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# 'Internet Governance: The United States won the battle, but will the Internet win the war?'

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The second stage of the World Summit on the Information Society (WSIS) in Tunisia in November 2005 saw the long-standing debate over who should govern the Internet reach an apparent culmination. The vast majority of parties involved (over 10,000 people from over 170 countries) announced their acquiescence to the final agreement, which allowed ICANN to maintain responsibility for domain name allocation, while introducing a non-binding multi-stakeholder Internet Governance Forum (IGF) to be set up alongside.[1] However, this current Paper will show that the agreement provides limited assistance to the ongoing discussion and resolution on Internet governance, and furthermore that unless the key players – particularly the United States – alter their stance, the Internet is in danger of fragmentation and gridlock, which is a genuine possibility unless the governance of the Internet moves to an International level away from exclusive American control.

## 1. The starting position

The background to the second stage of the WSIS in Tunisia is well documented. The conclusion from the first stage (held in 2003 in Geneva) was to create a committee to examine the area of Internet governance, involving definitions, public policy issues and strategic approaches. The Working Group on Internet Governance (WGIG)

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[1] World Summit on the Information Society *Tunis Agenda for the Information Society* Document WSIS-05/TUNIS/DOC/6 18th November 2005. Available at: http://www.itu.int/wis/docs2/tunis/off/6rev1.html [12th December 2005].

reported in June 2005.[2] The need for such a working group arose from the acknowledgement that:

> …the Internet is a central element of the infrastructure of the emerging information society, while recognising that there are differing views on the suitability of current institutions and mechanisms for managing processes and developing policies for the global Internet.[3]

Furthermore, it was also noted that if the Internet structure is to successfully defeat problems, such as spam, cyber-crime, privacy and security concerns, then a degree of international co-operation is required, however the Report noted that *"…the nature of global co-operation required is not well defined."*[4] Alongside the official reasoning for the working group, the political edge to the issue was apparent. The dilemma was, and is, predominantly political in nature and one founded upon freedom of expression. Countries, such as China, Brazil and Iran – not renowned for their record on free speech - are seeking a greater say on the governing of the Internet and are seeking a move towards a multi-national, multi-stakeholder body and a move away from the ICANN method of regulation, overseen by the American Department of Commerce.

Accordingly, in an effort to define and offer guidance on the governance level needed, four proposals were offered, ranging from retaining the *status quo* to having two councils to the creation of a Global Internet Council.[5] Immediately a line was drawn in the sand between the Americans, who sought to retain management through ICANN and other countries who sought a more fluid governance model, allowing them a greater input. John Dolittle, a Republican from the House of Representatives, stated:

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[2] Report of the Working Group on Internet Governance (June 2005). Available at: http://www.wgig.org/docs/WGIGREPORT.pdf [4th March 2006]. The Report provided a 'working definition of Internet Governance; specifically: *"Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet."* (Page 4).

[3] Ibid. Page 3.

[4] Ibid. Page 5.

[5] Ibid. Pages 13-16.

Turning the Internet over to countries with problematic human-rights records, muted free-speech laws, and questionable taxation practices will prevent the Internet from remaining the thriving medium it has become today.[6]

Furthermore, Senator Norm Coleman stated there is no:

…rational justification for moving Internet Governance to the United Nations…we cannot stand idly by as some governments seek to make the Internet an instrument of censorship and political suppression. We must stand fast against all attempts to alter the Internet's nature as a free and open global system.[7]

The irony is startling. For months, America has been actively vetoing (due in the main to lobbying by religious groups) the adoption of an '.xxx' domain name, which would be used for pornographic sites. No other country has this right of veto because ICANN comes under the control of the American Department of Commerce. Yet the prevention of censorship and the upholding of freedom of speech is one of the key American arguments for ensuring the Internet is kept within American oversight.[8]

Somewhat unsurprisingly, the United Nations (UN) was one of the protagonists, who took a differing view to that of the Americans. UN Secretary General Kofi Annan urged for control and restraint:

The United Nations wants only to ensure the Internet's global reach…Governance of matters related to the Internet, such as spam and cyber-crime, is being dealt with in a dispersed and fragmented manner, while the Internet's infrastructure has been managed in an informal, but effective collaboration among private businesses, civil society and the academic and technical communities. But developing countries find it difficult to follow all these processes and feel left out of the Internet governance

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[6] Reuters Press Release *More Lawmakers back US control of the Internet* (21st October 2005). Available at: http://www.boston.com/news/nation/washington/articles/2005/10/21/ more_lawmakers _back_us_control_of_internet/ [24th October 2005].

