



Finding a Formula for Brazil: Representation and Legitimacy in Internet Governance

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1) Introduction

In the summer of 2013, Edward Snowden's extraordinary leaks about U.S. National Security Agency (NSA) surveillance destabilized the foundations of international Internet governance. Speaking at the UN General Assembly on September 24, 2013, Brazilian President Dilma Rousseff denounced NSA spying in the strongest terms. This created fears among many Internet governance organizations that all Western-oriented Internet governance institutions would be held responsible for the NSA's actions, and that trust and cooperation on the Internet would break down into national walled gardens. One result was that the heads of the world's leading Internet organizations, including ICANN, the Internet Engineering Task Force (IETF), the IETF's parent organization the Internet Society, all five regional Internet address registries, and the World Wide Web Consortium (W3C), issued a statement decrying the NSA activities and calling for the "globalization" of ICANN and the IANA functions.²

One of the most unusual consequences of this crisis has been an alliance between Brazil's President Rousseff and the President of the Internet Corporation for Assigned Names and Numbers (ICANN), Fadi Chehadé. Together, Rousseff and Chehadé have spearheaded a push for new initiatives in Internet governance. After meeting with Chehadé on October 9, President Rousseff announced via Twitter that "*Brazil will host in April 2014 an international summit of government, industry, civil society and*

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² Montevideo statement made on Oct 7, 2013, see <http://www.icann.org/en/news/announcements/announcement-07oct13-en.htm> for further details.

academia.” Later in November, the date and title of the event was set: it will be called the Global Multistakeholder Conference on the Future of Internet Governance and will be held in Sao Paulo, Brazil April 23 and 24, 2014. According to a Brazilian government news release:

“[T]he meeting will aim to produce universal internet principles and an institutional framework for multistakeholder Internet governance. The framework will include a roadmap to evolve and globalize current institutions, and new mechanisms to address the emerging internet governance topics.”

This is a very ambitious agenda. Depending on how the Brazilian Conference is structured and what outcomes it produces, it could precipitate significant change in Internet governance arrangements. It will need to find a way to reconcile or resolve the tensions between an Internet dominated by Western so-called multistakeholder institutions and demands by nation-states and UN-oriented intergovernmental institutions for a greater role. The Rio summit might also be seen as a clever pre-emption of ITU members’ plans to place Internet governance on the agenda of their plenipotentiary meeting in late October 2014.

The following article analyses these events and tries to make sense of what they might mean for the future of global Internet governance. It begins by looking at how the Brazil-ICANN initiative alters the political alignment of actors in the world. Next, it places these developments within a larger historical context, showing how it echoes recurring attempts to develop legitimacy and principles for Internet governance for more than a decade. It then applies critical political analysis to the process of organizing and managing the summit itself. The paper is especially concerned with the representational formulae and procedural arrangements that will be used at the summit meeting and their impact on the legitimacy of the outcome. After exploring these arrangements, the paper will make prognoses about impacts and outcomes of the meeting in Brazil.

The article is meant not just for the usual Internet policy crowd. It will attempt to use language that can be understood by communities not immersed in these issues. Academics who study related issues but not Internet governance, as well as NGOs, businesspeople and government officials confused by the often-obscure debates around Internet governance will find in this article a starting point for future engagement.

2) Shifting Alliances

The Brazil conference reflects a change in the political alliances around Internet governance. For the past ten years, the international politics of Internet governance have been structured around three main groupings or alliances of actors.

One group is composed primarily of state actors who take a national sovereignty-oriented approach to global Internet governance. It includes a large number of developing countries as well as the large emerging economies such as China, Russia, Brazil and South Africa. The membership of this group corresponds roughly but not completely to the Group of 77 (G77), now a collection of over 100 countries with its roots in the Cold War non-aligned movement. These countries tend to be critical of US global hegemony and unenthusiastic, at best, about the so-called multistakeholder or private sector-led Internet governance institutions, which they see as creatures of the US. They favour locating global communications and information governance functions in intergovernmental institutions such as the UN and the ITU. Some, but not all, of these states are authoritarian and fear Internet freedom. But their support for traditional sovereignty is also explained by other factors. First, they are newly independent states to whom sovereignty and national identity is still important (Jackson, 1999). Second, these states tend to have less liberalized, more state-dominated telecommunications and Internet sectors; as such, their international communications policies tend to be driven by government ministries that have close and sometimes incestuous ties to incumbent telecommunications operators. These ministries tend to have longstanding ties to the ITU and their incumbent operators often benefit from the protectionism and regulations of a state-directed information economy. Aside from that, their governments often lack expertise and capacity in Internet and technology. They feel more equipped to navigate communication policy issues in traditional intergovernmental institutions. One litmus test holding together this group was the vote on the ITU's revised International Telecommunication Regulations (ITRs) at the 2012 World Conference on International Telecommunications (WCIT). These states voted in favor of it.

Two other groups - civil society and the private sector - are roughly allied in their support for what they call "the multistakeholder model" (MSM). MSM refers to the native Internet governance institutions that are generally private sector nonprofits. The private

sector contains representatives of the Internet technical community, including the Internet governance institutions themselves (ICANN, Regional Internet Registries, the IETF, W3C and the Internet Society), and multinational Internet and telecommunication businesses such as AT&T, Verizon, Google, Facebook and Microsoft. European states, Japan, and of course the U.S. government are, for the most part, in this camp. Governments in this camp voted uniformly against the WCIT 2012 ITR treaty.

Usually allied with the latter group are the civil society organizations (CSO's) that participate in ICANN and the IGF to promote Internet freedom, privacy and user rights. It should be noted that most CSOs and technical groups from states in the sovereigntist camp do not go along with their government's view. Often they pressure their governments to support more liberal policies and more multistakeholder approaches to governance. The Foreign Ministry of India, for example, has taken a classically sovereigntist line on most Internet governance issues, but pressure from Indian CSOs and the private sector pushed India to vote against the WCIT treaty.

