

## **ICANN@15: Born in the USA – But Will It Stay?**

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### Author's Introductory Note

This article was originally intended to be a short one focused on indications that ICANN was exploring the establishment of a legal nexus outside the United States and discussing what that might mean -- and whether it was consistent with the Affirmation of Commitments (AOC) entered into with the United States in 2009. Then, as completion neared, came the sudden and nearly simultaneous release of the October 7<sup>th</sup> Montevideo Statement and the announcement two days later of a proposed 2014 Brazil "Summit" focused on restructuring Internet governance. At that point the task vastly expanded.

So now this is intended to be an in-depth discussion of the broad and complex implications of these initiatives. It provides extensive and sometimes lengthy quotes from key individuals and documents so that readers have that background material readily at hand. There are also dozens of endnotes that provide links to the original sources, so that those so inclined can review them and form their own conclusions.

For those not inclined to wade through the next 17,000 words, the Overview immediately below sums up the gist. The author hopes that this exploration makes a meaningful contribution to a very consequential Internet governance debate that, while not new, has just ascended to a new plateau of controversy and timeliness.

### Overview

The last few weeks have witnessed startling developments related to Internet governance. A group of ten Internet technical organizations, including ICANN, issued a Montevideo Statement that collectively called for a globalization of the IANA function now performed under contract by ICANN with the United States. Immediately after its issuance ICANN's CEO flew to Brasilia and subsequently announced with President Dilma Rousseff of Brazil a May 2014 "Summit" in Rio de Janeiro tasked to redesign Internet governance based upon principles contained in her September UN speech that also excoriated the U.S. for National Security Agency (NSA) cyber-espionage activities.

Two weeks later, during the Internet Governance Forum (IGF) meeting in Bali, Indonesia, ICANN officials were peppered with questions about the purpose and agenda of the “Summit”. They responded with answers that included rhetorically downgrading it to a mere “meeting”, with an object not of finding solutions but simply establishing a framework and principles for further talks. But within weeks after the meeting’s announcement Brazil had taken over control of its planning, and it would come in a year already thick with official events related to Internet governance. An October 2014 International telecommunications Union (ITU) meeting will provide a platform for Russia, China, and other nations – including perhaps Brazil -- to renew their push for UN/ITU entry into Internet regulation. A chaotic, divisive and inconclusive Rio meeting could well be a “Brazilian trap” that strengthens the hand of pro-UN forces. Overall, it may raise major risks in return for little in the way of new approaches or unique results.

The ostensible purpose of the meeting – to restore ‘trust’ in the Internet in the aftermath of NSA revelations – is a politically expedient but largely irrelevant “red herring”. The end game for Rio proponents appears to be the expedited termination of exclusive U.S. status as counterparty to the Internet Assigned Names Authority (IANA) contract controlling the authoritative root zone directory, the master address book of the Internet. But the cyber-espionage activities of the NSA and of every other technologically advanced nation make little use of the DNS as a spy tool, and changing the IANA counterparty will have no appreciable impact on any nation’s ability to monitor Internet communications or obtain state or industrial secrets through cyber-espionage. Unless there are more major new NSA revelations, by Spring 2014 their political fallout will likely have already been addressed by new arrangements and understandings between the US and EU nations, passage of a hortatory UN Resolution, and within the U.S. a combination of Executive and Congressional reform of the Agency’s domestic activities. These will render the NSA controversy even less relevant to any Brazil agenda.

No consensus proposal for replacing the U.S. counterparty role yet exists – and is unlikely to emerge from a meeting that eschews solutions. Yet the IANA contract provides crucial leverage for enforcing ICANN’s commitment to accountability and transparency contained in an Affirmation of Commitments (AOC) signed with the U.S. but benefiting the global Internet community. Absent an acceptable replacement regime ICANN could well become a richly self-funded organization that effectively answers to no one and can wield political influence via development contracts and other means.

It is noteworthy that ICANN’s push for a meeting ostensibly aimed at strengthening mult-stakeholderism was undertaken without advance consultation with ICANN’s stakeholders. Apparently, even though there is no more consequential ICANN policy issue, the much-vaunted bottom-up, multistakeholder model needed to be bypassed in order to save it. It is also unclear to what extent ICANN’s Board had a detailed

understanding of the CEO's plans or has subsequently ratified them. All these events must be evaluated in the light of ICANN's long quest to reduce accountability and litigation risk – especially potential legal and tax liability -- including recent revelations that it was seeking to establish a legal presence outside the U.S., in Switzerland and perhaps other nations.

Fissures rapidly emerged at the subsequent Bali IGF meeting over the purpose and composition of the Rio event. Business groups were generally opposed, technical organizations were skeptical but willing to pursue a narrow technical agenda, and civil society entities were pushing for a broad agenda focused on human rights matters. This predictable infighting over a hastily conceived and vaguely defined event indicates that it could well produce little but an aftermath of disappointment and recriminations.

The Obama Administration has yet to indicate its views on the proposed Rio meeting but Congress may well start asking questions soon. Given the outsized risks and minimal foreseeable rewards it might be prudent for the U.S. to clarify that, while open to discussions on the future of Internet governance and encouraging continuation of annual IGF gatherings – especially in 2014 -- it has no intention of attending an event when its only consistently stated purpose is to bring political pressure to bear for surrender of the IANA contract in advance of any consensus proposal for a replacement counterparty. The U.S. could also state that it intends to hold ICANN to its contractual commitment and to remain the contract's sole counterparty through at least its current term ending in October 2015. That would allow all involved in Internet governance to step back from the Rio proposal and initiate a more deliberative approach to this critically important issue.

## Introduction

Visitors to the ICANN home page now encounter an "ICANN@15" logo, which links to a webpage<sup>1</sup> where individuals may post their own pictures and recollections of ICANN's historic first decade and a half. Those taking that trip down ICANN's memory lane read:

On September 30th, 1998, The Internet Corporation for Assigned Names and Numbers filed *Articles of Incorporation* in the State of California, the first step toward ICANN becoming the global steward of the Internet's system of unique identifiers – the Domain Name System.

Indeed, throughout ICANN's history it has been an American creation – spun out of the U.S. Department of Commerce, incorporated in California, with unique ties to the U.S. government. While formal U.S. oversight was terminated in 2009 and replaced by the AOC<sup>2</sup>, the U.S. still retains a central role through its control of the contract for operation of IANA<sup>3</sup>. The IANA contract is the vehicle through which ICANN coordinates the unique global identifiers of the domain

name system (DNS) and provides it with the authority to pursue such initiatives as the new gTLD program, as its administration of the contract gives it the ability to recommend the addition of new gTLDs to the authoritative root zone. But those recommendations are then reviewed by the Department of Commerce (DOC) and, after it grants approval, technically consummated by VeriSign under a separate DOC contract.

The U.S. also serves as counterparty to the AOC, which helps all users of the DNS by committing ICANN to minimum levels of transparency and accountability to the global Internet community by “including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.” NetChoice Executive Director Steve DelBianco has observed that “the need to re-earn IANA every few years is all that keeps ICANN from walking away from the Affirmation of Commitments — the only document holding ICANN accountable to the community it serves, including users, governments, the private sector, and civil society. Reviews for the IANA Contract are a powerful reminder that ICANN serves at the pleasure of global stakeholders and has no permanent lock on managing the Internet's name and address system.”<sup>4</sup> So it is important to have a vigilant and empowered counterparty to the IANA contract for the AOC to be meaningful.

While marking its fifteenth anniversary there are indisputable signs that ICANN has become a rebellious teenager. Recent controversy generated by revelations of the NSA's Internet-abetted data gathering and espionage activities provides the unsettled political context for recent developments. Yet upon examination it is clear that the NSA disclosures have no relevant connection to ICANN's past, current or future governance structure.

There could be serious consequences if ICANN management pursues a course of rapidly terminating residual U.S. control, much less severing or at least substantially diluting its corporate legal ties to its native land. What choice of law will govern ICANN's contractual ties to registries and registrars if it departs U.S. jurisdiction? What will replace the rather benign oversight exercised by the U.S. through the IANA contract, and will it lead to a more open Internet or a more politicized one? Will assertive governments usurp the central role now played in ICANN by the private sector and civil society?

And, perhaps most importantly, has there been adequate involvement with and approval of pending initiatives by ICANN's Board -- much less sufficient exercise of the bottom-up, multi-stakeholder consensus policy process it ostensibly seeks to strengthen -- as ICANN's senior management pursues what appears like an independent foreign policy? Answers to these questions should precede any alteration of ICANN's present accountability and empowerment arrangements.

Let's now review the remarkable occurrences of the past two months.

The Seoul Speech

On September 3<sup>rd</sup> ICANN CEO Fadi Chehade delivered remarks at the Asian Pacific Regional Internet Governance Forum (IGF) in Seoul, South Korea in which he stated<sup>5</sup>:

"You heard me announce recently in Durban that ICANN, for the first time, is setting up a legal structure in Switzerland. That means that ICANN is going to seek to become an International Organization that is serving the world, not just as a private corporation in California. These are important fundamental steps that we are exploring in order for ICANN to take a new global posture."

Parsing this statement raises multiple substantive questions:

- First, the author attended the July 2013 Durban ICANN meeting and recalls no such momentous announcement. While it's possible that I was out of the room when it occurred there was also no subsequent discussion of such a consequential declaration among meeting participants with whom I interacted, or a single question raised about it during the Public Forum with the Board. So it's not clear what announcement in Durban CEO Chehade was referring to.
- Second, what form of "International Organization" is being sought, and why is it needed for ICANN to serve the world – especially given ICANN's repeated declarations that it is already serving the global Internet community? According to the OECD, an International Organization (IO) is defined as follows: "International organisations are entities established by formal political agreements between their members that have the status of international treaties; their existence is recognised by law in their member countries; they are not treated as resident institutional units of the countries in which they are located."<sup>6</sup> ICANN's existing outreach office in Geneva, established to facilitate interaction with the multiple UN agencies headquartered or maintaining offices there, is presently subject to Swiss law in regard to its ICANN's activities in Switzerland. Converting that office to one of an IO would require a treaty or other multilateral agreement and would exempt ICANN from Swiss or any other sovereign law.
- Third, is a change in headquarters – from Los Angeles in the U.S. to Geneva in Switzerland – being contemplated, or a dual structure in which LA remains the nominal headquarters but some important functions are established in or transferred to Geneva? The phrase "not just as a private corporation in California" implies a dual structure but provides no details regarding the possible division of functions. Our understanding is that ICANN's President's Strategy Committee devoted some attention to this subject in the past but urged caution in regard to the splitting of approaches for contractual compliance and enforcement, as well as the fundamental alteration of ICANN's character that would occur upon becoming an IO. ICANN did provide an explanatory statement to one DNS-oriented publication in the wake of the Seoul speech<sup>7</sup>:

ICANN is not currently planning to set up a headquarters office in Switzerland. We will have an engagement center in Geneva, along with others scattered around the world but our three main hubs, as Fadi has previously announced, will be in L.A., Istanbul and Singapore.

While that statement denies any intent to establish a “headquarters office” in Geneva (at least at the present time) it provides no satisfactory explanation of what the Seoul statement actually means or what ICANN is actually planning.

- What is the “new global posture” being sought by ICANN, and what shortcomings in its present structure is it intended to address?
- Is the pursuit of IO status in Geneva consistent with ICANN’s pledges in the AOC? The relevant provision of that document states:

8. ICANN affirms its commitments to: (a) maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet; (b) **remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community;** and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act. ICANN is a private organization and nothing in this Affirmation should be construed as control by any one entity. (Emphasis added)

It is not at all clear whether establishing a legally separate IO presence in Geneva would be consistent with ICANN’s commitment to be headquartered in the U.S. while maintaining offices around the world -- the most logical reading of the AOC is that it would be an outpost of a US-headquartered organization, not one with IO status. The counterparty to the AOC, the U.S. Department of Commerce, has to date made no public comment on the Seoul statement. Yet, since Seoul, CEO Chehade has raised the possibility that ICANN might establish a legal presence in even more jurisdictions than Switzerland, stating on October 22<sup>nd</sup> at the Bali IGF:

“While we are a California corporation today there is nothing that precludes us from being also, in addition to that, **a legal organization in other places, and we intend to do that** in order to make ICANN a more international organization.”<sup>8</sup> (Emphasis added)

We take specific note of the plural phrase “other places”, rather than the singular “another place” – as well as the clear declaration that, in ICANN’s view, “nothing”, including the AOC, precludes establishing a legal presence under the laws of other nations.

