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FROM SELF-GOVERNANCE TO PUBLIC-PRIVATE PARTNERSHIP: THE CHANGING ROLE OF GOVERNMENTS IN THE MANAGEMENT OF THE INTERNET'S CORE RESOURCES

*Wolfgang Kleinwächter**

I. ICANN 1.0: THE ADVISORY ROLE OF GOVERNMENTS

According to its articles of incorporation, the Internet Corporation for Assigned Names and Numbers (ICANN) is a “nonprofit public benefit corporation . . . organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.”¹ The articles oblige ICANN to operate primarily “for the benefit of the Internet community as a whole”²

The articles do not specify any governmental role in the corporation.³ Paragraph 3 merely says that “the Corporation shall . . . pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet”⁴ ICANN’s original bylaws (ICANN 1.0) did recognize a role for governments, but clearly separated the functions of the ICANN governing bodies from the relevant governmental institutions.⁵ The original bylaws

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1. ICANN, ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (AS REVISED) § 3 (1998) [hereinafter ICANN, ARTICLES], available at <http://www.icann.org/general/articles.htm>.

2. *Id.* § 4.

3. *See id.*

4. *Id.* § 3.

5. *See* ICANN, ICANN BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (1998) [hereinafter ICANN, BYLAWS

preserved ICANN's independence from government interference primarily in three ways:

1. Article V, section 5 made government officials ineligible to join the Board of Directors. It said that "no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director."⁶ An "official" was defined as "a person (a) who holds an elective governmental office or (b) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies."⁷ In other words, the original ICANN bylaws provided governmental representatives no direct access to the policy development process or to the voting procedures.

2. Article VII established a Governmental Advisory Committee (GAC) but separated the GAC from the ICANN structure.⁸ While other advisory committees were integrated into the ICANN process, the GAC was designed as an independent unit, outside the ICANN structure. ICANN 1.0 did not allow GAC liaisons into supporting organizations for domain names and addresses or into advisory committees, such as the Root Server Advisory Committee. The only exception was that two of the four constituencies of the Protocol Supporting Organization (PSO) were units of inter-governmental organizations (IGOs): the International Telecommunication Union (ITU), and the European Telecommunication Standards Institute. However, representatives from these IGOs did not represent governmental positions.⁹

3. Article VII, section 3 defined the procedures for interaction between the ICANN Board of Directors and the GAC.¹⁰ The role of the GAC was to "consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's

(1998)], available at <http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm>.

6. *Id.* art. V, § 5.

7. *Id.*

8. *See id.* art. VII, § 3.

9. For example, with a mandate from the ITU Telecommunication Standardization Sector, the PSO elected Helmut Schink, a manager of Siemens AG, as its ICANN director.

10. *See* ICANN, BYLAWS (1998), *supra* note 5, art. VII, § 3.

policies and various laws, and international agreements.”¹¹ Section 3 stated that the “Board will notify the chairman of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b) and will consider any response to that notification prior to taking action.”¹² Section 3 gave the Board a rather high level of independence by making GAC recommendations non-binding on the ICANN Board. The Board needed only consider the governmental advice before taking action.¹³ It could, without explanation, reject a governmental recommendation.¹⁴

II. INTERNET GOVERNANCE AND GOVERNMENTS

An unusual relationship now exists between ICANN, the private corporation with the responsibility of managing a core resource of the global Internet, and the governments of the United Nations. This relationship resulted from political and diplomatic battles between private Internet stakeholders and the U.S. government, and between the U.S. government and other governments, in particular the European Commission and the ITU.¹⁵

The rapid growth of the Internet in the 1970s and 1980s as a global communication medium may be explained by its bottom-up development by private stakeholders without any interference from governmental legislation. While it is an overstatement to describe the Internet’s development as having occurred beyond governmental control, neither a national Internet law nor an international Internet convention channeled the Internet’s development in any particular direction. As Joseph Bordogna, Deputy Director of the National Science Foundation, said in a hearing before the U.S. Congress in 1997: “When the Internet was a U.S. government-supported research project, the original authority overseeing the registration of Internet addresses rested on the consent of the governed.”¹⁶

11. *Id.* art. VII, § 3(a).

12. *Id.*

13. *See id.*

14. *See id.*

15. *See* Press Release, ITU, Changes to Internet Domain Names Will Encourage Competition, Foster Growth and Stability (Apr. 29, 1997) [hereinafter Press Release, Changes to Internet Domain Names], available at http://www.itu.int/newsarchive/press_releases/1997/itu-07.html.

16. *The Internet Domain Name System (Part I): Hearing Before the Subcomm. on Basic Research of the House Comm. on Sci.*, 105th Cong. (1997)

When Jon Postel, a researcher with the Information Science Institute at the University of Southern California, developed the Domain Name System (DNS), he did not ask the U.S. government how to allocate names and numbers. Nor did he consult any national government when he delegated the management of 243 country code top-level domains (ccTLDs) to individuals or non-governmental institutions in all parts of the world. Instead, he used a list of the International Standardization Organization (ISO 3166) to identify countries and territories irrespective of their political or legal status.¹⁷

While nearly every country regarded telecommunications as part of its sovereignty,¹⁸ most world governments ignored Postel's delegation of ccTLD management to non-governmental entities. Few governments considered the DNS worthy of attention because few countries had more than a handful of registered zone files under each ccTLD.

