

DIREITO:

A PENSAR TECNOLOGICAMENTE

DIREITO: A PENSAR TECNOLOGICAMENTE

Do we have one real perception of the true degree of technological intrusiveness into the lives of citizens?

At this «Cyberlaw by CIJIC», 2nd edition, we intend to bring to one legal and technological debate some of the most worrying questions related with the weakness of the traditional concepts of public law. Take, for example, old problems where, alleged, threats to state security compress ordinary individual freedoms. Cyberspace currently dominates daily life. Where can we find the protection of the legal-subjective positions of individuals in it?

Traditional juridical and legal programs will lose all effectiveness, sliding into nominal, if the rule of law gives up to respond to the daily problems of netizens.

We all face new legal dimensions. In face of the ineluctable conclusion that the Internet is a global resource, which we dare say, incompatible, par excellence, with the old concept of territorial sovereignty of State, which scientific criteria need to be included in the construction of a dogmatic approach to the regulation of cyberspace? Furthermore, can it be regulated? Which - if any - new international, worldwide, legal solutions we must strive for?»

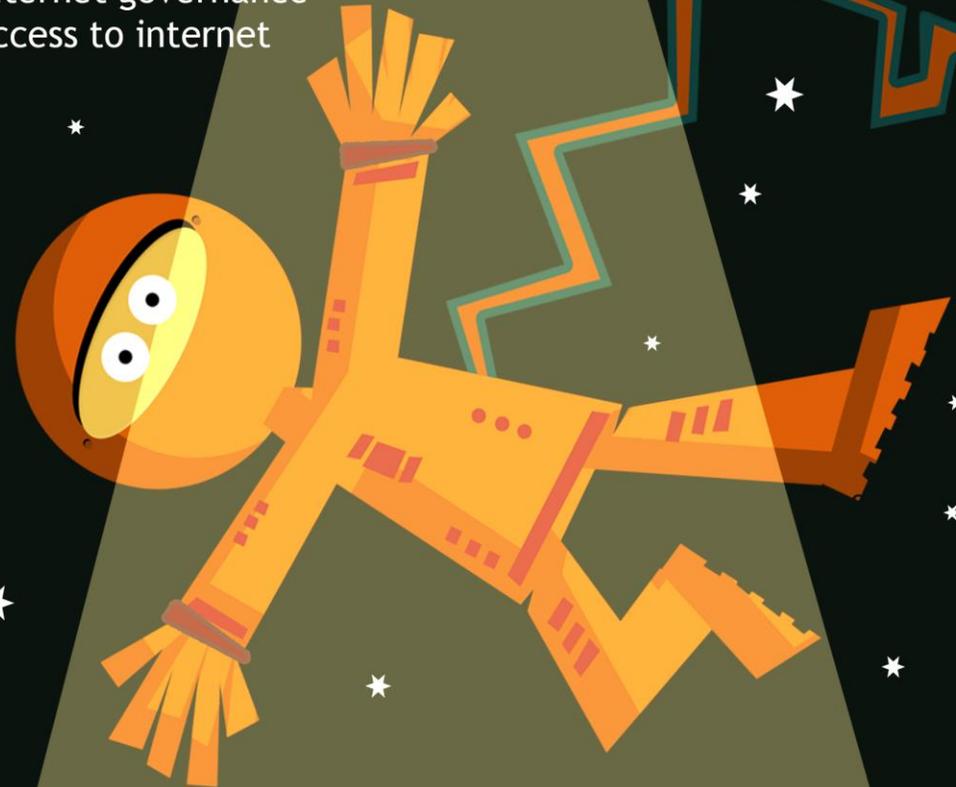


DIREITO: A PENSAR TECNOLOGICAMENTE

internet:

- international tribunal for the internet
- open and free Internet
- internet governance
- access to internet

OUTROS: • international cooperation



CYBERLAW

by CIJIC

EDIÇÃO N.º II – JUNHO DE 2016

**REVISTA CIENTÍFICA SOBRE CYBERLAW DO CENTRO DE
INVESTIGAÇÃO JURÍDICA DO CIBERESPAÇO – CIJIC – DA
FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA**

CYBERLAW

by **CIJIC**

INTERNET GOVERNANCE ON THE MOVE

INTERNET GOVERNANCE EM MOVIMENTO

ROLF H. WEBER ¹

¹ Faculty of Law, University of Zurich.