The quoted portion of the AOC also makes clear that ICANN is to act with public input and on behalf of the public. Yet, aside from the substance of what is being contemplated, there are serious questions about the process leading up to the exploration of IO status. There has been no ongoing dialogue with the ICANN community in regard to this, nor has there been any revelation of in-depth consideration of it by the ICANN Board to which management reports (although the lack of adequate transparency of the substance of ICANN Board meeting discussions, notwithstanding the organization’s official commitment to transparency, may be shielding such discussions from public view).

Nor has been there been any explanation of whether any benefits resulting from the establishment of IO status for at least some of ICANN’s operations would primarily flow to the public – or to ICANN as an organization. There has been speculation that ICANN may be pursuing this course to further insulate itself from potential litigation related to the new gTLD

program, or to ameliorate potential threats to its non-profit status due to the very substantial sums it has collected from it (more than \$300 million in net new application fees alone, with additional substantial income to be derived soon from the proceeds of auctions resolving string contention sets for which Preliminary Rules<sup>9</sup> were recently released) -- as well as the additional income that will soon flow from new gTLD registries and domain registration fees. All this incoming cash adds heft to an annual budget that is already north of \$180 million.

These escalating revenues also underline the dangers of a self-funded ICANN without sufficient oversight to assure transparency and accountability, with the potential for it to become an insulated, power wielding organization. That could transform it into a 21<sup>st</sup> century cyber-version of Robert Moses' Triborough Bridge and Tunnel Authority as described in Robert Caro's classic treatise on abuse of power by self-funding, quasi-public agencies, "The Power Broker".

Speaking on October 28<sup>th</sup> at a domain industry conference in Munich, Chehade both disclaimed any desire to expand ICANN's mission while simultaneously noting that the IGF was not prepared to take on additional responsibilities. According to one report:

Asked during a domain conference in Munich today if the IGF could become the internet governance body, Chehade said, the forum has to improve and get stable funding. "It cannot stay as it is and take more responsibility," he said.<sup>10</sup>

Another added more detail, including the potential creation of yet another new Internet-related organization:

There's now a "coalition" of the "I\*" groups (ICANN, IETF, etc.), big-name companies such as Disney, and governments such as Brazil, focused on creating multistakeholder solutions to problems — such as spam and cyber-bullying — that are not in ICANN's purview Chehade said.

There's a multistakeholder meeting planned for April or May next year ...to be hosted by Brazil, that will look at internet governance post-Snowden.

This meeting is about "allowing ICANN to not expand its remit", according to Chehade. He said: "We don't want to expand our remit."

What we seem to be looking at here is the creation for a new organization, of which ICANN could be a member, that will allow stakeholders to coordinate responses to tricky cross-border internet problems.<sup>11</sup>

In an October 31<sup>st</sup> call held with leaders of the GNSO constituency groups (the "GNSO call"<sup>12</sup>), CEO Chehade expanded further on this subject and its relationship to his recent activities:

[T]he reality is if we do not solve or at least join others in the broader Internet ecosystem in solving the issues here, I think that the pressure will mount on ICANN and we will find ourselves increasingly in a place where we can no longer just sit back and either keep to our knitting, because were getting pressure to expand what we do, if we don't want to do it; or there will be people who will then create solutions outside of our multi-stakeholder model that would truly start intruding on what we do and requiring that some of what we do move into that space.

And so these are the reasons we need to move and when we look at the situation since the wicket, it became extremely clear that there are no solutions that are within the multi-stakeholder model; that most solutions are truly, in my opinion, pushing towards multilateral model which also translates into governmental and without any solutions outside of our (inaudible) that are anchored in the multi-stakeholder way. We were getting, frankly, quite worried that the push will be towards multilateral model.

Notwithstanding the claim that ICANN does not wish to expand its “remit”, ICANN is the only organization, other than the ITU, that is positioned to take on any expanded Internet governance responsibilities. With hundreds of \$millions in annual cash flow, a cash stockpile exceeding \$300 million, and a growing network of global offices filled with expanding staff ranks, it appears positioned as the sole multistakeholder organization able to assume expanded Internet duties. While ICANN has a history of mission creep the notion of expanded duties should not be dismissed out of hand – the real issue is whether such restructuring should result from an ad hoc meeting in Brazil before community stakeholders have a meaningful opportunity to consider the consequences.

ICANN might also forge agreements with specific governments that provide, in return for their assistance in throwing off residual U.S. control or backing on other goals, siphoning a portion of its revenues toward a variety of “development” projects; becoming in effect a taxing authority over registrants, registrars, and registries and using those funds to grease political wheels. Without inferring any unethical intent, many were surprised by ICANN’s October 17<sup>th</sup> announcement that it planned to create a Center of Excellence in Domain Name System Security in India in partnership with the Center for Development of Advanced Computing (CDAC), with CEO Chehade providing this explanation:

This center will play a central role in ensuring the security and stability of the Domain Name System. The Internet has become one of the world's most valued resources and it is deserves nothing less than full global cooperation and collaboration in developing concrete solutions to combat threats to the DNS.<sup>13</sup>

CEO Chehade provided this further explanation of the choice of India:

“India greatest asset to the rest of world is its human capital. We decided we need serious research by scientists on DNS security to ensure stability of Internet. I said that we need to bring this to India because India leads the world in critical thinking.”<sup>14</sup>

Yet his remarks made no reference to the fact that the Indian government’s own central monitoring system (CMS) has been described as “chilling, given its reckless and irresponsible use of the sedition and Internet laws”, according to the Human Rights Watch in a June 7<sup>th</sup> statement. In April, the Indian government began rolling out CMS, which will enable it to monitor all phone and Internet communication in the country.<sup>15</sup> On November 2<sup>nd</sup> The Hindu newspaper reported<sup>16</sup> that Brazil had approached India for support of a proposed Internet Summit, but that India was concerned that such a meeting might focus attention on CMS:

Scepticism at the Brazilian summit became acute as multiple tweets and webcasts from the IGF in Bali showed that the Brazilian delegation remained unclear about their stance on the multilateral versus multi-stakeholder model of Internet governance, often using the words interchangeably.



India's concerns are graver. This is because, if surveillance, rather than evaluation of a multistakeholder model for transitioning Internet governance, remains the main issue of the Brazilian conference — in line with President Rouseff's U.N. speech and based on the Brazilian delegation's statements in Bali — this would bring India's Central Monitoring System (CMS) into focus.

An investigative report by The Hindu, 'India's surveillance project may be as lethal as PRISM', published on June 21, revealed that the CMS was second only to PRISM in terms of size, lethal capability and an extraordinary ability for intrusion into citizens' privacy, without much detail or guidelines in the public domain. Even at the IGF last week, the CMS attracted criticism for its opaque surveillance procedures.

Indian stakeholders favour removing the U.S. government's control over ICANN, even though that may not be directly linked to the predominant issue of surveillance, which has sparked the present anger sweeping global capitals. However, apart from a stronger role for the Government Advisory Committee (GAC), there is no clear roadmap for realigning ICANN. It is unclear whether the Brazil summit will deal with both surveillance and ICANN's internationalisation, or predominantly review global surveillance procedures.

The External Affairs Ministry did not confirm if India has decided to support the Brazilian effort. However, if it does, it will be at the risk of defending criticism against CMS-related surveillance, while agreeing to attack the Americans on PRISM. The Indian government has been either defensive of, or silent on, the PRISM program since it has benefitted from the program.

We would venture that the trust that India's citizens have in the Internet will be affected far more by CMS than by NSA — and it is the restoration of trust in the Internet that is the ostensible goal of the Brazil Summit. Yet in the GNSO Call CEO Chehade said this:

...some people are saying, "Oh, this [the Summit] will be all about surveillance." It won't be. And I already told them that if we even come close to the surveillance issue, we will pull out immediately, all of us. This is not about surveillance.

Turning to other potential ramifications of IO status, the "White Paper" that was the blueprint for ICANN's establishment specifically stressed the importance of assuring that relevant law, especially antitrust/competition law, applied to ICANN<sup>17</sup>; IO status would exempt ICANN contracting and business practices from that restraint.

As for tax-exempt status concerns, ICANN could explore taking the path of other non-profits by establishing a US-based for-profit subsidiary in which activities generating substantial sums could be located. If such a course was found to be consistent with the AOC it would obviate any need for overseas affiliates.

There is one other possible course for ICANN's future, a radical one that is nonetheless permitted by the AOC. And that is outright rejection of it through strategically timed provision of notice from ICANN to the U.S.

The last section of the AOC states:

The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party.

What would the U.S. do if such notice was delivered, especially if that event took place after an international “Summit” that declared that ICANN should be free of all vestiges of U.S. control? That scenario is not totally implausible. And it argues for extreme caution by the U.S. in doing anything that legitimizes a meeting that may aim to exert political pressure to surrender the IANA contract long before any effective replacement counterparty entity has been designated.

### The Montevideo Statement

CEO Chehade’s remarks in Seoul, while ambiguous, may presage nothing more than some type of dual structure for ICANN in which formal headquarters remain in Los Angeles while some functions and activities are migrated to an IO located in Geneva. While that is significant change in itself, a much more consequential shift has been proposed in the Montevideo Statement on the Future of Internet Cooperation<sup>18</sup>, signed on October 7<sup>th</sup> by CEO Chehade along with the heads of nine other Internet technical coordination organizations – the “I Organizations”.

The full Statement reflects understandable concerns in the wake of revelations about the extent of NSA Internet-abetted intelligence-gathering activities both within the U.S. and abroad, as well as the reactions of national governments, companies, and civic organizations as they seek to better insulate themselves from and generally restrain such espionage in the future. Yet the Statement also proposes a fundamental change in ICANN and the IANA function:

**Montevideo, Uruguay** – The leaders of organizations responsible for coordination of the Internet technical infrastructure globally have met in Montevideo, Uruguay, to consider current issues affecting the future of the Internet.

The Internet and World Wide Web have brought major benefits in social and economic development worldwide. Both have been built and governed in the public interest through unique mechanisms for global multistakeholder Internet cooperation, which have been intrinsic to their success. The leaders discussed the clear need to continually strengthen and evolve these mechanisms, in truly substantial ways, to be able to address emerging issues faced by stakeholders in the Internet.

In this sense:

- They reinforced the importance of globally coherent Internet operations, and warned against Internet fragmentation at a national level. They expressed strong concern over the undermining of the trust and confidence of Internet users globally due to recent revelations of pervasive monitoring and surveillance.
- They identified the need for ongoing effort to address Internet Governance challenges, and agreed to catalyze community-wide efforts towards the evolution of global multistakeholder Internet cooperation.

- **They called for accelerating the globalization of ICANN and IANA functions, towards an environment in which all stakeholders, including all governments, participate on an equal footing.**
- They also called for the transition to IPv6 to remain a top priority globally. In particular Internet content providers must serve content with both IPv4 and IPv6 services, in order to be fully reachable on the global Internet. (Emphasis added)

The current IANA contract was awarded to ICANN, after some substantial delay due to concerns within the National Telecommunications and Information Agency (NTIA) over the original ICANN application, on July 2, 2012. It took effect on October 1, 2012<sup>19</sup>. Signing the contract, which runs for a term of three years extensible up to seven (through two 2-year extensions), was the final official act of outgoing ICANN CEO Rod Beckstrom.

So now the current ICANN CEO, whose primary duty is to oversee the management of ICANN's DNS-related technical coordination functions as well as the implementation of community-based policy decisions, has signed a document calling for ICANN's most important contract – the contract that provides it with its central authority to manage the DNS and delegate new gTLDs – to be wrested away from the U.S., the contractual counterparty that awarded the IANA contract at ICANN's birth and that has re-awarded it ever since. We see no other way to interpret a call for ICANN and the IANA functions to be globalized and for all governments to participate on an equal footing vis-à-vis ICANN and IANA.