This alignment of actors has been in place since the 2003 World Summit on the Information Society (WSIS) meetings. But the Snowden NSA revelations seem to have destabilized this settled political alignment. The Montevideo Statement, as noted above, distanced the native Internet institutions from US government oversight. A day after the Montevideo Statement was released, ICANN President Fadi Chehadé, reacting to the Brazilian President's UN General Assembly speech denouncing NSA spying, made an unplanned visit to Brazil's capital. Although his access to President Rousseff was initially blocked by the pro-ITU Communications Minister, he eventually succeeded in gaining access to her. By joining with ICANN's President in the call for a summit, and by agreeing that the summit would be a multistakeholder affair, President Rousseff was edging away from the sovereigntist alliance and edging towards compromise with the multistakeholder alliance. By the same token, ICANN and the Internet organizations were signalling their willingness to bargain with governments critical of the system, and indicating some support for the sovereigntist idea that governments should participate in multistakeholder institutions "on an equal footing." By doing that, Chehadé managed to disturb the multinational business interests who were typically aligned with the American government. In post-Montevideo statement consultations, business interests in ICANN

have expressed strong criticism that ICANN's President had taken these initiatives without their consultation and approval. The civil society activists within ICANN, on the other hand, who were normally critical of ICANN, greeted Chehadé's initiatives more favorably. Thus, the realignments rippling out from the Snowden affair spread internally to ICANN as well.

All in all, the shifting alliances suggest that some loosening up of the sovereignty-multistakeholder polarity could be underway. An Internet governance summit supported and promoted by both ICANN and Brazil implies some kind of realignment with potentially significant long-term consequences.

3) Haven't we been here before? The larger historical context

If Brazil's initiative is assessed in isolation, one will fail to understand both its significance and its chances of success or failure. This section outlines the complex precedents and path-dependencies that got us to where we are today.

The relevant historical context dates back at least to the creation of ICANN. ICANN emerged from a struggle over control of the Internet's domain name system (DNS) in the mid-1990s. At that time the Internet was moving from technical experiment to public mass medium, and there was no clear, legitimate policy-making authority over the central coordinating functions of the Internet.³

After several years of jostling for power and position by various actors, the US government began to assert its control in 1997. Drawing on its 1996 policy statement, *A Framework for Global Electronic Commerce*,⁴ the US initiated a process to solve the institutional problem of DNS governance via an innovative path. The governance regime it proposed recognized the Internet's global nature without ceding control to intergovernmental treaties or organizations. The idea was to use a private sector non-profit dominated by the technical community to govern DNS by private contract rather than public regulation or treaties. It issued a policy White Paper describing its approach

³ For a complete account of this period, see Mueller (2002).

⁴ The Framework expressed the concern held by private business that "electronic commerce would be undermined by widespread assertions of territorial jurisdiction" and that "national governments would impose on the naturally global arena of the Internet a patchwork of inconsistent or conflicting national laws and regulations. A private sector governance authority was perceived as a way around this problem." (Mueller, Mathiason, and Klein 2007:238–239).

in June 1998 (NTIA, 1998) inviting a private corporation to come forward to be recognized as the new administrator of DNS.

Participants in the White Paper process then spontaneously convened a series of meetings around the world to debate the design of the new institution and to seek consensus on a design. This process became known as the International Forum on the White Paper (IFWP). The IFWP ultimately failed in its attempt to achieve collective legitimacy for ICANN and was supplanted by a privately brokered deal between Jon Postel, Network Solutions (which operated the authoritative root zone server and the .com domain) and the U.S. Commerce Department (Kleinwachter 2000, Mueller 2002, Malcolm 2008). IFWP could be considered an important precursor of the Brazil-ICANN Global Multistakeholder Conference on the Future of Internet Governance. The Brazil conference invokes some of the same hopes as the IFWP: conferring legitimacy on a new institutional framework. It also risks the same failure: raising expectations of widespread participation and agreement while ultimately dashing those hopes by failing to achieve consensus and reverting to a behind-the-scenes bargain.

Still, the US approach of administering a global resource through a California non-profit public benefit corporation forced it to deal with issues of representation and legitimacy. Who would be represented on the ICANN board? How would board members be selected? Who would be represented in policy-making processes for governing DNS? How would the organization be kept accountable? ICANN's policy-making organs were designed to include stakeholders from different countries and from different types of organisations. While this concept later came to be known as 'the multistakeholder model' in those early days it was called 'private sector-led' governance. The M-word was not used or even known in ICANN circles at that time. Indeed, the early institutional design of ICANN intentionally excluded governments from decision-making positions. At the insistence of the Europeans, it did create a Governmental Advisory Committee (GAC), an addition that was greeted with tremendous hostility when it first met in the 1999 Berlin meeting.

Not until the World Summit on the Information Society (WSIS) did the 'multistakeholder' concept start to be used as a legitimizing rationale for Internet governance institutions (Weinberg, 2011). Initially, WSIS was supposed to be an attempt to promote the

development of telecommunications infrastructure. But “the WSIS process gave certain developing countries and Europe an opportunity to openly challenge the legitimacy of the institutional innovation that was ICANN” (Mueller 2010:60). At the same time, global civil society groups involved in communications policy mobilized around the WSIS process to advance their own policy agenda. These groups supported the multistakeholder approach and used that norm to attack their exclusion from the intergovernmental WSIS process.

In the early stages of WSIS the U.S. was isolated diplomatically: most other governments either did not understand or actively opposed the private sector-led governance model. Some wanted to reassert traditional sovereignty-based international governance; others accepted ICANN but wanted to impose new forms of inter-governmental oversight upon it. Nearly all objected to the US’s unilateral oversight authority over ICANN. In the end, the U.S. was able to muster sufficient diplomatic clout to convince the EU and its member states to a last-minute shift in their position (Mueller 2010:74). What emerged from the WSIS process was a compromise that left ICANN intact and acknowledged the primacy of the multi-stakeholder model in Internet governance. However, the notion of multistakeholderism expressed by the Tunis Agenda (the final document produced by the meeting), was very different from the original ICANN model.⁵ It assigned different “roles” to different stakeholder groups. Its definition of roles elevated governments to be the exclusive maker of ‘public policy’ for the Internet. To further placate states, the Tunis Agenda called for a process of “enhanced cooperation” which would “enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet.”⁶ Post-WSIS, concepts of representation in the new Internet governance institutions were broadened to include governments as well as business, technical experts and civil society. Within ICANN, the GAC became far more empowered and active post-WSIS, claiming that it should have the final say on any decision that raised ‘public policy issues.’ (Weinberg, 2011)

⁵ Tunis Agenda for the Information Society, WSIS-05/TUNIS/DOC/6(Rev. 1)-E, 18 November 2005

⁵ <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

⁶ Tunis Agenda, op cit, paragraphs 68-69

Even after WSIS, however, the multistakeholder model continues to contrast sharply with the model of intergovernmental organizations, which only represent states and reserve decision making power to states exclusively (Cammaerts and Padovani 2006; Hintz 2007; de la Chapelle 2007; Padovani 2005; Weber and Grosz 2009). The multistakeholder model is more than just a public consultation process of the sort routinely held by democratic states (Ballamingie 2009; Barnes et al. 2003; Fishkin, Luskin, and Jowell 2000; Newman 2007; Newman et al. 2004). It claims to share decision-making power with nonstate actors. As such, the multistakeholder model could credibly be considered an innovative governance concept, part of a wider global debate about rethinking governance in a globalized world. But the multi-stakeholder concept has never been fully developed (Hintz 2007) and is only beginning to be critically studied or evaluated (DeNardis and Raymond, 2013). It raises serious issues of legitimacy, representativeness and accountability (Bendiek and Wagner 2012).