RESUMO

Parece-nos evidente a necessidade de regulação da Internet por lei; o ciberespaço não poderá estar totalmente dissociado do espaço real (físico). Ademais, as actividades desenvolvidas na Internet, inevitavelmente, reflectem a sua influência sobre os indivíduos e sobre outras entidades no mundo real. Concomitantemente, o actual quadro regulamentar da Internet sendo traçado por diferentes legislações nacionais, orientações autorreguladoras e um número considerável de tratados multilaterais, apresenta graus variados de incidência. Pese embora nos últimos 20 anos tenhamos vindo a assistir a múltiplas actividades dentro do ecossistema de Internet Governance, quer a internet quer a sua governance, denotam um estado contínuo de desenvolvimento, que vale a pena observar com mais acuidade.»

Palavras-Chave: *cosmopolitanismo; fragmentação; Multistakeholderism; Soft Law; Direito transnacional.*

ABSTRACT

The necessity of the Internet's regulation by law seems clear; given that cyberspace cannot be entirely dissociated from real (physical) space, activities on the Internet inevitably have an influence on individuals and other entities in the real world. Accordingly, the existing regulatory framework of the Internet is composed of different national laws, self-regulatory guidelines and a number of multilateral treaties having relevance in varying degrees. Although within the last 20 years manifold activities within the Internet Governance ecosystem have been made, just as the Internet also the Internet Governance is in a continuous state of development that is worth to be looked at more closely.

Keywords: *Cosmopolitanism, Fragmentation, Multistakeholderism, Soft Law, Transnational Law*

Table of Contents

1. Starting Point.....	
1.1 2015 Events.....	
1.2 2016 Challenges.....	
2. Tensions in the Regulatory Environment of Cyberspace.....	
2.1 General Principles vs. Detailed Norms.....	
2.2 Multilateral Agreements vs. Soft Law.....	
2.3 United Nations vs. United Constituencies.....	
2.4 Harmonization vs. Fragmentation.....	
2.5 Macrosystem vs. Microsystem.....	
3. Ongoing Hot Topics.....	
3.1 Cybereconomy.....	
3.2 Human Rights.....	
3.3 Cybersecurity.....	
4. Ongoing Important Platforms.....	
4.1 United Nations.....	
4.2 UNESCO and IGF.....	
4.3 Other Intergovernmental Bodies.....	
4.4 ICANN and IETF.....	
4.5 Multistakeholder Fora.....	
5. Outlook: Rise of Transnationalism.....	

1. STARTING POINT

1.1 2015 Events

Looking back to 2015 two main regulatory events are noteworthy, namely (i) the decisions of the United Nations (UN) and of UN special organizations to proceed with and intensify the cooperation in the field of Internet Governance and (ii) the ongoing efforts to make the transition of IANA functions to a new multistakeholder body a successful event.

(i) In December 2015, 193 governments participating in the UN General Assembly agreed on the so-called “WSIS 10+ Outcome Document” (A/Res/70/125).⁽¹⁾ Substantively the decision is an expression of the acknowledgment that the activities initiated by the two World Summits on the Information Society (WSIS) of 2003 (Geneva) and 2005 (Tunis) should be continued. In particular, the governments agreed to extend the mandate of the Internet Governance Forum (IGF) for another ten years, to strengthen the multistakeholder approach and to bring the next billion users online until 2010. Furthermore, the UN Group of Governmental Experts (GGE) expressed the intention to develop confidence building measures in order to improve cybersecurity. In addition, the collaboration between ITU and ICANN should be improved and the UN Human Rights Council appointed a new rapporteur on privacy in the digital age.

(ii) The self-regulatory approach of the Domain Name System has been the object of increasing criticism mainly by less developed countries. Since US-President Barack Obama announced in 2013 that the partly US “supervised” IANA functions could be transferred to a new multistakeholder body intensive efforts have been undertaken to work out the respective transition agreement. In 2015, within ICANN, the IANA Stewardship Transition Coordination Group (ICS) agreed on the details how to manage the transition of the IANA functions. The intensively discussed issue of the ICANN bodies’ accountability is still debated but in October 2015 a preliminary

¹ United Nations, Outcome Document of the High-Level Meeting of the General Assembly on the Overall Review of the Implementation of WSIS Outcomes, A/Res/70/125, adopted on 16 December 2015, online available at: <http://workspace.unpan.org/sites/Internet/Documents/UNPAN96078.pdf>.

agreement on a so-called “Designator Model” has been entered into by the members of the Cross Constituency Working Group on Accountability.⁽²⁾

1.2 2016 Challenges

In particular, the decision of the UN General Assembly can be seen as a milestone in the further development of the IGF and the multistakeholder approach. Nevertheless, the mentioned understandings reached in 2015 constitute “agreements in principle” having the consequence that many details are still not settled or even quite open. Political tensions due to different understandings of public policy will continue in 2016. Therefore, the design of the legal framework for cyberspace merits further attention. Different regulatory approaches are to be balanced in view of the ongoing hot topics and the existing established platforms.