[7] BBC News Press Release *US resists radical Net overhaul* 20th October 2005. Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4357360.htm [20th October 2005].

[8] BBC Technology News Press Release *Whose net is it anyway?* (Thompson, B) 19th August 2005. Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4165920.stm [9th March 2006].

structures…Everyone acknowledges the need for more international participation in discussions on Internet governance. The disagreement is how to achieve it. So let's set aside fears of UN 'designs' on the Internet. Much as some would like to open up another front of attack on the United Nations, this dog of an argument won't bark.[9]

Coupled with these somewhat contrasting views, was the view of Professor Zittrain (Oxford University), who suggested that governments *"...focus on the serious issues that do need an international solution, especially things like spam, phishing and cyber-security."*[10] Thus, the lead into the Tunisian conference was rather tense.

## 2. The agreement and subsequent reaction

The agreement reached in Tunisia allowed ICANN to remain in overall oversight of the Internet, in relation to domain names. However, alongside ICANN, a non-binding Internet Governance Forum (IGF) was to be established including governmental stakeholders from around the globe. The aggressive metaphors that greeted this outcome were indicative of the international tension prior to the meeting. The BBC announced that the *"...US has won its fight to stay in charge of the Internet"*,[11] while at the same time other commentators suggested that there had been a *"...brief cessation of hostilities between the United States and its critics on Internet management…"*[12]

The IGF is intended to be a multi-lateral, multi-stakeholder non-binding body. Thus, the remit is broad, but the power is minimal. The UN have taken the lead in formulating this body, and in February 2006 organised a consultation in Geneva to discuss its structure. It is expected to meet formally in Greece later this year.

Reaction to the decision was, understandably, mixed. Alun Michael MP (the United Kingdom's Minister for Industry and the Regions) simply said *"I welcome the*

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[9] CNET News.com Press Release *Kofi Annan says UN won't 'takeover' the Internet* (7th November 2005). Available at: http://news.com.com/2061-10789_3-5937659.html [11th November 2005].

[10] BBC News Press Release *US heads for Internet showdown* (15th November 2005). Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4436428.stm [15th November 2005].

[11] BBC News Press Release *US retains hold of the Internet* (16th November 2005). Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4441544.stm [16th November 2005].

[12] ZdNet Press Release *Internet governance battles to continue* (18th November 2005). Available at: http://news.zdnet.co.uk/internet/0,39020369,39237383,00.htm [18th November 2005].

*agreement on Internet governance.*"[13] His response was studiously guarded and the statement continued to read as a self-congratulatory for the UK and the European Union for their role in brokering the agreement. The self-congratulatory approach was continued by Viviane Reding (European Commissioner for Information Society and Media) who was of the view that the agreement:

> …was possible because of the strong belief of all democratic nations that enhanced international cooperation is the best way to make progress towards guaranteeing the freedom of the Internet around the globe.[14]

Whilst the American delegation was understandably delighted with the outcome, several non-governmental organisations around the globe were somewhat disappointed. For instance, Chantel Peyer, from the Swiss 'Bread for All' organisation stated that this *"…was presented as a 'summit of solutions…but there is a clear lack of political will by rich countries."*[15] This comment not only made reference to the Internet governance aspect of the conference, but also the secondary discussion on that of reducing the 'digital divide' in poorer countries. In contrast to this opinion was the view of some members of the private sector:

> Business sees great merit in the creation of a truly international, truly inclusive multi-stakeholder forum in which the myriad of issues surrounding the Internet can be discussed…As a complement to existing organisations, such a Forum can only further enhance the level of debate about the Internet, facilitate the exchange of ideas and experiences and finally contribute to the ultimate aim of this Summit - the spreading of the many benefits of the Internet to as many of the world's inhabitants as possible.[16]

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[13] Department of Trade and Industry Press Release *UK Minister welcomes Internet Governance agreement* (18th November 2005). Available at: http://www.gnn.gov.uk/envi ronment/detail.asp?ReleaseID=178131&NewsAreaID=2&NavigatedFromDepartment=False [10th March 2005].

[14] Public Technology Press Release *EU pushes internationalisation of Internet governance at Tunis World Summit* (17th November 2005). Available at: http://www.publictechnology.net/ print.php?sid=4003 [17th November 2005].

[15] Inter Press Service *Internet Governance: NGOs disappointed with declaration* (16th November 2005). Available at: http://allafrica.com/stories/printable/2005511170550.html [18th November 2005].

[16] Ag-IP Press Release *Private sector welcomes decision on Internet Governance and creation of Forum* (16th November 2005). Available at: http://www.ag-ip-news.com/PrintArticle.asp?Art_ID=2352 [13th March 2006].

However, perhaps Bernard Benhamou, who was a member of the French delegation, gave the most insightful reaction to the conference. He stated that *"the worst has been avoided but we're not sure that the best is to come in the future."*[17]

Unsurprisingly, for a diplomatic exercise all the main parties to the conference were saying what a success it had been for them. Yet, it is argued, whilst the agreement received high marks for good diplomatic practice, it is doubted whether the marks are as high in the 'realistic success' stakes. It is contended that the final decision by WSIS was won by the United States only by *"shouting the loudest."*[18] The forceful arguments the American delegation gave prior to and during the Conference (including a letter from the American Secretary of State, Condoleezza Rice[19]) ensured the United States kept oversight of ICANN, which comes within the remit of the Department of Commerce.

Accordingly, the country with the most to lose left Tunisia losing relatively little. Whilst the agreement has left America in overall control, it is suggested that the agreement has achieved a result similar to that of painting over a damp wall; a short-term decision that will need revisiting urgently. It is suggested that if this is not reviewed soon, the Internet is in real threat of fragmentation and potential gridlock.

## 3.  The problems remain

It is strongly submitted that the conclusion reached by WSIS is not a long-term effective solution to the conflict of controlling ideologies. In the lead up to the Tunisian conference, one of the key arguments forwarded by the American delegation was that removal of ICANN from their role had the potential of causing fragmentation of the Internet structure and established domain name system. However, it is suggested that the outcome as it currently stands is not sufficient and the consideration given by the Tunisia conference to both the role of ICANN and the appropriateness of their oversight role and the long-term concerns about the management of the internet was limited. Unless the governance of the Internet moves

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[17] Blakely, R *Tunis talks find international compromise* The Times (16th November 2005), page 8.
[18] Out-Law.com News Press Release *US wins net governance battle* 16th November 2005. Available at: http://www.out-law.com/page-6351-theme=print [17th November 2005].
[19] A copy of the letter from Condoleezza Rice can be found at: *Read the letter that won the Internet governance battle* (2nd December 2005). Available at: http://www.theregister.co.uk/2005/12/02/rice_eu_letter/ [5th December 2005].

to a global, *authoritative*, multi-governmental, multi-stakeholder body, there is a real threat of fragmentation of the Internet. Indeed, this is already being seen within China. It was reported in early 2006, that China were making changes to its domain name system. Whilst, there is an element of the Chinese Government seeking to restrict access to the approximate 110m Chinese Internet population (for instance it has been seen that the government are censoring online news services and bulletin boards, as well as more sensitive sites concerning democracy and Taiwan[20]), there appears to be a greater motivation. Indeed, when the news regarding the change to the domain name system was published in the Chinese press (interestingly, the article was written in English) it stated that as a consequence of the changes to the Chinese domain name system *"…internet users don't have to surf the web via the servers under the management of ICANN of the United States."*[21] The political edge to the Internet governance debate is still continuing and it is suggested that the IGF in its current form does not fully satisfy all nations. Whilst an all-encompassing solution maybe a utopian ideal, without more stringent efforts, it is suggested that the approach being taken by China will not be an isolated example.