Although issues regarding US control of ICANN were left unsolved, all the WSIS political factions could agree to create an annual multi-stakeholder forum where these topics could continue to be discussed on a non-binding basis. The vehicle for these discussions was the Internet Governance Forum (IGF). Like the Brazil meeting, the IGF was supposed to foster a dialogue that would lead to improvements in global Internet governance. But the IGF was never endowed with instrumental power of any kind; it serves as the nexus for a transnational network of actors (Flyverbom 2011) with considerable community building and socialisation capacity (Franklin 2013). Its purpose is to anchor the actors who support the multi-stakeholder model of Internet governance rather than to distribute instrumental power. Aside from providing discursive reinforcement of MSM legitimacy, the primary function of the IGF is to pre-empt other institutions from governing the Internet (Mueller 2010, Chapter 6). The IGF with its rituals, forums and symbolic interaction often seems more theatrical than oriented on producing a specific policy outcome.

But if the IGF was an attempt to close Pandora's box and prevent changes to the existing governance model, it was not successful. The last eight years, from 2005 to 2013, have seen a proliferation of national and regional Internet Governance Forums at various levels and various topics. The result has been to push the IGF to the fringes of

the core debates on Internet Policy, while governments and international organizations invent ever-new venues & fora where Internet policy issues are discussed. Crucially, neither key developing nations nor many International organisations within the U.N. system were happy with the IGF occupying a central role in the development of international Internet policy. Even if the IGF had no power, they feared that it might erode their own relevance and legitimacy within the international system.

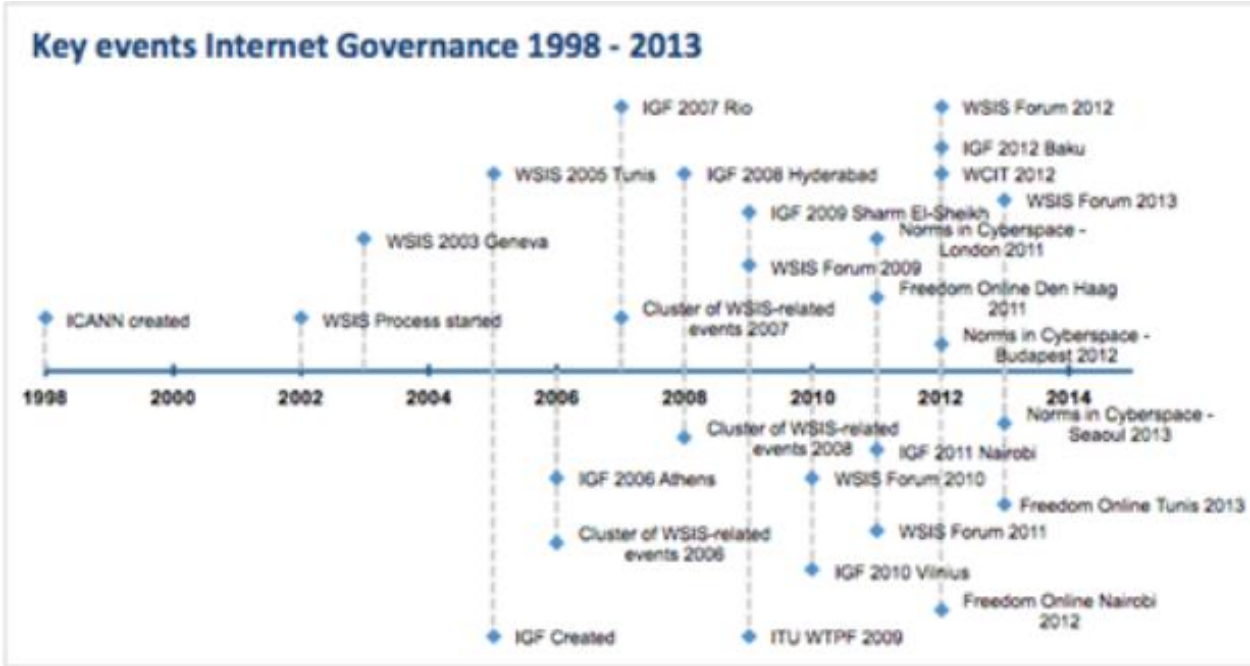
At the forefront of the international organisations seeking a role in Internet governance is the International Telecommunications Union (ITU). The ITU leveraged its role in organising the WSIS process and in supervising implementation of the Tunis Agenda as justification for creating a parallel, competing event: the WSIS Forum. This forum was held annually from 2006 to 2013. Like the IGF, it draws its legitimacy from the Tunis Agenda.⁷ The ITU also sought to add elements to the International Telecommunications Regulations treaty that would intersect its authority with the Internet, especially around cybersecurity issues.

Individual nation-states, or groupings of like-minded states, were also contesting (or ignoring) the IGF's putative role as the primary global forum for Internet governance discussions. With its London Conference on Cyberspace in December 2011, the British Foreign Office launched a series of annual cybersecurity-focused forums. These state actor-led conferences brought into the Internet governance discourse the policy networks oriented around national security and foreign policy. They were designed to address "norms of behaviour that govern interstate relations [...] in cyberspace" (Hague 2011). Additional meetings took place in Hungary in 2012 and in South Korea in 2013, and there are plans for a fourth one.

