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On the Future of Internet Governance

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On the Future of Internet Governance

Tim Wu, Professor, Columbia Law School, and moderator (remarks in italics, “T” during questions)

Esther Dyson, founding Chairman, ICANN (“E”)

Michael Fromkin, Professor, University of Miami Law School (“M”)

David Gross, Ambassador, State Department, United States (“D”)

The issues surrounding internet naming and internet governance have been controversial since about the mid-1990s. But public attention was drawn to Internet governance in the early 2000s, when Europe and other countries declared themselves unhappy with how internet governance was working, how the domain names were being assigned and other issues. David can you summarize what was happening in the early 2000s that created controversy in this area?

D: . There was in 1998 a proposal for a UN world summit, a summit on the information society. The concept was how to use new information and communications technology to help the world, particularly to support the developing world. And there was a lot of, as you can well imagine in the late 90s, a lot of enthusiasm for this idea, and although there was a little misgiving, everyone, by and large was on board. The U.S. government had some misgivings about it as we generally do with most UN summits, but we also came on board. It was such a popular idea, that they decided to hold it not in one place at one time, but rather in two places at two times, but they couldn't decide where to do it.

So, in Geneva in 2003 and then in Tunisia (a place that's always interesting when you're talking about internet related issues) in 2005. For those of you who are not familiar with a UN summit, all the fun and games happen before the summit, not at the summit. Summits are sort of parties, and all of the negotiations happen ahead of time in what's called preparatory meetings, where the world gathers, or at least diplomats from the world gather. One thing that was done differently, something that was really unique, was that the private sector, NGOs, private companies were invited in some fashion to participate. This was done because the internet, of course, was being driven forward by the private sector. But, of course governments and in particular many diplomats are uncomfortable with that, and so the first big fight was on the summits rules of the game.

That's important because internet governance and the ultimate resolution of these things, were driven by, as most things are, by those who were able to participate and how they were able to participate as much as by



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the substance. And many countries, as you can imagine, I won't name names, but you know who they are, did not want the private sector involved; they didn't want organizations like ICANN or NGOs or the Internet Society or others, or commercial companies to be involved. They just wanted it to be a traditional summit amongst foreign ministry types who are usually the last to get the memo about what the subject's technical aspects are really about. So of course what happens at that point is that everyone falls back on what summits generally are all about-- which are rights and discussions about rights. And as a relatively newcomer to this situation, I was very interested to see that generally when the discussion is about rights, those who scream loudest for rights are generally those who give the least amount of rights away to their own people, so I found it all a somewhat surreal experience initially.

But to really answer the question more precisely, there was certain parts of the developing world and particularly those who don't seem to allow their people to speak freely on the internet and otherwise, and to try to take ICANN in particular and other parts of the internet away from the private sector, and also arguably to take away the role that the US government plays uniquely, with regard to this, to some international organization, either by changing ICANN itself into an international organization or by subsuming the role that ICANN plays into an existing international organization such as the International Telecommunications Union or the United Nations or some other organization. The purpose of these efforts, in our view, was to create a veto, an effective veto, by those governments who are not very happy with the rapid and innovative changes on the internet, both economically and also with regard to speech, by threatening a veto. Let's just use one country, China, just to use one by example, by threatening to veto they could then restrict the issues that Michael talked about in terms of the allocation with domain names, the New top-level domain names, or some of the underlying architecture of the internet and how that would change.

Not surprisingly, we were very upset by that concept, we fought very hard. We won the first round in 2003 largely by pointing out that regularly the term "internet governance", you'll be pleased to see, nobody had an agreed upon definition. So, when in doubt, send it to a committee to define it, so that's what we did. In 2003, the world gathered, heads of states from most of the world's nations gathered together and decided to send this issue to a committee. And so we sent the issue to the committee, which then went off to form a group of experts to be appointed by the UN. They came back in late 2005, and came up with something, which I thought was fairly cockamamie on a number of points, some very excellent points regarding other areas, and of course it was completely ignored by the diplomats who then negotiated all

over again, and they were very, very tense negotiations; lots of late nights in many of these “prep-coms.”