The U.S. government was the only government more than minimally involved in the development of the DNS. The U.S. government participated mainly by financing research, first via the Department of Defense and later through the National Science Foundation. Yet financial support did not lead to preemptive legislation. In contrast to the development of telecommunication and broadcasting media, where top-down legislation channeled further development, such limits were never considered for the Internet, even when its broader communication potential became clear in the 1980s.

The Reagan Administration (1981–1988) exalted deregulation and thus rejected the United Nations Educational, Scientific and

(testimony of Dr. Joseph Bordogna, Acting Deputy Director, National Science Foundation), *available at* http://www.house.gov/science/bordogna_9-25.html; *see also* SUBCOMM. ON BASIC RESEARCH OF THE HOUSE COMM. ON SCI., 105TH CONG., HEARING INDEX [hereinafter HEARING INDEX], *available at* http://www.house.gov/science_democrats/hearings/basic105.htm (last updated Nov. 9, 1998).

17. *See, e.g.*, Memorandum from Jon Postel, Director, Information Sciences Institute, University of Southern California, to the Internet Community 7 (Mar. 1994), *available at* <http://rfc.sunsite.dk/rfc/rfc1591.html> (last visited Feb. 16, 2003) (“[T]he ISO 3166 list [is] a basis for country code top-level domain names . . .”).

18. Most countries already had detailed national legislation concerning the allocation and use of names and numbers in non-Internet areas, such as telephones and motor vehicles.

Cultural Organization's (UNESCO) efforts to introduce global media legislation for a New World Information and Communication Order (NWICO).¹⁹ The United States took the position—counter to that of the Third World and the Soviet bloc—that information should flow worldwide without regulation. Regulation was seen as violating international free speech principles.²⁰

Though not a subject of the NWICO debate, the Internet evolved in the shadow of the political mainstream. The Internet developed towards promoting a global, unhindered flow of information. Article 19 of the Universal Declaration of Human Rights, which states that “[e]veryone has the right . . . to seek, receive and impart information and ideas through any media and regardless of frontiers,”²¹ was regarded as the only legal foundation necessary for global communication.

The growth of the Internet in the early 1990s prompted the U.S. government to become increasingly concerned about the political implications of the Internet's development. While the Bush Administration (1989–1992) had no intention of regulating the Internet, it recognized the need to guarantee stability for a system that had become an infrastructure for a wide range of commercial, political, and cultural communications.

At the time, Jon Postel managed the DNS almost single-handedly.²² Postel was recognized worldwide as the caretaker of the U.S. DNS²³ and was sometimes labeled the “father of the Internet.”²⁴

19. See, e.g., Thomas P. Sheehy, *Stay Out of UNESCO*, THE HERITAGE FOUNDATION, Jan. 27, 1995, available at <http://www.heritage.org/Research/InternationalOrganizations/EM403.cfm> (discussing the Reagan Administration's opposition to UNESCO's NWICO).

20. See *id.*

21. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., art. 19, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

22. See, e.g., *Transferring the Domain Name System to the Private Sector: Private Sector Implementation of the Administration's Internet "White Paper": Joint Hearing Before the Subcomm. on Basic Research and the Subcomm. on Tech., of the House Comm. on Sci., 105th Cong. (1998) [hereinafter *Transferring the Domain Name System*] (testimony of Dr. Jon Postel, Director, Information Sciences Institute, University of Southern California), available at http://www.house.gov/science/postel_10-07.htm; see also HEARING INDEX *supra* note 16.*

23. See *Net Mourns Passing of Giant*, WIRED NEWS, Oct. 18, 1998, available at <http://www.wired.com/news/culture/0,1284,15682,00.html>.

The U.S. government convinced Postel to institutionalize the DNS management and to share the responsibility for its functioning by entering into a contract with the U.S. government. Consequently, the Internet Assigned Numbers Authority (IANA), which became the contracting partner of the Department of Commerce (DoC), began as Postel's one-man organization. Part of the contract called for the DoC to assume control of the A-Root Server, which was later managed by Network Solutions Inc. (NSI, today VeriSign) in Herndon, Virginia.

When the number of registered domain names exceeded three million, Postel recognized the need for a more developed DNS management system to go beyond IANA and his one-man show. He firmly believed in limiting the role of big government and big industry in the DNS management. Postel's first plan, to bring the DNS under the umbrella of the Internet community and to introduce 150 new generic top-level domains (gTLDs) to broaden the territory of the cyberspace, failed in 1995. Too many unsolved political and economic conflicts became apparent with the emergence of a global domain name market. At the same time, individual governments, particularly the European Commission, began asking more serious questions about their role in the global DNS management.

Trying to preserve the culture of the early Internet days and the role of the technical experts in a more commercially oriented and internationalized DNS management, Postel sought a broader partnership to incorporate IGOs such as the ITU, the World Intellectual Property Organization (WIPO), and the International Trademark Organization (INTA) into a globalized DNS management structure. In 1996 and 1997, the International Ad Hoc Committee (IAHC) produced a Memorandum of Understanding on gTLDs (gTLD-MoU), which was signed by eighty organizations in Geneva on May 1, 1997.²⁵ ITU Secretary General Pekka Tarjanne announced with pleasure that the ITU had become the depository of the gTLD-MoU.²⁶ Albert Trampusch of WIPO expected that the

24. *Id.*

25. Members of the IAHC have been the Internet Society, the Internet Architecture Board, WIPO, the ITU, and the INTA. The gTLD-MoU can be found at <http://www.gtld-mou.org/index.html>.