At the same time a group of governments known as the Freedom Online coalition was founded in Den Haag in December 2011. The coalition, led by the Netherlands, the United States and Sweden, includes 16 other states. Many of these states, particularly their foreign ministries, perceive the topic of human rights on the Internet as an opportunity to innovate in a new and attractive policy area. Following its inaugural meeting in Den Haag, the Freedom Online coalition organised annual meetings in

⁷ UNESCO, another international organisation entrusted with the task of enabling the "free flow of ideas by word and image," hosted the most recent WSIS Forum event (February 2013 in Paris).

Kenya in 2012 and Tunisia in 2013. As the name suggests, it focuses on international co-operation to promote freedom and human rights on the Internet (Wagner, Gollatz, and Calderaro 2013).



Timeline is copied from (Wagner 2013)

It's likely that the Cyber-summits and Freedom Online coalition meetings attracted a greater number of ministers and heads of state than the IGF events. Moreover, the general public and mass media barely noticed the existence of the IGF after the first two. This is not due to the unattractiveness of Internet Policy issues *per se*. The 2005 WSIS meetings attracted many high-level participants, as did the events of the Arab Spring and their supposed linkage to Internet technologies. Evidently, the relevant political bodies preferred to convene their own fora where they could give the agenda their own slant. The IGF was also handicapped by the native Internet institutions, who quickly gained control of its program committee. By blocking any attempts to have the IGF develop outcomes or recommendations, and by occasionally trying to substitute discussions of anodyne topics for real controversies, they undermined the IGF's status with states.

The organisation of all of these events can be seen as part of the wider struggle over global Internet governance. The ever-expanding number of conferences and acronymed organizations reflect the insecurities of states and international organisations about their ability to find a place in governing the Internet (Wagner et al. 2013). The statements emanating from these events repeatedly express support for or challenges to the multi-stakeholder status quo without producing any tangible results. Nevertheless, they serve to show that both states and international organisations are ‘doing something’ in an important policy arena.

To conclude this section, the call for a Brazil Conference on the Future of Internet Governance may seem like a bold and interesting new initiative. And in some ways it is. But the historical record shows that in the field of Internet governance, we have been improvising collective governance arrangements for 15 years, and these improvisations have so far failed to fully resolve the issues of legitimacy, adherence and scope on a global basis. The rationale for the Brazil meeting, for example, is not very different from the original rationale for the IGF back in 2005. It also has many echoes in the Tunis Agenda’s call for ‘enhanced cooperation,’ a term used by the WSIS negotiators to paper over fundamental disagreements between sovereignty advocates and defenders of private sector-based policy making institutions.

Note also that many of the leading players are the same. In reaction to pervasive US Internet surveillance, Brazil wants its 2014 meeting to produce ‘universal principles’ for Internet governance and an institutional framework. But Brazil also led the challenge to US dominance of Internet governance at the beginning of the WSIS process in 2003. After the WSIS gave birth to the IGF, Brazil was pushing to make the IGF the basis for developing a set of global public policy principles for Internet governance. Their chosen mechanism at the time was a framework convention, a form of intergovernmental intervention that would legally enshrine certain high-level principles. In 2007, Brazil made it a point to host the IGF in Rio, and exerted an unusually strong level of control over certain elements of the program in order to advance its political vision for Internet governance. Yet the 2007 IGF did not really lead to any new concrete developments in Internet governance.

4) The Bootstrapping Problem

Every one of the cycles of Internet governance institutionalization described above has faced the same politically profound problem: how can authoritative governance institutions be created from scratch and still achieve the legitimacy and compliance associated with established forms of governance? Who gets to participate in their initial setup and who will be excluded from that process? Which actors are empowered to make the decisions that establish the rules and procedures for all subsequent action? If committees are set up to make these initial decisions, who selects the committees? If a committee is set up to create committees, who selects *them*? This kind of infinite regress pervades the process of forming new institutions with legitimacy. In English idiom, this is often called the bootstrapping problem, drawn from the old phrase that the poor should “lift themselves up by their own bootstraps.” While in a literal sense lifting oneself off the ground by pulling up on one's own boots is impossible, the phrase refers to advancing by one's own efforts, generating something new with what one already has.

The bootstrapping problem in Internet governance is unusually large. Internetworking based on the TCP/IP protocols decentralises and distributes decision making over a large number of autonomous systems and jurisdictions. It also spans a vast number of policy domains. By virtue of converging so many different media of communication and industries, Internetworking of digital devices raises governance issues that are tremendously diverse and wide in scope. The Internet is the post office, the newspaper, the broadcast media, the telecommunication media, the retail shopping mall, the neighbourhood pub all in one. It raises issues of privacy, free expression, content regulation, commerce and consumer protection, crime, national security and more. Bringing together a critical mass of actors into any kind of collective action is hard enough, but pulling them into binding or influential institutional arrangements is even harder. Moreover, many Internet users and advocates retain a Jeffersonian distrust of centralized governance mechanisms. “Internet governance” as a unitary regime may in fact be an impossibility; it may only be possible to have loosely coordinated governance of different aspects of Internet activity.

In bootstrapping processes, there is an obvious trade-off between the size of the group involved in the initial decision-making and the ease of coming to an agreement. Smaller,

more homogeneous groups can reach agreement quickly and easily, but the results are not likely to be acceptable to the diverse stakeholders who were not part of those initial discussions. At the same time, the larger the group that is engaged or consulted, the more difficult and time-consuming it will be to achieve consensus, and the risk that no consensus will ever be found increases.

ICANN, the WSIS, the IGF, and the cyber-summits all had to deal with this problem. The Brazil meeting is no exception. The conference itself somehow needs to embody the character of the governance arrangements it is trying to bring about, otherwise the participants' efforts could be self-negating, or fail to get off the ground because they do not inspire adherence and participation. In what follows, we analyze how the Brazil meeting is handling this problem.

When framed in more simple of terms authority, rather than legitimacy, Internet governance has typically relied on charismatic authority figures such as Jon Postel or Vint Cerf, or appeals to traditional authority (we've always done it this way; "if it's not broken, don't fix it"). But rational-legal authority in the terms of Max Weber (Weber 1980:140) is hard to find in Internet governance, and insofar as it exists it has little legitimacy. The result of this process is a re-cycling of the same problems over and over again. Each legitimising event or process is a renewed attempt to find legitimacy and draws on the same old elites in order to gain legitimacy. As a result of which global Internet governance has gained a certain path dependent repetitiveness in seeming to reinvent itself while nothing actually changes.