## 4.  The role of ICANN and the development of the Internet

It is almost without doubt that since its inception in 1998, ICANN have regulated the Internet to a high standard. Stemming from historical reasons, ICANN was established to oversee domain name allocation on an international level and therefore, it could be suggested that they have an Internet governor role. The United States created this body (within the remit of the Department of Commerce), as they saw it as their role, having been responsible for the creation and early funding of the Internet, as the Internet has it roots as an American military tool (the Defence Advanced Research Project Agency or 'DARPA'). They have managed the domain name system well and have implemented workable dispute resolution schemes.

However, the nature of the Internet has clearly changed over the past couple of decades. Its prime usage is no longer military-based and a significantly greater

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[20] See BBC News Press Release *China tightens grip on web news* (26th September 2005). Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/4282510.stm [7th October 2005].

[21] BBC News Press Release *China and the break-up of the net* (7th March 2005). Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4779660.stm [8th March 2006].

emphasis on commerce has emerged. The cynic could argue that at the beginning of ICANN's existence America recognised this and brought the body into the remit of the Department of Commerce and not the defence or military equivalent. The debate on Internet Governance has its roots in this dilemma: the Internet has had remarkable success (indeed it is estimated that some 1bn people are online), growth and is a unique jurisdiction as it exists on a supra-national level, however developing countries, such as China, Brazil and Iran are seeking a greater say on the governing of the Internet and believe that ICANN should not be in sole charge. The American reporter Ted Demopoulos echoes these sentiments and stated that:

> The Internet has fundamentally changed. A little over a decade ago, it was US-centric and entirely non-commercial. Today, its scope is truly international and its economic importance is enormous and growing…Internet history has little bearing on current and future realities…it is the height of arrogance for the United States to insist on maintaining control of the Internet.[22]

Although the Internet has evolved, its management has not. It is recommended that the constitution of ICANN needs to alter. Currently, the Board of Directors contains members from countries such as Chile, Mexico and Senegal, however the majority are American. It is suggested that the change in the use of the Internet necessitates a change in governance. However, the problem with this is that the Internet - internationally - is dependant upon ICANN as they operate the centralised process for domain name recognition and ensuring that the domain requested is the website to which the user is sent.

There is, of course, the alternative argument, which highlights the potential problems with sharing the management of the Internet with countries that have legislation to mute free speech. Indeed, during the Summit, several protests were reported against the Tunisian government for their strict stance and restrictions on freedom of speech. This in turn demonstrates one of the key problems with any Internet governance model, led by ICANN or not. Different countries have different approaches to the right of an individual to speak freely and this has the potential for being problematic.

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[22] Demopoulos, T *Govern 'Net globally* USA Today (14th November 2005). Available at: http://www.usatoday.com/news/opinions/editorials/2005-11-14-oppose_x.htm [17th November 2005].

Indeed, Emily Taylor from Nominet (the organisation within the United Kingdom responsible for handing out second level domain names) argued that innovation and decentralisation was essential for a successful governance of the Internet and stated:

> Intervention by government worldwide, each with their own political agenda and cultural beliefs to uphold, threatens to consign the Internet to a future of over-regulation.[23]

Indeed, it is the author's contention that a decision needs to be made about which consideration is the most important. If on the one hand the Internet, as a free, open and international system predominates, then approaches (be they restrictions or otherwise) to freedom of expression need to put to one side. If on the other hand, countries are more concerned about freedom of speech or restricting free speech, then it is argued that the Internet will over time fragment, as is already being seen – in embryonic form – in China. It is contended that the IGF needs to evolve at a rapid pace to give the Internet any chance of continual success, the decision seemed to have done enough to appease countries like China, Iran and Brazil in the short term, but it is suggested that the reality behind the non-binding IGF is being realised and accordingly some countries are taking steps away from the ICANN model of management.