26. See Press Release, Changes to Internet Domain Names, *supra* note 15.

self-governance structures proposed by the gTLD-MoU would “eventually force changes in international law.”²⁷

Nevertheless, the gTLD-MoU also provoked significant opposition because it excluded a substantial number of key Internet stakeholders, such as the NSI and the ccTLDs. In addition, the U.S. government withheld its support for Postel’s plan to bring the A-Root Server under the control of the ITU. Two months later, the Clinton Administration (1993–2000) published “The Framework for Global Electronic Commerce,” which ignored the gTLD-MoU and offered an alternative proposal for the privatization of the global DNS management.²⁸

III. THE CLINTON/GORE ADMINISTRATION: PRIVATIZATION OF THE DNS MANAGEMENT

The Framework for Global Electronic Commerce (“Framework”) was based on the spirit of private sector leadership. It stated:

Though government played a role in financing the initial development of the Internet, its expansion has been driven primarily by the private sector. For electronic commerce to flourish, the private sector must continue to lead. Innovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not in an environment that operates as a regulated industry.

Accordingly, governments should encourage industry self-regulation wherever appropriate and support the efforts of private sector organizations to develop mechanisms to facilitate the successful operation of the Internet.²⁹

The Framework expressed the Clinton Administration’s support of “private efforts to address Internet governance issues including those related to domain names”³⁰ It supported the establishment

27. Press Release, ITU, 80 Organizations Sign MoU to Restructure the Internet (May 1, 1997), available at http://www.itu.int/newsarchive/press_releases/1997/itu-08.html.

28. See The White House, *The Framework for Global Electronic Commerce: Read the Framework*, available at <http://clinton4.nara.gov/WH/New/Commerce/read.html> (last visited Feb. 24, 2003).

29. *Id.*

30. *Id.*

of an interagency working group (“Group”) under the leadership of the DoC with the mandate of analyzing “(1) what contribution government might make, if any, to the development of a global competitive, market-based system to register Internet domain names, and (2) how best to foster bottom-up governance of the Internet.”³¹ The Group would also examine conflicts between trademark holders and domain name holders with the idea of establishing “a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis without the need to litigate.”³²

On July 2, 1997, the DoC published a “Request for Comments on the Registration and Administration of Internet Domain Names,”³³ which became the starting point for a process that led directly to the foundation of ICANN. In September 1997, Larry Irving, Assistant Secretary of Commerce, appeared before the U.S. Congress and criticized the IAHC as being too exclusive.³⁴ He also criticized the role of the ITU and proposed instead that “[t]he private sector, with input from governments, should develop stable, consensus-based self-governing mechanisms for domain name registration and management that adequately defines responsibilities and maintains accountability.”³⁵ Additionally, Irving said that “self-governance mechanisms should recognize the inherently global nature of the Internet”³⁶ Therefore, governments should “take a back seat in the registration and administration of Internet domain names.”³⁷

31. *Id.*

32. *Id.*

33. U.S. DEP’T OF COMMERCE, REQUEST FOR COMMENTS ON THE REGISTRATION AND ADMINISTRATION OF INTERNET DOMAIN NAMES (1997), available at <http://www.ntia.doc.gov/ntiahome/domainname/dn5notic.htm> (last visited Feb. 26, 2003).

34. See *The Internet Domain Name System (Part I): Hearing Before the Subcomm. on Basic Research of the House Comm. on Sci.*, 105th Cong. (1997) [hereinafter *The Internet Domain System (Part I)*] (testimony of Larry Irving, Assistant Secretary of Commerce for Communications and Information), available at http://www.ntia.doc.gov/ntiahome/congress/92597_domnametest.htm; see also HEARING INDEX, *supra* note 16.

35. See *The Internet Domain System (Part I)*, *supra* note 34.

36. *Id.*

37. *Id.*

After a series of congressional hearings,³⁸ the DoC published the “Green Paper” in February 1998.³⁹ The Green Paper proposed the foundation of a new private, non-commercial corporation (“NewCo”) that would overtake the functions of IANA. Registration of Internet domain names would become fully commercialized and open for competition. The NewCo would be incorporated under U.S. law.

The Green Paper provoked another wave of criticism, mainly from outside the United States, particularly from the European Union. The E.U. criticized U.S. dominance over the Internet and called for an international representative body for future Internet governance.⁴⁰ “The European Union and its Member States would wish to emphasise [sic] our concern that the future management of the Internet should reflect the fact that it is already a global communications medium and the subject of valid international interest.”⁴¹ The E.U. feared that under the guise of globalization and privatization of the Internet, the United States would use the NewCo to “consolidat[e] permanent US jurisdiction over the Internet . . . including dispute resolution and trademarks used on the Internet.”⁴² The E.U. also expressed concern that the work of existing IGOs, such as WIPO and ITU, would be disregarded. While generally supporting the idea of Internet privatization, the E.U. called for greater involvement of the European private sector in the management of the DNS.⁴³

38. The House Subcommittee on Basic Research also heard testimony from Gabriel Battista, CEO, Network Solutions, Inc.; Barbara Dooley, Executive Director, Commercial Internet Exchange; Donald Heath, President and CEO, Internet Society; Anthony Rutkowski, Director, World Internetworking Alliance; and Andy Sernovitz, President, Association for Interactive Media. See HEARING INDEX, *supra* note 16.

39. See Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826 (proposed Feb. 20, 1998) (to be codified at 15 C.F.R. pt. 23).