In the GNSO call, CEO Chehade insisted that, aside from the I organizations showing a united front, there was nothing new in the Statement:

...if the statement had included any announcements or positions that were not existing positions or understood positions, or if we had ventured into some new ground where would have committed the ICANN and ICANN community to new principles, then frankly, I would not have signed to it. The statement, from our perspective, was very much a putting down in writing what we have intended and said all along a million times including ICANN's globalization, so there is nothing new to it.

A further explanation has been provided by another senior ICANN official:

"Some have misinterpreted" the Montevideo statement to mean that because of the former NSA contractor Edward Snowden's document leaks, "ICANN is seeking to sever its ties with the U.S. government. Nothing could be farther from the truth," said Jamie Hedlund, assistant to the president of ICANN, in an interview. "The Snowden episode has highlighted the still fragile nature of Internet governance right now and we and others who signed on the Montevideo statement came down in favor of the multistakeholder model."

Hedlund said the original contract between ICANN and the U.S. Commerce Department in 1998 was expected "to fully transition to the private sector no later than the year 2000."

There was no connection between the NSA leaks and the hope of globalizing the IANA contract, he said. "This has been going on since 1998."<sup>20</sup>

Yet it is hard to divorce the Statement from the NSA situation when it expresses “strong concern over the undermining of the trust and confidence of Internet users globally due to recent revelations of pervasive monitoring and surveillance”. Of all its signatories, ICANN is the only one that is a counterparty on the IANA contract. And while the 1998 White Paper<sup>21</sup> does state, “The U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management...The U.S. Government would prefer that this transition be complete before the year 2000.”, it is also true that the IANA function has remained separate for the past fifteen years and that the agreement that ICANN signed last year contains no provision to transfer control away from the U.S.

Other signatories of the Montevideo Statement have been harshly critical of the NSA’s conduct. The Internet Society (ISOC), for example, stated on September 9<sup>th</sup> <sup>22</sup>:

The Internet Society is alarmed by continuing reports alleging systematic United States government efforts to circumvent Internet security mechanisms. The Internet Society President and CEO, Lynn St. Amour, said, “If true, these reports describe government programmes that undermine the technical foundations of the Internet and are a fundamental threat to the Internet’s economic, innovative, and social potential. Any systematic, state-level attack on Internet security and privacy is a rejection of the global, collaborative fabric that has enabled the Internet’s growth to extend beyond the interests of any one country.”

The Internet Society believes that global interoperability and openness of the Internet are pre-requisites for confidence in online interaction, they unlock the Internet as a forum for economic and social progress, and they are founded on basic assumptions of trust. We are deeply concerned that these principles are being eroded and that users’ legitimate expectations of online security are being treated with contempt.

But the Internet Society is a private organization that predates ICANN’s existence – and does not derive its most fundamental powers from a contract entered into with the U.S. government.

Efforts to promote the principles embodied in the Montevideo Statement are continuing. In early November a website<sup>23</sup> was established by a group dubbed 1Net with the explanation that “1net is hosting a free and open online forum about the future of Internet governance”. While the WHOIS record for the website shows it under proxy protection at Go Daddy, it is reportedly controlled by the Number Resource Organization (NRO)<sup>24</sup> acting in a capacity as secretariat for the Montevideo signatories.

### The Brazilian Gambit

Two days following the issuance of the Montevideo Statement, in a more startling development, CEO Chehade met with Brazilian President Dilma Rousseff and invited Brazil to host a 2014 summit to discuss the future of governance -- including oversight of ICANN and the IANA functions. It is uncertain to what extent the other “I Organizations” signatories of the Montevideo Statement knew of or condoned this ICANN initiative. The author has spoken to one signatory of the Montevideo Statement who stated they did know that Chehade planned to next meet with Brazilian telecomm but had no advance notice of a request for a “summit”.. However, during a

November 8<sup>th</sup> “Internet Governance Webinar Conversation Opportunity With ICANN Senior Executives” (Webinar<sup>25</sup>) that the author participated in he directly questioned CEO Chehade on this. Chehade stated that he had ‘absolutely shared” his plans to travel to Brazil with his colleagues in Montevideo although he only expected to be meeting with a Minister and not President Rousseff.

Following his meeting with President Rousseff CEO Chehade delivered a video statement<sup>26</sup> that we have transcribed:

I came personally to convey to her that when she spoke at the United Nations two weeks ago she spoke for all of us, she spoke for the world. She expressed the world’s interest to actually find out how we’re all going to live in this new digital age. She was the world’s leader on that day and I came to her to thank her for her leadership and to discuss with her how we go from her vision of the future to some practical solutions, because the trust in the global Internet has been punctured, and now it’s time to restore this trust through leadership and through institutions that can make that happen. And so today I am very pleased to share with you that Her Excellency Dilma Rousseff has accepted our invitation that we hold next year a global summit that will bring leaders of the world, leaders of governments but also leaders of industry, leaders of civil society, leaders of academia, leaders from the technical community to come together here in Brazil and discuss how together we will base our work on governing the Internet in the core principles that she has been good such a good champion of. So I am delighted to thank her and thank Brazil for the continued leadership they are playing in this important subject.

Without condoning in any way the scope or scale of NSA cyber-espionage activities – which are the subject of spirited and ongoing bipartisan debate within the U.S. that may well result in substantial Executive or Congressional reforms – one has to ask why the revelation of activities that most Internet-savvy persons already assumed were occurring suddenly “punctured” the trust in the global Internet. It is not all that surprising that the U.S. conducts espionage against Brazil, as “Brazil’s best friends under the Workers’ Party of Ms. Rousseff and her predecessor, Lula da Silva, are Cuba, Iran and Venezuela”<sup>27</sup> And the conduct is mutual; it was recently revealed that Brazil “surveilled diplomats, embassies and diplomatic residences from the U.S., Russia, Iran and Iraq”, although by less sophisticated means.<sup>28</sup>

Further, was that trust undamaged by the Russian-backed and originated cyberattacks on Estonia in 2007<sup>29</sup> – or by the order just issued by its Communications Ministry requiring all domestic ISPs to save all Internet traffic for at least twelve hours – including phone numbers, IP addresses, account names, social network activity, and e-mail addresses -- so that it can be readily accessed by the infamous KGB’s spy agency successor, the Federal Security Service?<sup>30</sup>

Was that trust not eroded by the February 2013 revelations that “an overwhelming percentage of the attacks on American corporations, organizations and government agencies” originate from a People’s Liberation Army base on the outskirts of Shanghai, China?<sup>31</sup> China is also well known to employ tens of thousands of government employees to monitor the Internet activities and communications of its citizens. Attendees at the March 2013 ICANN meeting in Beijing couldn’t help but note that websites that were readily accessible from the ICANN meeting rooms with their open Internet connection – such as Facebook, Twitter, and the New York Times –

were inaccessible from their rooms in the adjacent Beijing International Hotel, attesting to the effective information censorship achieved by the “Great Firewall of China”. Chinese citizens might well desire an Internet they can trust as a tool for open communications and access to information without fear of harassment, unemployment, or even imprisonment. Yet we can recall no ICANN Board member or executive using the Beijing meeting as a platform to urge its Chinese hosts to end these indefensible practices and thereby restore trust in the Internet.

Perhaps the selective nature of the outcry against the NSA revelations, without similar consternation over other Internet espionage and censorship activities, is simple political expediency?

Now what were these September 24<sup>th</sup> UN remarks that CEO Chohade characterized as speaking for the entire world and containing the core principles to guide the 2014 Summit he announced? They were remarks delivered after President Rouseff canceled a state meeting scheduled to be held at the White House with President Obama. They were remarks characterized in press reports as an angry and stinging rebuke to the U.S.

They were these remarks<sup>32</sup>:

Mr. President,

I would like to bring to the consideration of delegations a matter of great importance and gravity.

Recent revelations concerning the activities of a global network of electronic espionage have caused indignation and repudiation in public opinion around the world.

In Brazil, the situation was even more serious, as it emerged that we were targeted by this intrusion. Personal data of citizens was intercepted indiscriminately. Corporate information – often of high economic and even strategic value – was at the center of espionage activity. Also, Brazilian diplomatic missions, among them the Permanent Mission to the United Nations and the Office of the President of the Republic itself, had their communications intercepted.

Tampering in such a manner in the affairs of other countries is a breach of International Law and is an affront to the principles that must guide the relations among them, especially among friendly nations.

...We face, Mr. President, a situation of grave violation of human rights and of civil liberties; of invasion and capture of confidential information concerning corporate activities, and especially of disrespect to national sovereignty.

We expressed to the Government of the United States our disapproval, and demanded explanations, apologies and guarantees that such procedures will never be repeated.

Friendly governments and societies that seek to build a true strategic partnership, as in our case, cannot allow recurring illegal actions to take place as if they were normal. They are unacceptable.

Brazil, Mr. President, will redouble its efforts to adopt legislation, technologies and mechanisms to protect us from the illegal interception of communications and data.

...The problem, however, goes beyond a bilateral relationship. It affects the international community itself and demands a response from it. Information and telecommunication technologies cannot be the new battlefield between States. Time is ripe to create the conditions to prevent cyberspace from being used as a weapon of war, through espionage, sabotage, and attacks against systems and infrastructure of other countries.

**The United Nations must play a leading role in the effort to regulate the conduct of States with regard to these technologies.**

**For this reason, Brazil will present proposals for the establishment of a civilian multilateral framework for the governance and use of the Internet and to ensure the effective protection of data that travels through the web.**

**We need to create multilateral mechanisms for the worldwide network that are capable of ensuring principles such as:**

- 1 – Freedom of expression, privacy of the individual and respect for human rights.**
- 2 – Open, multilateral and democratic governance, carried out with transparency by stimulating collective creativity and the participation of society, Governments and the private sector.**
- 3 – Universality that ensures the social and human development and the construction of inclusive and non-discriminatory societies.**
- 4 – Cultural diversity, without the imposition of beliefs, customs and values.**
- 5 – Neutrality of the network, guided only by technical and ethical criteria, rendering it inadmissible to restrict it for political, commercial, religious or any other purposes. Harnessing the full potential of the Internet requires, therefore, responsible regulation, which ensures at the same time freedom of expression, security and respect for human rights. (Emphasis added)**

How these proposed principles may be translated into a plan resulting from the proposed 2014 “Summit” cannot be known at this time – but President Rousseff has clearly called for the UN to play a leading role and for the creation of new “multilateral mechanisms for the worldwide network” that include the participation of governments. And her own announcement of the 2014 Summit cloaked it in an anti-U.S. espionage theme when she proclaimed, “The United States and its allies must urgently end their spying activities once and for all.”<sup>33</sup> Not a word about Russian, Chinese, or any other state-sponsored cyber-spying.

Not everyone agrees that President Rousseff was speaking for the whole world, or even with her views. Internet consultant John Levine had this to say about her call for “neutrality of the network, guided only by technical and ethical criteria, rendering it inadmissible to restrict it for political, commercial, religious or any other purposes”:

**This is what is known in technical circles as a crock. Nation states can and will spy on any traffic that passes through their territory. This shouldn't come as any surprise to people who are familiar with, say, the history of World War I. (See Telegram, Zimmermann)**

One detail that seems to elude a lot of the governance crowd is that the Internet is designed so that everything is voluntary. If you want to force networks to do stuff they are not inclined to do, the only modes of influence are threats of disconnection, or for networks within a specific country, legal pressure from their own government.

The countries that make all the noise have zero leverage over US networks because their networks have far more to lose than we do if they disconnect, both because so much content is hosted in the US, and because so many transit routes run through the US.<sup>34</sup> (Emphasis added)

In other words, the effective way for Brazil to avoid NSA surveillance is for its government to start utilizing encrypted e-mails and push for the construction of Trans-Atlantic cables that bypass the U.S. Indeed, it has recently announced both initiatives. But technical responses, however effective, don't serve a political agenda. Technology expert Larry Seltzer contributed these supplemental observations to Levine's:

ICANN also thinks it will be at the center of Snowden-inspired changes. I find this amusing. ICANN policy has, at least as often as not, weakened the security of the Internet through added complexity and naïve governance.

