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## About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN

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# ABOUT A DIFFERENT KIND OF WATER: AN ATTEMPT AT DESCRIBING AND UNDERSTANDING SOME ELEMENTS OF THE EUROPEAN UNION APPROACH TO ICANN

*Herbert Burkert\**

*Certain delegations also considered it inappropriate to quote a private American company in a legislative text of the European Union and that therefore, should a reference to ICANN be absolutely necessary, it might be in a recital.<sup>1</sup>*

## ABSTRACT

*This Article outlines the coming of age of a European Union Internet governance policy and its activities in setting up a “.EU” registry.*

*A recurring leitmotif in these policies is the search for an adequate regime for a fundamental resource of global communications, which is still under the influence—if not direct control—of a single country.*

*It is suggested that an analogy which has been developed in Public International Law with regard to shared resources (for example, water) might be helpful, not only in understanding past European Union policies, but also in guiding future policies to transform ICANN into a more traditional, or at least a more familiar structure.*

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1. Council of the European Union, Outcome of Proceedings of Working Party on Telecommunications on 25 January 2001: Proposal for a Regulation of the European Parliament and of the Council on the “.eu” Top Level Domain, 5676/01 Limite (ECO 17, CODEC 74) 3 (Jan. 29, 2001), available at <http://register.consilium.eu.int/pdf/en/01/st05/05676en1.pdf>.

*However, the ICANN context contains some elements which might make the outcome of such a Public International Law-oriented approach less predictable.*

## I. INTRODUCTION

The year 2003, by declaration of the United Nations, is the International Year of Water.<sup>2</sup>

This Article is about a different kind of water. It is about information flows, and a particularly well-suited organizational and technical communication infrastructure to secure the continuity of such flows: the Internet.

At this stage, I shall not carry the analogy any further.<sup>3</sup> To my knowledge, the water system image has never expressly been used by any European Union policy actors, nor has this association provided tacit guidance for these policies. For the moment, however, the mental association with water systems may be heuristically helpful to arrive at an understanding of some, but not necessarily all, of the European Union<sup>4</sup> policies toward the Internet Corporation for Assigned Names and Numbers (ICANN) and ICANN-related issues.

To present these policies, this Article will organize ICANN-related policy documents of the European Union around two issues

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2. More precisely, 2003 is the "International Year of Freshwater." See United Nations Educational, Scientific, and Cultural Organization: International Year of Freshwater 2003, at <http://www.unesco.org/water/iyfw2/> (last modified Feb. 3, 2003).

3. Others have done so already, although in a slightly different context. See, e.g., halfbakery: Internet Water: Internet Signal Distribution Through Household Water Supply, at [http://www.halfbakery.com/idea/Internet\\_20Water](http://www.halfbakery.com/idea/Internet_20Water) (last visited Jan. 15, 2003).

4. In correct terminology, "European Union" stands for the three-pillar structure introduced in the Maastricht Treaty of 1993 consisting of the European Community (EC), the Common Foreign and Security Policy (CFSP), and the Cooperation in the Fields of Justice and Home Affairs (JHA). See TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 191) 1 (1992), available at <http://www.essex.ac.uk/info/Maastricht.html> (last visited Jan. 23, 2003). This Article deals with activities relating to the first pillar, thus, the correct term would be the European Community. The term "European Union," however, has become the most frequently used term and will be used here as well. It should be noted that because the European Union institutions have functions with regards to all three pillars, they maintain the reference to the Union: for example, the Council of the European Union.

which are linked but which, again, for heuristic purposes at least, should be kept separate:

- The European Union has participated in the debate on what it calls the “International Management of the Internet.” The European Union engaged in negotiations multilaterally with member states, as a separate participant in the Government Advisory Committee (GAC) to ICANN, and bilaterally, with the United States government.
- In addition, with this involvement, the European Union has been essential in establishing a specific .EU domain within, or rather in relation to, the framework of country code top-level domains (ccTLDs).

I am aware of at least some shortcomings. Concentrating on documents does not address the individual policy makers, their personalities, their games and strategies; in short, everything which makes ICANN-related newsgroups or similar sites worth reading and following. I shall not do so. Also, documents only provide a limited insight into institutional structures and procedures of interaction. Furthermore, to talk about *the* European Union approach, or occasionally by slip of the pen, the *European* approach, simply by reference to documents would entail a gross simplification because the European Union is rich in institutions, structures, and procedures. To quote from John Peterson and Michael Shackleton’s introduction to *The Institutions of the European Union*:

The EU remains one of the most elusive of all subjects of study in the social sciences. It straddles accepted categories of political organization: less than a federation and more than a ‘regime’ . . . , something like a confederation but not yet a *Gemeinschaft* . . . , certainly not a state but not an ‘ordinary’ international organization either . . . .<sup>5</sup>

One might be tempted to add that the European Union is almost as difficult to understand as ICANN.

Readers less familiar with this environment should keep in mind as rough guidance through the maze that the main players, for the purpose of our subject, in the institutional framework are the

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5. John Peterson & Michael Shackleton, *The EU’s Institutions: An Overview*, in *THE INSTITUTIONS OF THE EUROPEAN UNION 2* (John Peterson & Michael Shackleton eds., 2002).

Council,<sup>6</sup> the (European) Commission,<sup>7</sup> the European Parliament,<sup>8</sup> and the fifteen member states, which although represented in the

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6. The Council of the European Union Web site states:

The Council of the European Union is a Community institution exercising the powers conferred upon it by the Treaties.

Under the Treaty establishing the European Community, the main responsibilities of the Council are the following:

- o the Council is the Community's legislative body; for a wide range of Community issues, it exercises that legislative power in co-decision with the European Parliament (see below);
- o the Council coordinates the general economic policies of the Member States;
- o the Council concludes, on behalf of the Community, international agreements between the latter and one or more States or international organisations;
- o the Council and the European Parliament constitute the budgetary authority that adopts the Community's budget.

Under the Treaty on European Union:

- o the Council takes the decisions necessary for defining and implementing the common foreign and security policy, on the basis of general guidelines established by the European Council;
- o coordinates the activities of Member States and adopts measures in the field of police and judicial cooperation in criminal matters.

Council of the European Union: General Information: Function, at <http://ue.eu.int/en/Info/index.htm> (last visited Jan. 8, 2003). The Web site of the Council of the European Union is <http://ue.eu.int/en/summ.htm> (last visited Jan. 23, 2003). The Council of the European Union should not be confounded with the European Council, which is the assembly of the Heads of State or Government of the European Union member states and the President of the European Commission. Neither the Council of the European Union nor the European Council should be confounded with the Council of Europe (an international organization). See Council of Europe, at <http://www.coe.int> (last modified Feb. 4, 2003). Throughout the text the term "Council" will be used to refer to the Council of the European Union.

7. Europa: The European Union On-Line Web site states:

The European Commission embodies and upholds the general interest of the Union. The President and Members of the Commission are appointed by the Member States after they have been approved by the European Parliament.

The Commission is the driving force in the Union's institutional system:

1. It has the right to initiate draft legislation and therefore presents legislative proposals to Parliament and the Council;

Council, may still be following their interests outside the Council.<sup>9</sup> In the background, the Court of Justice<sup>10</sup> keeps watch. The other

2. As the Union's executive body, it is responsible for implementing the European legislation (directives, regulations, decisions), budget and programmes adopted by Parliament and the Council;
3. It acts as guardian of the Treaties and, together with the Court of Justice, ensures that Community law is properly applied;
4. It represents the Union on the international stage and negotiates international agreements, chiefly in the field of trade and cooperation.

Europa: Institutions of the European Union [hereinafter Institutions], at <http://europa.eu.int/inst-en.htm#3> (last visited Jan. 9, 2003). The homepage of the European Commission Web site is [http://europa.eu.int/comm/index\\_en.htm](http://europa.eu.int/comm/index_en.htm) (last visited Jan. 23, 2003).

8. Europa: The European Union On-Line Web site describes the European Parliament as:

Elected every five years by direct universal suffrage, the European Parliament is the expression of the democratic will of the Union's 374 million citizens. Brought together within pan-European political groups, the major political parties operating in the Member States are represented.

Parliament has three essential functions:

1. It shares with the Council the power to legislate, i.e. to adopt European laws (directives, regulations, decisions). Its involvement in the legislative process helps to guarantee the democratic legitimacy of the texts adopted;
2. It shares budgetary authority with the Council, and can therefore influence EU spending. At the end of the procedure, it adopts the budget in its entirety;
3. It exercises democratic supervision over the Commission. It approves the nomination of Commissioners and has the right to censure the Commission. It also exercises political supervision over all the institutions.

Institutions, *supra* note 7. The homepage of the European Parliament is [http://www.europarl.eu.int/home/default\\_en.htm](http://www.europarl.eu.int/home/default_en.htm) (last visited Jan. 23, 2003).

9. The European Union (represented by the Commission) may sit together with the representatives of the individual member states in international fora (and may even sign agreements side by side with them) if the subject matter falls partly within the European Union's and partly within the member states' competencies. See Michael Smith, *The Commission and External Relations*, in THE EUROPEAN COMMISSION 264, 269 (Geoffrey Edwards & David Spence eds., 2d ed. 1997).

10. "The Court of Justice ensures that Community law is uniformly interpreted and effectively applied. It has jurisdiction in disputes involving Member States, EU institutions, businesses and individuals. A Court of First

institutions also watch each other while the member states watch the institutions so that the limits of competence, as set by the European Treaties,<sup>11</sup> are not overstepped.

Toward the end of this Article, I hope to show that there may indeed be a case for the water systems analogy. Analogy is *the* instrument for the law community to restabilize general expectations in times of change. This analogy might prove useful to the European Union in transforming ICANN into something more traditional in terms of Public International Law (or simply, in American terminology, International Law). However, analogies are difficult tools in building concepts; analogies carry the potential for conclusions that might lead to less controllable interactions. The water systems concept carries such a potential. It may have a lasting impact on the delicate international management of communication power by shaping the most efficient shorthand reference to legitimacy, past power conflicts, their arguments, and their outcomes. In other words, it may have an impact on the Public International Law of Global Communications. Some concluding remarks will remind us of this possibility.

## II. EUROPEAN UNION ICANN-RELATED POLICIES PART I: TOWARD A POLICY OF THE “INTERNATIONAL MANAGEMENT OF THE INTERNET”

### *A. The Response to the Green Paper and its Preparation*

Christopher Wilkinson who—in his own words—is still:

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Instance has been attached to it since 1989.” Institutions, *supra* note 7. The homepage of the Court of Justice is <http://curia.eu.int/en/index.htm> (last visited Jan. 31, 2003).

11. See CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 173–306 (1997) [hereinafter EC TREATY], available at [http://europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf) (last visited Jan. 23, 2003); CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Nov. 10, 1997, O.J. (C 340) 145–72 (1997) [hereinafter EU TREATY], available at [http://europa.eu.int/eur-lex/en/treaties/dat/eu\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf) (last visited Jan. 23, 2003) Where available, when citing official European Union documents, the Official Journal reference will be given. It should be noted, however, that not necessarily all “Communications,” for example, have to be published in that journal. In all cases, however, a direct reference to an Internet source is provided in this Article.

at the forefront of trying to find the necessary balance—in Europe and globally—between the potentially contradictory requirements for the liberal self-regulatory regime of Internet governance, including the necessary flexibility and speed of response on one hand and the growing pressures for greater accountability, transparency, and conformity, at least with the principles of relevant local and international laws, on the other hand.<sup>12</sup>

Wilkinson points to the March 1998 joint response of the European Union (more precisely, the Council and the Commission) and the member states<sup>13</sup> to the U.S. Department of Commerce draft proposal<sup>14</sup> of the technical management of the Internet domain system as one of the first E.U. policy documents in this field. They prepared this response in due observance of procedure by a Communication of the Commission to the Council<sup>15</sup> in February 1998. It alerted the member states' governments represented in the Council of a need for European Union involvement.

The February 1998 Communication already contained the main issues with which the European Union was concerned:

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12. Christopher Wilkinson, *Public Policy Issues in Internet Governance, ON THE INTERNET* (Jan./Feb. 2002), at <http://www.isoc.org/oti/articles/1201/wilkinson.html> (last visited Jan. 31, 2003).

13. See Reply, Council of the European Union European Commission, Internet Governance: Reply of the European Community and its Member States to the US Green Paper (Mar. 16, 1998) [hereinafter Reply to Green Paper], available at [http://www.ntia.doc.gov/ntiahome/domainname/130dftmail/03\\_20\\_98.htm](http://www.ntia.doc.gov/ntiahome/domainname/130dftmail/03_20_98.htm) (last visited Jan. 23, 2003).

14. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998), available at [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm) (last visited Jan. 16, 2003). For more about the Department of Commerce draft proposal and subsequent developments that led to ICANN, see A. Michael Froomkin, *Wrong Turn In Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 62–70 (2000).

15. International Policy Issues Related to Internet Governance: Communication to the Council from the Commission (Feb. 20, 1998) [hereinafter International Policy Issues], available at [http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/MainDocuments/Communicationof20\\_february\\_1998.html](http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/MainDocuments/Communicationof20_february_1998.html) (last visited Jan. 23, 2003).



### 1. The international law issue

The Internet governance structure and the norms applicable to Internet governance issues should leave sufficient space for the applicability of respective national norms, and where appropriate, international law. In short, Internet governance issues should be taken away from the (exclusive) applicability of U.S. law:

**International Approach:** The principal objection to the actual proposals of the US Green paper is the lack of recognition for the need, and practical implementation, of an internationally coordinated approach as advocated by the Commission in its recent Communication on Globalisation and the Information Society.

**Jurisdiction:** The current US proposals, could in the name of the globalisation and privatisation of the Internet, consolidate permanent US Jurisdiction over the Internet as a whole, including dispute resolution and trademarks used on the Internet.<sup>16</sup>

### 2. The international structure and operation issue:

The technical and organizational operation of Internet governance, including mediation processes for domain name disputes, should, in its procedures, supervision, and operational structure, reflect the international character of the resource. It should also establish an adequate participative structure. "Participation: It will be necessary to take steps to ensure that the private sector in Europe including users and industry fully participates at all relevant levels in the process."<sup>17</sup>

### 3. The competitive environment issue:

To the extent that the Internet governance structure or part of this structure should move into the private sector, a guaranteed adequate competitive environment should be ensured:

**Competition policy aspects:** The reorganisation of the Internet management bodies raises several competition policy issues:

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16. *Id.*

17. *Id.*

[I]t would appear that IANA would for practical purposes occupy a natural monopoly position with respect to Internet numbers and the Root servers, as well as exercise certain regulatory functions. The extent to which it would be indemnified from anti-trust suits is not clear and is probably not adequately codified from the point of view of European competition law.

[T]he US proposals for structural separation of Registry/Database and Registrar activities within NSI, appear not to go far enough to ensure a level playing field and fair competition particularly as the alternative CORE system may not be allowed to create effective competition for NSI in the short term.<sup>18</sup>

\* \* \* \* \*

The first two issues reflect the European Union's concern with the concentration of central Internet resources in the United States. As to the role of participation in the second issue, it was not clear in the beginning what this would involve. Clearly, it meant there would be European involvement in the private sector. However, to what extent "users" would also involve the general public (and public policy concerns) remained, at that stage, difficult to ascertain.

The third issue, Competitive Environment, while shared with many observers from outside the European Union,<sup>19</sup> was a classical European Union concern on the part of the Commission to be more

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18. *Id.*

19. For example, this is reflected in the hearing on "TLD Competition" in the context of the Workshop *ICANN & the Public Interest: Pressing Issues*, organized by The Berkman Center for Internet and Society and The Markle Foundation in October 1999, which in turn foreshadowed the House Committee on Energy & Commerce Hearing *Is ICANN's New Generation of Internet Domain Name Selection Process Thwarting Competition?* on February 8, 2001. See *Is ICANN's New Generation of Internet Domain Name Selection Process Thwarting Competition?: Hearing Before the Subcomm. on Telecomm. and the Internet, House Comm. on Energy and Commerce*, 107th Cong. (2001), available at <http://energycommerce.house.gov/107/hearings/02082001Hearing37/hearing.htm> (last visited Jan. 28, 2003); *ICANN & the Public Interest: Pressing Issues: A One-Day Workshop Presented by The Berkman Center for Internet and Society and The Markle Foundation* (Oct. 31, 1999), at <http://cyber.law.harvard.edu/icann/workshops/1a/> (last visited Jan. 23, 2003).

precise, since watching over competitive effects on the European Internal Market falls under its core competence.<sup>20</sup> Thus, mentioning this issue in this document reflected a general concern shared by others, and put a clear mark of political territory on it. While treaties and subsequent decisions by the European Court of Justice may establish rules of competence, in day-to-day policy-making, it is the interpretation of these rules that count. Therefore, it was helpful to clarify this link. To that extent, the message was not only addressed to the eventual receiver of the letter based on this Communication, but also to the member states.

The other issues mentioned in the Communication preceding the European Union comment on the Green Paper were more general in nature—namely portability and scalability and the need for stability.<sup>21</sup> In accordance with that Communication by which the Commission had sought authorization,<sup>22</sup> the European Union response to the Green Paper duly emphasized the international perspective:

The European Community and its Member States would wish to emphasise 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.

....

Contrary to such an international approach, the current US proposals would, in the name of the globalization and privatization of the Internet, risk consolidating permanent

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20. See, e.g., EC TREATY, *supra* note 11, tit. VI.

21. For more on these objectives, see Richard Delmas, *Introduction*, in 3 LA GOUVERNANCE D'INTERNET 9, 12 (Françoise Massit-Folléa & Richard Delmas eds., 2002).

22. The Council is furthermore requested:

to agree to the broad lines of the approach as identified in this Communication;

to agree to a first, joint reply to the US Government by the Community and its Member States;

to authorise the Commission to submit to the US Administration the joint reply of the European Community and its Member States

International Policy Issues, *supra* note 15.

US jurisdiction over the Internet as a whole, including dispute resolution and trademarks used on the Internet.<sup>23</sup>

*B. From Assessing the White Paper to an Internet Governance Policy*

1. Content of the White Paper

Subsequent talks seemed to satisfy the European Union, judging from the July 1998 Communication of the Commission on *Internet Governance: Management of Internet Names and Addresses: Analysis and Assessment from the European Commission of the United States Department of Commerce White Paper*:

On 16 March 1998, the Council and the Commission addressed a joint reply based on a Proposal from the Commission. from [sic] the European Union and its Member States to an inquiry initiated by the US Department of Commerce in the form of a Green Paper. The initial policy proposals of the US Green Paper regarding the organisation and management of Internet names and addresses received a number of comments and criticisms from the EU Council and the Commission.

Since then, the Commission has met several times with the competent US officials. More recently, the US Government has finally published a White Paper setting out their policy in this area. As recently announced, US Government policy is substantially different from that which was proposed in the initial Green Paper. In many respects, it now responds to the comments and criticisms of the European Union, and a large number of other commentators, both internationally and even from within the United States.

Consequently, the Commission can now confirm that the EU should act to participate fully in the process of organisation and management of the Internet that has been launched by the US White Paper.<sup>24</sup>

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23. See Reply to Green Paper, *supra* note 13.

24. Communication from the European Commission to the European Parliament and to the Council: Internet Governance: Management of Internet

The document not only showed satisfaction as to the outcome of the bilateral and multilateral discussions;<sup>25</sup> it also reaffirmed Internet governance as a legitimate subject for European Union policy-making and the Commission's mandate, even if shared with the member states.

## 2. Taking a look back

The European Union had, of course, discovered the importance of the Internet well before. This is why, for example, the European Union bodies were concerned that "illegal and harmful content" would undermine the appeal and economic potential of this developing infrastructure and why the Commission previously addressed content issues in a 1996 Communication.<sup>26</sup> In its 1997 *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation Towards an Information Society Approach*,<sup>27</sup> the

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Names and Addresses: Analysis and Assessment from the European Commission of the United States Department of Commerce White Paper, COM(98)476 final [hereinafter Analysis and Assessment], available at [http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/MainDocuments/com\(1998\)476.html](http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/MainDocuments/com(1998)476.html) (last visited Jan. 19, 2003).

25. Werle is somewhat more critical in his assessment:

When, in 1997, the US Department of Commerce issued a Request for Comments concerning the future role of governmental and non-governmental organizations in this area after privatisation of the Internet, the Commission's response unveiled a lack of detailed knowledge about naming and addressing procedures. Thus, the Commission only emphasized the need to establish an internationally recognized transparent system and to ensure adequate European representation.

Raymund Werle, *Internet @ Europe: Overcoming Institutional Fragmentation and Policy Failure*, in 5 EUROPEAN INTEGRATION ONLINE PAPERS (EIOP) 9 (2001), at <http://eiop.or.at/eiop/texte/2001-007.htm> (last visited Jan. 23, 2003). This criticism does not sufficiently recognize that the Commission had to look carefully in all directions before it crossed the street.

26. See *Illegal and Harmful Content on the Internet: Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, COM(96)487, at <http://europa.eu.int/ISPO/legal/en/internet/communic.html> (last modified Nov. 5, 1999).

27. See *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation Towards an Information Society Approach*, COM(97)623,

Commission asked about regulatory consequences of (among other issues) the Internet, particularly for the telecommunications sector.<sup>28</sup> Later on, an ambitious “eEurope program” was launched, pointing to the Internet as a crucial element for the economic, social, and cultural future of the Union.<sup>29</sup>

However, in regards to Internet *governance*, and particularly in regards to its own role and the role of the United States, the underlying sentiment in the European Union before and after the activities of the International Ad Hoc Committee<sup>30</sup> is best reflected in a 1997 document prepared for the Commission by an Internet Advisory Group which pointed out—in a somewhat naïve manner, to say the least—under the heading, *Internet Governance and Evolution*:

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*available at* <http://europa.eu.int/ISPO/convergencegp/97623.html> (last visited Jan. 23, 2003).

28. As Werle correctly observes in his paper, the European Union at that time had been preoccupied in the early 1990s by the transformation of the telecommunications environment from state monopoly to privatization. See Werle, *supra* note 25, at 3–7. This process was complicated by the rising awareness of the convergence phenomena. Only recently has the transformation process come to an intermediate pause with the passage of the “New Regulatory Framework.” See New Regulatory Framework for Electronic Communications Infrastructure and Associated Services [hereinafter New Regulatory Framework], *available at* [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm) (last modified Nov. 13, 2002). This framework (a regulation and several directives) now provides a new regulatory environment in the European Union not only for telecommunications, but more broadly for what has been termed as “electronic communications.” See Herbert Burkert, *The Post-Deregulatory Landscape in International Telecommunications Law: A Unique European Union Approach?*, 27 BROOK. J. INT’L L. 739, 739–40 (2002). These new conditions will have to be transformed into national law by July 2003, with the exception of the Regulation on Unbundled Access to the Local Loop, which, as the *regulation* in the set, is directly binding on the member states since coming into force. See Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on Unbundled Access to the Local Loop, 2000 O.J. (L 336) 4, *available at* [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_336/l\\_33620001230en00040008.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_336/l_33620001230en00040008.pdf) (last visited Jan. 23, 2003).

29. See eEurope: An Information Society For All: Communication on a Commission Initiative for the Special European Council of Lisbon, 23 and 24 March 2000 [hereinafter eEurope], *at* [http://europa.eu.int/information\\_society/eeurope/news\\_library/pdf\\_files/initiative\\_en.pdf](http://europa.eu.int/information_society/eeurope/news_library/pdf_files/initiative_en.pdf) (last visited Jan 23, 2003).

30. See Froomkin, *supra* note 14, at 62 n.163.

The way in which the Internet is organised and evolves is sometimes seen as “mysterious”, and even by some as “dangerous for Europe”, but, while it might seem surprising that the process works, there is no mystery. The basic point is that all companies and organisations with a serious interest (whether as vendors or as users) in the development of the Internet need to reach agreement on technical standards. But, in this fast-moving field, these technical standards have to be developed very quickly and they also need to be very robust. Since 1991 this overall process has been overseen by the Internet Society (ISOC), with important roles being played by the Internet Architecture Board (IAB) and Internet Engineering Task Force (IETF).

While the Internet Society was formed in the USA, and face-to-face meetings of these bodies are largely held, in English, in North America, they must be seen as entirely democratic bodies, with well-defined rules of procedure, which are making a serious attempt to recognise the international nature of the Internet. Indeed it is a rule of the IETF that all decisions are taken by e-mail, to avoid the need for participants to attend all meetings and have good spoken English. *De facto* observation shows that the proceedings and recommendations of these bodies cannot be dominated either by single vendors or by single countries, however powerful they may be. We should further note that some very powerful positions in these bodies have been and are held by non-Americans. This includes the chair of the Internet Architecture Board, which has been held for the past four years by two different Europeans.<sup>31</sup>

Although the European Union seemed content with the results obtained from the Green and White Paper exchanges as expressed in the 1998 Communication,<sup>32</sup> in 1999, the minutes of a

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31. Report, Esprit, The Future of the Internet—What Role for Europe?: Interim Report of an Advisory Group (Mar. 11, 1997), *available at* <http://www.cordis.lu/esprit/src/i2eurepo.htm>.