Ultimately the result, in my view, was extraordinarily positive, which was the decision to not change what we had already established, that we would instead create a forum for discussion of internet related issues, internet governance, where parties could go and have discussions about these things, but would that would be in a non-binding fashion.

And, I will quickly add one last thing that’s often overlooked, in this discussion. I think the good news is that with all of the focus on the internet governance, we the U.S. together with very close allies, were able to get the paragraph 4 in to the Tunis Declaration, that enshrines the right to free-flow of freedom of expression over the internet in an unfettered way. Where in 2003, when we had tried to hit it sort of head-on, we ended up restating the Universal Declaration of Human Rights paragraphs 19 and 29. So we were actually able to get something by a bit of a misdirection play. Bottom line, no change after the world summit, by the world summit.

In a nutshell: A lot of work, no change.

Esther is there anything that you’d like to add to that?

E: The saving grace of ICANN as far as I’m concerned is that it’s widely considered to be illegitimate, and therefore it has very little power. If it were considered legitimate, and could actually do a lot, with impunity, it would be a very dangerous organization. But, as it is, it’s pretty hamstrung and nothing much actually happens, which is good.

Nonetheless, I was founding chairman of this organization, and I think we made two huge mistakes. The first was not to be open. This was actually before I showed up, even in how the thing was created and how the initial board was selected. But then we held our board meetings in private for the first year or two, which completely destroyed any affection we might have had among the people who were supposed to be the people on behalf of whom we were developing policies. That created a very unhappy relationship between ICANN itself and the internet community. It was exacerbated by the fact that we were trying to privatize Network Solutions, which owned the dot com, dot net and dot org registries. They behaved extremely badly, which made things worse because the U.S. wanted to pretend that we were not created by the U.S. and had given us no funding. We had very little in the way of the budget so we had to – in quotes - “tax the internet.”

The second big thing we did - wrong was to impose way too strict and precisely defined contracts. Even now, the terms on which registries and registrars can compete are extremely limited; they have to offer pretty much the same services for the same prices, with restrictions on almost anything creative – including stronger security, privacy services and the like. Almost the only way they can compete is on the basis of sleazy marketing practices.

But I think that there are many more interesting things to talk about than ICANN concerning Internet governance. For example, what can be done to improve security on the internet? Not by ICANN getting into the security regulation business, but by better treaties and understandings of liability that would encourage the use of security practices - primarily by consumers and companies, but most likely implemented by ISPs who would be liable for the actions of their customers if they didn't give properly manage their customers' security or something like that. Those are the things that I'd like to talk about.

Do you want to jump in, Michael?

M: I just want to say that two things. The first thing is that if Esther had been saying these things when ICANN was founded, we wouldn't have founded ICANN Watch we would have just quoted everything Esther just said.

The second thing is, I wish I were as confident that ICANN isn't dangerous. Nobody's been tortured, nobody's been killed; in the grand scheme of things it's really not that bad. But, the budget has grown a lot, and ICANN has gotten rich and a lot of people have gotten rich in dealing with ICANN. And, one does, I think, reasonably worry the critical mass is at some point achieved, where Esther was saying, that that which was true yesterday might not be true tomorrow.

I want to ask all of you whether you think the current system is in fact stable--whether the partnership between ICANN, a California, non-profit organization and the United States government, basically on behest of the rest of the world, is something that can continue for the foreseeable future or whether you think its going to run into serious challenges.

E: I think that your description misses the fact that the ICANN board, whatever its faults, is international. Part of the huge amount of money ICANN spends is in fact spent to be more international, including traipsing around the world to hold their meetings in Lisbon, Africa, wherever. This is a huge expense and it makes the point that being international is not free,

just as being open is not free. ICANN unfortunately does a much better job of being international than of being open.

But, I think it's stable in a way that an airplane is going through heavy weather. Now, airplanes don't generally crash in heavy weather: they crash when they're landing or taking off. ICANN is very definitely in flight; it's moving up and down a fair amount but I think it's stable. It's like nuclear deterrence: People are scared to mess with it. There's a wonderful poem by Hillaire Belloc that says, "Hold tightly to the hand of Nurse, for fear of finding something worse."