40. See Press Release, E.U. Council of Ministers & the Delegation of the European Commission to the United States, EU Replies to US Paper on Internet Governance (Mar. 20, 1998), available at <http://www.eurunion.org/news/press/1998-1/pr20-98.htm>.

41. *Id.*

42. *Id.*

43. The E.U. and its member states sought

a balance of interests and responsibilities, so that the international character of the Internet is recognized with respect to the relevant jurisdictions around the world.

IV. FROM THE "WHITE PAPER" TO ICANN

The global discussion of the Green Paper initiated another series of congressional hearings in March 1998. Ira Magaziner, President Clinton's Internet adviser, defended the U.S. proposal before a joint hearing of the Subcommittee on Basic Research and the Subcommittee on Technology of the House Committee on Science: "The purpose of the Commerce Department proposal is to improve the technical management of the DNS *only*. The Green Paper does not propose a monolithic Internet governance system. Frankly, we doubt that the Internet should be governed by a single body or plan."⁴⁴ Magaziner added that "the Internet has become an international medium for commerce, education and communication. We believe that it has outgrown the legacy system of technical management, and faces increasing pressure for change from different quarters."⁴⁵ He emphasized that the NewCo would not change existing international law and would not interfere in the legal system of other sovereign states. "Although [the NewCo] would be headquartered in the U.S. and subject to U.S. law, as a global organization, the new corporation would be subject to the laws of the countries in which it does business."⁴⁶ He proposed that the board of directors of the NewCo "should be balanced and represent the functional and geographic diversity of the Internet."⁴⁷

In line with Magaziner's comments, the U.S. government modified its Green Paper and published a "DNS White Paper" on

We recommend that the US Administration limit its direct regulatory intervention in the Internet only to those relationships which fall clearly under existing contracts between the Agencies of the US Government and their contractors and that all other decisions be referred to an appropriate internationally constituted and representative body.

Id.

44. *Domain Name Systems: Where Do We Go From Here?: Joint Hearing Before the Subcomm. on Basic Research and the Subcomm. on Tech. of the Comm. on Sci.*, 105th Cong. (1998) [hereinafter *Domain Name Systems*] (written statement of Ira C. Magaziner, Senior Adviser to the President for Policy Development, Department of Commerce), available at http://www.house.gov/science/magaziner_03-31.htm; see also HEARING INDEX, *supra* note 16.

45. See *Domain Name Systems*, *supra* note 44.

46. *Id.*

47. *Id.*

June 5, 1998. At the press conference convened for the White Paper's release, Becky Burr, DoC spokeswoman, stated:

We are looking for a globally and functionally representative organization, operated on the basis of sound and transparent processes that protect against capture by self-interested factions, and that provides robust, professional management. The new entity's processes need to be fair, open, and pro-competitive. And the new entity needs to have a mechanism for evolving to reflect changes in the constituency of Internet stakeholders.⁴⁸

The global discussion of the White Paper was pressured by the impending termination of the contracts between the DoC, the NSI, and IANA on September 30, 1998. The DoC initiated an International Forum of the White Paper (IFWP), which organized a series of seminars and workshops aimed at drafting a legal framework for the NewCo.

Meanwhile, Postel and IANA initiated a global online discussion. During this discussion, a revolutionary legislative process, akin to international law-making, developed. The virtual negotiations that emerged differed from traditional inter-governmental negotiations, which always took place among diplomats behind closed doors. In an open and transparent manner, hundreds of e-mails from individuals and from governmental and non-governmental institutions worldwide played an active role in formulating the NewCo drafts. Participation in the discussion required no governmental mandate.

For three months, five drafts were circulated on the Internet. Individuals and organizations from over fifty countries participated in the discussion. "This process was about as public as it could possibly be; the only thing that was not 'public' was the actual drafting, but the results were there for the world to see every time a new document was created," said Postel.⁴⁹

48. Press Release, Becky Burr, Associate Administrator, National Telecommunications and Information Administration's Office of International Affairs, Press Conference Remarks, Commerce Department Releases Policy Statement on the Internet Domain Name System (June 5, 1998), available at <http://www.ntia.doc.gov/ntiahome/press/dnsburr.htm>.

49. *Transferring the Domain Name System*, *supra* note 22 (testimony of Dr. Jon Postel).

Nevertheless, some criticized the online drafting and the virtual negotiations as a global conspiracy of a privileged minority: participants in the drafting process were only those individuals who had both access to the Internet, and knowledge of the proposals and the existence of these virtual negotiations. Postel defended his approach: "Group discussion is very valuable; group drafting is less productive. . . . We listened to everyone who wanted to offer comments or suggestions, and we then tried to turn those suggestions into actual documents."⁵⁰

On October 2, 1998, Postel, on behalf of IANA, sent the articles of incorporation and the draft of the bylaws of the NewCo to U.S. Secretary of Commerce William M. Daley.⁵¹ The articles of incorporation renamed the NewCo the "Internet Corporation for Assigned Names and Numbers."⁵² Postel wrote, "[t]his organization will be unique in the world—a non-governmental organization with significant responsibilities for administering what is becoming an important global resource."⁵³ When Postel presented the draft to the U.S. Congress five days later, he recognized a number of remaining controversial issues.⁵⁴ However, Postel also added that "[t]here was one issue on which there seemed to be almost unanimity: the Internet should not be managed by any government, national or multinational."⁵⁵

On October 20, 1998, the DoC signaled its readiness to recognize ICANN as the envisaged NewCo.⁵⁶ However, the DoC also expressed some reservations, particularly in regard to issues of membership, financing, mechanisms against capture, the relationship between the ICANN Board and other bodies of the corporation, the

50. *Id.*

51. See Letter from Jon Postel, Director, Information Sciences Institute, University of Southern California, to William M. Daley, U.S. Secretary of Commerce (Oct. 2, 1998) [hereinafter Postel Letter], available at <http://www.ntia.doc.gov/ntiahome/domainname/proposals/icann/letter.htm>.