## 5. Proposals for reform

It is acknowledged that having an effective international body will not equate to absolute free speech. Yet without such a body there is a real threat of countries reacting to the ostensible American arm of control and pulling away and creating their own root servers and domain name systems. In essence, the question that key international governmental stakeholders need to answer is, as suggested, whether the free use of the Internet is more important that free speech restrictions. If this is not answered it could lead to gridlock on the Internet as one domain name could be the address for a number of different websites around the world, within different spheres of control.

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[23] BBC News Press Release *US resists radical Net overhaul* 20th October 2005. Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/4357360.htm [20th October 2005].

There is the secondary consideration to this issue, based more generally around the regulation of the Internet. There is the argument that too much regulation, maybe from a top-down governmental approach, could lead to restrictions to online usage. However, if there is a lack of regulation (arguably the current *status quo*) there is a threat of fragmentation, as the perception will remain that the Internet is an American-managed system. It is strongly suggested if the Internet is to avoid fragmentation then the IGF needs a more significant role in the management of the Internet than is currently being mooted. Unless the IGF moves to a global, authoritative, multi-governmental, multi-stakeholder and binding body, there is a real threat of fragmentation of the Internet. The concerns of over-regulation are legitimate, yet a 'top-down' approach does not equate to restriction. Indeed, it could be suggested that the current Internet governance approach (by ICANN and the American Department of Commerce) is a top-down system led by the American government.

An alternative method of governance is through a 'bottom-up' approach with management of the Internet resting on individual stakeholders (for instance businesses and Internet Service Providers). The bottom-up approach has received some support, notably from Paul Twomey (Head of ICANN), who has stated:

> From ICANN's viewpoint, the Internet's future success, in all aspects, is dependent on the continued participation of the entire Internet community through the existing multi-stakeholder mechanism, rather than a top-down model with governmental control.[24]

However, in contrast to Twoney's view, it is suggested that the sovereignty stakes are too high for the Internet to successfully operate through the adoption of a bottom up approach. If the WSIS process teaches observers anything, it is that sovereignty of Internet space is a key issue, which many countries feel very strongly about, as seen in the tense run-up to the Tunisian Summit and the apparent declarations of 'victory' heard afterwards. Accordingly, Governmental involvement and oversight is essential, but this must be alongside stakeholder involvement. Indeed the WGIG gave a good suggestion when talking about the future of Internet governance by saying that *"Global Internet governance can only be effective if there is coherence with regional,*

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[24] BBC News Press Release *The net and politicians don't mix* (16th November 2005). Available at: http://news.bbc.co.uk/po/pr/fr/-/1/hi/technology/4438664.stm [17th November 2005].

*sub-regional and national level policies."*[25] The current proposals do not adequately fulfil this recommendation; it is apparent that at national level governments do not have a coherent and unified approach to Internet governance.

Furthermore, the IGF in its current form does not give day-to-day running of the Internet to any country other than America, indeed the IGF will have *"...no oversight function and...[will]...not replace existing arrangements, mechanisms, institutions or organisations."*[26] There is a suggestion that the agreement has done little for the long term stability and governance of the Internet and has simply *"...bought some time"* for America as they seek to retain the key management hold.[27] There is a suggestion that the IGF is the beginning of an evolution towards a more inclusive governmental model, yet there are still several missing links until a satisfactory model is reached.

Early estimates suggest that the first full meeting of the IGF in late 2006 will have around 500 delegates.[28] With this number of stakeholders, there should be a greater emphasis and weighting on the opinions and decisions reached.