32. *See* Analysis and Assessment, *supra* note 24.

Telecommunications Council<sup>33</sup> meeting still recorded continuing concern and apprehension:

Commissioner Bangemann expressed his confidence that the new Internet Corporation for Assigned Names and Numbers (ICANN) will come to satisfactory decisions on the future governance of the Internet.

It is recalled that one year ago the United States published a White Paper which raised a number of international policy issues related to Internet governance. A subsequent clarification of positions between the US and the EU led to a view largely shared by both sides on the approach to be taken. The basic arrangements for ICANN reflect the generally satisfactory outcome of the issues raised by the US White Paper. Nevertheless, important questions regarding the structure of ICANN membership and its functioning still need to be resolved.<sup>34</sup>

### 3. Toward the "Internet Governance Communication" 2000

In the meantime, the European Commission tried to arrive at a more comprehensive approach on the issue of Internet governance policy, and its concerns became more specific. In a Communication to the Council and the European Parliament,<sup>35</sup> the Commission once again ensured endorsement of its policies and actions. However, in regards to participation, the Commission became more outspoken and urged the "Member States and the European Parliament to help in encouraging the flow of information about the ICANN process, including membership, to all categories of Internet users, particularly

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33. The Telecommunications Council unites those ministers (or their representatives) of the member states in the Council of the European Union who are responsible for telecommunications-related issues. They meet, as do their counterparts in other areas, at regular intervals.

34. 2172nd Council Meeting—Telecommunications—Luxembourg, 22 April 1999, 7398/99 (Presse 112) at 15, *available at* <http://register.consilium.eu.int/pdf/en/99/st07/07398en9.pdf> (last visited Jan. 23, 2003).

35. Commission of the European Communities: Communication from the Commission to the Council and the European Parliament: The Organisation and Management of the Internet: International and European Policy Issues 1998–2000, COM(00)202 [hereinafter *Management of the Internet*], *available at* [http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000\\_0202en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0202en01.pdf) (last visited Jan. 23, 2003).



individuals and public service organizations, to ensure an adequate level of participation and representation of the interests concerned.”<sup>36</sup>

The reference to “particularly individuals and public service institutions” is notable. This finally enlarged the initially limited concern regarding “private sector participation” in the 1997 Communication.<sup>37</sup> It also gave it a slightly different focus. The at-large election was beginning to cast its shadow.<sup>38</sup>

By now, the GAC<sup>39</sup> had become an increasingly important forum for European Union involvement. The Commission consequently drew particular attention to the role of this gathering within the ICANN structure. As a prediction of its later involvement, the Commission noted:

In conclusion, even within their narrowly defined remit, it is already the case that ICANN and the GAC are taking decisions of a kind that governments would, in other contexts, expect to take themselves in the framework of international organisations.

For the time being, there would appear to be consensus that the nature of the Internet and the speed of events preclude this approach and that the current self-regulatory structure buttressed by active public policy oversight is the best available solution.<sup>40</sup>

The main focus of the European Commission’s “Internet Governance Communication” remained on operational issues such as Internet addressing<sup>41</sup> and domain names.<sup>42</sup>

It is interesting to find in this self-reflection on European Union involvement with Internet governance an admonition or, perhaps less dramatically, a gentle reminder to the member states. The

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36. *Id.* at 8 (emphasis omitted).

37. *See* International Policy Issues, *supra* note 15.

38. *See* ICANN: March 2000 ICANN Meeting in Cairo: At Large Membership and Elections, at <http://www.icann.org/cairo2000/atlarge-topic.htm> (last modified Oct. 6, 2002).

39. *See* ICANN: Governmental Advisory Committee (GAC), at <http://www.icann.org/committees/gac/> (last modified Nov. 26, 2002).

40. Management of the Internet, *supra* note 35, at 9.

41. *See id.*

42. *See id.* at 11.

Commission, well aware that transparency<sup>43</sup> could not only be requested from the United States government and from ICANN, made it a point to remind member states that this principle was also important for “their” ccTLDs:

It would also be appropriate for the national ccTLD Registries in the European Union to adapt their policies and practices to achieve a high level of transparency in their operations. In so far as the national Registries accept registrations from entities and individuals from outside their territory, their dispute resolution policies should take full account of the interests of third parties in other Member States, and elsewhere.<sup>44</sup>

Finally, the European Union took note that there were still concerns for ICANN policies regarding the top-level domain (TLD) .EU,<sup>45</sup> intellectual property rights,<sup>46</sup> and the United States position on them. The Commission also introduced a new concern of data protection (privacy) with regard to the Whois databases.<sup>47</sup> This was an opportunity for the European Union to link ICANN issues with the transatlantic exchanges on the adequate level of data protection,<sup>48</sup> and thus enlarge its diplomatic maneuvering space.

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43. Transparency of European Union bodies and processes is an always-present issue in European politics. Significant progress has been achieved. See *Europarl: Citizens' Portal* [hereinafter *Citizens' Portal*], at [http://www.europarl.eu.int/opengov/default\\_en.htm](http://www.europarl.eu.int/opengov/default_en.htm) (last visited Jan. 23, 2003). For a critical assessment regarding transparency, see, for example, *Statewatch: FOI in the EU: Freedom of Information in the European Union*, at <http://www.statewatch.org/foi.htm> (last visited Jan. 23, 2003). For Internet accessibility of European Union documents, see NYU Law: New York University School of Law: Library: European Union, European Commission, at [http://www.law.nyu.edu/library/foreign\\_intl/european.html](http://www.law.nyu.edu/library/foreign_intl/european.html) (last modified Jan. 22, 2003).

44. Management of the Internet, *supra* note 35, at 16 (emphasis omitted).

45. See *id.*; for a more detailed discussion see *infra* Part III.

46. See Management of the Internet, *supra* note 35, at 16–17.

47. See *id.* at 19.

48. For the privacy-related “US-Safe Harbor” negotiations and their outcome, see Data Protection: Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries, para. 3 [hereinafter *Data Protection*], at [http://europa.eu.int/comm/internal\\_market/en/dataprot/adequacy/index.htm](http://europa.eu.int/comm/internal_market/en/dataprot/adequacy/index.htm) (last visited Jan. 23, 2003).

4. From the “Internet Governance Communication” to the present day

Following proper procedure, the Council, in October 2000, reacted to the “Internet Governance Communication” of the Commission with a resolution.<sup>49</sup> The Council became more specific about the issues that it still regarded as mainly unresolved:

- The nature of, and arrangements for, balanced and equal oversight of some of ICANN’s activities by public authorities,
- the rules to govern generic domains, notably database ownership and separation of registries’ and registrars’ activities,
- the redelegation of certain ccTLDs to another manager at the request of the Government concerned,
- regarding the relationships between the registries established in the Community with their public authorities on the one hand and with ICANN on the other hand,
- the transfer of the management of the root server system from the US Department of Commerce to ICANN, under appropriate international supervision by public authorities,
- that those issues need to be addressed with due regard for both the interests of the international community as a whole and the public policy challenges involved, particularly as regards competition, personal data protection and respect for intellectual property rights.<sup>50</sup>

The European Parliament, as the next in line to voice its opinion, passed its resolution in March 2001,<sup>51</sup> and added some of its own

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49. Council Resolution of 3 October 2000 on the Organisation and Management of the Internet, 2000 O.J. (C 293) 3, *available at* [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c\\_293/c\\_29320001014en00030004.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c_293/c_29320001014en00030004.pdf) (last visited Jan. 23, 2003).

50. *Id.*

51. *See* European Parliament Resolution on the Commission Communication to the Council and the European Parliament on ‘The

concerns. First of all, in the optimistic spirit of the time and responding favorably to the Commission's remarks on "participation," it explicitly encouraged the elections for the at-large directors by stating that it "[e]mphasises the need for all five geographical areas covered by ICANN to be represented by democratically elected representatives on the organisation's Board of Directors."<sup>52</sup>

This comment should be kept in mind for the last part of this Article. The European Parliament, perhaps remembering its own difficult road to legitimate representation,<sup>53</sup> supplemented the European Commission's concept of the GAC. It put the concept of "democratically elected representatives" side-by-side with the Commission and the Council's concept of a body in which the member states and the European Union voiced their public policy concerns by traditional means of "government representatives"—although somewhat downplaying their status.<sup>54</sup>

Still, the Parliament fully endorsed the Commission's role to bring in the European Union's counterweight to ensure what it saw as necessary neutrality of ICANN.<sup>55</sup> The Parliament also felt that the European Union should have an even stronger role within the ICANN set-up:

[The European Parliament] 3. considers that the Commission should be a leading authority, backed by the necessary resources, to negotiate with governments from

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Organisation and Management of the Internet—International and European Policy Issues 1998–2000', EUR. PARL. DOC. (COM(2000)202-C5-0263/2000-2000/2140(COS)) (No. A5-0063/2001) [hereinafter European Parliament Resolution], available at <http://europa.eu.int/ISPO/eif/InternetPoliciesSite/InternetGovernance/EPResolution15March2001.html> (last visited Jan. 23, 2003). For a .pdf version, see European Parliament Report on the Commission Communication to the Council and the European Parliament on 'The Organisation and Management of the Internet—International and European Policy Issues 1998–2000' 2001 O.J. (C 343) 286, (COM(2000)202-C5-0263/2000-2000/2140(COS)), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c\\_343/c\\_34320011205en02860289.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_343/c_34320011205en02860289.pdf) (last visited Jan. 23, 2003).

52. European Parliament Resolution, *supra* note 51.

53. The European Parliament started out as a Parliamentary Assembly, and only in 1962 did it describe itself as the European Parliament, with only limited advisory power and no direct elections until 1979. See THE EUROPEAN PARLIAMENT 8–9 (Richard Corbett et al. eds., 3d ed. 1995).

54. See *id.* at 9–16.

55. See European Parliament Resolution, *supra* note 51.

the US and other parts of the world; insists that neither the Commission, nor the US Government, nor other governments should interfere in the organisation and management of the Internet, but they should give it sufficient independence and a legal basis at international level, so that it may be an independent network;

4. Considers that the neutral role of ICANN must be reinforced by a strong presence from the European Union, working alongside the US and other governments, through the Governmental Advisory Committee;

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8. Considers it necessary to guarantee the independence of ICANN from the US Government and to define the legal framework to which it must adhere in future, on the understanding that it is of paramount importance to maintain international neutrality if ICANN is to play a key role in the global development of the information society; considers, similarly, that all continents must be represented on it . . . .<sup>56</sup>

The Parliament then added as a "*ceterum censeo*," a number of comments which were, so to speak, for internal European Union use only.<sup>57</sup> The comments contained what may be viewed as reminders that European Union telecommunications policies could be more efficient.<sup>58</sup> As a balance, the Parliament also included some favorable remarks on the .EU proposal, which at that time was already on its way.<sup>59</sup> Furthermore, the Parliament did not forget about the competition issue:<sup>60</sup>

[The European Parliament] 15. Notes that it took a long time to introduce the seven new domain names and that the time thus lost needs to be made up as quickly as possible; maintains, more generally, the need for a more transparent and democratic process when other new domain names are created in the future;

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56. *Id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See supra* text accompanying note 19.

16. Attaches priority to the achievement of an open and competitive environment for registration, supported by an international regulatory structure for domain name registration and registrar;

17. Considers it necessary to establish clearly the scope of the responsibility of the national bodies administering the registers and of the service contractor, in the event of dispute; calls therefore on Member Governments to coordinate their Country Code top level domain registration policies and procedures, so that users are handled in a consistent manner and with effective dispute resolution policies, and further encourages the Commission to promote effective alternative dispute resolution procedures to reinforce the domain name registry codes of conduct . . . .<sup>61</sup>

From then on, attention in the European Union shifted back to the changes in telecommunications regulations. The European Union had prepared and was finally successful with a set of measures for a “New Regulatory Environment.”<sup>62</sup> Against this background of convergence, the European Union kept the Internet in mind. The New Framework Directive<sup>63</sup>—the general part of the other more specific legislative materials—defined the area of applicability.

For the purposes of this Directive:

- (a) ‘electronic communications network’ means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are

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61. European Parliament Resolution, *supra* note 51.