52. ICANN, ARTICLES, *supra* note 1, at § 1.

53. Postel Letter, *supra* note 51.

54. See *Transferring the Domain Name System*, *supra* note 22 (testimony of Jon Postel).

55. *Id.*

56. See Letter from Becky Burr, Associate Administrator, NTIA for International Affairs, to Dr. Herb Schorr, Executive Director, Information Sciences Institute University of Southern California (Oct. 20, 1998), available at <http://www.ntia.doc.gov/ntiahome/press/icann102098.htm>.

global representation in the elected bodies, and the responsibility of national governments for the ccTLDs.⁵⁷ In a letter from E.U. Telecommunications Commissioner Martin Bangemann to Commerce Secretary Daley, the European Commission also agreed in principle with the concept and the bylaws of ICANN.

The first meeting of the initial ICANN Board of Directors took place on November 14, 1998, in Cambridge, Massachusetts.⁵⁸ Eleven days later, the DoC and ICANN signed a Memorandum of Understanding (MoU), which officially established ICANN as the NewCo.⁵⁹

V. ICANN'S GOVERNMENTAL ADVISORY COMMITTEE

ICANN is a private corporation, but governments played a role from the very first days of its existence. The founders of ICANN created the GAC as the institution where the nearly 200 governments of the world could discuss Internet- and DNS-related policies.⁶⁰

Defining the legal status of the GAC is difficult. The creation of the GAC is fixed in Article VII, section 3 of the ICANN bylaws.⁶¹ The ICANN Board selected the first chairman of the GAC,⁶² yet the GAC is not part of ICANN's governing structure. "Members of the Governmental Advisory Committee [are] representatives of national governments, multinational governmental organizations, and treaty organizations"⁶³ While the GAC operates independently from the ICANN Board, supporting organizations and other advisory committees, the GAC does not function as an independent IGO. Under its operating principles, the GAC provides advice; it does not make decisions.⁶⁴

57. *See id.*

58. *See* ICANN, ICANN PUBLIC MEETING DETAILS (1998), *available at* <http://cyber.law.harvard.edu/icann/cambridge-1198/>.

59. *See* Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (Nov. 25, 1998), *available at* <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

60. *See* ICANN, BYLAWS (1998), *supra* note 5, art. VII, § 3(a).

61. *See id.*

62. *See id.*

63. *Id.*

64. *See id.*

The GAC was designed to establish an informal mechanism for communication between private Internet stakeholders and governments without clarifying the legal relationship. According to Article VII, section 3 of the ICANN bylaws, the GAC “should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation’s policies and various laws, and international agreements.”⁶⁵

The hybrid character of the GAC can be explained as the unwritten consensus of the main governmental players in the creation of ICANN—Ira Magaziner from the White House, Becky Burr on behalf of Commerce Secretary William Daley, Christopher Wilkinson on behalf of the E.U. Telecommunications Commissioner Martin Bangemann, and Paul Twomey on behalf of the Australian government. They all shared the value of private leadership and low governmental involvement in the DNS management.

A more formal arrangement involving all sovereign members of the United Nations would have resembled, inevitably, a codification conference for an international convention with a ratification process by national governments. Such an approach would have blocked further development of the DNS for years. The establishment of the GAC avoided such a formal process. Nevertheless, four years after its launching, the GAC resembles a *de facto* inter-governmental Internet organization. The GAC’s operating principles could be easily transformed into an international Internet governance convention. But like ICANN generally, the GAC suffers from a lack of legitimacy. Although the GAC is open to all governments, no more than about thirty governments take part in its work on a regular basis. Russia, China, India, Brazil, and other countries with fast growing domain name markets have so far ignored the GAC almost entirely. Even though ICANN has held Board meetings in Singapore, Ghana, Egypt, Chile and Uruguay, the majority of governments from Third World countries lack either the capacity or the interest to participate in the GAC’s activities.

The GAC started its operation with closed sessions alongside ICANN Board meetings. The GAC issued communiques to inform the ICANN Board and the public about its proceedings. From its

65. *Id.*

very first meetings, the GAC emphasized its position that “the Internet naming system is a public resource and that the management of a TLD Registry must be in the public interest.”⁶⁶ Later, the GAC opened parts of its agenda for consultations with different ICANN constituencies. The GAC formulated recommendations on a number of various ICANN issues, including the UDRP, the at-large membership, and the introduction of new gTLDs.

Naturally, the ccTLD question was a focus of the GAC’s work. In February 2000, the GAC adopted a special document on the ccTLD issue which defined the relationship between a national government, the ccTLD manager, and ICANN from a governmental perspective.⁶⁷ The document emphasized that the ultimate public authority over a ccTLD resides with the national government. Section 5 of the GAC Principles states:

5.1 The relevant government or public authority ultimately represents the interests of the people of the country or territory for which the ccTLD has been delegated. Accordingly, the role of the relevant government or public authority is to ensure that the ccTLD is being administered in the public interest, whilst taking into consideration issues of public policy and relevant law and regulation.