For a governance model to be truly effective, an internationally representative body needs to be created in place of ICANN. Whilst ICANN have managed the Internet well, the nature of the system is changing and the governance model is no longer adequate for all users of the Internet system. This body could be made up from a selection of people from different areas of the geographic telecommunications world. They would take on the role of ICANN in relation to domain names. This body should not be under the immediate control of the Department of Commerce, but should shift towards an independent international body similar to the International Telecommunications Union (ITU) or the UN. This would remove the perception of American control, which is arguably the key bone of contention for many countries. Internet governance would therefore remain centralised, which it is contended is essential, and the issues surrounding sovereignty could be dealt with though the UN.

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[25] *Supra* n.2, page 16.
[26] International Herald Tribune *Victory claims abound for global web accord* (16th November 2005). Available at: http://www.iht.com/bin/print_ipub.php?file=/articles/2005/11/ 16/business/net.php [17th November 2005].
[27] Ibid.
[28] United Nations News Service Press Release *Internet governance Forum to tackle broad range of topics, UN official says* (17th February 2006). Available at: http://www.un.org/ apps/news/printnews.asp?nid=17534 [20th February 2006].

Alongside, should be a body that is able to discuss the wider issues of the Internet (similar to the IGF recommended). The wider issues could include cyber-crime, spam, and intellectual property rights. However, it is essential that this body has binding authority, to ensure that all participants in the Internet are able to provide input into solving these problems.

The advantages of this dual-system would be fourfold. First, the good practice and experience of ICANN would be maintained; it is essential to maintain the centralised model demonstrated by ICANN. Second, greater involvement by more countries and removal of American oversight will reduce the threat of fragmentation of the Internet. The fight for sovereignty (and accordingly control) over the Internet is a key consideration for the vast majority of countries. Third, domain name allocation could still be monitored, to ensure the free-flow of information. Finally, the binding multi-stakeholder body alongside, the reformed ICANN would be able to provide an effective governance of a system increasing used on a worldwide basis for trade, finance, communication and entertainment.

The conclusions made in Tunisia are not fully representative and the perception of American control has not been removed. Until this is revisited and altered, the Internet remains in considerable threat of break-up and potential gridlock.

## 6.  Conclusion

The Internet governance battle still has a long way to go. America certainly achieved the consensus it was seeking in Tunisia and have retained oversight of ICANN, who are still the closest body currently to an Internet Parliament. The IGF in its current embryonic form may have ideals of taking over ICANN's mantel, but in its non-binding format, it can have little hope of achieving that aim.

Accordingly, the apparent victory for America has the potential at being at the expense of the Internet as a whole. While America are perceived to be the government responsible for the Internet, other countries seeking to provide more input are likely to pull away and consider forming their own 'intranet' as is beginning to be seen in China. The fragmentation of the Internet would potentially be disastrous and the many advantages the Internet offers could be lost overnight unless America concedes some ground to other states.

However, although this sounds negative, there are two potential glimmers of light. First, David Hendon who led the European Union's delegation to Tunisia suggested that America are aware that the deal that was brokered was a short-term arrangement and that seamless interregnum that the Internet may be travelling through will give the opportunity to *"…bodies like ICANN…[to]…see the writing on the wall and sort themselves out. To say the U.S. won would be grossly oversimplifying the situation"*[29]

Second, there is the somewhat fringe view that the Internet may be able to cope in a fragmentised state. Yoshio Utsumi, who is the General-Secretary of the ITU suggested that:

> The Internet need not be one Net controlled by one centre. Regionalisation has already started and I suspect in a few years, the simile of the Internet will be a quite different one.[30]

Utsumi points to China who is attempting to move towards an internal Internet system and suggests this could become the norm. Yet, while this may be proven to be correct, it is an untested model. The Internet has survived so far on a centralised model, with all roads leading to ICANN. For the Internet to avoid fragmentation this model must remain. What must alter, however, is the input of other countries besides America.

The definitional make-up of the Internet has changed in recent years, as must the governance structure.

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[29] *Supra,* n.26.
[30] The Register Press Release *ITU refuses to accept net governance agreement* (21st November 2005). Available at: http://www.theregister.co.uk/2005/11/21/Utsumi_ rejection/print.html [23rd November 2005].