62. See New Regulatory Framework, *supra* note 28 and accompanying text.

63. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (L 108) 33, 38–39, available at [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/l\\_10820020424en00330050.pdf](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00330050.pdf) (last visited Jan. 23, 2003).

used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed . . . .<sup>64</sup>

The extension of the definition from telecommunications to electronic communications clarifies the applicability of the competition and universal service-oriented regulatory principles to the conditions set by member states on, for example, their ccTLDs and their administration. Where and whether this will become a new source of conflict with ICANN will be seen when the process of transformation into national law has ended.

In a more technological context, the European Union took note of the slow migration to Internet Protocol Version 6 (IPv6).<sup>65</sup> However, the place for day-to-day policy making for Internet governance was now definitely with the GAC.

The Commission kept the Council informed about what was going on through regular reports on ICANN meetings and on the activities of the GAC. The Council also took note of the next phases of ICANN change. In March 2002, in preparation of a Telecommunications Council meeting, it was noted:

3. Discussions on the reform of ICANN are necessary in view of the expiry, on 30 September 2002, of the Memorandum of Understanding between ICANN and the United States' Department of Commerce which forms the basis of the current arrangements. This provides a natural opportunity to review the functioning of these arrangements, and for the Community to make proposals for reform and/or react to proposals made by others.
4. The exchange of views planned for the Council is intended as a first discussion at political level on the broad approach to be taken on the question of international Internet governance in the course of

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64. *Id.* art. 2(a).

65. See Council of the European Union: Communication from the Commission to the Council and the European Parliament: Next Generation Internet—Priorities for Action in Migrating to the New Internet Protocol IPv6, COM(02)96 final, available at <http://register.consilium.eu.int/pdf/en/02/st06/06637en2.pdf> (last visited Jan. 23, 2003).

forthcoming international discussions, whether these be multi-lateral (for example in the context of the existing GAC structure) or bilateral, notably with the United States Government.<sup>66</sup>

After having been on the agenda of the March Council meeting,<sup>67</sup> ICANN relations became the subject of a more comprehensive document which was prepared by the Presidency of the Council for the next Telecommunications Council meeting in June 2002. This document was intended to set up guidelines for coordinating the position of the member states and the European Union for the GAC position paper on the "Lynn reform." The paper would be finalized at the GAC meeting in Bucharest from June 24th to the 26th.<sup>68</sup> The document summarized the Lynn proposal on ICANN reform and provided elements for a response through the GAC. It reinforced the fact that the channel for input into the reform process was not restricted to the GAC. It stated that, "[t]he reform of ICANN involves a negotiation within the ICANN framework in

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66. Council of the European Union, Note from the Presidency to COREPER/COUNCIL: International Management of the Internet and ICANN Reform, 7171/02 (ECO 89) (Mar. 19, 2002), *available at* <http://register.consilium.eu.int/pdf/en/02/st07/07171en2.pdf>. The duration of the Memorandum of Understanding has, of course, been extended to September 20, 2003. *See* Statement, U.S. Department of Commerce, National Telecommunications & Information Administration, U.S. Department of Commerce Statement Regarding Extension of Memorandum of Understanding with ICANN (Sept. 19, 2002), *available at* [http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement\\_09192002.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/docstatement_09192002.htm); *see also* Agreement, U.S. Department of Commerce, National Telecommunications & Information Administration, Memorandum of Understanding Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers: Amendment 5 (Sept. 19, 2002), *available at* [http://www.ntia.doc.gov/ntiahome/domainname/agreements/Amend5\\_09192002.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/Amend5_09192002.htm).

67. *See* Council of the European Union, Provisional Agenda for 2420th Meeting of the Council of the European Union (Transport/Telecommunications), 7290/02 (OJ CONS 17, TRANS 90, ECO 92) (Mar. 22, 2002), *available at* <http://register.consilium.eu.int/pdf/en/02/st07/07290en2.pdf> (last visited Jan. 23, 2003).

68. *See* Council of the European Union, Note from the Presidency to Coreper: Preparation of the Transport/Telecommunications Council on 17/18 June 2002: International Management of the Internet and ICANN Reform, 9526/02 (ECO 180) (June 3, 2002), *available at* <http://register.consilium.eu.int/pdf/en/02/st09/09526en2.pdf>.



parallel with the inter-governmental consideration of these issues in the GAC and bilaterally with the United States.”<sup>69</sup>

In general, however, the Presidency’s suggestions called for strengthening the GAC as *the* channel for public policy concerns and contained the first officially documented hint for the later European Union involvement with the secretariat for GAC:

Governments **agree** that the GAC is the principal forum for the international discussion of public policy issues related to the ICANN mission and the Domain Name System. In this respect, **Governments attach great importance** to strengthening the role of GAC and ensuring its independence from ICANN.

In order to effectively fulfil this role vis-à-vis ICANN, **GAC needs to work more effectively and be better integrated into the policy formulation process.** This will require the necessary organisation and secretariat and in due course a more appropriate legal structure. Governments should provide the necessary resources to this effect. In anticipation that other administrations will also make available such resources, the European Commission is also encouraged to allocate appropriate resources for this purpose. Responsibility for the GAC secretariat could thus be shared between several GAC participants. This secretariat would provide services to GAC both for policy making and logistics.<sup>70</sup>

The guidelines for coordinating the GAC response paper to ICANN reform were then finalized in the Committee of Permanent Representatives (COREPER—a group that regularly deals with

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69. *Id.* at 4.

70. *Id.* at 6 (emphasis in original).

Council issues under the level of ministers).<sup>71</sup> It was then submitted to the Council meeting in June 2002.<sup>72</sup>

These guidelines for reaching consensus within the European Union reiterated some well-known principles of internationalization, while at the same time emphasizing some self-regulation. “Public policy” was now fully represented through the GAC (which deserved adequate strengthening) while the other supplemental means of participation—democratic elections—once referred to by the European Parliament,<sup>73</sup> was no longer worth mentioning:

The private sector participants concerned are responsible for reaching mutually acceptable agreements regarding the structure of ICANN, its membership and financing and its decision-making processes. Due consideration should be given to the adequate protection of the public interest by strengthening the standing of GAC Advice.

Such agreements, however, must give full weight to internationalisation, transparency and fairness and to maintaining the principle of geographic diversity and representation throughout the organisation. These agreements should be defined in such a way that the legitimate interests of each area of the world, and of their respective stakeholders, whether economic, legal or pertaining to public policies, could be duly taken into account.

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71. This short definition could lead to an underestimation of its function. “The Committee of Permanent Representatives (Coreper) originated as an iterative diplomatic forum to prepare meetings of the Council of Ministers. It quickly and quietly evolved into a locus of continuous negotiation and *de facto* decision making, gaining a reputation as ‘the place to do the deal.’” Jeffrey Lewis, *National Interests: Coreper*, in *THE INSTITUTIONS OF THE EUROPEAN UNION 277* (John Peterson & Michael Shackleton eds., 2002).

72. See Council of the European Union, Report from COREPER to Council: International Management of the Internet and ICANN Reform, 9823/02 Limite (ECO 204) (June 13, 2002) [hereinafter Report from COREPER], available at <http://register.consilium.eu.int/pdf/en/02/st09/09823en2.pdf>. The subsequent document 9823/02 COR 1 corrected the classification to “LIMITE.”

73. See European Parliament Resolution, *supra* note 51.

Governments are responsible for public policy, not ICANN. Where ICANN's activities are likely to involve public policy implications, ICANN must consult the GAC. The GAC and ICANN should seek to define in advance which areas involve such implications. When there is an ICANN Board majority against a GAC advice, the matter must be further discussed in good faith between the ICANN Board and the GAC, with a view to reaching an agreement. Decisions taken by the ICANN Board against a GAC advice do not prejudice any steps governments may decide to take in order to protect the public interest. In all cases, ICANN should inform GAC on how its advice has been taken into account.<sup>74</sup>

Additionally, on the GAC secretariat issue the coordination guidelines noted:

In order to effectively fulfill this role vis-à-vis ICANN, GAC needs to work more effectively and be better integrated into the policy formulation process. This will require the necessary organisation and secretariat and in due course, if needed, a more appropriate legal structure. Governments should provide the necessary resources to this effect. In anticipation that other administrations will also make available such resources, the European Commission is also encouraged to allocate appropriate resources for this purpose. Responsibility for the GAC secretariat could thus be shared between several GAC participants. This secretariat would provide services to GAC both for policy making and logistics.<sup>75</sup>

The draft concluded with a suggestion, or perhaps a warning, underlining the new GAC self-reliance: "In future reserve powers of last resort in the event of ICANN failing to fulfil its essential tasks and for the oversight of the maintenance of the authoritative Root Zone File could be exercised through the GAC or another appropriately constituted entity."<sup>76</sup>

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74. Report from COREPER, *supra* note 72, at 3-4.

75. *Id.* at 4.

76. *Id.* at 5.

The minutes of the June Council meeting note the support for those guidelines for European Union consultation in the GAC Bucharest position-making process. The Council endorsed the Permanent Representatives Committee's coordination function for the Council's involvement in the ICANN process which was already established in the Council's March 2002 meeting. Furthermore, the Council did not forget about the "secretariat" point on the agenda:

Delegations' contributions related in particular to the need to further clarify ICANN's mission, to strengthen the role and effectiveness of the GAC, among other things by the establishment of a specific secretariat.

It should be noted that, in its Resolution of 30 October 2000, the Council invited the Member States to consult one another with a view to establishing common positions to be adopted within the international fora concerned and, thus, achieving a genuine globalisation of Internet management, at its meeting on 25 and 26 March. It instructed the Permanent Representatives Committee to coordinate Member States' positions in due time; the guidelines forwarded to the Council for information were drawn up on the basis of those instructions.<sup>77</sup>

The process of internal European Union consultation is now well installed, and ICANN and Internet governance have become almost a regular item for the Council, as witnessed by the Committee of Permanent Representatives' meeting agendas from October<sup>78</sup> and

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77. 2438th Council meeting—Transport and Telecommunications—Luxembourg, 17 and 18 June 2002, 9702/02 (Presse 176) at 31 (June 17–18, 2002), available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.getfile=gf&doc=PRES/02/176|0|AGED&lg=EN&type=PDF](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=PRES/02/176|0|AGED&lg=EN&type=PDF) (last visited Jan. 23, 2003). Note that the cited quote contains an error—the Resolution was on October 3, 2000, *not* October 30, 2000. It is known from the Bucharest meeting that the guidelines of coordination did not make it fully into the Bucharest document. Also, some of the E.U. member states added their own addenda to the Bucharest GAC position paper. See Statement, Governmental Advisory Committee, Governmental Advisory Committee Statement on ICANN Reform (June 26, 2002), available at <http://www.icann.org/committees/gac/statement-on-reform-26jun02.htm> (last visited Jan. 23, 2003).

78. See Council of the European Union, Provisional Agenda of 1982nd Meeting of the Permanent Representatives Committee (Part I) on Wednesday

November 2002<sup>79</sup> and the last Telecommunications Council Meeting in December 2002.<sup>80</sup>

While in the European inter-institutional arena ICANN is on its way to becoming routine, and the Commission's negotiating power in GAC is fully recognized at home, the Commission has been able to move a step forward in consolidating its position in the GAC and via the GAC toward ICANN. This is made clear from the results of the Council meeting in December 2002:

INTERNATIONAL MANAGEMENT OF THE  
INTERNET—REFORM OF ICANN

The Council heard a report from the Commission on international management of the Internet, and in particular on the reform of ICANN (Internet Corporation for Assigned Names and Numbers), the non-profit-making organisation which has co-ordinated the Internet domain name system since 1998.

The Commission's report focused on an ICANN meeting held in Shanghai from 27 to 31 October, the results of which it considers to be very positive for the European Union. The Commission has agreed to provide, on an interim basis from 1 December, the secretariat for Government Advisory Committee, the body through which national governments participate in ICANN, advising it on matters that concern them, through non-binding recommendations.<sup>81</sup>

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23 (14.00) and Monday 28 (15.00) October 2002, at Item 13, 13307/02, (OJ/CRP1 35) (Oct. 21, 2002).

79. See Council of the European Union, Provisional Agenda of 1986th Meeting of the Permanent Representatives Committee (Part I) on Wednesday 20 (10.15) and Friday 22 (10.15) November 2002, at Item 7, 14375/02, (OJ/CRP1 39) (Nov. 18, 2002).

80. See Council of the European Union, Provisional Agenda of 4272nd Meeting of the Council of the European Union (Transport, Telecommunications and Energy) on Thursday 5 (09.30) and Friday 6 December 2002 (10.30), at Item 11, 15008/02 OJ CONS 70, (TRANS 311, TELECOM 64, ENER 301) (Dec. 3, 2002).

