

Re-Interpreting Document 98:

India's Proposals at the ITU Plenipot 2014 and the Evolution of Internet Governance

Introduction

At the recently concluded ITU Plenipotentiary Conference in Busan¹, India proposed a controversial new resolution that sought to contribute to realising a more secure information society. Known as Document 98, the draft resolution was received with concern by many delegates, and for human rights activists, as for others, the resolution did, indeed, contain concrete proposals that are difficult to support.

I will argue in this paper, however, that despite this, and despite the fact that the resolution was ultimately not agreed to by the conference, it deserves a second reading – in the ITU as well as in other fora. More particularly, I will argue that as an intervention in the tense global debate on Internet governance that has gained momentum over the past five years, India's proposed draft resolution has, in fact, considerable merit.

Indeed, unlike many of its predecessors, India's unique proposal at the ITU Plenipot did not seek to meet the concerns of developing countries by demanding major changes to the architecture of global internet governance so as to achieve greater political control. Instead, it aimed to do so by encouraging existing bodies and structures to work together to explicitly look into these concerns and to find solutions for them at the level of the network itself.

With this, India moved away from advocating for a government-led model to what can well be described as a third path: one that recognises the importance of both multistakeholder and multilateral fora in internet governance, and encourages them to work together without privileging one over the other. It is for this reason, I will argue, that India's proposal deserves continued attention, even after the conclusion of the ITU Plenipot.

In what follows, I will first outline the content and evolution of the draft resolution. I will then discuss the various criticisms that were levied at the draft resolution when it was introduced at the ITU Plenipot, as well as critically assess these. I will finally outline how, when considered against the backdrop of the larger politics of global Internet governance, India's proposed new resolution has, in fact, considerable merit. For its attempt to find solutions to long-standing concerns of developing countries while at the same time recognising the value of existing internet governance institutions, India's proposal deserves a second reading.

Three sets of suggestions

To begin with, let us consider in some detail what Document 98, introduced by India at the conference, proposed. At the heart of India's draft new resolution, as introduced on 21 October 2014², was the paragraph that instructed the Secretary-General

to prepare [a] reference plan for current and future telecom networks that addresses concerns of member states including safety, robustness, resilience, routing in normal and exceptional cases and provide guidance on technical capabilities to developing countries.³

Other paragraphs of the draft new resolution, then, exemplified the kind of solutions the Secretary-General would be expected to explore as part of this exercise. Three sets of concrete suggestions in particular were made.

As a first priority for the Secretary-General's work, the draft new resolution identified the development of a public telecom network architecture that keeps traffic originating and terminating in the country/region and meant for the country/region, as well as address resolution relating to such traffic, local.⁴

Secondly, the resolution entrusted the Secretary-General with several initiatives explicitly intended to address India's and other countries' security concerns. It requested that the Secretary-General work with all other stakeholders, including international organisations, to make changes so that it is possible to discern the country location of a particular IP address.⁵ It proposed the development of routing plans that could effectively ensure the traceability of communications.⁶ In addition, it asked the Secretary-General to collaborate with all stakeholders to study the weaknesses of existing protocols used in telecom networks and to 'develop and recommend secure, robust and tamper proof protocols to meet the requirements of future networks'.⁷

Finally, the resolution aimed to strengthen the democratic nature of global internet governance by asking the Secretary-General to work with all concerned stakeholders to develop policies for the allocation, assignment and management of IP resources that are

systematic, equitable, fair, just, democratic and transparent and need to be adhered to by entities designated with the responsibilities of allocating or assigning resources and dealing with day-to-day technical and operational matters.⁸

Following initial debates, India submitted a reworked and final version of the draft resolution on 3 November, to provide clarifications regarding a number of issues that had been raised on the floor. This final version differed from the earlier one in several significant ways.

Most importantly, it proposed radically different processes. Thus, the resolution recognised that many of the substantive issues that it sought to highlight are addressed in bodies other than the ITU. As such, it no longer instructed the Secretary-General to ensure that the ITU would find a resolution to these matters in isolation. In fact, the paragraph that instructed the Secretary-General to prepare a reference plan for current and future telecom networks was dropped altogether in this final draft. Instead, throughout its operative part, the proposed resolution now instructed the Director of the

Telecommunications Standardisation Bureau to study these matters in collaboration with relevant organisations or stakeholders.⁹ The substance of what was to be examined remained more or less the same.

In addition, because several ITU member states had questioned whether the issues that the first draft resolution sought to address fall within the ITU's mandate, references to several supporting ITU Plenipot resolutions and other documents were added to the introductory paragraphs of the final draft of the resolution.¹⁰

Finally, to further highlight the precise aims of the resolution, its title had also been modified. It now read: 'draft new resolution – ITU's role in improving network functionalities for evincing trust and confidence in IP based telecom networks'.