D: That has always been ICANN's best argument for its existence. I think I see three things which threaten that stability and none that's the obvious killer right now. The first is that there are some new technologies being talked about, which could affect the technological assumptions on which ICANN is based. One of them is, some countries, particularly China, are looking at setting systems of regulating their internal DNS, which if replicated could sort of upset what we call now the stability. It might not, but I think that some people want to prioritize traffic.

E: But it's not actually the technology. China could make the decision now with no new technology to really cut themselves off. It would really hurt China even more than it would hurt the rest of the world, but they have enough people that they might just think they should do it.

M: The other thing is that there are some talks about just redesigning the internet from scratch to achieve some ends, whether it be to achieve security or prioritizing traffic for movies and so on, which could use the DNS we have, or could be an excuse to flip the switch and do something radically different, and there's some real money behind these efforts because of the movie delivery aspect. So, it's really quite a serious thing, especially in the last six months, I think, there's a lot more hard work going in to try to figure out what that would look like. They're not talking to me at least, and I'm not sure that they're talking to themselves about the DNS part of the problem yet. So, we don't know what they're going to do, but that's something that could be de-stabilizing.

The second is the ambassador's subject, which is that there are a lot of countries out there which, for reasons of pride or policy, are just not comfortable with the U.S. having a preemptive role therefore are open to the suggestion that something else -- it's not quite clear what, but something else -- really ought to be a better answer. And that is a source of great instability when combined with the third thing, which is that many people in the ICANN structure, on the board and in the incumbents who have become

quite wealthy off the relationships that they have with it, would really like UDI. They want ICANN to be separate because that locks in their victories and takes them out of accountability mechanisms that at least exist theoretically now.

What do you mean by UDI?

M: Unilateral Declaration of Independence. They want ICANN to not be tied to the regular stewardship of any particular country, they disagree amongst themselves about what the best alternative is, and the Ambassador deals with this everyday so he can speak better than I can about this.

E: Can I just say one thing more? Something which has always been a check on ICANN is that it's not illegal to run an alternate DNS. People tried to do that, but they didn't succeed in the market place. They were mostly crackpots, but not all. You can still do that and it's still not against the law to create an alternative. So, the issue isn't so much technology; it's simply. Do you have something compelling to offer? I'm sure we'll see some of those, whether it's a country or a TV network or My Space. It will have its own internal namespace inside. If that thing grows very large, it could get interesting...

Why do you think we don't see any serious alternatives?

E: Because the DNS is actually pretty convenient. The problem is that the open internet now is getting really scuzzy. I think the first thing you're likely to see is some kind of VPN or a dot fin, a secure financial network. Certainly the U.S. government has its own black networks behind the internet either completely behind it or running over it in the dark. There is more and more of that, but you're not seeing it when you're on the DNS, except you might see some black matter somewhere.

Coming back to you, Ambassador Gross. There are people out there who say that this is crazy; we have the international global resource, the internet, the medium of the future, and lo and behold there's one country that's running it for the rest of the world. How can it possible be a lasting system to have the United States essentially running a global resource for the entire world and what possible legitimacy does the United States have in this area? Why not give the authority to the United Nations, why not give it to the ITU?

D: Let me sort of take that in a couple ways. One there is clearly anxiety, and very understandable anxiety about the role of the U.S. government, with regard to ICANN and other media issues. It's a very

legitimate source of anxiety. If I were a government official of another country, I think I too would be very anxious about that. And I think that everyone recognizes the origins and the history and so forth. But one of the things that became very interesting to me is that, and this not was intuitively obvious as when I first started looking at these issues, is that there is no doubt large numbers of countries, of which I put many in Europe, virtually all of Africa, and many in Asia, would say that, unless an international treaty-based organization, like the United Nations, ITU or something else, unless such an organization plays some role with regard to any type of international activity, then there is a serious question about its legitimacy. And so at its core, it's a way in which we think about it.

I think that's interesting because if you were to walk down the street and ask 100 Americans what they think about this, I would say about 99% would look at you like you're crazy. Why an international organization makes what I do legitimate or illegitimate is strange for Americans, who, I think, are less concerned about that issue. So we have to recognize that for the rest of the world, that is an important role for international organizations and that is what animated part of the discussion at the world summit. In discussing with government officials, it's interesting, almost all of them would say that having a role for the ITU or the UN or some other international organization or changing ICANN into some treaty based organization would be a source of legitimacy. However, the other extreme is that they are most fearful is that if no government were to play a role regarding the Internet. And I think this is what animates a lot of the concern.