5) Between Multistakeholderism and Statism

Reflecting its origins in an alliance between the Presidents of ICANN and Brazil, the program and organizational structure of the Brazil Conference resembles a power-distribution bargain between the government of Brazil and the native Internet governance organizations. (The latter are often referred to as the I* organizations – pronounced 'eye-star' – in that they include ICANN, the IETF, the Internet Society, and the Internet address registries). Brazil's government is responsible for bringing governments into the process and its local multistakeholder organizing committee

defines the organizational details. ICANN attempts to mediate between the Conference and the wider world of non-state actors in the Internet community.

In the immediate aftermath of the announcement of the summit, the I* organizations used the Bali Internet Governance Forum to start an initiative called 1net. 1net would be the vehicle for rallying the Internet community in preparation for the Conference. 1net positions itself as a supporter of the multistakeholder model and as a single interoperable, fully globalized Internet. It points to the Montevideo Statement as the articulation of its basic principles. Initially described as a coalition, then as a “movement,” 1net is currently little more than an open mailing list that several hundred people have joined and a web site (1net.org). 1net was initially run by ICANN and some people associated with the Regional Internet Registries, but in a decidedly clumsy process, full of false starts, it attempted to create a 1net steering committee that included independently selected ‘representatives’ of four different non-state actor stakeholder groups (business, civil society, the technical community and academia).

The centre of action on the Brazil side appears to be the Brazilian Internet Steering Committee (CGI.br). Created by a 1995 national law to coordinate and integrate all Internet service initiatives, the CGI is a corporatist body with a fixed number of representational slots allocated to specific sectors: the government, business, civil society (known as 'the third sector' in Brazil), and academia. With 9 members on the CGI, governmental ministries have the most extensive representation, and it is chaired by a member of Brazil's Ministry of Science, Technology and Innovation. Business and the third sector are given four representatives each, and there are three representatives from the science and technology community plus a single "Internet expert." Since July 2004 the civil society representatives have been democratically elected to the steering committee. The leading CGI.br technical representatives tend to be active in, and supporters of, ICANN and the ccTLD community. The executive secretary of CGI.br is Hartmut Glaser, an Internet veteran and one of the founders of Brazil's country code top

level domain. Also important, the CGI.br has adopted its own set of “Principles for the Governance and Use of the Internet.”⁸

Some of the earliest announcements coming from Brazil floated the idea of extending Brazil’s CGI approach to representation at the Conference. A news report quoted an unnamed Brazilian source as saying that each country could form its own equivalent of CGI and send one representative of government, business and civil society to the summit. This proposal, while ultimately not followed, staked out a corporatist middle ground between a governance model based on nations/sovereignty and one based on the multistakeholder model. One might call it the nationalization of multistakeholderism. It also demonstrated the potential absurdity of grafting these two models onto each other. Societies like the U.S., which have thousands of civil society organizations occupying every conceivable position on the political spectrum, would need to select one person to “represent” them all. Societies such as China, where truly autonomous civil society organizations would never be allowed to participate, would deliver little more than three Communist Party-approved representatives.

That initial idea, however, seems to have disappeared. On November 18, 2013 the Brazilian government released some preliminary details about the purposes of the conference and the organizational structures that would be used to run the meeting. About a month later, a more detailed and finalized report emerged from the meeting of the local organizing group.⁹

The late December meeting notified the involved community that the Conference would be co-chaired by ICANN’s CEO Fadi Chehadé and Virgilio Almeida, the aforementioned CGI chair and Brazil’s Minister of Science, Technology and Innovation. Four other committees would organize the conference. A High-Level Multistakeholder Committee would “oversee the political articulations” and “encourage the participation of the international community.” It would be composed of 26 people; 12 government representatives from different countries, 12 nonstate actors (based on the familiar

⁸ Principles for the Governance and Use of the Internet. <http://www.cgi.br/english/regulations/resolution2009-003.htm>. These principles provided the starting point for the Marco Civil bill that would have made them into national law.

⁹ Report from Carlos Afonso, CGI, on the meeting of the Brazil Local Organizing Group, email sent to the discussion list of the Noncommercial Stakeholders Group (NCSG-DISCUSS), December 21, 2013.

formula of four each of civil society, academia/technical community, and private sector), and two representatives of UN agencies. The nonstate actors will be appointed by 1net. The tendency to emphasize representational formulae over effectiveness is revealed by the decision to have no less than 4 co-chairs for the High Level Committee.

The Executive Multistakeholder Committee will organize the actual event. It will set the agenda, select the participants and decide among various stakeholders' proposals. This committee will have a lot of administrative power. The report did not specify the total number of people on this committee, but it did say that there will be 8 Brazilian members, a representative of an international agency, and an unspecified number of non-state actors appointed by 1net. In an earlier description of this committee, it would have included 6 governmental representatives, and 6 non state actor representatives, with the governmental representatives selected by Brazil and the 6 non-state actors selected by the 1net coordination committee, with 2 from industry/business, 2 from civil society and 2 from technical organizations. In the later incarnation of the EMC, Brazil takes a much stronger role and two of the four co-chairs have already been named by CGI. They are both Latin Americans deeply involved in the ICANN/Internet technical community world: Demi Getschko of Brazil's country code and Uruguayan Raúl Echeberría, Director of LACNIC, the address registry.

While the EMC will handle the programmatic aspects of the Conference, a Logistics and Organization Committee will handle the administrative aspects. The LOC will be responsible for things like venue, translation, activities and travel visa support. It will be co-chaired by Brazil's Hartmut Glaser and a person to be named later by 1net.

The report also stated that there would be a Governmental Advisory Committee, an entity that is apparently not at all embarrassed about adopting the name of ICANN's not so popular or effective counterpart. Participation in this GAC will be managed by Brazil's Ambassador in charge of Foreign affairs and participation in it will be open to any government that wishes to provide advice. It is not quite clear to whom this GAC provides advice – is it to the High-Level Committee, the Executive Committee or to the world at large? Open membership in the GAC can be seen as a way to deal with the problems of aggregating governmental representation. Ironically, governments often demand that business and civil society reduce their representation into smaller

aggregates, but when they are confronted with the need to aggregate governmental input they typically invoke sovereignty and claim that all governments are unique and cannot be aggregated.