A variety of criticisms, a one-sided debate

Unfortunately, when the resolution was discussed again on the evening of 3 November, it became clear that many delegations had not read this final draft, and their comments continued to address the original one. During these discussions, the draft resolution was criticised, mostly by the US, Europe and their allies, on a number of grounds. Many of those member states who spoke during the final discussion expressed concern that the proposals put forward in the draft resolution involved changes to the design of the internet and could fundamentally change the way that the internet works. Many, including the US, flagged human rights concerns, especially around privacy. And there were questions raised about the possible unintended consequences of the proposal. But because these criticisms generally were fairly one-sided and did not take into account the final version of the resolution, they often missed the mark.

For example, that the proposals put forward by India, if implemented, have the potential to change the design and functioning of the internet is, indeed, correct. However, as observers from the technical community at the meeting pointed out in informal conversations, it is highly likely that the internet and its design will change over the next fifty years anyway. The question then becomes who will determine the direction of change, and on what basis.

What India's proposed resolution aimed to do was to initiate a discussion around a number of very concrete proposals to shape that change. By emphasising study and debate, rather than decisions, the final draft of India's proposed resolution in particular made this amply clear. For example, in informal conversations, the Indian delegation repeatedly clarified that the request to keep local traffic local as envisioned in this proposed resolution does not entail server requirements. In response, several other delegates remarked that the stimulation of local businesses through a legal framework that supports innovation would, then, perhaps be a more effective measure to achieve

this result. Similarly, observers have commented that speeding up the transition from IPv4 to IPv6 could do much to address several of the security and other concerns that India and other countries have highlighted. An approval of India's draft resolution would, therefore, by no means have predetermined the path that the network would take in the future, as discussion of these matters in great depth is precisely what it envisaged. Unintended consequences, too, could have figured prominently in these discussions. But change in itself seems inevitable.

Carrying more weight are the allegations that the proposals could negatively affect the promotion and protection of human rights on the internet, especially those concerning privacy. Indeed, the draft resolution did contain some worrying proposals on that count. To make all communication traceable, for example, is not acceptable from a human rights perspective. The right to anonymity is an integral part of both the right to privacy and the right to freedom of expression.

But for other proposals, the human rights implications are more complex to assess. If keeping local traffic local means that the US can no longer snoop on the traffic of people who use the service of a company that is incorporated in the US, but only the government of the territory where the traffic in question originates and ends, does this undermine or promote the protection of human rights? If the same measure ensures that the problem of online abuse of women can be addressed more effectively, is this measure a bane or a boon? Perhaps there are no straightforward answers to these questions. But in light of the fact that the US has denied responsibility for the protection of the human rights of those who are not its citizens or residents, certainly, they need serious consideration. For those billions of internet users who are not US citizens or residents, their own governments are the only ones they can appeal to with some hope for redress when they fear that their privacy has been violated. In this context, the US government's protestations that India's proposals risked violating the right to privacy frequently sounded hollow.

Again, opening up such debate was, however, precisely what India hoped to achieve with this proposal. It is for this reason that India was willing to make such significant changes to the original draft of the resolution, with the final one recommending study, not decisions, throughout the operative part. It is also for this reason that India agreed to drop the proposed resolution for now, provided that in return, the Chairman of the subgroup in which the resolution had been discussed reported on the debate to the larger meeting with the following agreed statement:

While some participants share the views of India regarding this issue, raising *[sic]* the proposal, others expressed concern. And the group could not reach consensus. The group thanks the Indian Delegation for their proposal and efforts at compromise and *welcomes all participants to study the [sic] show of concern in the appropriate fora dealing with the Internet-related issues, including the ITU, each with their limit* (emphasis mine).¹¹

The Head of the Indian delegation, Mr. Ram Narain, himself also said in a final statement that is included in the conference minutes that

India agreed not to press the resolution for discussion due to paucity of time, with an understanding that for these issues of concerns for many Member States, contributions can be made in various fora dealing with development of IP based networks and future networks, including ITU.

He further stressed again that ‘India would like that discussion should take place on these issues’.¹²

Debates at the ITU Plenipot 2014, WCIT redux?

As the debates at the Plenipot made clear, even discussion is a sensitive matter, however. Indeed, perhaps the most important concern around India’s contribution was, in fact, the question of where those matters could and should be discussed, and whether the ITU was an appropriate venue in the first place.