The other side of ICANN is that the only thing that scares governments more than their particular government having some sort of control is if no government has control over something that affects their peoples' lives. And one of the examples I use is the Brazilians. In their interventions, for example, Brazil raised a very legitimate and serious issue. Their question, was, "we, the Brazilian government, rely tremendously on the internet. We basically use it for tax purposes; we do it for our government services. When and if the internet goes down, if we have some catastrophic event, are your citizens going to look to us, the Brasília government, to be responsible for fixing this problem, and to whom do we go? Do we go to some international organization? We know how to go to the UN. Or, on the other extreme, do we go to some California, not-for-profit company and say 'What's up? What are we supposed to do?'"

That's not a role that very many governments are comfortable with. Which means that if they couldn't win the argument to go all the way to a multi-lateral organization, virtually every country is comfortable with having at least one government, namely the US government, having a role. They

know how to come to us, they know how to deal with us, even if they don't like us. And, the old analogy, they have a number to call and they know that someone's going to answer that call and try to deal with those issues. And in fact the irony is that countries are in fact more comfortable with the US government involvement than no government involvement.

E: I just want to raise another irony: Governments are actually a very small part of the world, even though they putatively control most of it. But, in fact the real constituency of ICANN is the users, all around the world, many of whom are treated shabbily by their own governments, censored, ignored... You go to these international meetings and you see people who tend to be the cousins of important ministers living very nicely in expensive hotels in Geneva, spending days and days and days on useless meetings. They're not doing any real harm, but they're sucking resources out of the treasuries of those countries. That's why I find a lot of this obsession with ICANN offensive: Not because anything's doing anything evil but because they're wasting not just money but talent that could be better applied.

M: ICANN published a consultive paper sometime within the last 48 hours, which raises officially for the first time, an idea that's been muttered for about a year or more. That ICANN's identity should be changed to that what they call a private, international organization based in the US, which I took to mean something like the International Olympic Committee. I was just wondering if you're saying that that's a non-starter for many governments.

D: Yeah, I haven't studied that. I don't know enough to be knowledgeable to answer the question, but if it is as you say, a way in which governments don't play a role, including the US government and the like, I think that would be a very unsatisfactory. In fact I will say that one of the most interesting pieces for me, from a legal perspective on this, and it shows you how uncomfortable governments are, is there has been this constant search within ICANN to figure out what is the role for governments. What is the appropriate role in this sort of unusual structure? And so far that has been defined as something called the GAC, which is the Government Advisory Committee, for whom the roles are defined but not, and I think everyone would agree, in a way that makes people comfortable. And governments are extraordinarily uncomfortable. And I think the French are leaders, at least in my conversations, of pointing out the irony here because governments are very used to having private NGOs or companies that give advice to governments and governments decide what to do. Governments are extraordinarily uncomfortable in fact, are completely perplexed by the fact that they would give non-binding advice to some private entity—that's just something that government officials don't normally do.

M: It looks awful binding from out here when they give it.

D: Well in fact that's part of the tension is, I think it's fair to say, that ICANN doesn't really know itself how to deal with that. And therein lies some of the problems. One other piece, Tim, that Michael raises too, one. We were driven, from a policy perspective, to say that the current system of the internet is not the end-all be-all. And we are convinced that there will be something down the road. Just like the internet has, in many respects, replaced telephony, in ways that 50 years ago we didn't know would happen. Fifty years from now we suspect that DNS or something else like that will be different. Now at least we want to make sure that there is a free opportunity. And part of the cost of having ICANN or any other organization become that international organization that governments then control, is highly undesirable because governments by nature are extraordinarily conservative. Then they will then enshrine the current system and the current set of relationships in ways that then have impact that make it extraordinarily hard for the next best thing to come along and do something.

I wanted to get back to an issue that Esther raised. One of the original dreams of ICANN and the internet governance process was some hope that perhaps, by going around territorial government or creating some alternative, that ICANN or internet governance might be an alternative to the United Nations and the ITU. So, the question I have, is there anything left of that internet dream? Have we learned a way for a coordinating organization to represent people independent of government?