5.2 Governments or public authorities have responsibility for public policy objectives such as: transparency and non-discriminatory practices; greater choice, lower prices and better services for all categories of users; respect for personal privacy; and consumer protection issues. Considering their responsibility to protect these interests, governments or public authorities maintain ultimate policy authority over their respective ccTLDs and should ensure that they are operated in conformity with domestic public policy objectives, laws

66. Communiqué, Government Advisory Committee of the Internet Corporation for Assigned Names and Numbers (Aug. 24, 1999), *available at* <http://www.icann.org/committees/gac/communique-24aug99.htm>.

67. *See* ICANN, PRINCIPLES FOR DELEGATION AND ADMINISTRATION OF CCTLDs PRESENTED BY GOVERNMENTAL ADVISORY COMMITTEE § 2 (2000), *available at* <http://www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm>.

and regulations, and international law and applicable international conventions.⁶⁸

The GAC Principles provoked some opposition. The ccTLD constituency of the Domain Name Supporting Organization, while recognizing the role of governments, wanted to safeguard the ccTLD manager against a misuse of power by a government in the delegation/redelegation question. Other groups, such as the Internet Rights Coalition in the United States, rejected this governmental approach entirely and declared categorically that the “[c]ountry code Top Level Domains in the Internet Domain Name System are not the subject of sovereignty or international law.”⁶⁹

The controversy over the role of governments in DNS management was further agitated when the ICANN Board rejected a governmental recommendation to reserve a number of second-level domain names for official names of countries in the newly established TLD information domain in 2001. ICANN’s own failure in a number of areas, including its inability to establish a contractual arrangement with the ccTLDs and the experiences of ICANN’s at-large elections (which provoked in some parts of the world races among nations to get the majority of votes for their “national candidates”) produced additional questions about the efficiency and appropriateness of the concept of Internet self-governance among governments.

The U.S. government remained silent during these discussions, although the MoU with ICANN gave the DoC the de facto and de jure role of an overseeing body. The original plan to release ICANN into full independence after a two-year transition period failed because ICANN failed to meet all the criteria specified in the MoU by the October 2000 deadline designated by the memorandum. Since then, the MoU has been renewed three times, always for one year. It will terminate again in October 2003. The second MoU, signed by IANA and the DoC, also faces the pressure of annual renewal. Its present version terminates in May 2003.

68. *Id.* §§ 5.1–5.2.

69. Letter from Garth Miller, Dot CX Ltd., to Tom Dale, General Manager, Regulatory and Access, National Office for the Information Economy 21 (Jan. 25, 2001) (Appendix C: Brief of the Internet Rights Coalition), available at <http://www.nic.cx/acrobat/communication.cont.pdf>.

VI. THE ROLE OF THE ITU

The failure of the gTLD-MoU placed the ITU in a difficult position. On the one hand, the ITU saw itself as the natural home of discussions on policies related to the names and numbering system of the Internet. On the other hand, the ITU recognized after lengthy discussion at its Plenipotentiary Conference in Minneapolis, Minnesota, in November 1998, that the private sector should take the lead in DNS management. The Minneapolis Resolution, adopted three days before the signing of the MoU between the DoC and ICANN, did not refer to the gTLD-MoU, but requested the ITU Secretary General to take an active part in further discussions about the DNS.

The ITU's offer to contribute to the ICANN discussion was not well-received by the ICANN Board. ICANN extended an invitation to join the PSO, not to the ITU as an IGO but to the Telecommunications Standardization Sector of the ITU. In an environment of converging technologies, ICANN's failure to more fully involve the ITU may impede the coordination of names and numbering policies for fixed and mobile telephony and the Internet. Issues such as electronic numbering, Internet Protocol version 6 (IPv6), and an internationalized Domain Name System (iDNs) will be on the agenda of both organizations.

When ICANN started its reform process in February 2002, the ITU made concrete contributions by recognizing private sector leadership and by offering the ITU's expertise in the management of names and numbering systems. At its Plenipotentiary Conference in Marrakesh, in October 2002, the ITU sought an even greater role for itself, particularly in areas with a public policy dimension.

At the Plenipotentiary Conference, the ITU addressed the DNS situation by proposing a division of labor.⁷⁰ While the ITU recognized that private entities can be responsible for technical tasks, the ITU claimed for itself the leading policy-making role for public

70. See *Role of Administrations of Member States in the Management of Internationalized (Multilingual) Domain Names*, ITU Res. PLEN/5 (2002), available at <http://www.itu.int/newsroom/pp02/highlights/Plen-5.html> (last updated Oct. 17, 2002); see also *Management of Internet Domain Names and Addresses*, ITU Res. 102 (2002), available at <http://www.itu.int/osg/spu/resolutions/2002/res102.html> (last updated Oct. 22, 2002) [hereinafter *Management of Internet Domain Names and Addresses*].

interest matters such as “stability, security, freedom of use, protection of individual rights, sovereignty, competition rules and equal access for all”⁷¹ In addition, the ITU instructed its Secretary General to consider the sovereignty of ITU member states in regards to an iDNs.⁷²

Without mentioning ICANN or the GAC, the ITU invited all of its member states “to participate actively in the discussions on the management of Internet domain names and addresses”⁷³ Yet, despite the calls from the ITU Marrakesh Conference, the majority of the 186 ITU member states ignored the GAC meeting in Shanghai, which took place two weeks later. Further, the GAC Communique from the Shanghai meeting, in which only thirty governments participated, did not endorse the ITU Resolution.⁷⁴

VII. ICANN 2.0: FROM SELF-GOVERNANCE TO PUBLIC-PRIVATE PARTNERSHIP

The terrorist attacks on September 11, 2001, changed the environment for the DNS management. By developing a new security strategy to combat terrorism worldwide, the current Bush Administration (2001–present) put the Internet into a central position. The stability and protection of the Internet infrastructure is seen now as a highly sensitive security issue. For example, access to Internet communication and contact details of domain names registrants and e-mail address holders has become an important part of criminal investigations.