In 2016, the net community could celebrate the 20th anniversary of the “Declaration of Independence of Cyberspace”, emphatically proclaimed by John Perry Barlow in February 1996.⁽³⁾ But in the meantime it has become clear that many wishes of Barlow remain unfulfilled,⁽⁴⁾ even if the Internet has indeed created a new world with many benefits, challenges and risks.

The following contribution attempts to shed light on the regulatory environment in Internet Governance and to path ways for future successful actions in this field. On that regard, the existing tensions in the cyberspace’s regulatory environment particularly need to be discussed in respect of aspects like cybereconomy, human rights, cybersecurity and the ongoing platforms’ actions.

2 See Wolfgang Kleinwächter, Internet Governance Outlook 2016: Cooperation & Confrontation, online available at: http://www.circleid.com/posts/20160111_internet_governance_outlook_2016_cooperation_confrontation/.

3 John Perry Barlow, A Declaration of Independence of Cyberspace, 8 February 1996, online available at: <https://www.eff.org/de/cyberspace-independence>

4 Rolf H. Weber, Realizing a New Global Cyberspace Framework – Normative Foundations and Guiding Principles, Zurich 2014, p. 17

2. TENSIONS IN THE REGULATORY ENVIRONMENT OF CYBERSPACE

A philosophical and sociological assessment of the regulatory environment of cyberspace allows to identify several theoretical tensions occurring between different normative systems. Before discussing the ongoing developments in the cyberspace area it appears to be valuable to theoretically analyze the respective tensions.

2.1 General Principles vs. Detailed Norms

Rule-making can be conceptualized in two different ways: On the one hand, general principles are able to provide for a normative framework designing guidelines for an expected fundamental behavior; on the other hand, detailed norms specify the concrete behavior expected from the addressees of the regulations.

(I) General principles need to be founded on very basic values such as good faith, public interest, or the proportionality principle. As a consequence, the addressees remain with a relatively wide area of discretion in the implementation of the principles. Correspondingly, the addressees are responsible to comply with the general guidelines in a suitable and reasonable way. A liberal interpretation is possible as long as the underlying objectives of the principles are observed. In the field of Internet Governance a special positive feature of this approach consists in the independence from the vast technological advances: The general principles are applicable notwithstanding the prevailing technology and changes in the techniques do not have an immediate repercussion on the regulations.⁽⁵⁾

(II) Detailed rules give clear and precise directives to the addressees. If properly drafted, such provisions should not lead to major interpretation problems since they regulate specific situations. Apart from the length of detailed rules, an important

⁵ For a general overview see Marcelo Thompson, *Evaluating Neutrality in the Information Age – On the Value of Persons and Access*, Oxford (Bodleian) 2013.

weakness of this approach consists in the dependence from the given technology; a change therein might lead to the need of adapting the regulatory framework.

2.2 Multilateral Agreements vs. Soft Law

The traditional legal instruments dealing with global issues are multilateral agreements. Ideally, most (at least the concerned) countries ratify and implement the respective normative frameworks. In reality, however, unanimous consent cannot easily be achieved. Good examples of the past are the telecommunications regulations under the auspices of the International Telecommunications Union (ITU) and the international trade regulations designing the framework of the World Trade Organization (WTO).⁽⁶⁾

In the Internet Governance field multilateral agreements covering a broad field of topics do not exist. Moreover, the normative framework is based on so-called “soft law”. This situation with “half-governmental” rules has revitalized the relatively old discussion to what extent “hard law” is necessary and to what extent “soft law” could exercise a substituting function, respectively. Indeed, a robust regulatory system does not necessarily have to be founded on hard law.⁽⁷⁾

Soft law is a model developing and establishing rules independently of the principle of territoriality, mainly through the concerned organizations; in accordance with the subsidiarity principle the concerned participants of a specific community are attempting to achieve suitable solutions themselves.⁽⁸⁾ The legitimacy of soft law is based on the fact that private incentives lead to a need-driven rule-setting process. Therefore, soft law is justified if it is more efficient than hard law and if compliance with traditional hard law is less likely than compliance with self-regulatory rules.⁽⁹⁾

6 See Rolf H. Weber, Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises, *Journal of Governance and Regulation*, Vol. 1/1, 2012, p. 8, p. 10.