In fact, as Levine reminds us, the Internet is a collection of networks with voluntary agreements to connect to each other and route traffic. The only possible leverage countries like Brazil have with the US on this matter would be to disconnect their networks from us and connect through other countries. Doing this will certainly cost them enough money to trump their principles and they'll just get spied on by the countries with whom they connect instead of the US.<sup>35</sup>

Indeed, some of Brazil's domestic initiatives seem economically counterproductive, as well as fundamentally at odds with a global Internet that is technically a borderless network of networks. Pending legislation to require that all data relating to Brazilian citizens be stored in Brazil has caused Google, Facebook, the Information Technology Industry Council, the Software Alliance and over 40 other organizations representing companies from Brazil and the rest of Latin America, Canada, Europe and Asia to write to members of Brazil's Congress, saying, "Global data flows rely on data centers dispersed all over the world. Thus, in-country data storage requirements would detrimentally impact all economic activity that depends on data flows."<sup>36</sup>

According to press reports:

A draft of the law says "the government can oblige Internet service companies ... to install and use centers for the storage, management and dissemination of data within the national territory."



The government would evaluate the requirement for each company, the draft says, "taking into consideration their size, their revenues in Brazil and the breadth of services they offer the Brazilian public."<sup>37</sup>

Major technology firms are already responding – "Google's DNS service started leaving the country on September 12th, the day President Rousseff announced her intention to require local storage of user data".<sup>38</sup> "If companies like Google feel like they have to stop providing local service in such a significant market due to new restrictions on their in-country operations, Brazilian Internet users and multinational content providers could ultimately both suffer as a result of the new legislation."<sup>39</sup>

We also note that the current storage of their personal data abroad does not seem to be deterring President Rousseff or Brazilians generally from using U.S.-based social networks. She recently relaunched her Twitter account, opened an Instagram account, and promised to soon sign up with Facebook. And four out of five of Brazil's 105 million Internet users (just over half of a total population of 200 million) utilize Facebook for an average of eight hours a month; Brazil has in fact the world's second largest Facebook community after the U.S.<sup>40</sup>

For the President and CEO of ICANN to travel to Brazil and invite that nation to host a global summit to reengineer Internet governance looks very much like ICANN is now conducting its own foreign policy. And it resembles a foreign policy designed to force fundamental changes in ICANN's oversight and operations. But there are no details of these potential changes or whether they will primarily benefit Internet users or ICANN as an organization, as well as the governments that resent its remaining legacy ties to the U.S.

According to Brazilian Communications Minister Paulo Bernardo, the "Summit" proposal was CEO Chehade's personal initiative and his outreach was preceded by a series of discussions with other government leaders and senior officials:

"He came to us and said that he had spoken with the leaders of several countries, like Estonia, South Korea, and Germany and with the European Commissioner Nellie Kroes, and all of them cited President Rousseff's speech before the United Nations. **He feels that these changes must be made and wants to begin a debate and wants our help.** This is a notable change in the behavior of ICANN."<sup>41</sup> (Emphasis added)

But even those who allegedly cite President Rousseff's speech may have different views as to what reforms are desirable. In a September 19<sup>th</sup> blog post Commissioner Kroes wrote:

This digital age needs **a new social contract**. Decisions that affect the Internet shouldn't be taken just by politicians, companies or technicians alone, without any reference to common principles.

So I believe that the new social contract **must be based on sound principles**...the Internet should remain open, unified, pro-democratic, enabling trust and confidence, and based on transparent, multi-stakeholder governance.

...But we also must have a clearer view of **what we mean when we speak of "multi-stakeholder processes"**. I worry that without a clear definition, everyone will claim that their decision processes are inclusive and transparent, when in practice they are not –

as was shown recently, when the Governmental Advisory Committee of ICANN pressed on regardless - in spite of the EU's legitimate concerns on new domain names<sup>42</sup>.

As you may have seen, Brazilian President Dilma Rousseff recently set out her strong belief in multi-lateral cooperation as a basis for Internet governance. I am looking forward to seeing further details – but in principle I very much support that line.

It appears that the Brazil “Summit” may not be CEO Chehade’s only recent initiative to reshape Internet governance. His expansive perspective on his CEO responsibilities was expressed in this recent declaration in India, “I feel like I’m the public trustee of the internet.”<sup>43</sup> The Internet Governance Project has reported that he recently pushed a separate but similar 2014 project:

At the recently concluded Seoul Conference on Cyberspace, a memo was circulated calling for the creation of a “Commission on the Future of Internet Cooperation.” The commission, the confidential memo said, would consist of “civic leaders, ministers, CEOs and technical pioneers.” Its purpose will be to “provide new ideas for transnational and multistakeholder proposals for Internet governance.” According to the leaked document, the group is supposed to begin work in October and conclude its work with a presentation at the World Economic Forum in January 2014.

We do not know the current status of this proposal; it is not mentioned as part of the official output of the Seoul Conference. The idea may not even have been accepted by the assembled leaders. But if, as the document stated, work was to begin in October it would need to be created very soon. If efforts to create this commission are indeed underway, why doesn’t anyone know about it yet? Who will choose these “civic leaders,” etc.?

**While the formation and fate of this commission remain shadowy there is little doubt about where the proposal came from. It is another brainstorm of Fadi Chehade, the President and CEO of ICANN. In what has become a one-man crusade to re-shape Internet governance from the top down...<sup>44</sup>**

By what authority has ICANN management taken these steps? There has been no discussion within the ICANN community of whether such changes are necessary or desirable. There has been no known directive from the ICANN Board to senior staff to pursue such a course.

On the GNSO call, CEO Chehade said this about Board knowledge of Montevideo and Brazil:

Before I went to Montevideo, I did meet with my board and I shared with them the purpose of the meeting and why we're meeting. I shared with them that I feel that there are growing concerns post the (inaudible) that we have yet to build common positions on. And I told them that I would like to go to the meeting in Montevideo and see if we can form common opinions and kind of more of a coalition around the common principles – and the board was very supportive and authorized me to move forward with that kind of (inaudible)... There was no particular statement or set of points that the board had when they set me off to go meet with the other leaders. It was more that the board understood the broad problem and that is beyond ICANN, as well as the issue of globalizing ICANN and they said, "We understand. We appreciate that these have been

on the plate of ICANN and it's part of our normal effort. So if you can work with other leaders to start building kind efforts, so it's not ICANN, so ICANN is not leading, to address these issues, then yeah, go give it a shot and once you go there and you put together something, if this requires them that they go beyond that and do other things, please come back to us. Please come back and talk to the board."

One week later, on the Webinar, he elaborated further, stating that he had received a "blue light" from the Board at a September workshop to speak with the other I organizations to discuss support for the multistakeholder model. Both statements indicate that the Board had general knowledge of Montevideo plans, but do not provide any evidence that it knew of his plan of action for Brazil. And Chehade conceded in the GNSO call that the Board had not ratified the Montevideo Statement.

ICANN Board member Chris Disspain has characterized these recent developments as an effort to preserve the multi-stakeholder model (MSM) of Internet governance against the onslaught of those favoring the multi-governmental approach backed by adherents of the International Telecommunications Union (ITU):

Disspain says there needs to be a sense of urgency among supporters of the multi-stakeholder form of governance to keep the internet an open and secure system. He says the next 12 months will be critical in shaping the internet's future. The ITU and its supporters appear to be gaining some momentum at a time when the US leadership in internet governance seems to be fading. It is distracted by its own internal divisions; dealing with budgetary collapse; and facing international criticism for the NSA PRISM scandal.

"Love or loathe the US Government's role in internet governance, it has often stood up for the multi-stakeholder model when few others have. But now, its ability to lead is seriously weakened," Disspain said.<sup>45</sup>

Disspain expanded on this when, speaking at the Bali IGF meeting, he stated:

"Since the WCIT and the events of the last few weeks, the "coalition of the willing" who have been looking after the multi-stakeholder model has been weakened. To the point there is now a real risk of the governance of the Internet falling into governmental control...There are many important meetings to come. The [2014 ITU] plenipot and the WSIS+10 for example. Yet today we don't have an alternative to offer, so there is increasing worry that some Internet Governance functions will fall to government oversight."<sup>46</sup>

This view appears based in the questionable belief that those parties and governments seizing on the NSA revelations to further their long-held desire for a UN takeover of ICANN functions will be appeased by some amorphous "alternative". We are also confused His reference to WCIT is confusing, because there a coalition of willing governments refused to sign an ITR – one that Brazil endorsed - that could have paved the way for ITU incursion into Internet activities. As for "the events of the last few weeks", that can't be the NSA revelations, which started months ago (although they continue to dribble out) – the only significant events of late have been Montevideo and Brazil.

Even if one accepts that the Montevideo and Brazil initiatives were undertaken to defend the MSM, one needs to ask whether the MSM needs to be ignored in order to save it? As noted, there was no dialogue between ICANN's Board and management with the ICANN community preceding these initiatives of a clear and fundamental policy nature, even though ICANN policy is supposedly generated through a bottom-up consensus process. It's also curious that it is being pursued in conjunction with Brazil, part of the group of nations that have backed the ITU's approach over the defense of the MSM by the U.S and its allies, especially given President Rousseff's call for the UN to play a lead role in the changes to come.

And, most important, there has been little public consideration of what such a momentous change could mean for ICANN and for all the constituencies that comprise its community. Will it really result in a neutral network that cannot be restricted in any way, or will it result in a new Internet order in which a multilateral, government-dominated oversight authority takes primacy over the private sector and civil society? It appears that the ICANN community that has not been consulted to date will have no official role at the proposed "Summit" in Brazil meant to determine the future of the MSM. Under this plan, ICANN's fate may be decided outside of ICANN.

### The Shifting Brazil Agenda

One need not excuse any of the NSA's activities or even defend the present arrangement between ICANN and the U.S. to have concerns about the potential outcome of the Brazil "Summit". Professor Milton Mueller, who has long criticized the special role retained by the U.S. in relation to ICANN, wrote just after the Montevideo and Brazilian developments:

**The President of ICANN thus not only allied himself with a political figure who has been intensely critical of the US government and the NSA spying program, he conspired with her to convene a global meeting to begin forging a new system of Internet governance that would move beyond the old world of US hegemony.**<sup>47</sup>

A follow-up post at the IGP website underlines the uncertainty of what any new Internet governance order might look like, and the ever-present danger of multi-state control:

We suggested last week that the USG has lost its chance to lead the transition away from its unilateral oversight of ICANN. The I\* orgs, in alliance with at least one like-minded government (Brazil), have shrewdly positioned themselves to do so. **However, the details about how such a transition would occur are absent. What would a newly independent ICANN look like? How would it be held accountable to its stakeholders? How will we get there? It is these details which should be on the agenda of the highly anticipated meeting in Rio this coming spring.**

**We respectfully suggest that the Rio meeting must *not* be organized as a parade of "leaders" on a podium purporting to speak for the public.** Let the meeting be open to anyone and everyone with a serious stake in the accountability of ICANN and its relationship to the U.S. and other governments. Let it have an open process for submitting, deliberating upon and expressing support for or opposition to specific proposals. **Let us also not forget that ICANN and its oversight are the main topic of**

**the meeting, which suggests that ICANN's staff should not be playing a major role in setting the agenda for the meeting; ICANN has a bit of a conflict of interest in that regard. We must not allow ICANN to use its escape from the USG to escape all accountability.** Ideas should be solicited widely, not from an assemblage of leaders hand-picked by the institution being governed. Let any dialogue on transition emerge openly from civil society, industry and governments and let them determine their own representation in the Rio event. That is the essence of "bottom up, multistakeholder" governance.<sup>48</sup>

That post also suggests that consideration of the elements of a new international agreement governing ICANN might continue its status as a California non-profit, stating:

Selection of an appropriate body of national law under which ICANN should operate. If California Nonprofit Public Benefit corporation is deemed the best option, then its membership provisions need to be rethought and reapplied to ICANN in a way that does not permit it to evade accountability and substitute open ended "participation" for binding rights and obligations vis-à-vis its members.

It also proposes that the GAC be dissolved and that government representatives be allowed to directly participate in ICANN supporting organizations.

These are interesting and well-intentioned proposals, but they seem unlikely to bear fruit. It seems implausible that ICANN would not participate in the "Summit" it precipitated and which may decide its future, and we suspect that if it transpires CEO Chehade and other ICANN senior executives will be present. Also, having monitored the GAC, which spends most of its time in closed door sessions despite ICANN's supposed commitment to transparency, we can't imagine that government officials will readily agree to sitting side-by-side and having no more say than individuals from civil society and industry. Other proposals are also emerging for "a distributed or networked form of governance, in which networks of actors across stakeholder groups work together on making policies around an issue related to the Internet that falls within the specific domain of expertise of those actors"<sup>49</sup>, but they seem too free form to gain traction.