E: The best way to describe cynicism is as the disappointment of the idealist. A government has an interesting challenge because it needs to govern everyone and be accountable to everyone. A private sector organization can arbitrarily decide whom it wants to deal with; it can say, "You're too much of a trouble maker; we don't want you in our store, in our organization, whatever." ICANN had an even more difficult problem because it wasn't really clear who was in its store. It kept foundering on the notion of representative democracy and voting. Of course, people who wanted to be influential could round up the digital troops. They may or may not have existed as physical bodies, and so there were some votes, but they were pretty messy.

The elections?

E: Yes, the elections.

For people who don't follow this, ICANN made an effort in its earlier days to have global elections. To have elections for the whole world, independent from any sort of government, so it was an experiment in global democracy.

E: Yes, it got about 100,000 votes as I recall. It was riddled with problems, and conspiracy theories abounded. The things you're finding, they're great examples of governance on the internet, but they're governance *on* the internet; they're not governance *by* the internet.

That is, you can be arbitrary if you're not a sovereign government. You can have rules in a particular online community, and you can have rules for changing those rules that aren't voted upon; if you don't like the rules, you can go somewhere else.

So, there are great models for governance *on* the internet but they don't really apply to governance *of* the Internet. They could apply to ICANN, and you can argue they should apply to ICANN, if there were credible alternatives. But precisely because there is no credible alternative to ICANN, it has a duty, to be more accountable and more procedure-ridden than might be appropriate. But I think it goes way, way too far in that direction. The best thing that could happen for ICANN would be some lightening up of its rules; that might improve things.

The other challenge is dealing with some of the mess on the commercial side of ICANN. I'm not talking about people living off ICANN, but the whole domain name business, the association of easy-to-get domain names with criminals who run phishing websites and stuff like that have turned this thing into a cesspool.

M: I'd give a somewhat different answer, because I think that there was more than one dream that sort of combined together. One was the dream of a sort of spontaneous, self-governance. And we do see that for things that are purely on the internet like the IETF. I wrote a big paper arguing that it was as close to having an ideal discourse as you were ever going to see in real life. And that it was also hothouse conditions, where you had people with similar interests, they had an economic interest in there being an answer and it's not something that's easy to replicate outside. I would say that we also have some of the dream alive for the use of IT to help national politics. I mean You Tube and blogs and the whole discourse that's happening here and in other countries, which is a very exciting development. That wasn't ICANN ever. ICANN became very quickly, an economic fight over board votes: that went by fast. But, there was a different dream that hasn't been mentioned and that was the public/private cooperative dream

which I sometimes call vulgar corporatism. It was a dream dreamt by people who weren't really familiar with that history of attempts of corporatism and didn't try to design around the problem and therefore fell into the known traps. I'm very happy to say that if anything good came out of ICANN, we killed that.

Do we need internet governance at all? Is it possible to imagine an outcome where we just think back to the 1990s or 2000s and say well, at one point, this was all thought to be necessary, but turned out not to be. After all, we don't have anyone really in charge of the World Wide Web so do we really need someone in charge of internet naming and numbering?

E: We need rules, yes. And again I think that the best system is where rule sets compete. Right now we have a system where it's a single rule set and a single group of individuals in charge. Perhaps one of the things most unstable about ICANN now is the individuals who are there, because they're not immortal.

They're going to have to change at some point and it's way more personal, in some sense, than it ought to be. The original ideal of ICANN was a place where people would come together to argue about policies; the policies would be promulgated by consensus and then everyone would observe them. Those who did not observe them would be banished from the system. That actually is a pretty good idea. It's just really, really hard to implement.

Is the focus on issues of naming and numbering to the exclusion of more important issues of internet governance? Is there anything you come across that might fall into that description?