For example, some, including observers who were not participating in the conference¹³, claimed, implicitly or explicitly, that India’s proposal was another attempt to bypass and/or make irrelevant the multistakeholder model that has been governing large parts of the internet up until now. Such claims are exaggerations at best. First, both drafts of the resolution explicitly referred to the multistakeholder approach as one that ‘should be adopted, as far as possible, at all levels, to improve the coordination of the activities of international and intergovernmental organisations and other institutions’ concerned with IP-based networks.¹⁴ In addition, they both explicitly recognised the role of the private sector in day-to-day operations, innovation and value creation.¹⁵ Moreover, as noted before, in the operative part of the draft new resolution, the ITU was explicitly instructed in each paragraph to study the issues mentioned in collaboration with other relevant organisations or stakeholders. Decisions were not mentioned.

If such claims nevertheless still held power, this was largely because of the fears on the part of some member states that the Plenipot would be used by other member states to push for an expansion of the mandate of the ITU to include the internet. Indeed, in a manner reminiscent of the ITU World Conference on Telecommunications (WCIT) in 2012, fears of an attempted ITU-takeover of internet governance continued to rule much of the agenda and strategies of the US and its allies at the ITU Plenipot. And so, though this criticism was usually levied in response to the first draft of the resolution, that what it suggested would require an expansion of the mandate of the ITU was perhaps one of the most frequently voiced criticisms of India’s proposal.

India clearly disagreed with this assessment. Among the significant changes that it

made in the final draft of the resolution was the inclusion of various documents that highlighted the role of the ITU in the areas the resolution sought to address, including resolutions of the Plenipot itself. In a climate where too many saw no outcome as the best outcome, these changes were, however, never given due attention. Nor were the other significant, process-related modifications that India made to the final draft of the resolution. As the fear for a change in the ITU mandate, or an 'ITU takeover of the internet', clouded discussions, the possibly considerable merit of the resolution as an intervention in the tense global debate on internet governance of the past five years was neither discussed nor, it seems, considered.

Recovering the contribution of Document 98

It is, however, precisely when assessed dispassionately against the backdrop of the larger politics of global internet governance in recent years that the significance of India's proposed new resolution at the ITU Plenipot 2014 becomes evident.

The US government and its allies among governments, businesses, the technical community and civil society, have consistently defended the status quo in this debate: a multistakeholder form of governance that claims to be inclusive, but in practice – at least at present – tends to favour the incumbent. Until today, this model has largely failed to address many of the legitimate concerns that developing countries have regarding cybersecurity, jurisdiction and the implementation of national law. In reaction, governments of developing countries have often swung to the opposite pole and have demanded a shift to a government-led model of internet governance.

In this context, both the novelty and the greatest merit of India's proposal rest in two particular aspects. First, while India's proposed resolution did confirm a role for the ITU in internet governance within its existing mandate, it did so while also recognising and acknowledging the value of the multistakeholder approach that dominates aspects of internet governance today. The issues that the resolution sought to address arguably all fall within the mandate of the ITU. However, India nevertheless did not push for the ITU to singlehandedly study and decide on how to address these issues. Rather, it proposed to use the ITU as a mechanism to ensure that the concerns that developing country governments have been flagging up for so long would receive due attention in other relevant organisations. Decisions on these matters would, however, only be reached when all organisations or stakeholders come to an agreement.

For some, of course, the idea of increased government involvement in internet governance is unacceptable. Certainly, if developing countries ask for a change in that architecture, a simple desire for more power in the global community and greater control at home undoubtedly plays some role in this. One can question, however, whether this differentiates them in any way from the developed world.

Moreover, such an acknowledgement does not do away with the fact that the existing multistakeholder model of internet governance, despite its claims of being inclusive, continues to see a marked under-representation of people from developing countries and their concerns. This is for a variety of reasons, including financial.¹⁶ As important a role as power and control may play in determining developing countries' strategies regarding global internet governance, their governments also have very real and concrete concerns about matters regarding cybersecurity, jurisdiction, and the implementation of law and order. And when they ask for changes in the global internet governance architecture on these grounds, they will often find considerable domestic support.

The model proposed by India at the ITU, thus, deserves further consideration because it proposes a novel way to ensure that at least some of these concerns are squarely on the agenda of existing internet governance institutions, while at the same time respecting a multistakeholder approach to their resolution. With this, it suggests a middle path between the two existing, but polar ways forward: a government-controlled model or the status quo. If given a chance to be tested in a limited way, it could well prove to be a successful model to resolve existing tensions while at the same time making progress to resolve particular issues. Moreover, if successful, this model could also easily be replicated in other UN bodies, to address issues that fall within their respective mandates.

The second aspect in which the India proposal distinguished itself was that it sought to resolve issues relating to cybersecurity, jurisdiction and implementation of the law, not by means of political agreements, but by writing them into the architecture of the internet. For users of the internet, this should be a reason to rejoice. Political agreements and laws alike generally leave considerable space for either disregard (for example in the case of international human rights frameworks) or abuse (for example in the case of domestic laws). Where solutions are written into the network after agreement among network engineers, governments and others involved, this creates an environment that is arguably far more predictable and reliable, where users' rights are concerned, than any law could ever be. Code, too, is indeed law,¹⁷ but perhaps minus some of the drawbacks.