7 Weber (supra note 6), pp. 10/11.

8 For a general overview see Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century*, 2nd ed. New York 2015.

9 Weber (supra note 6), p. 12.

As far as the legal quality of soft law is concerned, it should not be underestimated that soft law can encompass several functions previously tied to hard law. Therefore it is arguable that the notion of legalization entails a specific form of discourse as far as justification for certain rules is concerned; furthermore, the often expressed assumption that hard law is qualitatively better than soft law does not hold anymore in today's environment of Internet Governance.⁽¹⁰⁾

2.3 United Nations vs. United Constituencies

Developments in many political fields have shown that the State-centric approach of traditional international relations does not anymore fulfil the requirements of today's regulatory needs. In particular, the involvement of other stakeholders apart from States is suitable in order to improve the quality of rule-making. Even if the approach as such is known for many decades, the most recently coined term is called "*multistakeholderism*": This concept attempts to include all potentially concerned stakeholders in the relevant decision-making processes.⁽¹¹⁾

The first international organization to recognize the relevant role of multiple stakeholders in the discussion of global issues was the International Labor Organization (ILO) having created a model including representatives from governments, employers and unions. The ITU also accepted the participation of private telecommunications providers in its deliberations. The probably best known example for a multistakeholder undertaking in the past was the World Conference on Environment and Development (UNCED) held in Rio de Janeiro (1992). The stakeholders of many segments were invited to discuss and integrate different views and interests to realize practical solutions leading to a more sustainable world. More recently, the multistakeholder concept has again been taken up by the UN Commission on Sustainable Development (CSD) in the context of the "Agenda 21" that envisages different stakeholders' roles in a global sustainability arrangement.⁽¹²⁾

10 Weber (supra note 6), p. 11.

11 Rolf H. Weber, Legal foundations of multistakeholder decision-making, ZSR 2016 I, pp. 259 et seq.

12 See Virgilio Almeida/Demi Getschko/Carlos Afonso, The Origin and Evolution of Multistakeholder Models, IEEE Internet Computing 2015, Vol. 19, p. 74, 75.

In the context of Internet Governance, the multistakeholder approach goes back to the Report of the Working Group on Internet Governance” (WGIG) which introduced a widely accepted working definition of multistakeholder Internet Governance referring to the “development and application by governments, the private sector, and civil society, in their respective role, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet”.⁽¹³⁾ Based on this notion some five years ago a sophisticated model composed of the “United Nations” encompassing sovereign States and international organizations and of the “United Constituencies” representing networks, non-governmental groups, businesses, technical/academic communities and civil society was developed. Even if the two governance cultures are rather different, they do not need to be antagonistic, but can co-exist in a meaningful way. A formal and rough comparison between the “national hierarchies” of the “United Nations” and the “global networks” of the “United Constituencies” could be designed as follows:⁽¹⁴⁾

Issue	United Nations	United Constituencies
Actors	Governments	Private Industry/Civil Society
Structure	Hierarchies	Networks
Codification	National Laws	Universal Codes
International Agreements	Legally Binding Treaties	Memorandum of Understanding

13 Report of the Working Group on Internet Governance, June 2005, p. 4, online available at: <http://www.wgig.org/docs/WGIGREPORT.pdf>.

14 Wolfgang Kleinwächter, A new Generation of Regulatory Frameworks: The Multistakeholder Internet Governance Model, in: Rolf Sethe et al. (Eds.), Kommunikation, Festschrift für Rolf H. Weber, Bern 2011, p. 559, pp. 571/72.

Mission	Broad	Narrow
Policy Development	Top Down	Bottom Up
Decision-Making	Formally specified Majority Voting	Informally specified Rough Consensus
Representation	Elections by All	Delegation by competent Constituencies or via NomComs
Policy-Making	Formally Restricted Access and limited Participation	Formally Open Access and broad Participation
Negotiations	Mainly closed to outsiders	Mainly transparent and open for outsiders
Result	Stability and Predictability	Flexibility

The table shows that both the “real places” and the “virtual places” are linked to each other. Since reality does not allow a separation, an objective need for collaboration in a multistakeholder model is given. Thereby, all stakeholders need to recognize the dynamic nature of their respective roles in the cyberspace environment. Not only do new actors appear and have to be integrated, but also iterative consultation processes and governance workflows change over time. Appropriate participatory processes need to ensure inclusive participation by fighting information overload, by

synthesizing debates, by preventing capture(s), and by complying with the neutrality principle.⁽¹⁵⁾

2.4 Harmonization vs. Fragmentation

The Internet is a global information and communication network. Therefore, ideally, its governing rules would also be globally acknowledged. In part, mainly as far as technical standards are concerned, coherence is needed in order to allow cross-border data delivery. Since the infancy of the Internet, requirements related to protocols and domain names are harmonized based on technical recommendations of the Internet Engineering Task Force (IETF).

