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Global Governance in the Information Age

**Skrifter fra Center for Internetforskning
Papers from The Centre for Internet Research**



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Information Age:
GBDe and ICANN as "Pilot
Projects" for co-regulation and a
new trilateral policy?**

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Skifter fra Center for Internetforskning
Papers from The Centre for Internet Research
Aarhus, Denmark 2001

Published by The Centre for Internet Research, Aarhus, August 2001.

Editorial board: Niels Brügger, Henrik Bødker, Rune Dalgaard, Claus Elmholdt, Jakob Linnaa.

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Printed at Trøjborgtrykkeriet, The Faculty of Arts, University of Aarhus.

Coverdesign: Thomas Andreasen

ISBN: 87-91163-02-1

ISSN: 1601-5371

ISSN: 1601-538X (electronic version)

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Global Governance in the Information Age: GBDe and ICANN as "Pilot Projects" for co-regulation and a new trilateral policy?

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Abstract: Globalization and the borderless Internet are changing not only the world economy but also the global systems of governance. The emergence of new global governance mechanisms like the "Internet Corporation for Assigned Names and Numbers" (ICANN) and the "Global Business Dialogue on eCommerce" (GBDe) can be seen as "pilot projects" to explore the feasibility of new policy mechanisms which go beyond the traditional governmental top-down system. Both institutions have introduced new principles in global policy-making like bottom-up coordination, rough consensus, openness and transparency. But they still have to demonstrate their legitimacy and accountability. The publication concludes that with the ongoing globalization and informatisation of law and policy-making, new governance structures will appear which go beyond a system based on the territorial and personal sovereignty of the nation state.

Keywords: Internet Governance, GBDe, ICANN, Nation State, International Law, Domain Name System, New Trilateralism, Global Information Society

Globalization challenges many of our notions of national and international governance. Since the time of the Peace of Westphalia (1648), the world's governance systems have been based mainly on the nation-state. The

sovereignty of nations is the cornerstone of the contemporary system of international relations. The principle of "sovereign equality" is the basis of modern international law, codified in the Charter of the United Nations. In the industrial age, the constitution of a nation-state also became a precondition for the development of a national economy.

As the industrial society systematically transforms into a global information society (GIS), many issues are moving outside of national governance arenas and governmental control. This "information revolution," like other revolutions in the past, will undoubtedly have consequences for our various systems of governance. The question which is arising is: will the traditional rules, procedures and institutions that reflected the needs of the industrial age have to be only adjusted and "modernized" to keep pace with the new circumstances, or will the winds of change lead to a totally new global governance system extending beyond the nation-state and the traditional governmental system as we know it from the last two centuries?

NATIONAL SOVEREIGNTY AND CYBERSPACE

After the political and industrial revolutions of the 18th and 19th century, kingdoms were substituted by representative democracies. National governments and national parliaments together with an independent judiciary became the essential institutions of the governance systems. National parliaments created the legal systems, national governments executed the policies, and courts settled conflicts within the country. If national laws, policies and conflicts took on international dimensions, governments embarked on negotiations with other governments and concluded bi- or multilateral treaties requiring ratification by national parliaments before they were enacted. Although non-governmental actors like private industry or non-governmental organizations (NGOs) got growing influence in international policy and law-making in the 2nd half of the 20th century, international law is up to our days de facto an "intergovernmental law." International organizations, including the whole system of the United Nations, are nothing more than a contractual arrangement among governments that delegate (a limited number of) rights to them. Sovereignty remained and remains with the nation-state and its government.

Territorial and Personal Sovereignty

Sovereignty of a nation-state is based on two elements: sovereignty over a

territory and sovereignty over citizens. The principle of “sovereign equality of states” implies that “each state has the right freely to choose and develop its political, social, economic and cultural system.”¹ This term encompasses primarily the national government, which acts as the representative of a nation-state. The government has, in principle, all the necessary (political) means to execute this sovereignty. If it is democratic, the government has also the legitimacy to act on behalf of its citizens. And if it is well organized it is in its complexity more efficient than other institutions.