81. Council of European Union, 2472nd Council Meeting-Transport, Telecommunications and Energy-Brussels, 5-6 December 2002, at 21, 15121/02 (Presse 380).

### III. EUROPEAN UNION ICANN-RELATED POLICIES PART II: TOWARD A .EU REGISTRY

#### A. First Preparations and Motivation

The creation of a .EU TLD was one of the 2001 targets of the eEurope-Action plan, launched at the Special European Council of Lisbon on March 23 and 24, 2000: “The Commission will support the creation of an .EU Top Level domain to encourage cross-border electronic commerce within the EU and assist those companies wishing to establish an EU-wide Internet presence.”<sup>82</sup>

Why exactly the European Union would get involved in the process of setting up a domain has to be viewed in the “historical context” of three years ago. The main motivation was industrial policy. Internet use in the Internal European Union Market had to be encouraged. In order to encourage the use of the new technology, confidence-building measures were thought to be a necessity against the background of diversity in language, culture, and legal systems. TLDs, the landmarks of the new territory, not only provided orientation as to brands for goods and services, but they could also provide guidance on what to generally expect, if there was an appropriate registry policy. TLDs like “.com”, while certainly attractive for European Union businesses, did not yet provide any such additional confidence-building information. There might even be no businesses at all under such a sign. Several European Union member states, such as France<sup>83</sup> and, less differentiated, the United Kingdom,<sup>84</sup> had already used “their” ccTLD name<sup>85</sup> allocation policy

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82. See eEurope, *supra* note 29, at 9.

83. “L’AFNIC s’efforce de faire des zones de l’espace de nommage français (‘.fr’; ‘.re’) un espace de confiance. Son mode d’enregistrement fait d’elle une des zones les mieux gérées au monde.” [AFNIC undertakes everything to set up a French name space under the .fr and .re [for the Island of Réunion] domains as domains of trust. The registration procedures make this one of the best administered name spaces.] Association Française pour le Nommage Internet en Coopération: Présentation de l’AFNIC, at <http://www.nic.fr/presentation/confiance.html> (last visited Jan. 23, 2003). For the name space policy see Association Française pour le Nommage Internet en Coopération: Chartes de Nommage, at <http://www.afnic.asso.fr/enregistrement/nommage.html> (last visited Jan. 23, 2003).

84. See Nominet.uk: Choosing a Domain Name, at <http://www.nic.uk/news/guides/reg1.html> (last visited Jan. 23, 2003).

to introduce additional contextual information and to watch over the purity of its enforcement.

During the preparatory process, consultation meetings with the European Internet community had taken place largely through the European Community Panel of Participants in Internet Organisation and Management (EC-POP).<sup>86</sup> In addition, the developments in ICANN had not yet produced any extension of available generic top-level domains (gTLDs). Last but not least, .EU had symbolic value: The European Union, in the broadest possible meaning of the word, was going to have its own “space” on the Internet.

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85. See ICANN: March 2000 ICANN Meeting in Cairo: ccTLD Delegation and Administration Policies, at <http://www.icann.org/cairo2000/ctld-topic.htm> (last modified Mar. 7, 2000).

The domain-name system was implemented in the mid-1980s and now employs approximately 250 ‘top-level domains’ or ‘TLDs’ (the string, such as .com, to the right of the last period in the domain name). These TLDs currently consist of two or more letters. Two-letter TLDs are referred to as ‘country-code top-level domains’ or ‘ccTLDs,’ because those codes correspond to the two-letter abbreviations for countries (such as .dk for Denmark) or external territories (such as .gl for Greenland) that are presented on the ISO 3166-1 list. Longer TLDs are known as ‘generic top-level domains’ or ‘gTLDs’; there are currently seven of these.

ccTLDs have been established to facilitate and promote the spread of the Internet globally. They are delegated by the Internet Assigned Numbers Authority (IANA) to designated managers, who operate the TLDs according to local policies that are adapted to best meet the economic, cultural, and linguistic circumstances of the country or territory involved. The global policies regarding the operation of ccTLDs, and concerning the circumstances under which a delegation will be made or changed, were originally developed by the IANA in the late 1980s. As the Internet has spread globally and shifted to commercial use, these policies have evolved at the IANA.

*Id.*

86. Since February 2000, the European Commission had provided the organizational backup for the EC-POP, a self-organized group which commented on ICANN developments and became involved with the preparations of the .eu registry. See EC Panel of Participants in Internet Organisation and Management (EC-POP): The Dot EU TLD Registry Proposal, at <http://www.ec-pop.org/> (last visited Jan. 23, 2003). For the comprehensive report on that issue by EC-POP-s Interim Steering Group in September 2000, see EC Panel of Participants in Internet Organisation and Management (EC-POP): The Dot EU TLD Registry Proposal [hereinafter Panel of Participants], at <http://www.ec-pop.org/1009prop/> (last visited Jan. 23, 2003).

*B. The ISO Issue*

Perhaps initiating .EU was also seen as a telling test case for the flexibility of then-existing Internet governance structures, the role of ICANN, and the position of the United States government. .EU did not belong to those abbreviations that directly qualified as “country” code TLDs. It was not on the ISO 3166-1 list referenced in the ICANN ICP-1 policy document<sup>87</sup> on country code delegations and was only on the list of ISO 3166 reserved codes—in fact, for possible Euro currency use.<sup>88</sup> By preparing that policy, IANA already had tried to avoid the potentially controversial issue of having to decide which entity should be regarded as a country.<sup>89</sup>

The ISO issue was resolved fairly quickly. In May 1999, the Commission asked the ISO 3166 Maintenance Agency to agree to using the reserved .EU code for an Internet TLD.<sup>90</sup> ISO agreed<sup>91</sup> and “[d]ecided to extend the scope of the reservation of the code element .EU to cover any application of ISO 3166-1 that needs a coded representation of the name European Union,” including the use of a TLD.<sup>92</sup> In July 2000, the European Union sent a request for delegation to ICANN.<sup>93</sup> In August 2000, in an interim reply, ICANN described the general function of the ISO reference and assured

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87. See ICANN, ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation) (May 1999), at <http://www.icann.org/icp/icp-1.htm> (last visited Jan. 23, 2003).

88. See European Commission, The Creation of the .EU Internet Top Level Domain (Commission Working Paper) (Feb. 2, 2000) [hereinafter Working Paper], available at <http://europa.eu.int/ISPO/eif/InternetPoliciesSite/DotEU/dotEU-en.pdf> (last visited Jan. 23, 2003).

89. See Memorandum from Jon Postel, Information Sciences Institute, Network Working Group to the Internet Community (Mar. 1994), available at <http://www.isi.edu/in-notes/rfc1591.txt>.

90. See Working Paper, *supra* note 88, at 4.

91. See *id.* at 4 n.14 (citing Letter from the ISO 3166 Maintenance Agency to the Commission of 7 September 1999).

92. *Id.* at 4 (quoting Letter from the ISO 3166 Maintenance Agency to the Commission of 7 September 1999). For reference, see also Letter from Erkki Liikanen, Member of the Commission, to Mike Roberts, CEO and President ICANN, Regarding .eu Top-Level Domain (July 6, 2000) [hereinafter Liikanen Letter], available at <http://www.icann.org/correspondence/liikanen-letter-06jul00.htm>.

93. See Liikanen Letter, *supra* note 92.



speedy treatment of the request.<sup>94</sup> Consequently, in September 2000 the ICANN Board, without direct reference to the .EU request, passed a resolution that was somewhat cryptic for those not familiar with the fine details of the E.U.-ICANN exchanges:

It is therefore RESOLVED [00.74] that the IANA staff is advised that alpha-2 codes not on the ISO 3166-1 list are delegable as ccTLDs only in cases where the ISO 3166 Maintenance Agency, on its exceptional reservation list, has issued a reservation of the code that covers any application of ISO 3166-1 that needs a coded representation in the name of the country, territory, or area involved . . . .<sup>95</sup>

Solving the ISO issue, however, did not answer the questions of who should run such a registry and what it would offer as added value.

### C. *The History of the .EU Regulation*

In February 2000, a European Commission Working Paper<sup>96</sup> (“Working Paper”) summarized the situation as follows:

The limited alternatives available in Europe have given rise to individuals, companies and organisations seeking registrations in the World Wide Web in the US-Based existing TLDs, (e.g., .COM), and in other TLDs elsewhere.

...

In view of the size and economic importance of the European Union and the extensive use that could be made of a .EU TLD, both for Electronic Commerce and for the European Institutions, the European Commission will request the ICANN Board to delegate the .EU TLD on the basis of a decision by the ISO 3166 Maintenance Agency to extend the reservation of the existing EU code for the purposes of the Internet.<sup>97</sup>

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94. Letter from Michael M. Roberts, CEO and President, ICANN, to Erkki Liikanen, Member of the Commission, Regarding .eu Top-Level Domain (Aug. 10, 2000), available at <http://www.icann.org/correspondence/roberts-letter-to-liikanen-10aug00.htm>.

95. Preliminary Report, ICANN, Special Meeting of the Board (Sept. 25, 2000), available at <http://www.icann.org/minutes/prelim-report-25sep00.htm#00.74>.

96. Working Paper, *supra* note 88.

97. *Id.* at 1, 5.

Throughout the preparation of the Working Paper and over the whole process, the European Commission kept in close contact with the businesses and public sector institutions in the European Union through, *inter alia*, the already mentioned EC-POP group.<sup>98</sup> The Working Paper invited comments from interested parties, and some ninety responses reached the Commission.<sup>99</sup> These responses were integrated into a Communication from the Commission to the European Parliament and the Council<sup>100</sup> dated July 2000. During this same time, the Commission set out to settle the ISO-issue with ICANN.<sup>101</sup>

The July 2000 Communication summarized the responses to the Working Paper and organized them around a number of topics:

1. The added value of the proposal for .EU

The Commission stressed the positive Internal Market aspects. It also pointed to the “confidence element” if connecting registration to certain qualifying conditions. The Commission, however, added a cautious note to such inclinations:

It must however be borne in mind that domain name registration is an automatic, computerised process that, in a moderately successful Registry, may involve processing thousands of applications every day. Consequently policies favouring distinctive features for the future TLD, would have to be implemented in practice at a reasonable cost.<sup>102</sup>

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98. See Panel of Participants, *supra* note 86.

99. See European Commission, The Creation of the .EU Internet Top Level Domain: Responses, available at <http://europa.eu.int/ISPO/eif/InternetPoliciesSite/DotEU/responses.html> (last modified May 17, 2000). For a summary of the responses see European Commission, The Creation of the .EU Internet Top Level Domain: Analysis of Responses to Commission Working Paper (COM/2000/153) (February 2, 2000), available at [http://europa.eu.int/ISPO/eif/InternetPoliciesSite/DotEU/Analysis\\_of\\_response\\_s.html](http://europa.eu.int/ISPO/eif/InternetPoliciesSite/DotEU/Analysis_of_response_s.html).

100. See Commission of the European Communities: Communication from the Commission to the European Parliament and the Council: Internet Domain Name System: Creating the .EU Top Level Domain, COM(2000)421 final [hereinafter Internet Domain Name System], available at [http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000\\_0421en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0421en01.pdf) (last visited Jan. 28, 2003).

101. See *id.* at Part 3.2.

102. *Id.* at 5.

## 2. Constitution of the registry organization

Here the Commission remained fairly vague: "The Commission is facilitating and actively participating in this process in order to help identify the most appropriate structures and, in consequence, the framework measures that should be taken by the European institutions."<sup>103</sup>

## 3. The role of the European Union

This point was perhaps the most important point in view of the relationship to the member states and the other European Union institutions. The role of the European Union was contested in some of the responses. Here again, the Commission was not too specific, except confirming that it was intent to stay in the game:

The Commission therefore envisages that it will participate on behalf of the European Union in the overall policy formation process for the .EU Domain. It will facilitate the creation of an adequate structure together with representatives of appropriate interests drawn from suppliers and users of Internet services in order to define broad policy guidelines.