In November 2001, the first ICANN meeting after September 11 was held in Marina del Rey, California. That meeting reflected the changes in the general political environment.⁷⁵ The original itinerary called for the At-Large Study Committee (ALSC), chaired by former Swedish Prime Minister Carl Bildt, to consider the future of the at-large membership in Marina del Rey. Instead, that issue was forced

71. *Management of Internet Domain Names and Addresses*, *supra* note 70.

72. *See id.*

73. *Id.*

74. *See* Communiqué, General Advisory Committee of ICANN (Oct. 2002), *available at* <http://www.noie.gov.au/projects/internationalgac/CommuniqueXIV-shanghai.pdf>.

75. *See* ICANN, ICANN MEETING IN MARINA DEL REY, 12–15 NOVEMBER 2001: MEETING SCHEDULE AND AGENDA, *available at* <http://www.icann.org/mdr2001/schedule.htm>.

from the spotlight by the issue of the security of the Root Server System.⁷⁶ ICANN moved from an experiment in cyber-democracy into a mechanism for cyber-security.

The proposal from ICANN President Stuart Lynn in February 2002 to reform ICANN responded not only to the obvious deficiencies in the management structure but also reacted to the new security challenges. Lynn recognized the need for greater governmental involvement.⁷⁷ His proposal for a new public-private partnership aimed at avoiding two extremes: a general governmental take-over or a totally independent ICANN, governed by providers and users of services.⁷⁸

With the new ICANN bylaws (ICANN 2.0),⁷⁹ governments got something akin to veto power. While the character of the corporation as a private entity remained unchanged, the concept of self-governance was greatly de-emphasized. The newly defined core values guiding ICANN 2.0 stated that “[w]hile [ICANN] remain[s] rooted in the private sector, [it] recogniz[es] that governments and public authorities are responsible for public policy and duly tak[es] into account governments’ or public authorities’ recommendations.”⁸⁰

As with ICANN 1.0, under ICANN 2.0 no governmental official may serve as an ICANN director.⁸¹ However, ICANN 2.0 gives the GAC the right to send a non-voting liaison to the Board.⁸² While the Board can remove non-voting liaisons from other advisory committees, it has no right to do so with the GAC liaison.⁸³ If the Board wishes to remove the GAC liaison, three-fourths of the directors must vote to request that the GAC consider appointing a different liaison.⁸⁴

76. *See id.*

77. *See* M. Stuart LYNN, PRESIDENT’S REPORT: ICANN—THE CASE FOR REFORM (Feb. 24, 2002), at <http://www.icann.org/general/lynn-reform-proposal-24feb02-htm>.

78. *See id.*

79. ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2002) [hereinafter ICANN, NEW BYLAWS], available at <http://www.icann.org/general/bylaws.htm>.

80. *Id.* art. I, § 2.11.

81. *See id.* art. VI, § 4.

82. *See id.* art. VI, §§ 1, 9.1.a.

83. *See id.* § 11.2.

84. *See id.*

Also, the Board is now obliged to “notify the Chair of the Governmental Advisory Committee . . . of any proposal raising public policy issues on which it or any of ICANN’s supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.”⁸⁵ At the same time, the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”⁸⁶

The new ICANN bylaws require the Board to take GAC recommendations “duly . . . into account, both in the formulation and adoption of policies.”⁸⁷ If the Board rejects a GAC recommendation, it must “inform the [GAC] and state the reasons why it decided not to follow that advice.”⁸⁸ In such a situation, the new bylaws now call for a mediation-like process. The GAC and ICANN must strive “to find a mutually acceptable solution.”⁸⁹ “If no such solution can be found, the ICANN Board will state in its final decision the reasons why the [GAC] advice was not followed”⁹⁰ The Board’s explanatory “statement will be without prejudice to the rights or obligations of [GAC] members with regard to public policy issues falling within their responsibilities.”⁹¹

In addition, the GAC has the right to send non-voting liaisons to the other ICANN advisory committees and supporting organizations,⁹² thus allowing the GAC to become involved in the bottom-up policy development process from the earliest stages. Also, while the Board must periodically initiate an independent review of other ICANN bodies, the GAC “shall provide its own review mechanisms.”⁹³

A greater governmental role will not make global Internet governance easier. Conflicts exist not only among the different private Internet stakeholders but also among governments

85. *Id.* art. XI, § 2.1.h.

86. *Id.* § 2.1.i.

87. *Id.* § 2.1.j.

88. *Id.*

89. *Id.*

90. *Id.* § 2.1.k.

91. *Id.*

92. *See id.* § 2.1.g.