Such kind of harmonization is more difficult to achieve in respect of issues having a social and political nature. But generally, interventionist measures of Nation States have become more frequent during the last few years, often with the objective to “protect” the own civil society from foreign influence. Tendencies to split the global network into smaller parts (national Internet segments, special Internet economic zones) through firewalls and wallet gardens cannot be overlooked. The building of fences around sub-systems can be justified in order to secure the functionality of the specific services, at least in the form of checkpoints avoiding the access to the dark side of the Internet.

However, the re-erection of frontiers should not jeopardize the developments that have enhanced the individual rights/freedoms and the social/economic advances (innovation) of the last twenty years.⁽¹⁶⁾ For good reasons, therefore, fragmentation has become subject of scholarly research; in the recent past concerns have been expressed about the Internet being in some danger of breaking up into “loosely coupled islands of connectivity”.⁽¹⁷⁾

15 Weber (supra note 4), p. 135.

16 Kleinwächter (supra note 2).

17 See William Drake/Vint Cerf/Wolfgang Kleinwächter, Internet Fragmentation: An Overview, Future of the Internet Initiative White Paper, January 2016, p. 3, online available at: http://www3.weforum.org/docs/WEF_FII_Internet_Fragmentation_An_Overview_2016.pdf.

2.5 Macrosystem vs. Microsystem

Similarly to the distinction between macroeconomic and microeconomic elements in the societal developments, a differentiation can be made between the macrosystem and the microsystem in Internet Governance. The not identical topics of the two systems are also reflected in the differing actors being involved.

The macrosystem addresses substantive issues such as cybereconomy, human rights, and cybersecurity. Since these issues have a global reach, the platforms and fora for negotiations, discussions and decision-making procedures must also be global. Looking from a general perspective, the respective normative framework mainly encompasses substantive/material issues.⁽¹⁸⁾

The microsystem relates to the more formal operating structure of the Internet as the most important international data exchange network and encompasses the issues of names/numbers and of protocols. In this field, private initiatives and expertise are of major relevance. Taken from a general point of view this system rather entails operational and procedural issues.⁽¹⁹⁾

3. ONGOING HOT TOPICS

3.1 Cybereconomy

Without any doubt, the digitization of private and business life is a major achievement of the last twenty years. But the full benefits of the digitization depend on the global access to the infrastructure. Therefore, with good reasons the “WSIS 10+ Outcome Document”⁽²⁰⁾ pleaded for bringing the next billion Internet users online. In particular the European Commission, for example in its Agenda for a Digital Market

18 See below Ch. 4.1-4.3.

19 See below Ch. 4.4.

20 See note 1 above.

Strategy of May 2015, pointed out that the development of a digital economy is crucial for economic growth and job creation.⁽²¹⁾

The European Union is keen of bringing Europe up to speed in the digital ecosystem even if some past initiatives have not been very successful. Otherwise, Europe risks of being dominated by a US-China digital race with the Silicon Valley giants (Google, Facebook, Apple, Amazon, eBay) on the one hand and the Chinese giants (Baidu, Weibo, Alibaba, Tencent) on the other hand.⁽²²⁾

Cybereconomy requires the possibility to trade goods and services without being confronted with impediments such as trade barriers. The international trade framework has been established by the WTO, however, improvements in the regulation of digital trade have hardly been made during the last ten years. As a consequence, regional trade agreements such as the Trans-Pacific Partnership Agreement (TTP) and the Transatlantic Trade and Investment Partnership Agreement (TTIP) as well as bilateral treaties are concluded in order to overcome the standstill in the WTO negotiations. Nevertheless, such preferential trade agreements lead to a fragmentation of the legal landscape; providers of goods and services always have to check which country is covered by which regulatory regime.⁽²³⁾

A further cross-border problem has arisen in connection with data protection. Obviously, privacy is a fundamental right and the protection of the personality constitutes an important value. From a cybereconomy perspective, however, data protection could (at least theoretically) become a trade barrier if the applicable regulations substantially differ between countries.⁽²⁴⁾ This assessment does not mean

21 European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6 May 2015, online available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>.

22 See also Kleinwächter (supra note 2).

23 Rolf H. Weber, Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism, *Asian Journal of WTO & International Health Law and Policy (AJWH)*, Vol. 10, 2015, pp. 321-347.

24 Rolf H. Weber, Regulatory Autonomy and Privacy Standards under the GATS, *Asian Journal of WTO & International Health Law and Policy (AJWH)*, Vol. 7, 2012, pp. 26-47.

that privacy considerations should be given up but an obvious need exist to attempt at achieving harmonized data protection standards.

3.2 Human Rights

At the end of 2013 the UN Human Rights Council agreed that human rights should apply in the online world equally as in the offline world.⁽²⁵⁾ This principle has been reconfirmed by the governments in the “WSIS 10+ Outcome Document”: The UN Resolution 70/125 reiterates the principle of equal level of protection and also links the WSIS process to the Millennium Development Goals (MDG).