The organisation in charge of the operational registration of domain names under .EU (the Registry) would be independent from the policy structure. The Commission envisages to designate the Registry either in response to a consensus proposal from the European Internet community, or if necessary following evaluation of the results of a public call for expressions of interest. It is envisaged that the Registry organisation would be a not-for-profit entity.<sup>104</sup>

\* \* \* \* \*

With regards to principal registry policies and jurisdictional issues, the Commission had not made up its mind yet, particularly as to whether and how a .EU should be organized into sub-domains. Jurisdiction, of course, remained a matter of International Private Law; and only under some restraining conditions would a .EU registry be able to prove its advantages. If a registry were situated in

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103. *Id.*

104. *Id.* at 6.

a European Union country, and the registrants and those being registered were placed in European Union countries, then the contesting parties would come under the umbrella of the previously named Brussels Convention<sup>105</sup> (now Brussels I Regulation<sup>106</sup>).<sup>107</sup>

The Commission was also not yet decided on how exactly any .EU registry should interact with the national ccTLD registries in the member states. Furthermore, there was an even more gripping question: What about the European element in the European Union domain? Should businesses from European, but non-European Union member states, be allowed to register under .EU? This question, the Commission suggested, should be dealt with when the registry came into existence.<sup>108</sup>

The Commission then sketched somewhat generally formulated proposals on the next steps. At least these proposals provided some indication that a .EU registry would follow a public policy oriented approach, providing, one might add, a bit of a contrast to a gTLD like .com.

- (1) In the light of these consultations, the Commission will draw conclusions for the legal framework for the operation of the system, including the designation of the entity in charge of running the .EU Registry and the guidelines for its registration policy, which will include measures to counter the speculative and abusive registration of names. These conclusions will form the subject of a further Communication to the European Parliament and the Council.
- (2) Ensure that the responsibilities of the EU public authorities towards the economy at large, the deployment of the information society in Europe and the character of public resource of the .EU Domain

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105. The Brussels Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1990 O.J. (C 189) 2 [hereinafter *The Brussels Convention*].

106. Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

107. *See* Internet Domain Name System, *supra* note 100, at 7.

108. *See id.* at 7–8.

Name are effectively linked to the policy of the not-for-profit entity in charge of its operation.

- (3) Report to and maintain a dialogue with the Council and the European Parliament on the results of these actions and its contacts with the US Government and ICANN.<sup>109</sup>

Time was running short if the objective from 2001 was still to be met. In December 2000, a regulatory proposal—as announced in the quotation above—was introduced in the next Communication of the Commission on the issue entitled *Proposal for a Regulation of the European Parliament and of the Council on the implementation of the Internet Top Level Domain .EU*.<sup>110</sup>

This proposal also clarified European Union competence to those still in doubt. It referred to Article 156 of the Treaty establishing the European Community<sup>111</sup> and thus connected the action to the objectives of trans-European networks as defined below:

1. To help achieve the objectives referred to in Articles [relating to the Internal Market and economic and social cohesion] and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.
2. Within the framework of a system of open and competitive markets, action by the Community shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island,

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109. *Id.* at 9.

110. Commission of the European Communities: Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the Internet Top Level Domain “.EU” (COM(2000)827 final - 2000/0328(COD)), 2001 O.J. (C 96/E) 333 [hereinafter Proposal: European Parliament Regulation].

111. See EC TREATY, *supra* note 11.

landlocked and peripheral regions with the central regions of the Community.<sup>112</sup>

The instrument chosen in the proposal was a regulation rather than a directive.<sup>113</sup> The proposal still was not very specific on the registry policies. The Commission was asked to develop such policies together with the registry and the committee responsible for the regulatory framework for electronic communications, thus embedding registry policy into the framework of overall electronic communication regulation.<sup>114</sup> The proposal referred to avoiding illegal name space use and the dispute resolution process—which should take into account, but not necessarily adopt, the World Intellectual Property Organization (WIPO) settlement process.

In June 2001, the proposal went to the Telecommunications Council meeting. The Council reached an informal “common orientation” and referred the issue to the Committee of Permanent Representatives for finalization, who would take into account the opinion of the European Parliament.<sup>115</sup>

The First Reading of the Commission’s Proposal in the European Parliament led to a fair amount of amendments.<sup>116</sup> The

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112. *Id.* art. 154.

113. Regulations create directly binding obligations for those subjected to that regulation; directives need transformation into national law by the member states. In this case the addressee was the European Commission.

114. See Proposal European Parliament Regulation, *supra* note 110, art. 4.

115. For results of that Council Meeting, see Press Release, European Commission, 2364th Council Meeting-Transport/Telecommunications-Luxembourg, 27/28 June 2001, 10235/01 (Presse 257), available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=PRES/01/257/0|AGED&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/01/257/0|AGED&lg=EN) (last visited Jan. 28, 2003). For the text of the “common orientation” itself, see Council of the European Union, Outcome of Proceedings of Council on 27 June 2001: Proposal for a Regulation of the European Parliament and of the Council on the “.EU” top level domain, 10425/01 (ECO 200, CODEC 675) (June 29, 2001), available at <http://register.consilium.eu.int/pdf/en/01/st10/10425en1.pdf>.

116. See Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the Internet Top Level Domain “.EU,” COM(00)827 final at 154 [hereinafter Implementation of the Internet Top Level Domain .EU]. For amendments, see Implementation of the Internet Top Level Domain “.EU”: Proposal for a European Parliament and Council Regulation on the Implementation of the Internet Top Level Domain “.EU,” (COM(2000)827-C5-0715/2000-2000/0328(COD)), 2002 O.J. (C 65) E/147 [hereinafter Proposal Amendments].

proposed amendments referred to, *inter alia*, data protection;<sup>117</sup> but most pointedly, the Parliament had a different view on the institutional setting of the registry. The Parliament did not (and could not) intervene in the comitology set-up, which placed the registration policy-making of the Commission into the framework of the Electronic Communications Committee, as suggested in the Commission's proposal. Nevertheless, the Parliament suggested that the registry itself be counseled by a "Policy Advisory Board." This amendment was resonant with the memories of the at-large elections and the Parliament's then-expressed view on the necessary democratic element in Internet governance:<sup>118</sup> "[The Policy Board] shall include representatives from consumer/user groups, industry, including small and medium-sized businesses, trade unions and professional associations, Internet service providers, intellectual property rightholders and public authorities, including the democratically elected representatives of the peoples of Europe."<sup>119</sup>

The First Reading was just the beginning of a somewhat complicated (but not uncommon) consolidation process between the European Union institutions in the co-decision procedure<sup>120</sup> as required for trans-European network measures. In October 2001, the Commission took note of Parliament's proposed amendments and introduced an amended proposal for the regulation.<sup>121</sup> The Commission preferred to see the Policy Advisory Board as an option rather than a necessity.<sup>122</sup> In November 2001, the Council took its formal "Common Position" on the proposed regulation; it did not mention a Policy Advisory Board,<sup>123</sup> but at least it conceded a recital:

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117. See Proposal Amendments, *supra* note 116, amend. 5.

118. See European Parliament Resolution, *supra* note 51.

119. Proposal Amendments, *supra* note 116, amend. 18.

120. See EC TREATY, *supra* note 11, art. 251. For a short thirty-page description of the co-decision procedure and its variations, see Co-Decision Guide, available at <http://ue.eu.int/codec/en/EN.pdf> (last visited Jan. 28, 2003).

121. See Amended Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the Internet Top Level Domain ".EU," COM(01)535 final, available at [http://europa.eu.int/eur-lex/en/com/pdf/2001/en\\_501PC0535.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0535.pdf) (last visited Jan. 28, 2003).

122. See *id.* at 5.

123. See Common Position (EC) No 9/2002 Adopted by the Council on 6 November 2001 with a view to adopting Regulation (EC) No . . . /2002 of the European Parliament and of the Council of . . . on the implementation of the

(20) When reference is made to interested parties, provision should be made for consultation encompassing, in particular, public authorities, undertakings, organisations and natural persons. The Registry could establish an advisory body to organise such consultation.<sup>124</sup>

Still, in November 2001, the Commission issued its opinion on that Common Position.<sup>125</sup> As to the Policy Advisory Board, the Commission suggested:

Recital 20 (new): this recital seeks to clarify the meaning of 'interested parties' in article 5.3, by proposing that consultation with such parties should include public authorities, undertakings, organisations and natural persons. In reflecting on the Parliament's proposal for a Public Advisory Body to advise on registration of second-level domains, the Council's proposal refers in this recital to the possibility for the Registry to set up an advisory body to organise such consultation. The Commission can agree to this proposal, with the proviso that any advisory body should not be an exclusive mechanism for consultation and that all interested parties, whether members of such a body or not, are free to participate in any consultation. Such an advisory body should be established by the Registry itself.<sup>126</sup>

In February 2002, the proposal received its Second Reading<sup>127</sup> in the European Parliament. This Reading resulted in some more

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.eu Top Level Domain (2002/C 45 E/03), 2002 O.J. (C 45 E/53), available at <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/ce045/ce04520020219en00530059.pdf>.

124. *Id.*

125. See Commission of the European Communities: Communication from the Commission to the European Parliament Pursuant to the Second Subparagraph of Article 251(2) of the EC Treaty Concerning the Common Position of the Council on the Adoption of a Regulation of the European Parliament and Council on the Implementation of the .eu Top Level Domain/\* SEC/2001/1758 final-COD 2000/0328 \*//, available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52001SC1758](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52001SC1758) (last visited Jan. 28, 2003).

126. *Id.*

127. See Implementation of the Internet Top Level Domain .EU, *supra* note 116.



amendments. Specifically, on the issue of the Policy Advisory Board, all that was left was the following recital:

- (21) When reference is made to interested parties, provision should be made for consultation encompassing, in particular, public authorities, undertakings, organisations and natural persons. The Registry could establish an advisory body to organise such consultation.<sup>128</sup>

#### D. The Regulation

In March 2002, the Commission gave its own comments on Parliament's proposals from the Second Reading.<sup>129</sup> Subsequently, in March 2002, the Council approved the results of the Second Reading.<sup>130</sup> On April 30, 2002, *Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the Implementation of the .eu Top Level Domain*, was finally published in the Official Journal.<sup>131</sup> Recital 20 became Recital 21 but its wording was unchanged.

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128. Position of the European Parliament Adopted at Second Reading on 28 February 2002 with a View to the Adoption of European Parliament and Council Regulation (EC) No . . . / . . . on the Implementation of the .eu Top Level Domain, 2002 O.J. (C 293 E/63), available at <http://europa.eu.int/eurlex/en/dat/2002/ce293/ce29320021128en00630069.pdf> (last visited Jan. 28, 2003).

129. See Commission of the European Communities: Opinion of the Commission Pursuant to Article 251(2), Third Subparagraph, Point (c) of the EC Treaty, on the European Parliament's Amendments to the Council's Common Position Regarding the Proposal for a Regulation of the European Parliament and of the Council on the Implementation of the .eu Top Level Domain Amending the Proposal of the Commission Pursuant to Article 250(2) of the EC Treaty, COM(02)165 final at 2, available at [http://europa.eu.int/eurlex/en/com/pdf/2002/en\\_502PC0165.pdf](http://europa.eu.int/eurlex/en/com/pdf/2002/en_502PC0165.pdf) (last visited Jan. 28, 2003).

130. See European Union, Council of the European Parliament, Regulation of the European Parliament and of the Council on the Implementation of the .eu Top Level Domain, 2000/0328(COD)PE-CONS3613/02 (ECO 75, CODEC 304) (Mar. 15, 2002), available at <http://register.consilium.eu.int/pdf/en/02/st03/03613en2.pdf> (last visited Jan. 28, 2003); Press Release, European Commission, 2420th Council Meeting: Transport and Telecommunications, Brussels, 25/26 March 2002, available at [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=PRES/02/78|0|AGED&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/02/78|0|AGED&lg=EN) (last visited Jan. 28, 2003).

131. See European Union, Council of the European Parliament: Council Regulation 733/2002 on Implementation of the .eu Top Level Domain, 2002

The Regulation requires a registry, in order to be established, to deal with the organization, administration, and management of the .EU TLD.<sup>132</sup> This registry has to be a not-for-profit organization, operated for the public interest.<sup>133</sup> Specifically, the registry shall:

- (a) organise, administer and manage the .eu TLD in the general interest and on the basis of principles of quality, efficiency, reliability and accessibility;
- (b) register domain names in the .eu TLD through any accredited .eu Registrar requested by any: (i) undertaking having its registered office, central administration or principal place of business within the Community, or (ii) organisation established within the Community without prejudice to the application of national law, or (iii) natural person resident within the Community;
- (c) impose fees directly related to costs incurred;
- (d) implement the extra-judicial settlement of conflicts policy based on recovery of costs and a procedure to resolve promptly disputes between domain name holders regarding rights relating to names including intellectual property rights as well as disputes in relation to individual decisions by the Registry. This policy shall . . . take into consideration the recommendations of the World Intellectual Property Organisation. The policy shall provide adequate procedural guaranties for the parties concerned, and shall apply without prejudice to any court proceeding;
- (e) adopt procedures for, and carry out, accreditation of .eu Registrars and ensure effective and fair conditions of competition among .eu Registrars;
- (f) ensure the integrity of the databases of domain names.<sup>134</sup>

The Commission, after consultation with the registry and with the assistance from the Communications Committee (along with

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O.J. (L 113) 1 [hereinafter Council Regulation 733/2002], available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_113/l\\_11320020430en00010005.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_113/l_11320020430en00010005.pdf) (last visited Jan. 30, 2003).