A diminished role for governments is an unlikely outcome for Rio as the Brazilian government controls its planning and governments are more important now to ICANN than ever. Only governments and not the ICANN "community" can bring the political leverage to help ICANN break free of the remaining vestiges of U.S. control, much less achieve the shelter from litigation and taxes that would accompany IO status derived from a multilateral treaty.

Indeed, just weeks after the announcement of the Brazil "Summit", it became clear that its progenitors are conceiving it being structured in a manner that gives the lead role to nation-states and includes ICANN's central participation. As reported by the IGP:

"[A]t a Bali Internet Governance Forum pre-event, Chehade and representatives of the technical community began to provide more detail about what would happen at the planned Brazilian "Summit" meeting in April 2014. According to a description of the meeting sent out by Access's Jochai Ben-Avie, **Brazil and ICANN are proposing an oddly corporatist approach to representation at the meeting:**

To ensure multistakeholder and global participation, **there is a proposal that each country will have three representatives to the conference (one each from government, business, and civil society) — to “create a mini CGI in each country.” It was not discussed how these people will be selected. Additionally, the heads of all the I\* organizations and international government organizations will be invited.** A question was raised about how the technical community would be represented, and the response was not clear whether technical community reps would be considered for some of the national civil society spots, or whether they would be represented by the heads-of-organizations representatives. **The plan is to have 800-900 people present in total, but there will be large screens set up to facilitate remote participation from stakeholders and users from around the world. These details will be announced in 2-3 weeks in Brasilia...**

**There are two things drastically wrong with this approach to the meeting. First, why is representation of civil society and private business, both of which are transnational, being organized on a nation-state basis? Second, imagine this: One representative of civil society and the private sector for each country!** Civil society is conceived not as a pluralistic arena in which hundreds or even thousands of groups are free to articulate and advance diverse proposals and interests, but as a unitary stakeholder group with homogeneous interests. That’s wrong. Business, likewise, is seen as a single category: there is no difference between Amazon and the local second-hand bookstore; between IBM and a three-person IT consultancy. **That’s insane.**<sup>50</sup> (Emphasis added)

Speaking at the Bali IGF, in remarks that included lofty declarations that “There is no cyberspace there is only one place we all occupy and where we all live”<sup>51</sup> and “The status quo is not sustainable”<sup>52</sup>, CEO Chehade gave this new explanation of the Brazil “Summit” – which he rhetorically downgraded to a mere “meeting” with similarly downgraded objectives:

This is not a "Brazil meeting", it's "a" meeting. Brazil has told us they don't want it to be about them or ICANN, it's not about finding solutions, it's about setting the framework for doing so. It will be a truly multistakeholder meeting, with a multistakeholder steering committee where Brazil and maybe 3 or 4 other organising countries will be involved, attended by a multistakeholder audience.<sup>53</sup>

Let’s parse that. It is not a Brazil meeting but it is taking place in Brazil. It will be a truly multistakeholder meeting but Brazil and three or four other nations will also be overseeing its planning. Most remarkably, “it’s not about finding solutions” but about setting the framework for finding solutions. So a thousand or more delegates will travel to Rio to meet in early May 2014 to merely discuss a framework? What is this meeting’s unique purpose? What will be discussed there that hasn’t just been discussed at the Bali IGF and will be discussed again at the official Internet-related policy already scheduled in the future? This latest description it is at considerable variance with CEO Chehade’s initial declaration that the then-“Summit’s” purpose was to assemble “leaders...to come together here in Brazil and discuss how together we will base our work on governing the Internet in the core principles that she has been good such a good champion of”. How can a meeting that is not about Brazil or solutions be reconciled with a goal of governing the Internet based upon principles espoused by the President of Brazil?

The planning process for this Summit now appears to be firmly under Brazil's control. In the GNSO call CEO Chehade explained it in these terms:

[W]e want to make sure we don't end up with some new big organization that will very quickly get corrupted as much as any big organization can, so I think the framework for what will happen will be decided shortly and it will be decided with a set of stakeholders that we are pulling together from business, civil society, the technical organizations, CGI and Brazil, the Brazilian government, and the co-governments, the co-host governments that they're inviting. We don't know who they're inviting but we have begged them to invite other governments because we didn't want this to be about Brazil or to be about ICANN. We wanted it to be about a global group of middle countries and a coalition of multi-stakeholder players...This has to be a multi-stakeholder conference – business, civil society, technical organizations, and government.

Yet one week later, during the Webinar, Chehade stated that Brazil alone would decide how many and which members of civil society and business would be on the "steering committee" planning the meeting. When asked by one participant how to ensure a meaningful role for civil society, his response was, "Send a letter to Rousseff. We're not in control."

Long before any intensive dialogue occurs in Rio on Internet governance there is already uncertainty on the structuring of the "Summit". There is no telling what may come out of next spring's Rio meeting, or whether it shall reach consensus at all. When CEO Chehade "conspired with her [President Rousseff] to convene a global meeting to begin forging a new system of Internet governance" a process was set in motion that has no predictable outcome and may be highly destabilizing, with the dreaded "fractured root" and a resulting balkanized Internet a not inconceivable result.

However, CEO Chehade has a substantially different perspective, stating on the GNSO call, "we created the possibility of an alternative to the multilateral model, which did not exist before Dilma agreed to do this...a leading government is going to have an actual multi-stakeholder conference where the president of that country inviting us has agreed already that the people sitting at the table will be government, civil society, and industry, side-by-side, participating on an equal footing. How could it be worse?"

### The NSA Red Herring

A starting point for any discussion of ICANN's future would be to question whether the NSA revelations are even relevant to the residual U.S. role as counterparty to the IANA contract. As John Levine observed:

What people call Internet governance is mostly at the DNS application level, and perhaps the IP address allocation. The NSA is snooping down in the tubes, the underlying networks, and servers located in the U.S., where none of this matters. They do have a few DNS based attacks, but they'd work the same way regardless of who was running the real DNS servers.<sup>54</sup>

In short, while the breadth of the NSA activities revealed by Edward Snowden raises multiple and justifiable concerns in the U.S. and abroad, they are a technological “red herring” in the ICANN debate -- unless one believes that the unsurprising revelation of cyber-espionage by the world’s leading power has irretrievably damaged the moral authority of the U.S. to oversee IANA. The politics of Internet governance make it exceedingly unlikely that the U.S. would ever utilize its IANA contract authority to block or remove a gTLD precisely because of the international outcry that would occur. The as yet undetermined recipient of that IANA counterparty role might be far more likely to employ it for political ends. Meanwhile, the U.S. has a Constitutional commitment to free speech and press, and a reliable and well-regarded judicial system, which arguably makes it an extremely favorable locus for ICANN activities and contract enforcement, especially in the absence of any certainty over what jurisdiction or accountability framework might replace it.

Domain industry journalist Kevin Murphy reached a similar conclusion, recently writing:

Chehade’s current campaign therefore seems to be politically opportunistic at best and a distraction from the underlying problem of US human rights violations at worst...If Chehade wants to unshackle ICANN from the US, the IANA contract will have to be a cornerstone of that project.

But NTIA’s past performance makes that possibility seem unlikely, unless Chehade can rally enough political pressure from the likes of Brazil and India to change his own government’s mind.

He faces an uphill battle, in other words, and at the end of the day whether breaking from the US government would be a good thing or not depends entirely on what, if anything, replaces it.

Whatever happens, let’s not pretend that ICANN’s independence has anything to do with PRISM...<sup>55</sup>

The truth is probably close to the observations of Professor A. Michael Fromkin, who recently stated that the NSA revelations have ““become a way for a lot of different agendas to meet. “You’ve got all the countries who are unhappy about the NSA’s surveillance. You’ve got all the countries and parties who were unhappy they didn’t get everything they wanted in the last round, in terms of independence. **And you have ICANN itself, which is always trying to get out from any control over its behavior by anybody.**”<sup>56</sup> (Emphasis added) As for “the last round”, he explains that reference is to the end of direct U.S. oversight and the signing of the AOC in 2009, ““The Affirmation of Commitment was kind of a truce. ICANN got most of what it wanted; the Europeans and Japanese got most of what they wanted; the US gave up, you know, a lot, without giving up the core thing -- which is that, in case of emergency, it can step in.”

While excoriating the U.S. for permitting the NSA to open a Pandora’s Box of issues that can be utilized by repressive regimes, Sascha Meinrath, Director of the New America Foundation’s Open Technology Institute, is also deeply concerned that the Summit may lead to Internet balkanization:



**Rousseff's move could lead to a powerful chorus—one that would transform the Internet of the future from a global commons to a fractured patchwork severely limited by the political boundaries on a map.** Brazil is one of a handful of countries—including Indonesia, Turkey, and India—that have wavered in the debate over whether to develop an international framework to govern the Internet, one that would replace the role that the United States has played as chief Internet steward... The NSA's actions have shifted that debate, alienating key Internet-freedom allies and emboldening some of the most repressive regimes on the planet. Think of it as an emerging coalition between countries that object to how the United States is going about upholding its avowed principles for a free Internet, and countries that have objected to those avowed principles all along... **The motivations of those nations questioning America's de facto control over the global Internet may vary, but their responses are all pointing in the same troubling direction: toward a Balkanized Internet...** Netizens would fall under a complex array of different jurisdictions imposing conflicting mandates and conferring conflicting rights. And much as different signaling hampers the movement of people and the trade of physical goods, an Internet within such a complex jurisdictional structure would certainly hamper modern economic activity.<sup>57</sup> (Emphasis added)

The Congressional debate regarding NSA reform should certainly consider the corrosive influence of the Snowden revelations on discussions of Internet governance, and the need to restore faith in America's stewardship of the Internet. Aside from the bipartisan outcry over the mass aggregation of metadata pertaining to U.S. Citizens, it is now becoming clear that the revelations are triggering reactions that could do great damage to U.S. business and counterterrorism interests.

Alongside reports of bulk interception of EU e-mail traffic, the big uproar on the other side of the Atlantic is over what the Germans have dubbed "Handyuberwachung"; that is, spying on cellphone calls – and specifically the calls of Chancellor Angela Merkel. The Chancellor's photo was subsequently displayed on the front pages of EU newspapers holding her new encrypted cellphone. Yet after all the angry declarations it is unlikely that any of Europe's own spy programs, ranging from the UK's Tempora program operated by its GCHQ to France's Direction Generale de la Securitie Exterieur – renowned for its industrial espionage capabilities and "run at the margins of legality" according to Le Monde -- is likely to be diminished. Spying is, after all, the world's second oldest profession (and one that has often utilized the very oldest).

Indeed, according to multiple reports, what the Germans may seek out of all this is admittance to the coveted "Five Eyes" intelligence-sharing circle so that they can have better access to NSA data:

The heads of Germany's intelligence services are now headed to Washington, DC, for meetings with the White House and NSA to smooth over the scandal. At bottom, Germany (like France), seeks not to shut down NSA espionage, rather to get closer to it. Berlin has long been jealous of London and the other Anglosphere members of the so-called Five Eyes community, the SIGINT alliance born in the Second World War which, to this day, constitutes the most successful international intelligence partnership in world history. Perhaps because they were on the wrong side when that alliance was created in the days of the ULTRA secret, German intelligence agencies have always wanted into the club and its privileged inner circle. Although Germany enjoys a tight spy relationship

with the United States (and Britain too), Berlin knows its place, and it would like an upgrade.<sup>58</sup>

It is also being revealed that intelligence-sharing between the U.S. and other European nations goes beyond the Five Eyes arrangement. As more information pours out, it appears that a great deal of activities initially attributed to the NSA instead involved data supplied to it by other intelligence agencies, such as those of France and Spain:

Millions of phone records at the center of a firestorm in Europe over spying by the National Security Agency were secretly supplied to the U.S. by European intelligence services—not collected by the NSA, upending a furor that cast a pall over trans-Atlantic relations.

Widespread electronic spying that ignited a political firestorm in Europe was conducted by French and European intelligence services and not by the National Security Agency, as was widely reported in recent days.