If an agreement on fundamental principles exists, its implementation in reality is often more cumbersome. As already mentioned, governments have different appreciations of privacy around the globe. In the post-Snowden era it has also become obvious that the issue of mass surveillance to fight criminals and terrorists is not identically interpreted by the governments around the world. Furthermore, many examples show that notions such as “public order” or “illegal content” are quite differently understood and applied in the UN countries, usually depending on the political and social system.⁽²⁶⁾

The strengthening of human rights also means that in less developed countries more people should have online access: in 2015, more than 80% of the developed world was online, but only 34% of the developing countries. The “WSIS 10+ Outcome Document” correctly states that bridging the digital divide “requires greater sustainable investment” (para 35), that “private investment” is “critical” (para 38), and that “an ongoing evaluation of “new innovative financing options” is needed (para 40). But the realization of these objectives, even if unanimously agreed upon, remains quite open.

25 United Nations, The right to privacy in the digital age, A/RES/68/167, adopted on 18 December 2013, online available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167

26 Kleinwächter (supra note 2).

3.3 Cybersecurity

Peace is a general objective of the UN since 1945. In particular, Chapter 7 of the UN charter gives the governments a right to self-defense in cases of an attack. The problem with this provision consists in the fact that “cyberwar” is not a generally acknowledged term. In the physical world, war leads to death, destruction, and damages but neither the attack against Estonia (2007) nor the Stuxnet case (2010) caused death and destruction. Therefore, the rights of individual Nation States in case of cyberattacks are uncertain.⁽²⁷⁾

The UN Group of Governmental Experts (GGE) agreed on a set of confidence building measures in cyberspace⁽²⁸⁾ however, these measures are not generally acknowledged as legally binding instruments for cybersecurity. The Budapest Convention on Cybercrime released by the Council of Europe⁽²⁹⁾ and signed by many Western countries has not been ratified by politically important countries like China, Russia, India and Brazil, i.e. its scope of application is limited. The Shanghai Cooperation Organization (SCO) has announced to be interested in negotiating a new treaty under the auspices of the UN; so far, however, progress has not been made.

The “WSIS 10+ Outcome Document” states that the members will “review their procedures, practices and legislation regarding the surveillance of communications, as well as their interception of personal data, including mass surveillance” (para 46). This wording is derived from the NETMundial Declaration of April 2014 (São Paulo).⁽³⁰⁾ Again, the practical implementation of the principle is difficult. How can mass surveillance directly and justifiably be targeted at combating terrorism to be

27 Kleinwächter (supra note 2).

28 United Nations Group of Governmental Experts (UN GGE), Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, A/70/174, online available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/70/174.

29 Council of Europe, Convention on Cybercrime, 23 November 2001, online available at: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf.

30 NETmundial Multistakeholder Statement, 24 April 2014, p. 4, online available at: <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>.

differentiated from illegal espionage? Countries around the globe also do not share a consensus about the notion of “terrorism”.⁽³¹⁾

4. ONGOING IMPORTANT PLATFORMS

4.1 United Nations

After the adoption of the “WSIS 10+ Outcome Document” in the UN General Assembly the practical work on Internet Governance is now conducted by the UN Commission for Science and Technological Development (UNCSTD). The UNCSTD is vested with enlarged functions and a more important role in cooperation with other international bodies.⁽³²⁾ In particular, the Working Group on Enhanced Cooperation (WGEC) is reactivated and mandated to produce a report about Internet Governance matters for the UN General Assembly in 2017 (Session 72). The WGEC is a multistakeholder body allowing all participating members to act on equal footing. In contrast, the UNCSTD is still an intergovernmental body and allows the participation of non-governmental stakeholders only to a very remote extent.⁽³³⁾

During the UN General Assembly 2016 (Session 71) three reports are expected to be discussed, namely the GGE-report on cybersecurity (Committee 1), the UNCSTD-report on economic and social developments (Committee 2) and the report of the special rapporteur on privacy/human rights (Committee 3).⁽³⁴⁾

31 See also Kleinwächter (supra note 2).

32 See <http://unctad.org/en/Pages/CSTD.aspx>.

33 See <http://unctad.org/en/Pages/CSTD/WGEC.aspx>.

34 Kleinwächter (supra note 2).

4.2 UNESCO and IGF

UNESCO has become more active in the field of Internet Governance during the last few years. In 2014 a special framework encompassing several important elements of Internet Governance was published (so-called R-O-A-M approach, standing for Rights, Openness, Accessibility, and Multistakeholder).⁽³⁵⁾ In 2015 a special rapporteur delivered a hundred pages comparative analysis of Internet Governance frameworks and guidelines.⁽³⁶⁾ In addition, UNESCO called all stakeholders for an important conference “Connecting the dots” in Paris (March 2015). UNESCO is particularly suited to promote Internet Governance issues since this UN organization is strongly devoted to social, cultural, educational, and development issues.