132. See *id.* art. 1, para. 1.

133. See *id.* art. 3, para. 2.

134. *Id.* art. 4, para. 2.

representatives from the member states), which will operate in the context of the Regulatory Framework,<sup>135</sup> will adopt public policy rules for the register and the registration process.<sup>136</sup> These policies shall comprise:

- (a) an extra-judicial settlement of conflicts policy;
- (b) public policy on speculative and abusive registration of domain names including the possibility of registrations of . . . temporary opportunities for the holders of prior rights recognised or established by national and/or Community law and for public bodies to register their names;
- (c) policy on possible revocation of domain names, including the question of *bona vacantia*;
- (d) issues of language and geographical concepts;
- (e) treatment of intellectual property and other rights.<sup>137</sup>

The regulation further makes it clear that the .EU TLD will operate in conjunction with existing national registries operating ccTLDs,<sup>138</sup> and that the “first come, first served” method can be used.<sup>139</sup>

#### *E. Further Progress*

By now, the member states were consulted on the implementation procedure.<sup>140</sup> The selection criteria for the registry were concluded. According to Article 5.2 of the Regulation, the member states were also consulted about their ability to notify the Commission and other member states of lists of broadly recognized

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135. See The European Parliament and the Council of the European Union: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, art. 22(1), 2002 O.J. (L 108) 33, 47, available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_108/l\\_10820020424en00330050.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf) (last visited Feb. 8, 2003).

136. See Council Regulation 733/2002, *supra* note 131, art. 5, sec. 1.

137. *Id.* art. 5, sec. 1.

138. See *id.* at Recital 4.

139. See *id.* at Recital 20.

140. For the current state of the implementation process, see European Commission Information Society, A New Internet Top Level Domain: “.eu”: Procedural Steps After Adoption of the Regulation, at [http://europa.eu.int/information\\_society/topics/telecoms/internet/eu\\_domain/procedure/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/internet/eu_domain/procedure/index_en.htm) (last modified Jan. 7, 2003).

names relating to geographical or geo-political concepts which affect their political or territorial organization.<sup>141</sup> Finally, a call for the expression of interest to operate the registry for the TLD .EU was published in September 2002;<sup>142</sup> the call was closed in October 2002. By November, the evaluation was concluded with the assistance of independent external evaluators, the results of which are still subject to confidentiality. Thus, the final decision on the Registry is expected in February or March 2003. Consequently, the Commission has strongly discouraged pre-registration.<sup>143</sup>

#### IV. THE EUROPEAN UNION'S ICANN-RELATED POLICIES: AN ASSESSMENT AND SOME POTENTIAL CONSEQUENCES

##### *A. Assessing the Results*

This Article shows in some detail the slow and gradual construction of an "Internet Management Policy" of the European Union and the process of establishing a .EU registry to be run under the auspices of the European Commission.

The emphasis of this Article has been on European Union institutions, influenced by a certain tendency of European private actors to rely on the more traditional forms of representation in international fora. The exceptions to this are those large players that directly intervene on a more international level. This reliance—and the accepted responsibility by European Union institutions—is a compensation for the limitations of resources and linguistic difficulties smaller and medium-sized industries are facing. It is a compensation still needed in spite of increasing representation of such interests at the level of European institutions, since these representations are mainly meant for intra-European Union issues rather than for external relations.

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141. See Council Regulation 733/2002, *supra* note 131, art. 5, sec. 2.

142. See Commission of the European Communities, Call for Expressions of Interest for the Selection of the .eu TLD Registry (2002/C 208/08), 2002 O.J. (C 208) 6, available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c\\_208/c\\_20820020903en00060022.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_208/c_20820020903en00060022.pdf) (last visited Jan. 30, 2003).

143. See European Commission Information Society, A New Internet Top Level Domain: ".eu:" News, at [http://europa.eu.int/information\\_society/topics/telecoms/internet/eu\\_domain/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/internet/eu_domain/index_en.htm) (last modified Jan. 9, 2003).

In response to such expectations, and as a result of both developing an Internet governance policy and establishing a .EU regime, the European Commission has firmly established itself as a separate player, side-by-side with the European member states in the GAC and to the chaperone of Internet governance, the United States of America. Whether “separate” in this context also means “independent” remains difficult to assess from the outside. That is because any activity of any European Union institution will get feedback from the member states and other European Union institutions, all of whom watch each other carefully for any signs of overstepping the boundaries of competence. However, it can also safely be assumed, even if only for reasons of practicability, that internal regulatory requirements and practices still leave sufficient maneuvering space for day-to-day policy-making. This is true as long as the player is seen as to observe the basic rules, and if at the same time, the subject, while being important, is still not seen too important to remain *constantly* in the focus of the member states and the other institutions.<sup>144</sup>

By running the Secretariat for the GAC, the Commission has not only become a rallying point for broader European Union representation, but also for the GAC in general. With the basic establishment of the .EU registry, the Commission so far has shown how to effectively introduce a domain in spite of formal difficulties (for example, a complex internal decision-making structure, which it is facing within the European Union institutional framework). It also hopes to provide a model for a complex regional domain.

In this process, the European Union documents quoted have reiterated the importance of the Internet domain name system and its technical and organizational maintenance as a global resource and have emphasized the global dependency on this resource. The

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144. In addition to the European Union as an institution (represented by the European Commission), all European member states are represented on the list of accredited GAC representatives with the sole exception of Greece. See Letter from Dr. Paul Twomey, Chairman, Governmental Advisory Committee of ICANN, to the Internet Community (July 9, 1999), *available at* [http://www.noie.gov.au/projects/international/gac/contact/gac\\_representatives.htm](http://www.noie.gov.au/projects/international/gac/contact/gac_representatives.htm). The representative of France by an editing error is listed under “Finland.” So the European Union—in its broader meaning—is represented by fifteen accredited members out of a total of seventy-nine as of December 2002. See *id.*

European Union, over the last four years, has finally come to realize, understand, and reaffirm by its own policies what Mueller has summed up as the essence of ICANN: "To understand ICANN one must first move beyond the hopeful notion that the Internet is intrinsically voluntary and cannot be institutionalized or controlled . . . . ICANN must be understood as a new international regime formed around a global shared resource."<sup>145</sup>

### *B. Some Reflections on Consequences*

#### 1. On the road to Public International Law rules

Policy statements and practices in international fora that are guided by such an understanding do have their consequences, and these consequences tend to be largely self-reinforcing. The European Union policies have helped to shape the policies and the position of the GAC in the general setting of ICANN. Reiterated policy statements and consequential practices, if issued by international bodies and the representatives of national states, help to shape future international practices. This in turn contributes to the body of international "soft law"<sup>146</sup> as a sort of short-hand reference to legitimacy, and finally, contributes to form the body of the Public International Law of Global Communications.

As with national communications law, the international law of communications is an area of law in search of a structure that would bring together more traditional areas like media and telecommunications law with the structures of Internet law. Additionally, the law of communications, certainly on the international level, is still in search of appropriate institutions. Some institutions have taken up some of the new issues for some time, such as WIPO<sup>147</sup> and its involvement in domain name mediation. Other institutions seem to have lost their attraction to some of these

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145. MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 217 (2002).

146. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 54–55 (7th ed. 1997).

147. See WIPO: Arbitration and Mediation Center: Domain Name Dispute Resolution Service, at <http://arbiter.wipo.int/domains/index.html> (last visited Jan. 30, 2003).

issues. For example, the International Telecommunications Union has failed, so far, to be given root administration functions.<sup>148</sup>

In terms of substance rather than locus, these policy statements and practices deal with the importance of a unique global resource, symbolized rather than represented by the “A-Root Server,” which is seen to be under the influence, if not possession, of one country while being needed by all countries. Only recently this position was again reiterated in the GAC:

As the GAC has previously noted, the Internet is a global resource, which supports world-wide economic and social interaction. The GAC notes that the issues arising from the co-ordination, at the overall level, of the technical aspects of the global Internet’s systems of unique identifiers are entrusted to one entity whose activities should appropriately reflect the global interdependency of the resource.<sup>149</sup>

## 2. Finally about water and communications

In other areas, in similar situations, Public International Law rules on the responsible sharing of unique resources have been developed for quite some time.<sup>150</sup> Such rules have been developed notably more recently in the Public International Law of the Environment.<sup>151</sup> One such principle is the principle of “equitable and reasonable utilization and participation,”<sup>152</sup> developed for rules on the access to and the quality and availability of—and here we are finally at what we had announced at the beginning of this Article—water resources. Similar Public International Law principles have developed in other contexts of water resources.<sup>153</sup>

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148. See International Telecommunication Union, at <http://www.itu.int/home/index.html> (last visited Jan. 30, 2003).

149. See ICANN, Communiqué of the Governmental Advisory Committee 30 October 2002, Shanghai, China, available at <http://www.icann.org/committees/gac/communique-30oct02.htm> (last modified Nov. 1, 2002).

150. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 230–34 (5th ed. 1998).

151. See WOLFGANG DURNER, COMMON GOODS: STATUSPRINZIPIEN VON UMWELTGÜTERN IM VÖLKERRECHT (2001).

152. G.A. Res. 51/229, U.N. GAOR, 51st Sess., Supp. No. 49, at 9, U.N. Doc. A/51/49 (1997); see also BROWNLIE, *supra* note 150, at 270.

153. Ian Brownlie names *inter alia*, international rivers, canals, and straits. See BROWNLIE, *supra* note 150, at 267, 272, 276.

In such situations, the Public International Law of the Environment asserts that the main holder of the resource is allocated a trustee function in relation to those dependent on that resource. Similarly, such a trustee function could be seen to fall on the United States of America as the holder of the resources that ensure end-to-end communication and upon which other countries are dependent.<sup>154</sup>

The trustee role is, in itself, a consequence of the Public International Law principle of national sovereignty.<sup>155</sup> Sovereignty, as the “personality right” of nation-states, is by its own implicit logic reflexive: You will have to respect my sovereignty as I am respecting your sovereignty. Consequently, the principle of sovereignty implies mutual respect of the sovereignty of others. This may limit the sovereign use that is being made of one’s “own” resource because of the possible impact of that resource’s use on the sovereignty of others. This in turn requires a system of mutual consideration—in this case for the operation of a global communication resource.

Other somewhat older and perhaps more vague Public International Law concepts might be invoked as well—for example, the “*res communis*,” which has mainly been used so far in the context of the High Sea or Outer Space.<sup>156</sup>

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154. For an example of first attempts to argue along these lines, see Deborah L. Spar, *The Public Face of Cyberspace*, in PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 344 (Inge Kaul et al. eds., 1999); see also Herbert Burkert, *ICANN-ein kommunikationsvölkerrechtliches Experiment?*, MEDIALEX, 2001, at 135.

155. See MALANCZUK, *supra* note 146, at 10.

156. Brownlie remarks:

The use of these terms is innocent enough providing not too much is read into them. They represent only a few basic rules and do not provide a viable regime of themselves. The *res communis* may not be subjected to the sovereignty of any state, general acquiescence apart . . . and states are bound to refrain from any acts which might adversely affect the use of the high seas by other states or their nationals. It is now generally accepted that outer space and celestial bodies have the same general character.

BROWNLIE, *supra* note 150, at 174–75 (citations omitted).



C. *European Union ICANN-Related Policies and Public  
International Law*

While content with the present ICANN regime and its reform process, European Union policies (and those of the GAC) contribute to transforming the ICANN structure into a format that might acquire a Public International Law life of its own. The use of some of the concepts invoked above might well provide additional legitimacy to these policies.