The revelations suggest a greater level of European involvement in global surveillance, in conjunction at times with the NSA. The disclosures also put European leaders who loudly protested reports of the NSA's spying in a difficult spot, showing how their spy agencies aided the Americans.

The phone records collected by the Europeans—in war zones and other areas outside their borders—were shared with the NSA as part of efforts to help protect American and allied troops and civilians, U.S. officials said.

European leaders remain chagrined over revelations that the U.S. was spying on dozens of world leaders, including close allies in Europe. The new disclosures were separate from those programs.

But they nevertheless underline the complexities of intelligence relationships, and how the U.S. and its allies cooperate in some ways and compete in others.

"That the evil NSA and the wicked U.S. were the only ones engaged in this gross violation of international norms—that was the fairy tale," said James Lewis, a former State Department official, now a technology-policy specialist at the Center for Strategic and International Studies. "It was never true. The U.S.'s behavior wasn't outside the norm. It is the norm."<sup>59</sup>

This is not to say that the NSA fallout within the EU has not been at least temporarily damaging for the U.S. On October 23<sup>rd</sup> the European Parliament (EP) passed a Resolution calling on the EU Commission to temporarily suspend all data transfers according to the Terrorist Finance Tracking Program (TFTP) with the United States Treasury Department, and also requesting a full onsite technical investigation of such matters as the backdoors used by US authorities to illegally access the SWIFT payment system servers.<sup>60</sup> The EP is also preparing to consider legislation that would tighten privacy standards and restrict how U.S. tech firms can operate within the EU, and additional negative fallout is anticipated in ongoing trade discussions. Revelations that the NSA monitored personal communications of German Chancellor Merkel and aggregated data on 70 million French phone calls have only added fuel to the fire,

prompting EU Justice Minister Viviane Reding to declare, "The recent spying revelations have been yet another wake-up call. This is the moment for European leaders to take a strong and ambitious stance on the EU's data protection reform."<sup>61</sup>

U.S. technology leaders are equally disturbed. Facebook founder Mark Zuckerberg recently observed, "The government's [initial] comment was, 'Oh don't worry. Basically, we're not spying on any Americans. Oh, wonderful, that's really helpful to companies who are trying to serve people around the world and really going to inspire confidence in American Internet companies.'"<sup>62</sup> And, after learning of reports that the NSA had spied on Google's data centers, Executive Chairman Eric Schmidt stated, "'It's really outrageous that the National Security Agency was looking between the Google data centers, if that's true. The steps that the organization was willing to do without good judgment to pursue its mission and potentially violate people's privacy, it's not OK...The NSA allegedly collected the phone records of 320 million people in order to identify roughly 300 people who might be a risk. It's just bad public policy...and perhaps illegal.'"(Asked in the same interview whether Google would restart its China-based search engine, he answered, "China's censorship regime has gotten significantly worse since we left so something would have to change before we come back.")<sup>63</sup>

While NSA practices still have Congressional defenders, a coalition of civil liberty and privacy groups acting in concert with the tech and business sectors may well be able to achieve substantial legislative reforms during the remainder of this Congress. Such a development would do far more to restore trust in the Internet than any reassignment of the IANA contract.

Beyond the EU, the UN will likely soon consider a German-Brazilian initiative to address Internet surveillance:

An effort in the United Nations by Brazil and Germany to hold back government surveillance is quickly picking up steam, as the uproar over American eavesdropping grows.

The German and Brazilian delegations to the U.N. have opened talks with diplomats from 19 more countries to draft a General Resolution promoting the right of privacy on the Internet. Close American allies like France and Mexico -- as well as rivals like Cuba and Venezuela -- are all part of the effort.

... The draft, a copy of which was obtained by *The Cable*, calls on states "to respect and ensure the respect for the rights" to privacy, as enshrined in the 1976 International Covenant on Civil and Political Rights. It also calls on states "to take measures to put an end to violations of these rights" and to "review their procedures, practices and legislation regarding the extraterritorial surveillance of private communications and interception of personal data of citizens in foreign jurisdictions with a view towards upholding the right to privacy."

... The NSA has reportedly monitored communications of up to three dozen world leaders and accessed the emails of the president of Mexico.

The draft appears designed to provide oversight of those types of incursions -- as well as surveillance incursions of average citizens worldwide. It requests that the U.N. High Commissioner for Human Rights report to the U.N. General Assembly twice in the next

two years on "human rights and indiscriminate surveillance" with "views and recommendations" aimed at "identifying and clarifying principles, standards and best practices on the implications for human rights of indiscriminate surveillance."<sup>64</sup>

The U.S. is also likely to be in bilateral and multilateral talks that set limits on future intelligence-gathering:

French and German leaders said they would insist the U.S. agree to limits on its surveillance practices by the end of the year. According to a report in the Associated Press, allies are likely to demand that the U.S. agrees to a code of conduct for intelligence gathering.

Asked about that demand Friday, deputy national security adviser Ben Rhodes seemed open to the possibility.

"We are already in diplomatic and intelligence channels talking to the Germans, French, countries around the world — Brazil and Mexico, as well," Rhodes told NBC. "I think we'll have a series of bilateral discussions with these countries and look at multilateral discussions as well."<sup>65</sup>

Six months from now, when the May 2014 Rio meeting would take place, the fallout from the NSA revelations will likely have been addressed in multiple ways and to have faded substantially from front pages. Reforming Internet overreach by the NSA or any other national intelligence agency in no way argues for participation in a hastily arranged Brazilian "Summit" with no official status, an unknown participation structure, and no discernible agenda other than wresting control of the IANA contract away from the U.S. so that it can be awarded to – well, who knows? CEO Chehade reportedly stated in India on October 18<sup>th</sup> that the AOC must be changed from an agreement with the U.S. to one between 'ICANN and you', and that the IANA function must be altered to make it the 'root of the world' rather than any single country.<sup>66</sup> These idealistic phrases will take real work to transform into meaningful oversight rather than a release of ICANN from all accountability.

The bottom line is that alterations of the responsible party for the AOC or IANA will have no impact on the ability of the NSA or any other state intelligence agency to conduct cyber-surveillance and that concerns about such activities must be addressed through national legislation and international agreements. In the absence of a well-developed transition plan, the rather benign U.S. handling of the AOC and IANA is preferable to the potential substitution of politicized multinational control or the possibility of Internet balkanization, both of which could emerge from the Brazil Summit.

It is also becoming clear that the restoration of trust in the Internet includes a sizeable technical component that may be as or more important than any policy initiative. The 88<sup>th</sup> meeting of the Internet Engineering task Force (IETF) held during the first week of November was almost entirely focused on this topic:

"Ensuring the global Internet is a trusted platform for billions of users is a core and ongoing concern for the IETF community. Discussions over the past few months, including many in the more than 100 working group sessions this week, are carefully and systematically reviewing Internet security and exploring ways to improve privacy and

other aspects of security for different applications," said Jari Arkko, Chair of the IETF. "Internet security has many facets, and the IETF is focused on ensuring that the technical Internet protocols that it develops provide a strong foundation for privacy and security."

"The Internet has been turned into a giant surveillance machine," said Bruce Schneier, who spoke at the meeting's technical plenary. "This is not just about any particular country or individual action. We need to work broadly to fix the problems of today and tomorrow."

... "The IETF is taking steps to develop the technical specifications to improve the privacy and security of the Internet," said Russ Housley, the Chair of Internet Architecture Board. "However, others need to take on the non-technical aspects that are part of a comprehensive response to mass surveillance on the Internet."<sup>67</sup>

Again, Milton Mueller – who favors transition of the IANA function from the U.S. to non-state actors –reached a similar conclusion:

[W]hen President Rouseff proposes to solve these problems by means of a “multilateral framework for the governance and use of the Internet,” she reveals a fundamental flaw in her thinking. It is a flaw shared by many in civil society.

You cannot control militaries, espionage and arms races by “governing the Internet.” Cyberspace is one of many aspects of military competition. Unless one eliminates or dramatically diminishes political and military competition among sovereign states, states will continue to spy, break into things, and engage in conflict when it suits their interests. Cyber conflict is no exception.

Rouseff is mixing apples and oranges. If you want to control militaries and espionage, then regulate arms, militaries and espionage – not “the Internet.”

**This confusion is potentially dangerous. If the NSA outrages feed into a call for global Internet governance, and this governance focuses on critical Internet resources and the production and use of Internet-enabled services by civil society and the private sector, as it inevitably will, we are certain to get lots of governance of the Internet, and very little governance of espionage, militaries, and cyber arms.**

**In other words, Dilma’s “civilian multilateral framework for the governance and use of the Internet” is only going to regulate *us* – the civilian users and private sector producers of Internet products and services. It will not control the NSA, the Chinese Peoples Liberation Army, the Russian FSB or the British GCHQ.**

... That’s one reason why it is so essential that these conferences be fully open to non-state actors, and that they not be organized around national representation.

**Let’s think twice about linking the NSA reaction too strongly to Internet governance... let us not confuse NSA regulation with Internet regulation.**<sup>68</sup>  
(Emphasis added)

## ICANN Lost? – Or ICANN Reformed?

The U.S. has not yet said much in regard to these important developments. In particular, the silence from the NTIA has been deafening. That may not last once the U.S. Congress becomes aware of recent events. Just this summer the Senate Appropriations Committee was highly critical of NTIA, stating in a report issued on July 5<sup>th</sup><sup>69</sup>:

The Committee is concerned that the Department of Commerce, through NTIA, has not been a strong advocate for U.S. companies and consumers and urges greater participation and advocacy within the GAC and any other mechanisms within ICANN in which NTIA is a participant. NTIA has a duty to ensure that decisions related to ICANN are made in the Nation's interest, are accountable and transparent, and preserve the security, stability, and resiliency of the Internet for consumers, business, and the U.S. Government.

With considerable irony, one of the events that may have triggered that criticism was NTIA's July 5<sup>th</sup> issuance of a "U.S. Statement On Geographic Names In Advance Of ICANN Durban Meeting"<sup>70</sup> in which it announced that it was dropping opposition to the GAC's objections to multiple geographic gTLDs – including the application of Amazon Corporation for .Amazon -- an application for which Brazil was the leading opponent! Indeed, many believed that the U.S. position on this matter had been substantially weakened by the NSA revelations and forced its hand pre-Durban.

There is agreement between CEO Chehade and the U.S. that the NSA revelations have weakened its hand in Internet governance. On the GNSO call he said, "I think there is a definite weakening of the US Government in its global position in Internet governance – and this is not Fadi saying that, this is the US Government telling me that, and we saw in Bali as well...our US government has even come to the conclusion that they're not sure that there is another government that can actually catalyze these the communities around a multi-stakeholder way. And so we're doing our part, along with the rest of the leaders, to just make sure that we keep the world focused on the multi-stakeholder solution." Similarly, at a November 6<sup>th</sup> press conference discussing the aftermath of the Bali IGF, State Department official Scott Busby, deputy assistant secretary of state-democracy, human rights and labor, conceded that they had created a "serious perception issue" as it tries to defend the multistakeholder model; while Chris Painter, State's coordinator for cyber issues, added that they'd "emboldened those people who always were against the multistakeholder system, who do target their citizens."<sup>71</sup>

Congress will take note that the only thing about the agenda for the Rio meeting that remains constant, at least from ICANN's perspective, is that the IANA contract with the U.S. will inevitably be on the table. Speaking at an October 28<sup>th</sup> domain industry meeting in Munich, Germany, CEO Chehade said:

**The current ICANN contract that gives the US government a unique role in the root management function is not sustainable. It's just not sustainable.** I think we need to think together how we grow from that and how we globalize that contract. But we need to be very careful about creating a vacuum or unintended consequences that would destabilize the root of the internet.<sup>72</sup> (Emphasis added)

Of course, a “Summit” without any coherent globalization plan in hand could well produce unintended consequences leading to the very Internet root destabilization he warns against.