With the information revolution and the emergence of the Internet, these assumptions are beginning to appear in a different light. Cyberspace is not part of national territory like the Airspace. Cyberspace can also not be compared with the borderless Outerspace. The Outerspace is not accessible for everybody and only a limited number of governmental controlled, sponsored or licensed activities take place in it. Cyberspace is an open place for everybody with no territorial boundaries. Internet Communication differs substantially from Radio and Tele Communication. When in the past communication crossed borders, like telephony or broadcasting, states adopted national laws and governments concluded treaties among them, like the international telecommunications conventions, where they introduced legal regimes such as licensing of broadcasters, allocation of frequencies, tapping of telephone calls, guidelines for programme content or interrupting communications with other countries under certain circumstances.

There is no similar legal arrangement concerning the Internet. While a radio or television transmitter and a public switched telephone network (PSTN) can be more or less controlled by governments, the decentralized IP network is nearly uncontrollable by traditional means. Messages are sent in distributed packages, which makes tapping difficult, computer addresses do not have a country and city code (like telephone numbers) which complicates the determination of the geographical location of a computer. And there is no central authority over internet communication. If national governments would try to get Internet communications within their territory under “sovereign control” like broadcasting and telecommunications, it would create enormous costs and could end like Don Quixote's battle with the windmills.

Not only is “territorial sovereignty” undermined by the Internet, it also

1. U.N.-Resolution 2526 (XXV), Declaration on Fundamental Principles of International Law, 25th of October 1970.

challenges sovereignty over citizens. Individuals do not lose their citizenship if they enter cyberspace, but as "netizens" they have numerous opportunities to escape from national regulations and governmental supervision by changing identities, using servers from outside the country, and bypassing national laws. Within a country, the law defines the rights and duties as well as freedoms and responsibilities of citizens and legal entities. In cyberspace the execution of national sovereignty becomes difficult, if not impossible.

Furthermore, the Internet stimulates international activities of individuals and private institutions by removing the barriers of time and space and reducing the costs for trans-border communication. Transnational corporations and international NGOs are belonging to the main beneficiaries of the Internet. They can deepen and broaden global activities, a privilege which belonged for a long time to big governments and its "embassy system" only. The Internet enables also small organizations without a large bureaucracy and a limited budget to participate in global operations. By going global private industry institutions, Internet users, consumer groups and citizen's organizations (NGOs) are developing their own policies, independent from national governments and their international organizations, and are building self-regulated global systems with their own sets of norms, rules and standards. The monopoly of governments in international politics is disappearing. Governments are confronted with other actors, who are sometimes more flexible, faster, efficient and powerful. In the information age, governments find themselves suddenly in a competitive situation, not against each other, but confronted with other "international subjects" outside of governmental control. In reaching global agreements governments have to negotiate in a new way (not the hierarchical top down decision making but the network based bottom up coordination) and they have to learn to share power.

Against this background, cyberspace becomes an area where actors and subjects with different legal status and different political and economic weight are coexisting in a new and widely unregulated manner. The global arena is developing from rather simple to very complex structures and multidimensional relationships of different qualities. In cases of conflicts or behavior in bad faith, it is very often unclear how the case can be legally settled and the behavior corrected. Already the question of whether a problem is a legal issue and which jurisdiction applies, produces confusing answers.

Collision of Legal Norms in Cyberspace

The new territory of cyberspace is not yet regulated. With hundred of millions of users concerned and hundred of billions of dollars at stake the need for a regulatory framework is growing. But while there is a rough consensus, that the "information highway" needs "rules of the road" there is a fundamental disagreement on the scope, the extension and the drafting procedures for new rules. Those who entered the new and unknown territory at a time when Internet regulation was not an issue (from the Internet pioneers to all kind of individuals), are in favor of low or self regulation and keeping as much individual freedom as possible. Other (mainly governmental) groups see value in bringing the Internet under a workable legal regime. In contrast, private industry is fighting against national Internet related "patchwork legislation" which is seen by the industry as a barrier for global eCommerce and favors industry self-regulation.