At this stage, however, it is time for several reservations:

- Public International Law, perhaps more than any other area of law, builds on *long* processes of explicit and occasionally tacit consensus-building mechanisms.<sup>157</sup> No such explicit reference to one of those principles mentioned above has yet been made. In fact, it seems from the documents quoted, that while always a possibility, current policies by all relevant actors want to keep the issue just under the level of Public International Law, even if, as we have seen at least in one of the documents,<sup>158</sup> reference has been made to international law implications. However, upon closer reading, these references related to Private International Law rather than Public International Law.
- Public International Law is seen to lack proper enforcement procedures.<sup>159</sup> And in the ICANN case, the main subject of possible Public International Law consequences would be the United States of America, and at least some European Union institutions tend to see this subject as a difficult one when it comes to International Law questions.<sup>160</sup>

157. See MALANCZUK, *supra* note 146, at 7.

158. See International Policy Issues, *supra* note 15 (explaining implications of the Internet globally).

159. See MALANCZUK, *supra* note 146, at 5.

160. See, e.g., European Parliament Resolution on Echelon, RSP/2002/2596-T5-0530/2002 of 7 November 2002, available at [http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SD OCTA=6&TXTLST=1&POS=1&Type\\_Doc=RESOL&TPV=PROV&DATE=071102&PrgPrev=PRG@TITRE|APP@PV2|TYPEF@TITRE|YEAR@02|Find@%45%63%68%65%6c%6f%6e|FILE@BIBLIO02|PLAGE@1&TYPEF=TITRE&NUMB=1&DATEF=021107](http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SD OCTA=6&TXTLST=1&POS=1&Type_Doc=RESOL&TPV=PROV&DATE=071102&PrgPrev=PRG@TITRE|APP@PV2|TYPEF@TITRE|YEAR@02|Find@%45%63%68%65%6c%6f%6e|FILE@BIBLIO02|PLAGE@1&TYPEF=TITRE&NUMB=1&DATEF=021107) (last visited Mar. 29, 2003); see also European Parliament Resolution of 5 September 2001 on the Existence of a Global System for the Interception of Private and Commercial Communications (Echelon Interception System) (2001/2098 (INI)), 2002 O.J. (C 72E) 221, 226, available at <http://europa.eu.int/eur->

In addition, even if one would follow the reasoning for trusteeship, and even if the United States national law would seem to accept such a responsibility, at least in principle,<sup>161</sup> in the context of Public International Law, it would still be at the discretion of the U.S. government to decide how to best handle this responsibility for the global communication infrastructure. Also, there would be a broad margin of appreciation with regard to the adequate manner of addressing this responsibility.<sup>162</sup>

Additionally, the European Union might want to keep ICANN-related policies on the political agenda rather than the legal agenda of transatlantic issues, thus providing a broader range of negotiation options. Communications issues observed with the Cybercrime Treaty,<sup>163</sup> the ongoing work at the OECD on the taxation of electronic commerce,<sup>164</sup> and the continuing business of privacy,<sup>165</sup> not to mention world trade issues and international security questions, illustrate the need for such an approach. This does not deny that there is no new material for possible conflict in ICANN issues themselves, such as the tension between those responsible for ccTLDs (particularly in the European Union area), ICANN, and eventually, the U.S. government. There might be some centrifugal

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[lex/pri/en/oj/dat/2002/ce072/ce07220020321en02210229.pdf](http://www.pri/en/oj/dat/2002/ce072/ce07220020321en02210229.pdf) (last visited Feb. 3, 2003).

161. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (c)–(f) (1986); Declaration of Henry H. Perritt, Jr., *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 389 (S.D.N.Y. 1999), available at <http://namespace.pgmedia.net/law/Perritt-Declaration.html> (last visited Jan. 30, 2003).

162. See Panel Statement, ICANN Study Circle, Responsibility for ICANN—Stability and Legitimacy (Feb. 4, 2001), available at <http://www.atlargestudy.org/Zurich-E.pdf> (last visited Jan. 30, 2003).

163. Although an instrument of the Council of Europe, it does affect European Union Internet policies. See Council of Europe, Convention on Cybercrime: Budapest, 23.XI.2001, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm> (last visited Jan. 30, 2003).

164. See Forum on Strategic Management, Tax Administration Aspects of Electronic Commerce: Responding to the Challenges and Opportunities: A Report from the Forum on Strategic Management to the Committee on Fiscal Affairs (Feb. 1, 2001), available at <http://www.oecd.org/pdf/M000015000/M00015520.pdf> (last visited Jan. 30, 2003).

165. See Data Protection, *supra* note 48.

forces at work, which might need orientation or re-orientation by reference to law.<sup>166</sup>

Last, but not least, the Public International Law arguments put forward here are still far from being generally accepted; almost all of these arguments remain contested in the highly dynamic environment of International Law. Borrowing an image from Gustave Flaubert (from which I vaguely remember but I am unable to verify), with its ICANN policies, the European Union has put strings into the sugar solution of Public International Law, and we may well see crystals

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166. See, e.g., Statement, CENTR, Statement on ICANN (July 30, 2002) (noting issues facing ICANN in carrying out its functions and setting forth the role and implications of ICANN's structure), available at <http://www.centri.org/news/CENTR-ICANN-statement.html> (last visited Jan. 28, 2003); Statement, CENTR, Comments on ICANN Zone Access Policy (Sept. 26, 2002) (building heavily on arguments already used in the *The Organisation and Management of the Internet International and European Policy Issues 1998-2000*), available at <http://www.centri.org/news/ICANN-Zone-Access-Comments.html> (last visited Jan. 30, 2003). The Zone Access Policy Statement states explicitly:

Delicate issues such as data protection laws vary from country to country, and the appropriate legal and responsible way to manage data must be determined on a local level. For many ccTLDs it is only appropriate to provide such data and responsibility to a party in their country (or the EU) which is subject to the same laws as the ccTLD manager.

....

It is our considered view that providing zone files to ICANN would constitute a breach of data protection laws that cover many jurisdictions within Europe. Although the EC directive 95/46/EC is implemented differently throughout Europe, the underlying principles are identical.

....

The Directive 96/9/EC of the European Parliament on the legal protection of databases empowers the creator of any database which requires the investment of considerable human, technical and financial resources, when said database can be replicated at considerably less expense.

As registries have a duty as trustees of a database that has been developed by and for the local community, they have a responsibility to use this power to protect the database against undesirable use by third parties.

*Id.* pt. 2. So arguments once provided by the European Union to steer ICANN into more traditional waters without challenging its basic role are used here to push ICANN into a more subsidiary role.

developing around these strings that could contribute to building a New Public International Law of Global Communications.

#### *D. Consequences of Consequences*

One of these “crystals” deserves a closer look. European Union involvement in ICANN-related issues has made it obvious that questions of technical coordination have public policy implications and that proper procedures for voicing these concerns must be implemented. In the ICANN context, after many changes—some of them under the influence of the European Union—these procedures seem to go the way of traditional international government-oriented regimes, even if not referred to as a Public International Law consequence. Transforming the structure of ICANN along the lines of more traditional forms of government cooperation must be seen as a contribution to “taming cyberspace,”<sup>167</sup> or as sort of a belated fulfillment of what Brian Winston (in a slightly different context) had once called the “law” of the suppression of radical potential (of new technologies).<sup>168</sup>

Still, the locus proper of policy-making is not going to be changed for the moment. The soon-to-be-reformed ICANN structure still seems to hold enough competitive advantages over other existing structures of international cooperation on global infrastructures, so as not to affect the mere existence of ICANN. ICANN, however, has a specific organizational “stain” from its past, and this stain may lead to unexpected consequences, particularly for the European Union. Participating in the ICANN policy-making process initially exposed the European Union to two specific challenges, which also touched upon the self-image of the European Union: transparency and representation.

Transparency, to the extent experienced in the ICANN context, is a cultural birthright ICANN received from the United States legal and cultural environment. While it is a point of controversy as to whether ICANN used this right wisely or used it at all, it contained sufficient attraction and challenges for at least some of the participants in the GAC. The European Union, at least, over the last years, has become increasingly familiar with the challenges of

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167. See MUELLER, *supra* note 145, at 265–67.

168. BRIAN WINSTON, *MISUNDERSTANDING MEDIA* 23 (1986).

transparency.<sup>169</sup> Thus, in the long run, and also in view of other regulatory policies on the European Union level,<sup>170</sup> transparency is being mastered.

The second challenge of participating in ICANN policy-making presented to the European Union policy makers has been the principle of representation. Again, the European Union is touched. Its political structure, too, suffers from its own representation problem. The member states' government representatives in the Council claim to represent the public interest of their countries. The European Parliament claims the public interests of the European citizens by whom it is elected, yet the European Parliament is still limited in its competences in comparison to the Council.<sup>171</sup> The "representation and legitimacy" tune that was heard throughout the debate on at-large-membership elections must have contained familiar notes for the European Union participants.

Traditional international fora of government cooperation have approached this problem (rather than solved it) by facilitating access by non-governmental organizations up to the point of establishing formal relationships.<sup>172</sup> Non-governmental organizations have their own problems as to whom they represent and as to the legitimacy of the procedure of representation. Nevertheless, a liaison with non-governmental organizations is now a well-established procedure for international organizations where government representatives had once claimed sole rights.<sup>173</sup>

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169. See Citizens' Portal, *supra* note 43.

170. Transparency of regulatory policies plays an important role. See Burkert, *supra* note 28, at 805.

171. See Institutions, *supra* note 7.

172. See, e.g., U.N. CHARTER art. 71, available at <http://www.un.org/Overview/Charter/chapte10.html> (last visited Jan. 30, 2003) ("The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations . . ."); see also United Nations Association of the United States of America, Non-Governmental Organization Affiliation with the U.N. (1999), available at <http://www.unausa.org/programs/coo/ngo.htm> (last visited Jan. 30, 2003) (providing information on "the history and nature of affiliation between [Non-Governmental Organizations] and entities within the United Nations (UN) system").

173. As to the role of non-governmental organizations in this context, see Herbert Burkert, *ICANN-ein Beispiel?*, in *WER REGIERT DAS INTERNET? ICANN ALS FALLBEISPIEL FÜR GLOBAL INTERNET GOVERNANCE* 347, 353 (Ingrid Hamm & Marcel Machill eds., 2001).

At least once, ICANN tried a different approach, and this experiment has become a stain on ICANN that has not gone away. There has been comprehensive critique in regards to the question of whether such a structure of representation has been basically adequate in the ICANN environment, or whether the procedures had been adequate and fair.<sup>174</sup> Regardless of this criticism, the ICANN experiment dared to go where no one had gone before. This reminds me of Ezra Pound's poem: "One hour was sunlit and the most high gods/ May not make boast of any better thing/ Than to have watched that hour as it passed."<sup>175</sup>

Regardless of the outcome, a structure was tried which provided a supplemental approach to representation in international organizations other than government representation or non-governmental organizations. It was direct representation.

The forms of at-large membership involvement may well be more satisfactory to the European Union and may also have their own legitimate reasons if "stability" is regarded as an essential value of this infrastructural resource. The European Union only needs to remember the recent activities of the European Convention<sup>176</sup> to recall that traditional forms of representation do need legitimization today rather than the more direct forms. The European Parliament's resolution<sup>177</sup> on the Communication on Internet governance and its suggested amendments as to a Policy Advisory Group for the .EU registry<sup>178</sup> were brief reminders of the still-existing attractiveness of at least the underlying concept.

## V. CONCLUSION

ICANN still has to show that it is able to adequately manage the coordination of governmental and private responsibility for a global resource that, although not necessarily scarce, depends in its current

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174. See, e.g., ICANN At-Large-Membership Study Committee, at <http://atlargestudy.org/> (last visited Feb. 3, 2003); see also the various studies listed at ALSC's "Call for Studies," at [http://atlargestudy.org/studies\\_list.shtml](http://atlargestudy.org/studies_list.shtml) (last visited Feb. 3, 2003).

175. See EZRA POUND, *Erat Hora*, in SELECTED POEMS 14 (1957).

176. The European Convention, at <http://european-convention.eu.int/bienvenue.asp?lang=EN&Content> (last visited Feb. 24, 2003).

177. See European Parliament Resolution, *supra* note 51.

178. See Implementation of the Internet Top Level Domain .EU, *supra* note 116, at E/63.

form on a single unifying structure. With its policies, the European Union is contributing to the stabilization of this structure with references to notions that have or might have Public International Law implications. In this process, the European Union was reminded of the values of transparency and representation. The European Union has made good progress in mastering the challenge of transparency, not only in the context of ICANN policy-making, but also with respect to its own governmental design. The representation issue, however, may prove to be more difficult. You may find yourself in a situation where you may call on the helpful spirits of Public International Law, on legal precedence, and even occasionally on a daring element of a possible new international regime, to help you in rooting and developing your own policies, but you may not be certain what these spirits might do once they have been called. This too recalls yet another poem, *Der Zauberlehrling* (*The Magician's Apprentice*) by Johann Wolfgang von Goethe. This poem deals with a magic trick on water.<sup>179</sup>

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179. See JOHANN WOLFGANG VON GOETHE, *DER ZAUBERLEHRLING* (Kurt-Bösch-Press 1990) (Text in German).