6) Representation and Legitimacy

The proposed organizing committees need to have “representatives” of different “stakeholder groups.” But neither business nor civil society have well-defined institutions or procedures for appointing representatives of their group to committees in a way that will be readily accepted *globally*. In international Internet governance, the International Chamber of Commerce’s Business Allied to Support the Information Society (ICC BASIS) routinely presumes to speak for “business interests.” But though it has recently gained a few entities from India and Africa, ICC-BASIS is overwhelmingly comprised of large, multinational American firms. It does not and cannot reflect the preferences of all the world’s business interests, especially smaller firms in non-western parts of the world. True to form, ICC BASIS shocked the 1net community when it announced the names it had selected to populate the private sector slots for 1net’s coordinating committee. All 5 of the representatives were Americans working for US companies (Facebook, Google, Microsoft, 21st Century Fox, and an ICANN consultant). On the whole, business representatives tend to be less openly contentious - and less transparent - than civil society, and so when ICC-BASIS privately forwarded names for representation to the Brazil meeting organizers the pretence that these selections represent “business” can be easily maintained. Still, one member of the commercial stakeholders openly challenged ICC’s selections on the 1net list, and others ridiculed them as representatives of the “large American multinationals stakeholder group.”

The civil society groups cannot even pretend not to be diverse and fragmented, and often compete with each other for funding and public attention. As of this writing, a coalition of 5 civil society groups managed to form a committee with the capacity to nominate names for the organizing committees. The committee includes a delegate from the Noncommercial Stakeholders Group (a formal part of ICANN’s GNSO); a group known as Best Bits (a coalition of 10 civil society advocacy groups); the Internet Governance Caucus, based on an email list which served as the meeting point for civil

society participation in WSIS; the Diplo Foundation (an educational organization that runs online training courses in Internet governance); and the Association for Progressive Communication (a global network of civil society organizations that is also part of Best Bits). As soon as it announced its 5 selectees for the 1net coordinating committee, there were complaints from marginalized civil society groups that the process was no good.

If forming the organizing committees is complicated, one can only imagine the issues raised by deciding how the actual Brazil Conference will work, who will participate, etc. In some sense the community went through this before when it organized the first IGF meetings, but the Brazil Conference is a one-off meeting that is supposed to produce real outcomes rather than just dialogue, and so has tougher constraints. It seems that much of the authority here will reside in the Executive Multistakeholder Committee.

Emphasizing its need for agreed outcomes, some observers have called for limiting the number of direct participants, but of course this means that each participant would be a 'representative' for a broader group, which raises many questions about how these participants are selected, and by whom. Open participation, on the other hand, raises the prospect of a meeting with 2,000 people, making agreement and procedure unwieldy. In a comment at the ICANN meeting, Milton Mueller proposed that each of four stakeholder groups (governments, civil society, business and the technical community) be afforded 50 slots, while having observation of the 200-member meeting open to all observers and designated time slots for opening up the meeting to comments from the observers. But the December meeting of the Brazilian local organizing group has, somewhat surprisingly, located the meeting at the larger end of the spectrum. "The basic distribution of participants," according to the December report from Afonso, "is envisioned approximately as 450 from governments, 500-550 from non-governmental, non-UN stakeholders, 100 journalists, and 50 representatives of UN International Governmental Organizations."

At the time of this writing, there has been very little public discussion of the actual formula for the Brazil meeting itself - perhaps because it is an issue that will be decided by the organizing committees currently being formed.

Adding to the complexity, ICANN's President has created a hand-picked committee called the High Level Panel on Global Internet Cooperation and Governance Mechanisms. The tasks of the committee - to propose basic principles, an institutional framework and a road map for implementation of the reforms - correspond exactly to the agreed agenda of the Brazil meeting. There was contention and negotiation over who would be represented on this committee as well, as external pressure forced ICANN to add a representative of a country code top level domain registry and a civil society organization representative after it was initially formed. It is to be expected that the members of this panel, and the output it produces, will have privileged entree into the Brazil Conference.

Both Brazil's Internet community and the Internet technical community as embodied by the I* organizations are in the most powerful position going into the meeting. It should be remembered that organizations such as ICANN and the regional IP address registries are not disinterested actors in this space. It is their future role, their possible reform, and their legitimacy that is the fundamental topic of discussion. It is therefore predictable that these organizations will be extremely well-represented and placed in key positions on organizing committees, discussion panels, and the like. The growing centrality of CGI.br on the Brazilian side of the equation is also noteworthy. This, too, reinforces the centrality of the technical community. CGI is the entity in Brazil best equipped to deal with the global Internet governance community as a whole because of its long-term experience in the ICANN environment and its familiarity with the substantive issues of Internet governance (which far surpasses that of the typical foreign Ministry staff).

Given its goal of actually reaching agreements on key topics, the Brazil meeting poses major organisational challenges. If the meeting is open, the voting rights of the participants will be unclear, and the procedures for arriving at a decision difficult. If it is not an open meeting, it is unlikely that everyone in the world will view its outcomes as something they should conform to. We return again to the base problem of representation and legitimacy (bootstrapping), which could only (potentially) be broken through with some kind of constitutional moment. Through what formula will the Brazil meeting overcome this problem?

7) What is to be governed?

There are widely varying ideas about what ‘Internet governance’ can do and what kind of ‘governance’ the Brazil meeting might legitimate and begin to institutionalize. Discussion on the 1net list has exposed this variation in all its contentious glory. Brian Carpenter, a veteran of the IETF, asserted a basic dichotomy between the regulation of social and economic conduct on the Internet and the “technical administration, to make the Internet work properly.” He believes that the whole notion of “Internet governance” confuses the two and should be abandoned. This dichotomy, however, simply does not exist; governance and technical administration are routinely linked in technology sectors, where control of technical standards or resources often affords the leverage for regulation of conduct. Indeed, this inability of many IETF veterans to come to grips with the whole concept of ‘governance’ illustrates the wide gaps in the mentalities of the participants. Other participants in the dialogue, typically left-progressive elements from emerging economies, reveal a vision of Internet governance as a scaled-up, globalized national legislature with the sweeping powers needed to rein in multinational corporations, enforce network neutrality, protect consumers from economic abuse, enforce privacy rights and redistribute wealth to promote broadband diffusion. There are various visions in between these extremes. Here again, the discourse is cycling. The same discussion about the scope of Internet governance took place during the WSIS, when its Working Group on Internet Governance developed the now-prevailing definition of Internet governance.