It is certainly true that the Internet does not create a "law free zone." Even if there is neither a "National Internet Law" nor an "International Internet Convention," rational thinking concludes that what is illegal offline, is also illegal online. Even if it is more difficult to fight crimes in cyberspace, the general legal system does not disappear when a netizen enters cyberspace. In this respect the Internet is nothing more than a new challenge to further adjust and improve the relevant instruments for dispute settlement, crime investigation, law enforcement etc. There is a greater need for international co-operation among governments and, in some cases, there is a need to redefine old crimes or define new crime categories.

But while this can be done mainly within the traditional political and institutional framework, based on national laws and international conventions, there are a growing number of new problems that go beyond the "business as usual" of international law and policy-making. The challenge comes when incompatible national legal systems, differentially regulated sectors or inconsistent legal norms meet in cyberspace. There are numerous cases where different countries have regulated the same issues in different ways, with no international convention to harmonize the varying national approaches. While the different legal systems can easily coexist in the real world with clearly defined territorial borders between them, the Internet, by removing these borders, leads directly to clashes among them. It starts with the "core business" of the Internet, the distribution of information and communication content, and leads up to issues like taxation, privacy, security, intellectual property rights,

data protection, conflict resolution and dozens of others.

The controversial issue of information content illustrates the problem. While in Europe nearly all states have adopted laws that restrict racist and Nazi propaganda, in the U.S. such propaganda is protected as "free speech" by the First Amendment in the U.S. constitution. If a Bertelsmann bookstore in Germany would sell Adolf Hitler's fascist book "Mein Kampf", it would be punished by a German court. But an Internet user in Germany, regardless of her or his citizenship, can buy the book for \$18 U.S. at <http://www.bn.com>, the virtual bookshop of Barnes & Noble, a company based in the U.S. (with Bertelsmann AG as a main shareholder). German customs authorities could certainly confiscate the book at the border, if it is delivered by s-mail, but what could the German government and the German courts do, if the book can be downloaded from a server based elsewhere in the Bahamas or if the whole book comes via e-mail?

With the growth of similar controversial cases, national courts, and national governments have started to do something. Their first reaction is an unilaterally one, based on the old understanding of "territorial sovereignty". Courts in Germany and France decided in cases against CompuServe and Yahoo.com that it is the responsibility of the Internet Service Provider (ISP) to stop the distribution of content deemed illegal in the two countries (e.g. pornography and racist propaganda.) In other regions, the governments in China or Singapore tried to get critical political propaganda on the Web under control via proxy servers and rigid national legislation.

However, the anarchic structure of the Internet, the difficulty in identifying the geographical position of an Internet address, the liberal regime of domain name registration, and the packet switching system for the transport of messages, makes it nearly impossible to translate the above mentioned national court decisions into practice. Critical websites that protest the violation of human rights in China and Singapore will not disappear, when a minister calls for strong actions or when a court puts a CEO of an ISP or an user in jail. Even if European courts ordered global companies headquartered in the United States to deny access to certain websites for users in Germany or France, these websites will most certainly reappear on servers operating from a Caribbean or Pacific island. Yahoo.com, after a French court instructed it to shut down Nazi websites in November 2000, asked an American court whether the French court has authority to regulate the business of an American company that is operating on the global market. If the American court denies the

authority of the French court, there is no "higher institution" where the case can be further negotiated. In another decision from spring 2001 the German "Bundesgerichtshof", a federal court, punished a racist Website which is hosted by an Australian citizen. When the Australian comes to Germany, he will be arrested. Does this mean, that an US citizen, hosting a critical website against Human Rights abuses in China which contradicts with Chinese legislation, will be arrested when he arrives at Beijing's Airport?

The "Information Superhighway" needs "Rules of the Road"

While there is a global consensus that the "information superhighway" needs some "order" it seems obvious that a nationalistic approach to any kind of Internet legislation and governance will fail. The global Internet needs a global political and regulatory framework. It needs a procedure to develop global policies. It needs an institutional mechanism to execute these policies.