Conclusion: A new way forward for internet governance?

The ITU Plenipotentiary was marked by a strong resistance on the part of western governments to any text that had the potential to imply an acknowledgement of the role of the ITU in internet governance. As the debate around Document 98 showed, even the mere idea of allowing the ITU to initiate a dialogue seemed too ambitious for these governments. Their haste to dispose of India's proposal has blinded them, however, to what could well be a very worthwhile model to consider for the future of the global internet governance architecture: a model in which UN bodies, within their mandate, can initiate a dialogue on concrete matters with relevant organisations and stakeholders, in

order to find a resolution to identified problems that can have the approval of all.

Presenting a middle way between the current poles in the global internet governance debate, India's proposals at the ITU Plenipot 2014 did not privilege one form of governance over another. Instead, they recognised and built on the value, strength and contributions of a variety of governance forms, to find solid and sustainable solutions in our complex, globalised world. It is arguably in proposals such as these that the way forward for global internet governance lies.

Endnotes

¹ The author participated in the ITU Plenipotentiary Conference from 27 October to 5 November 2014. She wishes to thank Mr. Ram Narain, Head of the Indian Delegation to the ITU Plenipotentiary Conference 2014, for his generosity in explaining in detail the rationale of the draft resolution as well as the concrete proposals that it contained, both during and after the conference. She also wishes to thank all the participants in a multistakeholder expert round table on India's proposed new resolution, organised by the Internet Democracy Project in Delhi on 5 December 2014, for their many helpful insights and comments, and especially the representatives from APNIC, who supplied technical clarifications regarding the proposal on numerous occasions. All views expressed here are the author's own.

² The draft resolution was first introduced by India at the fourth Asia Pacific Telecommunity preparatory meeting – the regional preparatory meeting of the Asia Pacific for the ITU Plenipot which took place in Bangkok from 18 to 22 August 2014. At that time, it was entitled 'new resolution on ITU's role in securing information society'. The proposal failed to garner wide support there, and, thus, did not make it into the pool of Asia Pacific common proposals. At the very last moment, on 21 October when the Plenipot had already started, the proposal nevertheless appeared as an official conference document submitted by India, in a slightly modified form but with a similar title ('draft new resolution on ITU's role in realising secure information society').

³ See *instructs the Secretary General* 3, original draft.

⁴ See *instructs the Secretary General* 4 and 5, original draft.

⁵ See *instructs the Secretary General* 1, original draft.

⁶ See *instructs the Secretary General* 6, original draft.

⁷ See *instructs the Secretary General* 7, original draft.

⁸ See *instructs the Secretary General* 2, original draft.

⁹ See *instructs the Director of the Telecommunications Standardization Bureau* 1-4, final draft.

¹⁰ See *recalling a-c*, final draft.

¹¹ Final Copy, Captioning Archive, Twelfth Meeting of the Working Group of the Plenary, ITU Plenipotentiary Conference, Busan, Korea, 4 November 2014, p. 3, www.itu.int/en/plenipotentiary/2014/Documents/captioning/wgpl-04am.docx.

¹² For the full statement, see Minutes of the Sixteenth Plenary Meeting, ITU Plenipotentiary Conference, Busan, Korea, 5 November 2014, p. 7, https://www.itu.int/md/dologin_md.asp?lang=en&id=S14-PP-C-0174!!MSW-E; also Report of the Chairman WG-PL to the Plenary, ITU Plenipotentiary Conference, Busan, Korea, 6 November 2014, p. 6, https://www.itu.int/md/dologin_md.asp?lang=en&id=S14-PP-C-0164!R1!MSW-E.

¹³ See, for example, Muthusamy, Sivasubramanian (2014). An Open Letter to the Prime Minister of India, from Within India, Through an Internet Blog. *CircleID*, 25 October, http://www.circleid.com/posts/20141025_an_open_letter_to_the_prime_minister_of_india/.

¹⁴ See *considering* paragraph l, original draft; and *recognizing* paragraph f, final draft.

¹⁵ See *considering* paragraph l, original draft; and *recognizing* paragraph e, final draft.

¹⁶ Proposed solutions include using a significant portion of ICANN's considerable income to establish a fund that can sponsor the participation of stakeholders from developing countries across internet governance fora in a systematic manner. However, such proposals are generally met with little enthusiasm by those entrenched in the existing system and till date have not received the focused attention that they deserve.

¹⁷ Lessig, Lawrence (1999). *Code and Other Laws of Cyberspace*. New York: Basic Books.