With its call for universal principles and an institutional framework for realizing them, the Brazil meeting seems to tilt toward a broader conception of Internet governance. Furthermore, by taking a leadership role in reacting to the NSA revelations and by engaging in private diplomacy with Brazil, and by forming the High Level Panel to engage with the larger issues, ICANN’s President is positioning his organization to be engaged in areas of Internet governance that go far beyond its narrow focus on domain names and IP addresses.

As noted before, the two-day Brazil Conference will attempt to produce a declaration of “universal internet principles” and “an institutional framework for multistakeholder

internet governance.” The framework will include a “roadmap” to evolve and globalize current institutions (presumably a reference to unilateral US control of ICANN), and new mechanisms to address emerging Internet governance topics. Despite the role of the NSA revelations in motivating the call for the conference, the announcement said that the meeting will “not include any discussion or activity to create solutions for specific topics such as security, privacy, surveillance, etc.” In public and private statements, ICANN’s President has also emphasized strongly that they will not participate in a conference focused mainly on reacting to NSA surveillance.¹⁰ As the date of the conference nears and the organizing committees are formed, it will be interesting to see how different state and non-state actors try to influence the agenda - both in terms of what is expressly included, and what is ignored or kept out of consideration.

It is still possible that the principles and recommendations developed by the conference will address the NSA. But another form of US pre-eminence, the IANA contract that gives the US final approval rights over what ICANN puts into the DNS root, will definitely be addressed. This issue provides a good focal point for the discussions because it is narrow and specialized and it is possible to make concrete and implementable proposals for reform.

Another likely item that some will push for consideration is what might be called the “unfinished business of WSIS.” This would include issues such as the controversial delineation of stakeholder roles in the WSIS Tunis Agenda and the achievement of “enhanced cooperation.” Both topics deal with the role of states in Internet governance. The stakeholder roles as defined in the Tunis Agenda privilege national governments in the formation of international Internet policy, and subordinate civil society and the private sector to lesser roles. Advocates of MSM strongly dislike this definition of roles, and prefer to see all stakeholders have equal responsibility for formulating public policy for global Internet (see the more detailed discussion below).

At the same time as the Internet governance community is squabbling over the precise nature of Internet Governance, many states around the world are trying to find their own

¹⁰ This limitation on the scope of the conference may be produced by a combination of two concerns: first, a recognition that surveillance by national security agencies is not directly part of the remit of the technically oriented Internet governance institutions; second, there would be strong political pressures against such an overt confrontation with the US government, to which ICANN is still tethered in important ways.

role within the process. Unlike Brazil, most states have little high-level buy-in on these topics, with countries like Russia, Estonia and Sweden being the notable exception. For the most part, high-level officials are barely able to speak about Internet governance issues, much less take the initiative to develop coherent policy initiatives.

The result has been ‘strategic fence sitting’ in many parts of the world, particularly in Europe and in Asia. Even large economies with strong interests in Internet governance like Germany, the UK or India aren’t really sure what to make of the Brazilian summit. Lacking high-level leadership and a clear direction on Internet governance issues, they are torn between various positions and interests. Instead of clearly engaging on Internet governance issues, they prefer instead to sit on the fence and respond to formal diplomatic requests only. At least in regards to the Brazil summit, such requests have not been forthcoming and the countries have instead avoided deciding what they think about it or continuing to pursue their own pet ‘international Internet projects.’ For the UK this is the ‘London cyber process’ and more recently cyber security capacity building, for India ideas related to the CIRP remain at the top of the agenda, while Germany is involved in discussions with the Human Rights Council and other initiatives within the U.N. framework.

The problem for many states and business interests alike is that for the most part there is little interest in making significant changes to the Internet. The communications network has become far too important to substantively fiddle with, and most actors – for all of their public concerns about NSA surveillance – are acutely aware of this fact. This problem is further accentuated by the issue that both business interests and states are unwilling to challenge the United States for fear that doing so will bring negative repercussions in regard to commercial and strategic interests. So while there is an extraordinary global willingness to change Internet Governance, ownership of such change or leadership in developing alternatives is scarce to say the least.

Such problems also extend to civil society, which has been placed in an uncomfortable position by the NSA’s leaks. For a long time large parts of civil society have relied on intermediary liability protections and other constitutional guarantees in the U.S. to safeguard important civil liberties online. At the same time, parts of civil society are deeply embedded in the multi-stakeholder model, which gives them a considerably

greater role than in other systems of global governance. The result is that substantial parts of civil society, particularly from North America and Europe, were co-opted into supporting the status quo. Even if they did not fully agree with it, they felt more able to control it and to a certain extent also profited from it.

As the extent of U.S. surveillance and spying becomes apparent, this leaves many civil society actors in an uncomfortable position. While they can point to many of their previous statements on how they criticised the system, these do little to assist in understanding how to move forward. There is not a single state in sight that could provide similar constitutional protections or limitations of intermediary liability as the United States. Nor has a credible alternative to the multi-stakeholder model yet entered the international stage.

8) Making prognoses about impacts and outcomes

In this section we discuss some of the possible outcomes of the Brazil Conference and explore various conditional scenarios.

Stakeholder roles

Insofar as the Brazil Conference has any significance, it is as part of a long-term struggle over whether to legitimize and institutionalize the so-called multistakeholder model (MSM), or subordinate it to states. Can Brazil move beyond the way the 2003-2005 WSIS dealt with that issue?

The Tunis Agenda of WSIS confronted the challenge of multistakeholder Internet governance by devising an unbalanced, poorly thought-out compromise. While it formally endorsed MSM, it attempted to pigeonhole the three main stakeholder groups (governments, business and civil society) into separate and mutually exclusive “roles.” The Tunis Agenda claimed that governments have the sole and exclusive right to make “public policy” for the Internet. This claim is fundamentally incompatible with the MSM, which involves all relevant participants in the making of policy, and erases the boundaries between territorial jurisdictions and between state actors and non-state actors. Ideally, MSM creates a transnational polity in which all participants are policy makers. Further, the Tunis Agenda’s attempt to distinguish between ‘public policy’ and

'technical and operational matters' is meaningless in practice, because in this technical infrastructure all policy decisions have operational and technical implications, and many decisions about operational and technical matters embody policies.