Washington may soon be asking “Are we losing ICANN?” the institution spun out of the Department of Commerce in 1998 and intended to share a realized vision of private sector, multistakeholder participation model of Internet governance with the world. Speaking at the Internet Governance Forum (IGF) in Bali, Indonesia on October 22<sup>nd</sup>, Deputy Assistant Secretary and U.S. Coordinator for International Communications and Information Policy of the U.S. State Department Daniel A. Sepulveda delivered the first official response of the Obama Administration to the Montevideo Statement, declaring:

We support an open dialogue on the modernization and evolution of the multi-stakeholder system that enables the operation of the global Internet. Bottom-up, inclusive, cooperative efforts to empower users and further enable innovation free from arbitrary intergovernmental control are what the U.S. has called for all along. And we believe that the proper response to concerns related to the Internet’s development...lies in the cooperative work between and within the multi-stakeholder institutions that its founders empowered.

**...Separately, the leaders of the Internet’s multi-stakeholder governing organizations have renewed calls to modernize the Internet’s governing system and make it more inclusive. Their recent statement from Montevideo should be seen as an opportunity to seek that broad inclusion and for organizing multistakeholder responses to Internet issues that do not have a home today. And we must work together with them in good faith on these important issues. I think we can and all should agree that this effort cannot be used or manipulated in a way that centralizes power over the Internet in the hands of any one stakeholder.**

**We should guard against recent arguments for centralized intergovernmental control of the Internet that have used recent news stories about intelligence programs for justification.** I can assure you that the United States government takes the concerns many of you have expressed regarding the recent NSA disclosures very seriously...Let us work cooperatively to improve the trust, confidence, and security of our networks. Let us continue promoting an open Internet that can serve as a platform for innovation and job growth.<sup>73</sup> (Emphasis added)

While not directly addressing the Brazil “Summit”, the reference to potential manipulation that centralizes Internet power in a single stakeholder may well be an allusion to Brazil’s affirmative vote, at the World Conference on International Communications (WCIT), held in December 2012 in Dubai, for a revision of the International Telecommunications Regulations (ITR) that was seen by many as ceding jurisdiction to the UN-affiliated International Telecommunications Union (ITU) over a broad range of Internet governance functions currently left to international non-governmental organizations (NGOs) like ICANN -- 89 nations voted for the ITR, while 80, including the U.S., refused.<sup>74</sup> Now of course ICANN has no interest in seeing its functions transferred to the ITU. But ICANN might have a great interest in assembling multilateral support for achieving similar IO status, accompanied by insulation from litigation, taxation, and centralized oversight and accountability.

We are told that during the Bali IGF some participants speculated that ICANN had fallen into a “Brazilian trap”, and that the Summit may be intended to lay the groundwork for a full-scale assault by the ITU to assume ICANN’s responsibilities during its scheduled October-November 2014 meeting in South Korea. As one analysis observed, “The date chosen (which has subsequently been revised to May) falls immediately after the main WSIS+10 meeting, but before a follow-up high-level meeting that Brazil has been pushing for, that could be used to ratify the decisions taken at the Brazil summit. **It would also precede the ITU Plenipotentiary in October, at which moves for governmental control of the Internet could be reasserted, if insufficient progress were made at the summit.** And probably not coincidentally, it also leads into the re-election date of President Rousseff, also in October 2014.”<sup>75</sup> (Emphasis added)

That analysis also reports that in Bali fissures were already developing among various Internet governance constituencies:

Downplaying the importance of the summit, Disspain described it as “not the end game, just a stop on the road”, and asserted that “we seem to have the reins of that meeting, and we need to keep hold of those reins”. Even Chehadé, whilst clearly having a broader conception of the summit’s purpose than Disspain, similarly boasted about the technical community’s leadership of the event, saying “we can make it our meeting”, and claiming that that he had told the Brazilians that the meeting would not be about proposing solutions, as this would be taking things too fast.

This did not go down well for some in the room, particularly from civil society, who saw in the summit a potential way to address the serious human rights violations committed through mass surveillance, and to accelerate the long-delayed globalisation of oversight of ICANN and its functions. They were alarmed by the prospect of the summit being hijacked to serve the narrow interests of the Internet technical community...The technical community and private sector nominees expressed little enthusiasm for the summit at all, and seemed more interested in the new coalition that that the technical community had announced to oppose governmental involvement in Internet governance.

These unsurprising disagreements are only likely to become worse with time, as stakeholders come into conflict about the purpose, agenda, and representation at a hastily conceived and ever-morphing event. Civil society groups are already circulating a “Sign-On Statement regarding the 2014 Internet Governance Summit in Brazil” that declares:

The event should discuss what Internet governance architecture is required to support an inclusive, people-centric, development-oriented information society...[and] should extend beyond good will speeches or presentations of good intentions and seek to produce actionable outputs.<sup>76</sup>

But that desire for ‘actionable outputs’ is at odds with Chehadé’s Bali pronouncement that “solutions’ will not be the goal. It could well emerge that the end result of disputes over the event, as well as its outcome, will be exacerbated enmity that plays right into the hands of those seeking a government-led takeover of Internet governance.

Another report also emphasizes the disharmony between governments and civil society as to what the Brazil meeting should accomplish – and within civil society itself:



ICANN has rushed to agree with Brazil and India on the preference of multi-stakeholder over multilateral, and has also reached out to the designated chair of the ITU Plenipotentiary in Korea.

While ICANN is looking for legitimacy, Anriette Esterhuysen, executive director of the Association for Progressive Communication, said Brazil and ICANN are still speaking different languages.

The roles of governments vis a vis the other stakeholders is an unresolved topic, despite the newly married ideas of “multistakeholderism” and “enhanced cooperation” to “enhanced multistakeholder cooperation.”

Given the failure of governments, not only the US, with regard to mass surveillance and the clarification of the facts brought to light by Edward Snowden, other stakeholders might have a point in pushing for “equal footing.” Yet stakeholders so far appear to have no consensus, even among themselves.<sup>77</sup>

Milton Mueller, recognized spokesman for the civil society perspective, has observed, “[T]he U.S. has to react creatively and not just in total denial of this new trend. They either have to recognize this summit and agree to participate in it, or give some alternative mechanism for moving forward.”<sup>78</sup>

We agree. But since the Rio proposal may well be based in current perceptions of U.S. weakness and indecision in foreign policy matters stemming from the NSA revelations and other recent events, any U.S. announcement of “red line” conditions for an acceptable meeting may lack credibility. Given that problem, and Rio’s many potential dangers, there may be considerable merit in the U.S. puncturing the early trial balloons for the Brazil event – before any significant group of nations signs on - by quickly and simply announcing that it has no intent of participating in an ad hoc gathering with no official status and inadequate advance planning; that it intends to remain the counterparty to the renewed IANA contract for its current initial term (through at least October 2015); and that it will continue monitoring ICANN’s compliance with the AOC and sharing its views with other members of the GAC. Such a declaration would let prospective Summit attendees know that if their goal is to compel transfer of the IANA contract they should save their airfare.

The U.S. could also, as an alternative to the Brazil event, take multilateral and multistakeholder action to build support for a 2014 IGF meeting. During the webinar CEA Chehade stated that the Montevideo signatories were all concerned that no 2014 IGF was scheduled due to lack of funding, and the U.S. could help catalyze efforts to assure it takes place. At least the IGF has official status, a known structure, and a history of positive dialogue on a broad range of Internet issues.

The NTIA may judge that suggestion as they wish, but both it and the State Department will likely soon need to inform Congress as to whether they intend to confer legitimacy on the “Summit/meeting” by spending taxpayer dollars to attend it. In particular, Congress may legitimately inquire whether continued control of the IANA contract is tied to national security – or whether its loss to others could threaten it.

Only if the Brazilian “Summit” is downgraded or derailed can a more considered and responsible course be undertaken. Hopefully, within such a context, the ICANN Board and staff will begin to engage in a candid and transparent dialogue with the broad ICANN community and discern what consensus views it might develop on this critical subject. That would be a bottom-up democratic approach to taking further steps, rather than the top-down developments we have seen to date. The first signs of change, if they arise, will appear at the upcoming ICANN meeting in Buenos Aires.

## Conclusion

Regardless of whether the Brazil “Summit” transpires, who attends, or what it produces, the NSA revelations have clearly raised questions about the acceptable limits of cyber-surveillance. They have also provided an opportunity for the many parties – including, clearly, ICANN – who want to remove the final vestiges of U.S. control over ICANN to push toward that goal. Yet intelligence reform has no connection to the future course of Internet governance other than near-term expediency.

Ultimately, the most relevant question for members of the ICANN community, especially those hailing from the business and civil society sectors, is “Who will find ICANN?” That is, in what form will ICANN ultimately emerge in the wake of these developments -- and subject to what, or any, control and accountability? The answers are too important to be addressed hastily.

Until these recent developments occurred one would have thought that the upcoming November ICANN meeting in Buenos Aires would be largely focused on the final stages of the new gTLD program, including the “name collision” issue. On the same day that the Montevideo Statement was issued, ICANN’s new gTLD Program Committee approved a New gTLD Collision Occurrence Management Plan<sup>79</sup> that calls for yet more study on this critical issue involving collision occurrences between new gTLDs and existing private uses of the same “strings”. Entities experiencing such collisions could encounter a “broken Internet” that no longer functions predictably, and that exposes confidential data to theft. If such problems are widespread they could threaten ICANN’s credibility as technical manager of the DNS.

That ongoing search for collision solutions, undertaken even as new gTLDs begin to launch, is a strong reminder that the technical and marketplace success of the new gTLD program is far from assured, and that substantial problems, much less failure, could jeopardize ICANN’s future viability. CEO Chehade is also overseeing a vast expansion of the organization through the establishment of multiple new management hubs and outreach offices around the globe and a planned doubling of staff ranks by the end of FY 2014. Senior ICANN management already had more than a full plate -- diverting management and stakeholder attention from these uncompleted tasks to take on politically charged matters of Internet governance could be a very risky course for ICANN. Indeed, during the GNSO call CEO Chehade conceded that addressing these new concerns was consuming a large amount of senior management time, stating, “I’ve had, on average, about 22 briefings a day, since Montevideo. I counted. So we’re, all of us, (inaudible) is doing them.”

Near the conclusion of the Webinar, CEO Chehade said, “We should all step back, take a deep breath, and consider what’s at stake here – an open Internet.” On that point we agree, but

respectfully believe that those very high stakes argue for stepping back from the meeting in Brazil before stepping forward more deliberately with plans more likely to preserve the multistakeholder model and a fully accountable ICANN.

[Note: Other than direct quotes, the views expressed in this article are solely those of the author.]

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- <sup>14</sup> <http://m.thehindubusinessline.com/industry-and-economy/infotech/activities-like-prism-erode-public-trust-global-net-body/article5248462.ece/?maneref=http%3A%2F%2Ft.co%2FtSSBZkoqTA>
- <sup>15</sup> <http://www.livemint.com/Opinion/zMg75KwkfUkEOA6ZhAqSDP/Why-the-Internet-needs-proper-governance.html>
- <sup>16</sup> <http://m.thehindu.com/news/national/brazil-approaches-india-for-global-summit-to-discuss-us-surveillance/article5308458.ece/?maneref=http%3A%2F%2Ft.co%2Ffrqk1wgwYzF>
- <sup>17</sup> There is also the "choice of law" issue to determine which national laws will apply to contracts with such parties as registrars and registries, but that can be handled in contract terms regardless of where particular activities or their enforcement have their locus. Indeed, ICANN is presently soliciting applications for a Contractual Compliance Specialist whose "primary role is to process complaints received by ICANN regarding all matters related to the Registrar and the Registry agreements and the Consensus Policies". All current ICANN contracts are governed by U.S. law, with any litigation to be brought in California, yet the position is to be located in Singapore or Istanbul. [https://icann-openhire.silkroad.com/epostings/index.cfm?fuseaction=app.jobinfo&jobid=213656&company\\_id=16025&version=1&source=ONLINE&jobOwner=992318&aid=1](https://icann-openhire.silkroad.com/epostings/index.cfm?fuseaction=app.jobinfo&jobid=213656&company_id=16025&version=1&source=ONLINE&jobOwner=992318&aid=1)
- <sup>18</sup> <http://www.icann.org/en/news/announcements/announcement-07oct13-en.htm>
- <sup>19</sup> <http://www.icann.org/en/news/announcements/announcement-2-09jul12-en.htm>

<sup>20</sup> “ICANN CEO Says Multistakeholder Model Critical to Success”; Washington Internet Daily: November 12, 2013

<sup>21</sup> <http://www.icann.org/en/about/agreements/white-paper>

<sup>22</sup> <http://www.internetsociety.org/news/internet-society-responds-reports-us-government%E2%80%99s-circumvention-encryption-technology>

<sup>23</sup> <http://www.1net.org/content/en>

<sup>24</sup> <http://www.nro.net/>

<sup>25</sup> Two versions of this webinar occurred on November 8<sup>th</sup>; the author participated in the session commencing at 2pm Eastern time and all references to its content are taken from his contemporaneous notes.