D: The answer is, absolutely. The rules of the road, not just over DNS, but its availability and the way in which individuals relate to the internet and are able to use it or not be able to use it, information flows become extremely important. We saw this very clearly before Congress last year, as there was proposed legislation about the appropriate role for U.S. companies in this space in dealing with governments in countries that do not allow their people to have free access to information and the like. I spend a lot of time, under Secretary Rice's direction, with many colleagues working on what we call "internet freedom", which is related to internet governance. This issue is about what the U.S. government can be doing on absent additional authority by Congress in this area, what tools do we have to promote this? We have a number of very important tools that we are increasingly using.

We do things, for example, in our State Department, congressionally mandated, Human Rights Report. We now have specific sections that focus

on internet issues, which had not been true before. We now ask all of our posts, when they're providing the input for all of the countries in the world, to help report on what's going on. What are the roles of government? What are the laws, what are the regulations on the free-flow of information? And then we talk about it. Talking about it and reporting on it is obviously not enough, so we spend time advocating about this. I recognize, that I'm an extremist on this subject, and as Americans, we all are because of our First Amendment. Being an extremist and a bit of a subversive on these things is a very powerful tool for change, and we've got a very powerful story to tell.

Having said that, it's a very difficult story to tell effectively as an advocate. How do you get China to liberalize? How do you get countries in the Middle East to liberalize? How do you deal with issues such as cartoons of the prophet Mohammed, as they are transmitted over the internet, creating riots where people are killed? How do you deal with those classes of issues in ways that allow, and give comfort to, people who want to allow greater freedom on the internet? Those are important things and ones that we're very actively discussing bilaterally, multilaterally and otherwise. It's a long process for many countries, it's easier for others, but it's clearly an important calling and one that we're spending a lot of time on.

And lastly, and perhaps most importantly in terms of internet governance, none of this stuff matters if people don't have access to it. And so we are spending an increasing amount of time, and my colleagues' time, and effort and money on working with governments around the world trying to figure out ways we can expand the facilities over which the internet, whether it is wirelessly or wire line, fiber optics or satellite, so that people have access to it. And so the important corollary to all of these interesting academic and legal debates, which are extraordinarily important, over internet governance, is that it's not much to do about anything unless we have a lot of people benefiting from it. I'm extraordinarily thrilled to report, as many of you know, that there are now over 2 billion people who have access to wireless and wire line telephones, many of whom now have access to the internet through that medium, and over 1 billion subscribers to the internet itself. An extraordinary change and it also underscores why governments take these issues of internet governance so very, very seriously.

Michael, do you have any thoughts on this?

M: I think we're building structures that may change but there's also some chance that they may last. In that context, I think we all realize just how dangerous internet governance can be. People want to solve the spam problem or maybe the porn problem, whatever they think the problem is, and legally and technically the power to do good is also the power to do great

harm. And when governance, the power to choose what will be valued and how that will be enforced is in the hands of a body that isn't terribly legitimate, and which isn't run in ways that any of us are terribly happy about, that might be one of the reasons you don't want to empower it to do some of the good things you might like to see done, because it's so easy to use those same powers to do very bad things which are very hard to undo. That's why I've proposed breaking ICANN up into pieces, partly because the more powers together make it more dangerous.

Let's say, in the interest of controlling child pornography, ICANN undertakes measures to more closely control who gets a domain name.

M: To make registrars enforcers.

Right. That sounds like a good thing, so tell us what's wrong about that?

M: Now we've institutionalized this idea that this odd body can make content-control decisions in a way in which aren't reviewable, aren't controllable, and yet makes decisions that are very enforceable and enlists other people to do things.

E: It makes the registrars into police.

M: Right. Please don't get me wrong, no one at ICANN has suggested that they are about to do that, I'm happy to say.

E: I want to go back to what David said, and talk about how important it is to think first about people just getting access to the Internet. I don't think it's going to be done by the ITU,. Is there anybody here from Kazakhstan? [yes; a hand was raised] Well, we should talk because I was there in September and spent a fair amount of time talking with local NGOs. One problem there is that internet access is extremely expensive. It's approximately \$350 a month. While I was there, it was revealed that the guy who runs Kazah Telecom, which is half owned by the state and half owned by other interests, makes \$350,000 a month. Nobody was shocked by this and they weren't really talking about the amount. What they were talking about is, "Gosh, I wonder who in the government caused this information to be revealed?"