The reassessment of stakeholder roles is an area where the Brazil conference has some potential to make progress. By challenging those aspects of the Tunis Agenda, and formally concluding that the roles of state actors and non-state actors must be equal in Internet policy making institutions, the meeting could settle one of the biggest issues facing Internet governance today. While reaching consensus on that is possible, it will not be easy. Civil society, business and the technical community are fully allied on stakeholder parity, but many governments are not. And it is not only developing and authoritarian countries that believe in the pre-eminence of states in Internet public policy, so do many European government officials. However, there is internal debate on this question within Europe, and Brazil, like Europe, straddles the fence on this issue. If Europe and Brazil can be turned around on stakeholder roles, then it is possible that the entire meeting will reach consensus on the question of stakeholder parity. And if that happens, it would constitute a milestone in the evolution of Internet governance.

ICANN globalisation

The "globalization" of ICANN is another area where there is great potential for progress. The key question is whether globalization occurs through a multilateral, top down control model (i.e., establishing accountability to states) or through a model, that emphasizes the bottom up accountability of the institution to a transnational set of stakeholders. In one case accountability is indirect – a group of states oversee and intervene in ICANN, acting as agents for their national polities. In the other case accountability is more direct – the world's Internet users and suppliers supervise ICANN themselves, elect or recall its board members and staff, or litigate when it acts outside the rules. The technical community, private sector, and civil society and a few liberal countries (probably) favour direct accountability. Here, as before, Brazil and Europe are in a strategic position. If Brazil's political leadership and its civil society can unify around direct accountability and so can Europe, then the meeting could agree on a road map to

reforming ICANN in a way that detached it from unilateral U.S. oversight. If Brazil and Europe insist on indirect accountability via states, then it is unlikely that the other parties would agree, and no blueprint for ICANN reform could be produced with widespread support and legitimacy.

Principles

The Brazil meeting's call for "universal principles" partly reflects the desire for interstate agreements that can prevent rights violations of the type exemplified by NSA surveillance. It also echoes the WSIS Tunis Agenda's call for *globally applicable public policy principles* for Internet governance. But there have been so many Internet principles released in recent years that it is hard to see what the Brazil conference could add. With Brazil's own principles developed by CGI, the 'International Principles on the Application of Human Rights to Communications Surveillance' promoted by civil society groups, numerous reports by U.N. special rapporteur Frank La Rue, the OSCE principles on 'Governing the Internet'¹¹ or UNESCO's on-going push for Internet Universality,¹² the production of 'Internet principles' has reached fever pitch. What some experts have called a 'constitutional moment' seems instead to be rehashing the same wording again and again across different institutions.

Indeed many of the principles are notable only for their ability to bring *yet another* International Organisation or global framework of some kind on board. In this sense the Brazilian conference's discussion of principles could become little more than a staging point for intellectual opportunism, as various groups and interests jockey to insert their own language and norms into an international document. Through the constant production of such principles in similar linguistic form, the various actors reaffirm their belief in the status quo as well as their understanding of how to access key professional communities responsible for creating the language. Thereby the performance of Internet governance becomes non-threatening and the actual, less theatrical negotiation around what individual actors actually want can proceed.

¹¹ www.osce.org/fom/26169

¹² http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/news/internet_universality.pdf

ITU plenipotentiary

As noted before, the ITU is home base for advocates of an intergovernmental approach to Internet policy. Every four years, the ITU holds its Plenipotentiary Conference at which it elects its officers and governing Council, adopts a strategic plan, and passes general policies. The next Plenipotentiary will be held in the fall of 2014, in South Korea. Some see the Brazil meeting as a way of pre-empting the ITU. If the Brazil meeting produces a strong consensus on meaningful outcomes (e.g., on stakeholder roles, ICANN globalization or principles), then any attempt to use the Plenipotentiary to advance a role in Internet governance will be pre-empted in many (though not all) respects. Supporters of the consensus will be able to refer to the Brazil meeting at the ITU Plenipot as *fait accompli*. Those seeking to use the ITU meeting to achieve different or contradictory outcomes will be on the defensive – diplomatic revisionists. On the other hand, if the Brazil meeting produces highly uncertain or divided outcomes on key issues, the path will be clear for certain actors favouring the intergovernmental approach to bring them up in the ITU meeting, and to show that the ITU environment can succeed where the multistakeholder environment failed.

9) Conclusion: Finding a formula for Brazil

Regardless of its specific outcomes, the events leading up to the Brazil Conference provide a fascinating prism through which to observe where global Internet governance stands today. It seems clear that there are many unanswered questions and there exists such a low level of institutionalisation that almost anything seems possible. Yet the communities of practice that dominate Internet governance have weathered so many similar storms that it remains unclear whether anything will actually change at all.

The Brazil Conference can be most concisely described as a way of taking up the unfinished business of WSIS. Stakeholder roles, the US control of ICANN, and the demand for ‘globally applicable public policy principles’ all constituted focal points of the 2003-2005 World Summit. The need for the meeting, therefore, speaks to the failure of the WSIS Tunis Agenda and its spawn, the Internet Governance Forum. Both of them,

in other words, have failed to establish stable political bargains upon which a lasting international regime for Internet governance can be based.

The struggle around formulae for invitations, stakeholder representation on organizing committees and modes of participation during the Brazil conference suggests the importance of legitimacy at this stage in the evolution of IG – especially a type of legitimacy that bridges the gap between state actors and non-state actors. All of the internal discussions suggest that there are a slew of unresolved issues where nothing close to an international consensus exists. In public, however, the theatre of Internet governance continues to propagate the story that business, the technical community and civil society, as well as diverse governments can come to agreement on how to effectively govern a complex, distributed cyberspace.

The shock to the system generated by the Snowden revelations created an opportunity for entrepreneurial political actors to reshape the existing alliances and structures of Internet governance. In that sense, President Dilma Rouseff of Brazil has been successful in breaking open established debates and challenging the status quo. It is entirely unclear, however, whether she has the ideas to genuinely reshape how global Internet governance works. Given the level of lobbying currently taking place and the numerous powerful stakeholders supporting the status quo, one could be forgiven for assuming that this is just another pseudo revolution that will reassert the status quo.

For ICANN and the Internet technical community, the key objective is to legitimize their own governance institutions. They want to reach a stable peace with the world's states regarding their private sector non-profits in global governance. The rest of the Internet-using community can only hope that they don't get sold down the river by some I* - nation-state bargain. The key relationship to watch is between Brazil and the EU as well as several key member states like the UK, France and Germany. If these states can reach an agreement, it is likely to be a palatable option for other states as well. If not, then Internet Governance is likely to fall back into the existing EU-U.S. vs. China-Russia blocks in which little movement can be expected.

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