<sup>26</sup> <http://blog.planalto.gov.br/brasil-vai-sediar-encontro-mundial-sobre-governanca-da-internet-em-2014/>

<sup>27</sup> <http://online.wsj.com/news/articles/SB10001424052702304527504579172003607958112?cb=logged0.1377361094423265>

<sup>28</sup> <http://online.wsj.com/news/articles/SB10001424052702304391204579178040803286708?KEYWORDS=brazil>

<sup>29</sup> [http://en.wikipedia.org/wiki/2007\\_cyberattacks\\_on\\_Estonia](http://en.wikipedia.org/wiki/2007_cyberattacks_on_Estonia)

<sup>30</sup> <http://www.reuters.com/article/2013/10/21/net-us-russia-internet-idUSBRE99K0M920131021?feedType=RSS&feedName=technologyNews>

<sup>31</sup> <http://www.nytimes.com/2013/02/19/technology/chinas-army-is-seen-as-tied-to-hacking-against-us.html>

<sup>32</sup> [http://www.scribd.com/document\\_downloads/170601718?extension=pdf&from=embed&source=embed](http://www.scribd.com/document_downloads/170601718?extension=pdf&from=embed&source=embed)

<sup>33</sup> <http://www.wired.co.uk/news/archive/2013-10/12/us-internet-control> and <http://www.news24.com/Technology/News/Brazil-to-host-internet-governance-summit-20131010>

<sup>34</sup> [http://www.circleid.com/posts/20131019\\_an\\_internet\\_governance\\_update/](http://www.circleid.com/posts/20131019_an_internet_governance_update/)

<sup>35</sup> <http://www.zdnet.com/meet-the-team/us/larry-seltzer/>

<sup>36</sup> [http://online.wsj.com/news/articles/SB10001424052702304799404579155991871623098?mod=WSJ\\_hps\\_sections\\_tech](http://online.wsj.com/news/articles/SB10001424052702304799404579155991871623098?mod=WSJ_hps_sections_tech)

<sup>37</sup> <http://www.reuters.com/article/2013/10/28/net-us-brazil-internet-idUSBRE99R10Q20131028>

<sup>38</sup> [http://www.circleid.com/posts/google\\_dns\\_to\\_be\\_discontinued\\_in\\_brazil\\_ahead\\_of\\_new\\_law/](http://www.circleid.com/posts/google_dns_to_be_discontinued_in_brazil_ahead_of_new_law/)

<sup>39</sup> <http://www.renesys.com/2013/10/google-dns-departs-brazil-ahead-new-law/>

<sup>40</sup> “Entrepreneurs seize chances in social media marketplace”; Financial Times, Brazil Innovation Special Report, October 23, 2013.

<sup>41</sup> “ICANN CEO Announces Global IG Summit In Brazil, Aimed at restoring trust in Internet”; Bloomberg BNA Electronic Commerce Law Report; October 16, 2013

<sup>42</sup> Commissioner Kroes is referring to EC objections to certain geographic indicators relating to wine; her letter on this subject can be found at <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en.pdf> . However, ICANN allowed those gTLD applications to proceed after being advised by GAC Chair Heather Dryden that “the GAC has finalized its consideration of the strings .wine and .vin And **further advises** that the applications should proceed through the normal evaluation process. ‘; see <http://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en> . So the EC’s complaint was not so much with ICANN but with the fact that it failed to sway GAC members toward a consensus position on these applications.

<sup>43</sup> <http://domainincite.com/14789-icann-using-prism-as-excuse-to-break-from-the-us> . To be fair, in his India remarks Chehade noted that the U.S. was hardly the only nation whose activities might erode trust in the Internet, stating, “It is not just by the recent revelations about PRISM, but there are other revelations that are coming out as well. Countries are employing millions of people to track the movements of their fellow citizens.”

<sup>44</sup> [http://www.internetgovernance.org/2013/10/20/plans-for-internet-commission-on-internet-cooperation-revealed/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+IGPBlog+%28IGP+Blog+Main%29](http://www.internetgovernance.org/2013/10/20/plans-for-internet-commission-on-internet-cooperation-revealed/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+IGPBlog+%28IGP+Blog+Main%29)

<sup>45</sup> <http://www.theage.com.au/it-pro/it-opinion/battle-for-control-of-the-internet-heats-up-20131017-hv23h.html>

<sup>46</sup> [http://www.circleid.com/posts/20131023\\_icann\\_explains\\_brazil\\_meeting\\_initiative/](http://www.circleid.com/posts/20131023_icann_explains_brazil_meeting_initiative/)

<sup>47</sup> <http://www.internetgovernance.org/2013/10/11/the-core-internet-institutions-abandon-the-us-government/>

<sup>48</sup> <http://www.internetgovernance.org/2013/10/16/a-blueprint-for-the-future-oversight-of-icann/>

<sup>49</sup> <http://internetdemocracy.in/reports/a-third-way-proposal-for-a-decentralised-democratic-internet-governance-involving-all-stakeholders/>

<sup>50</sup> <http://www.internetgovernance.org/2013/10/20/plans-for-internet-commission-on-internet-cooperation-revealed/>

<sup>51</sup> <https://twitter.com/icann/status/392117455851511808>

<sup>52</sup> [http://www.ip-watch.org/2013/10/23/a-new-model-for-internet-governance-is-in-the-air/?utm\\_source=post&utm\\_medium=email&utm\\_campaign=alerts](http://www.ip-watch.org/2013/10/23/a-new-model-for-internet-governance-is-in-the-air/?utm_source=post&utm_medium=email&utm_campaign=alerts)

<sup>53</sup> See endnote xli

<sup>54</sup> See endnote xxxiv

<sup>55</sup> See endnote xliii

<sup>56</sup> <http://www.nextgov.com/cio-briefing/2013/10/what-does-it-mean-us-lose-control-internet/72098/>

- <sup>57</sup> [http://www.slate.com/articles/technology/future\\_tense/2013/10/internet\\_balkanization\\_may\\_be\\_a\\_side\\_effect\\_of\\_the\\_snowden\\_surveillance.html](http://www.slate.com/articles/technology/future_tense/2013/10/internet_balkanization_may_be_a_side_effect_of_the_snowden_surveillance.html)
- <sup>58</sup> <http://20committee.com/2013/10/27/nsa-germany-and-handygate-a-reality-check/> . See also "Merkel eyes new intelligence sharing agreement with US", Financial Times, October 26/27, 2013
- <sup>59</sup> <http://online.wsj.com/news/articles/SB10001424052702304200804579165653105860502>
- <sup>60</sup> [http://www.ip-watch.org/2013/10/23/european-parliament-no-more-bank-data-transfers-to-us-for-anti-terror-investigations/?utm\\_source=post&utm\\_medium=email&utm\\_campaign=alerts](http://www.ip-watch.org/2013/10/23/european-parliament-no-more-bank-data-transfers-to-us-for-anti-terror-investigations/?utm_source=post&utm_medium=email&utm_campaign=alerts)
- <sup>61</sup> <http://www.ft.com/intl/cms/s/0/619f0158-3ccf-11e3-a8c4-00144feab7de.html?siteedition=intl#axzz2ikG7XRqs>
- <sup>62</sup> <http://www.politico.com/story/2013/10/tech-braces-for-privacy-storm-in-europe-98421.html>
- <sup>63</sup> <http://online.wsj.com/news/articles/SB10001424052702304391204579177104151435042?mod=djemalertNEWS>
- <sup>64</sup> [http://thecable.foreignpolicy.com/posts/2013/10/25/exclusive\\_21\\_nations\\_line\\_up\\_behind\\_un\\_effort\\_to\\_restrain\\_nsa](http://thecable.foreignpolicy.com/posts/2013/10/25/exclusive_21_nations_line_up_behind_un_effort_to_restrain_nsa)
- <sup>65</sup> [http://thehill.com/blogs/hillicon-valley/technology/188123-report-us-might-consider-no-spy-agreements-allies-upset-over?utm\\_campaign=HilliconValley&utm\\_source=twitterfeed&utm\\_medium=twitter](http://thehill.com/blogs/hillicon-valley/technology/188123-report-us-might-consider-no-spy-agreements-allies-upset-over?utm_campaign=HilliconValley&utm_source=twitterfeed&utm_medium=twitter)
- <sup>66</sup> <http://fastnetnews.com/dslprime/42-d/4997-first-look-declarations-of-independence-of-the-net->
- <sup>67</sup> <http://www.ietf.org/media/2013-11-07-internet-privacy-and-security.html>
- <sup>68</sup> [http://www.internetgovernance.org/2013/10/26/get-realist-dont-confuse-nsa-regulation-with-internet-regulation/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=get-realist-dont-confuse-nsa-regulation-with-internet-regulation](http://www.internetgovernance.org/2013/10/26/get-realist-dont-confuse-nsa-regulation-with-internet-regulation/?utm_source=rss&utm_medium=rss&utm_campaign=get-realist-dont-confuse-nsa-regulation-with-internet-regulation)
- <sup>69</sup> <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt78/pdf/CRPT-113srpt78.pdf>
- <sup>70</sup> [http://www.ntia.doc.gov/files/ntia/publications/usg\\_nextsteps\\_07052013\\_0.pdf](http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf) The Brazilian Embassy in the U.S reiterated its opposition to .Amazon in an October 4<sup>th</sup> letter from Ernesto Araujo to CEO Chehade; <http://www.icann.org/en/news/correspondence/araujo-to-chehade-04oct13-en>
- <sup>71</sup> "NSA Programs Causing 'Perception Issue' for U.S. on Multistakeholder Internet Governance"; Washington Internet Daily; November 8, 2013.
- <sup>72</sup> <http://domainincite.com/14888-chehade-talks-up-split-from-us-oversight>
- <sup>73</sup> <http://www.state.gov/e/eb/rls/rm/2013/215716.htm>

<sup>74</sup> Map of nations voting for and against the ITR at <http://www.ipv.sx/wcit/> . Other background articles on the Dubai WCIT include <http://www.internetgovernance.org/2012/12/18/itu-phobia-why-wcit-was-derailed/> ; [http://www.slate.com/blogs/future\\_tense/2012/12/14/wcit\\_2012\\_has\\_ended\\_did\\_the\\_u\\_n\\_internet\\_governance\\_summit\\_accomplish\\_anything.html](http://www.slate.com/blogs/future_tense/2012/12/14/wcit_2012_has_ended_did_the_u_n_internet_governance_summit_accomplish_anything.html) ; and <http://www.forbes.com/sites/eliseackerman/2012/12/14/the-u-n-fought-the-internet-and-the-internet-won-wcit-summit-in-dubai-ends/> .

<sup>75</sup> <http://igfwatch.org/discussion-board/stakeholders-wrangle-over-the-brazil-summit-on-internet-governance>

<sup>76</sup> [http://igcaucus.org/sign-on.html?goback=%2Egde\\_4382335\\_member\\_5799762889623494660#%21](http://igcaucus.org/sign-on.html?goback=%2Egde_4382335_member_5799762889623494660#%21)

<sup>77</sup> [http://www.ip-watch.org/2013/10/28/at-igf-glimpses-of-future-ip-governance-overshadowed-by-mass-surveillance/?utm\\_source=post&utm\\_medium=email&utm\\_campaign=alerts](http://www.ip-watch.org/2013/10/28/at-igf-glimpses-of-future-ip-governance-overshadowed-by-mass-surveillance/?utm_source=post&utm_medium=email&utm_campaign=alerts)

<sup>78</sup> <http://allthingsd.com/20131014/what-the-last-weeks-anti-u-s-shift-in-internet-governance-means-to-you/>

<sup>79</sup> <http://www.icann.org/en/news/announcements/announcement-08oct13-en.htm>