliances are formed such as the G-20+ that has members like Brazil, South Africa, India and China. These countries refuse to negotiate essential policy issues in established fora such as ICANN, because they consider them to be dominated by the West. Therefore, these states try to shift decision-making power to institutions where they have more of a say based on the principle of “one nation, one vote”. The recent initiative to transfer authority over some parts of the numerical addresses-space to the ITU fits neatly into this category. A similar development is apparent in the G-20+ campaign against the TRIPS agreement with regard to the issue of intellectual property rights, various aspects of which they consider inequitable.

The bottom line is that the guerilla strategy of regime shifting aggravates the process of institutional competition, as various coalitions of actors with conflicting interests support their favored arrangements. Coordinating bodies, on the other hand, have a strong incentive to frame their strategy and policy proposals in a way that appeases their most important constituencies – be they states or non-governmental actors.

The problem with this kind of institutional Darwinism is that you do not know the true reasons why a particular regulatory institution or a particular governance provider ultimately wins or increases in importance. Was it because a powerful state supported the organization? Was it because the institution aligned itself with the most influential interest group? Whatever the explanation, the process and result can be expected to be far from transparent. An unhindered dynamic of institutional Darwinism will lead to strategic results that benefit a small group of interests instead of society at large.

The problem grows even more complicated if we consider the effects that are added by the phenomenon of technological convergence, which actually shrinks the market in which the different governance providers can compete. (This is not to say that there will be fewer regulatory problems.)

What happens with technological convergence is that different governance providers from formerly separated policy fields are suddenly competing for a limited supply of expert knowledge and regulatory services within the same sphere. The ITU, for example, is confronted with this dynamic as the organization continually loses element of its traditional field of expertise due to the convergence of telecommunications and computing. It is thus

forced to enlarge its mandate into other policy fields that might also be claimed by other actors (ICANN, IETF). It is getting crowded in the Internet universe.

As the global market for regulatory services becomes smaller, competition among various governance providers increases and the dynamic of institutional Darwinism grows even tougher.

Against this backdrop, the challenge consists in the development of an overarching institutional framework that is flexible enough to absorb the sheer heterogeneity of issues and actors in the Internet's global governance tapestry. We are in need of a mechanism that minimizes opportunistic behavior on the part of the governance providers (supply side) but simultaneously disciplines the actors on the demand side, i.e., governments, the private sector and end-users.

At the top of the envisaged system must be an intergovernmental agreement fulfilling a so-called "meta-governance function"; that is, it must define the scope within which the private sector and civil society are allowed to self-regulate. In keeping with the spirit of a lightweight and flexible institutional arrangement, I argue for the establishment of a framework convention that would be open to every interested government. The convention would contain no legislation; rather, it would only specify which organizations – governmental and non-governmental – would be collaboratively responsible for various aspects of the Internet and what their respective competencies would be.

Even in the best of all possible worlds, self-governance has to leave room for political oversight and dispute resolution.

The formulation of specific rules and procedures as well as their implementation and enforcement would be completely delegated to designated non-state actors. What these embedded self-regulatory arrangements would look like is open to further consideration. Intergovernmental organizations could act as facilitators and assist the private actors in overcoming problems of collective action.

Hence, governmental actors would serve as moderators and enablers of private self-regulation while providing non-governmental actors with the necessary authority to make legitimate decisions. In such a system, ICANN would be just one organization among many, the decisive difference being that its responsibilities and duties would be defined in the constitutional convention and not bi- or tri-annually renewed in a Memorandum of Understanding (MoU) with the Department of Commerce.

All other tasks and responsibilities could be delegated to existing and well-performing entities: the development of protocols and standards to the IETF, the management of ccTLDs to country-specific registries, and so forth.

It would be naïve to think that governments would refrain from regulating the Internet if they consider it necessary[MSOffice6].

Of course, the negotiation of a framework convention will be a very difficult and highly politicized task. Compared to the non-transparent results of unhindered institutional competition, however, this looks much more promising.

Seen from this perspective, the current WGIG process is undoubtedly a step in the right direction. Stakeholders of diverse commercial and professional backgrounds are sitting at the same table and are learning to discuss very sensitive issues in a constructive way. This novel process is not self-evident, particularly when you recall the days of the International Forum on the White Paper (IFWP), which also had a constitutional mission: it soon disintegrated into various competing factions with each struggling to acquire the best behind-the-door deal first.

Co-regulation in the multilateral sense outlined above – and not in the unilateral sense currently performed – can reduce the potential for conflict inherent in issues of global public policy. A subsidiary approach would also be in tune with the architectural design of the Internet itself, which emphasizes principles such as delegation and decentralization, not centralization and hierarchy.

As long as multilateral co-regulation does not happen, governments will continue to politicize the issues of Internet governance. This will preclude the establishment of a functioning institutional arrangement in the foreseeable future.