Of course, Kazak Telecom has a monopoly. When I was leaving, just by chance, I flew out next to the Foreign Minister of Kazakhstan, the guy who tried to shut down Borat. Rather than engage him in a futile discussion on freedom of speech or anything like that, I said, "You know, it would really

help your economy, if you created, you don't even need to create competition for Kazakh Telecom... If it just lowered its charges by 50%, it would probably more than double its revenues and become even more profitable." But of course there are a lot of people in the Kazakh establishment who aren't particularly interested in providing access to lots of people more cheaply. That's one of the big problems. You go in there, and these people don't even want this to happen because they're making higher rents on the situation the way it is. And they don't want new channels for political speech."

Selected Questions

Q: My name is James Apple, I'm with the International Judicial Academy. My question is to the panel: What are the arguments against having something like the World Trade Organization, where you have a set of protocols and dispute resolution and a palate body and a whole system of trade disputes; what's the argument doing that for the internet?

T: Do you mean having the WTO itself assert more authority over the internet, because I think that that is something that is going to happen.

Q: No. That would be a possibility but the other would be to have a separate organization devoted to the internet; the WIO, the World Internet Organization.

M: I think that there are a huge number of problems with that, I'll just mention two. One is that, as a philosophical matter, I'm not ashamed to say that I do not want governments regulating my communication with you, and that would be an inevitable consequence of that structure and that makes me exceedingly uncomfortable. The second is that the governance mechanisms of the WTO aren't sufficient for the regulation of communications.

T: But the WTO does now, with the participation of various despotic governments, regulate your candy bar supplies or how you get your manufactured goods. You go to Wal-mart and look at the goods, those are strongly affected by the WTO. Does that bother you in the same way or is it a different issue?

M: I think communications are special, I think that it's stronger for that category. I think that in the WTO more reasonable people will disagree, for the internet, especially communications. When it touches politics and free speech and so on, I'm less willing to concede that aspect of it. And the next is the problem of how you allocate decision making power either for policy

making or how these arbitrations would work is so non-trivial as to ... no one's come forward with anything that even looks like a solution.

Q: Well, thank you. David Jeffrey, I'm from the United Nations, very much in a personal capacity; long time listener, first time caller. My first attendance at this meeting and thank you for taking my call. My question is, I find the topic of future International Law a bit too daunting, what about present International Law. What can we currently say about the role of International Law and, in your wildest dreams, what might it be called upon to do in the future?

T: I would say the role of treaties right now, in the regulation of the internet, is fairly minimal, though not non-existent. For you can count on one hand the number of treaties that are relevant to the current affairs of the internet. If this was an exam question, name all of the international laws that matter, I guess I would point to the telecommunications agreements. Particularly the ones that were assigned in the foundation of the WTO and various inter-connection requirements, you have to connect on this, the carriers are supposed to connect with each-other, as something that is kind of relevant in the sense that the pipes have to connect and there has to be a connection between the wires, the same way your airplane has to land. But, beyond that...

M: I think that framing the question in terms of treaties leaves out important...I'm talking about classic International Law too, for example the intellectual property area. There are a lot of things under the general umbrella existing harmonizing rules for copyright and trademark for example, which gets supplied too. Anyway, there's an ongoing attempt by WIPO to insert itself as a maker of a unique, global legitimate trademark law for domain names. There is transporter, transaction rules all kinds being negotiated bi-laterally, especially in the EU, there's data protection rules, etc., etc. There's comity questions, the yahoos...a whole chapter in your book...so I would say that there's tons and tons of it, just like anything else that's important. The fact that we don't have treaties for it, for many of the reasons that you say in the book, gets rolled up under familiar umbrellas and gets.... I used to say I was an internet lawyer and it's very hard to say that with a straight face anymore because it's now a sub-field of everything else.

T: That's true. Its also true that every time you click on a webpage of another country, it's also an export and import of service, and people haven't fully thought through and no one's really litigated or tried out what happens when you start thinking of every incidence of internet communications as a trade in service. But if I were to guess to what area might develop as international regulations of the internet, I would put my bet on the WTO.

On the Future of Internet Governance

That's all of our time. Thanks to everyone for attending and participating, and thanks the American Society of International Law conference organizers for placing this panel on the agenda of the meeting.

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