93. *Id.* art. IV, § 4.

themselves, and between some governments and their local Internet constituencies. Strengthening the “information sovereignty” of the state could encourage governments to justify restrictions of free speech and privacy in Internet communication. Strong national regulation of ccTLDs could lead to a new level of censorship. Governments could reserve the right to instruct ccTLD managers to remove unwanted second level domains from the Internet. Even worse, governments could introduce legislation requiring the approval of a public authority before a national citizen can register a domain name in a gTLD.

At the inter-governmental level, the question of root server control is thrust back into the spotlight. The thirteen root servers (ten based in the United States) host not only sixteen generic TLD Zone Files (gTLDs like .com, .org or .info) but also 243 ccTLDs (like .uk, .tv or .de). The DoC is the only institution in the world that can give orders to the A-Root Server Manager; other entities are left to hope that the system will work. Consequently, a growing number of governments would prefer a treaty system over a trust system.

VIII. THE REDUCED ROLE OF USERS

The losers of the present redistribution of power in cyberspace are the Internet users. The original ICANN bylaws reserved nine of nineteen director positions for at-large members.⁹⁴ Five directors were elected in 2000 by direct elections in which 160,000 individual Internet users registered as ICANN members. Later, the ALSC, under the Chairmanship of former Swedish Prime Minister Carl Bildt, proposed to reduce the number of at-large directors to six and to allow only domain name holders to participate in elections.

ICANN 2.0 does not provide direct Internet user representation on the Board. The sole remainder of the original bottom-up policy is an external “At-Large Advisory Committee” (ALAC), which will be established in the new transition period ending in 2003.⁹⁵ The plan calls for five “Regional At-Large Organizations” to select two individuals for the ALAC and five other individuals to be sent by the new Nominating Committee.⁹⁶

94. See ICANN, BYLAWS (1998), *supra* note 5, art. V, § 1.

95. See ICANN, NEW BYLAWS, *supra* note 79, art. XI, § 2.4.

96. See *id.* § 2.4.b.

The ALAC, when in place, can delegate one non-voting liaison to the ICANN Board and five members to the Nominating Committee.⁹⁷ The ALAC can also offer advice to the Board; however, unlike advice from the GAC, the Board is not obliged to take ALAC's advice into consideration or to publicly explain why it has ignored ALAC's advice.⁹⁸

Whether the strengthened role for governments and the weakened role for individual Internet users will enhance the stability of the Internet remains to be seen. Fifteen years of discussion on Internet governance demonstrate that proposed governance mechanisms that exclude main stakeholder-groups have difficulties functioning. ICANN 2.0 reversed the triangle of power between governments, Internet providers, and users of Internet services. ICANN 1.0 entitled providers and users of services to take the lead with governments on the sideline. ICANN 2.0 has empowered some governments and some industries while sidelining the global Internet users, the ordinary "netizens."

IX. PERSPECTIVES

We live in a transitional period where the old governance system, rooted in the concept of the sovereign nation-state, is increasingly complemented by an emerging new governance system. This new system is global by nature and includes actors beyond the nearly 200 national governments and their IGOs. To a certain degree, ICANN is testing how a new trilateralism, driven by market needs and user interests, could work. Somebody—governments, private industry, civil society—must supervise. Bilateral relationships in such a triangular environment offer opportunities for shared responsibilities among groups that have both common and divergent interests. Neither stronger government regulation nor industry self-regulation alone will deliver the solutions. Co-regulatory systems, designed according to special needs on a case-by-case basis, combined with transparent bottom-up policy development procedures, can produce frameworks that efficiently

97. *See id.* § 2.4.e.

98. *Compare id.* § 2.4.a, with *id.* § 2.1.j.

combine stability and flexibility for all interested parties—governments, industry, and the public.⁹⁹

Four hundred years ago, after the beginning of the Industrial Revolution, the first industrialists realized that the governance system of the time, based on kingdoms with an absolutist monarch, did not satisfy the new needs of the Industrial Age. The search for a new governance system in the seventeenth century led to a historical political compromise: the introduction of constitutional monarchy. The constitutional monarchy was, to a certain degree, a co-regulatory system. While the king and the feudal institutions of the old system still maintained some concrete power inherited by birth, new institutions gained power and legitimacy through elections, such as national parliaments and bourgeois governments. Interestingly, the king always had “a non-voting liaison” in the parliament.

The present system of governance in the twenty-first century, with nearly 200 nation-states, has functioned satisfactorily for centuries. But with globalization, the system based on the sovereign nation-state has started faltering when confronted with contemporary global challenges. As in the early days of the Industrial Revolution, the call is not to change the system but to increase its flexibility for a changing economic environment. The call for co-regulatory systems tries to combine the positive values of stable governmental regulation, within and among nation-states, with the new flexibility needed to meet the challenges of globalization in the Information Age.

This combination results in a new diversification of power on a global level. New actors create new institutions and move into the new territory, filling emerging gaps regardless of governmental mandate. National governments will not disappear over the next century; instead, they will become merely one of many actors, obliged to join into co-operative networks and consensual arrangements with other global actors. At the same time, emerging global actors, both private industry and global civil society (still in its infancy), must not only prove their legitimacy, but they must also

99. See Wolfgang Kleinwächter, *Global Governance in the Information Age: GBDe and ICANN as “Pilot Projects” for Co-regulation and a New Trilateral Policy?* (2001), available at http://cfi.imv.au.dk/pub/skriftserie/003_kleinwaechter.pdf.

learn that the rights and freedoms they are fighting for are linked to duties and responsibilities.