For quite some time it was not certain whether the IGF would survive after the first ten years’ period. With the mentioned decision of the UN General Assembly of December 2015 it is now clear that the IGF will be held for another ten years, the next time in December 2016 in Guadalajara (Mexico). This assurance for a long-term institutionalization facilitates the organizers of the IGF to tackle new topics and to initiate additional policy-making projects, subject to the availability of sufficient financial resources. Furthermore, the foundational ideas of the IGF have successfully spread out to the regions (for example EURODIG, the European IGF) and to a large number of countries knowing a national IGF.⁽³⁷⁾

4.3 Other Intergovernmental Bodies

The OECD mainly representing the Western world addresses its attention to issues of digital trade; as mentioned, the respective rules do have an impact on Internet Governance debates. Some initiatives such as the OECD Principles for Internet Policy Making (2012) did not reach full acceptance but new efforts to be taken at the Cancun

³⁵http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/news/internet_universality_en.pdf; see also Weber (supra note 4), p. 142.

³⁶ Rolf H. Weber, *Principles for governing the Internet: A comparative analysis*, UNESCO Series on Internet Freedom, Paris 2015.

³⁷ For example, most of the European countries hold a yearly national IGF.

Summit of June 2016 might lead to further harmonization attempts in the assessment of digital trade and Internet Governance.⁽³⁸⁾

The G-20 meeting and the G-7 meeting are supposed to take up topics like cybersecurity, digital trade and human rights in 2016. Further intergovernmental organizations, particularly regional organizations such as the Council of Europe, the OSCE, the OAS, the APEC, and the African Union, also look at Internet Governance issues.⁽³⁹⁾

4.4 ICANN and IETF

Similarly to 2015, the gTLD program again plays an important role in the ICANN agenda of 2016. However, as the ICANN meeting in Dublin (October 2015) and in Marrakesh (March 2016) have shown more emphasis will now be put to the completion of the IANA transition.

After the Marrakesh meeting, the National Telecommunications and the Information Administration (NTIA) of the US Department of Commerce was notified that the agreed mechanisms should now be put in place. This step has been celebrated as one of the most successful outcomes of the multistakeholder approach. Whether all activities can be finalized prior to 30 September 2016, the date of termination of the existing contract, remains to be seen. This assessment is based on the assumption that the US Congress also wants to consider the final package (although a formal approval of the US Congress is not needed). In particular, the US presidential election can cause certain drawbacks for political reasons.

ICANN also needs to tackle organizational questions such as the accountability issue. On 10 March 2016, the ICANN board submitted a plan developed by the

38 See <https://www.oecd.org/forum/>.

39 For more details see Kleinwächter (*supra* note 2).

international Internet community to the U.S. Government, among others containing recommendations on how to enhance the organization's accountability.⁽⁴⁰⁾

Furthermore, the newly established “Competition, Consumer Trust and Choice Review Team” (CCT-CRT) is burdened with many tasks. Representing an array of geographic regions and areas of expertise the review team's 17 members are expected to complete a final draft of the CCT-CRT's report by December 2016.⁽⁴¹⁾

The IETF realized that new challenges in respect of how standardization could move forward will have to be met. As mentioned, privacy issues in protocols do have political, cultural and social implications. Furthermore, new technical aspects are worth to be dealt with.⁽⁴²⁾

4.5 Multistakeholder Fora

A large number of multistakeholder fora have been established during the last few years. Activities can be expected from the following platforms:⁽⁴³⁾

- The New Mundial Initiative (NMI) has the task to implement the principles and the roadmap of the NETMundial conference, particularly the strengthening of the multistakeholder approach.
- The World Economic Forum (WEF) has initiated the project “Future Internet Initiative” (FII) in 2015. Topics of the FII are the digital transformation of industries, digital trade and strategies, cybersecurity, Internet for all, etc.; at the

40 IANA Stewardship Transition Proposal and Enhancing ICANN Accountability Recommendations, 10 March 2016, online available at: <https://www.icann.org/en/system/files/files/iana-stewardship-transition-package-10mar16-en.pdf>.

41 See <https://www.icann.org/news/announcement-2-2015-12-23-en>.

42 For more information regarding the IETF's recent activities see <https://www.ietf.org/>.

43 For more details see Kleinwächter (supra note 2).

Davos meeting in January 2016, a first rather extensive report on Internet fragmentation was presented.⁽⁴⁴⁾

- The Global Internet Governance Commission (GIGC), managed by Chatham House and the Center for International Governance Innovation (CIGI), is preparing a final report on the governance of the future Internet (June 2016). In addition, CIGI is producing a series of very valuable expert papers.⁽⁴⁵⁾
- The Global Forum for Cyber Expertise (GFCE), initiated by the Dutch government in 2015, attempts to prepare a declaration on cybersecurity issues. Notwithstanding several conferences, the document is not yet agreed upon but work of governments and big private companies is advancing.
- The Freedom Online Coalition (FOC), established in 2011, has the objective to promote human rights in cyberspace; the FOC has working groups producing policy recommendations and has already published two documents on human rights.
- The Wuzhen Internet Initiative (WII), initiated at the World Internet Conference in Wuzhen (December 2015) by the Chinese government, attempts at enhancing the role of China in the global Internet Governance framework. The WII is mainly driven by governmental efforts but ignores the multistakeholder approach driven by the IGF and the NETMundial declaration.

Apart from the mentioned multistakeholder fora, a large number of Internet Governance programs and projects are going on. The respective activities encompass research, knowledge production, documentation, and education. The outcome should serve policy makers, civil society, technical experts, and business leaders in their

44 See Drake/Cerf/Kleinwächter (*supra* note 17).

45 See <https://www.cigionline.org/publications/cigi-papers>.

attempt to deal with the relevant issues in the Internet ecosystem. The following projects fall into this category:⁽⁴⁶⁾

- The Global Internet Governance Academic Network (GigaNet), already implemented in 2006, assembles a large number of Internet Governance experts from almost all countries around the World; GigaNet regularly organizes an annual symposium back-to-back to the IGF and additional regional conferences; many research books and papers have been published based on these events.
- The Geneva Internet Platform (GIP), initiated by the Swiss government close to many international organizations in Geneva and managed by Diplo Foundation is very active in capacity building programs and documentation of the manifold Internet Governance events attracting a large number of diplomats.
- The Global Internet Policy Observatory (GIPO) has been launched by the European Commission in 2013 and provides for an Internet Governance database.
- The Internet & Jurisdiction Project (I&J Project) in Paris is making available a large (permanently increasing) database related to multistakeholder processes and to jurisdictional issues (transnational cooperation).
- Since 2007, the Summer School on Internet Governance (SSIG) in Meissen (Germany) offers high level multistakeholder education; similar educational facilities are now also established in Latin America, Africa and Asia.

This short overview evidences that Internet Governance debates are not anymore restricted to a small circle of specific experts but spread out to large communities of multistakeholder participants around the world.

46 Kleinwächter (supra note 2), p. 9.

5. OUTLOOK: RISE OF TRANSNATIONALISM

The aforementioned description of the manifold activities within the Internet Governance ecosystem shows that valuable guidance can be drawn from the observance of general substantive principles being conceptually able to complement the existing formal structures. As Fukuyama said more than ten years ago, modern constitutional structures and the rule of law were established to limit discretion in the exercise of governmental power.⁽⁴⁷⁾ Assuming that this kind of political system is effective in implementing cosmopolitical principles of good governance, an appropriate policy framework must encompass those values that motivate both democratic and sound governance on the global level.⁽⁴⁸⁾ In delineating the respective substantive principles a stronger focus should be directed to the concept of transnationalism. In overcoming the State-centricity of traditional law, collective regulation operating among economic actors or social actors with transnational ties must gain importance.

Transnational law allows designing governance patterns in not coherent structures. The presence of transnational law also indicates a flow of legal rules that is dynamic in form and contents and includes understandings from non-state actors. Therefore, globalization of legal developments involving manifold legal sources leads to a shift of the locus of political engagement from sovereign States to functional regimes.⁽⁴⁹⁾ Norms put into the pipeline of “*transnationalization*” and achieving normativity in international relations do have important common characteristics⁽⁵⁰⁾ such as legitimacy, transparency, and accountability, i.e. foundational characteristics of a sound Internet Governance ecosystem.

47 Francis Fukuyama, *State Building – Governance and the Order in the Twenty First Century*, London 2004, pp. 98/99.

48 See Rolf H. Weber, „Cosmopolitically“ Founded Concepts for the Cyberworld, in Giovanni Biaggini et al. (eds.), *Festschrift für Daniel Thürer*, Zürich 2015, p. 779, p. 781.

49 See Martti Koskenniemi, *The Politics of International law – 20 Years Later*, *European Journal of International Law*, Vol. 20, 2009, p. 7, p. 11.

50 See also Weber (supra note 48), pp. 781/82.