Traditionally, if a global problem appeared, that needed an international solution, national governments convened an intergovernmental codification conference to draft an international convention. Governments agreed on the Outer Space Treaty in 1966 and the Law of the Sea Convention in the 1980s. They agreed on a number of international conventions to protect the natural environment. And they have been able, after 20 years of controversial negotiations, to establish an International Criminal Court in 1999. But while all these international conventions can be seen as great achievements of contemporary international law, it is hard to believe that this is a usable model for policy and law-making for the global Internet.

Firstly, the conventions are legally binding only for the states that have ratified the treaty. Because practically no convention has a 100 per cent membership of the international community, there are "holes" in the system. In the case of the Outer Space Treaty, these holes are not fatal as long as the "big players" are members of the treaty. What illegal activities can a Pacific Island undertake on the moon? However, a "small hole" in an Internet convention could undermine the whole system. A Server in Tuvalu can distribute as many websites as a server in New York City.

Secondly, time is a critical factor. One Internet year is seen as seven man-years,² but drafting international conventions is a time-consuming endeavor.

2. See, among others: France Cairncross, *The Death of Distance*, Harvard Business School Press, Boston 1997; Anne Leer, *Welcome to the Wired World*, Pearson Education, London 2000;

The Human Rights Conventions of 1996 was the result of 18 years of hard work in the UN. Negotiations on the Outer Space Treaty started in the early 1960s and the convention enacted only ten years later. The Law of the Sea Convention was a 25-year project. It takes years to agree on a mandate for a codification conference. Several more years are needed to draft the final version of a convention. And sometimes it takes a decade between the signing of the convention and its entering into force. Even after it is implemented, there are still numerous states outside of the treaty. If governments would start now to convene an Internet codification conference, it would be a great surprise to have an "Universal Internet Convention" before the year 2015. And there would be no guarantee that all 243 "country code Top Level Domain Names" (ccTLDs, e.g. .ca, .ch, .uk) and the dozens of new "generic Top Level Domain Names" (gTLDs, e.g. .net, .org, .com) would fall under such a convention.

The progress with has been reached with the Draft Convention on Cyber Crime is an interesting illustration of the arguments mentioned above.³ Since 1989 the European Council is working on the subject to draft an international convention to fight criminal activities in connection with computers and the Internet. The Committee of Ministers adopted in 1995 a Recommendation to promote legislation against cyber crime. The established working group produced 25 drafts up to March 2001. On April 24th, 2001 the Parliamentary Assembly of the European Council adopted the Final Draft in principle. Probably the Convention will be signed under the Belgian Presidency of the European Union in the 2nd half of 2001. It could cost another two to five years until the needed number of states have ratified the convention and it enters into force. But although the United States and Japan have joined the work on this convention there will be many states outside this treaty. These limitations are not an argument against the Cyber Crime Convention (which has on the other hand a number of problematic elements in it with regard to the protection of individual freedoms and privacy of the citizen). To have a legal instrument is not a bad thing. But it would be an illusion to believe that the issue is settled by signing an intergovernmental treaty.

Manuel Castells, *The Rise of the Network Society*, Blackwell Publishers, 2000

3. Draft Convention on Cyber Crime, see: <http://stars.coe.int/doc/doc01/EDOC9031.htm>

FROM THE NEW WORLD INFORMATION AND COMMUNICATION ORDER (NWICO) TO THE GLOBAL INFORMATION SOCIETY (GIS)

The discussion around the development of a global political and legal framework for international communication started in the late 1960s. Third World and Eastern Bloc countries were calling for the establishment of a “New World Information and Communications Order” (NWICO) under the auspices of the U.N. system. This order should be “based on the fundamental principles of international law, as laid down in the Charter of the United Nations,” including the principle of “information sovereignty.” The efforts within the Paris-based UNESCO to elaborate a global governmental regulatory system for international information and communication (in form of a “NWICO-Declaration”), failed.⁴ The issue became a hostage of the final stage of the ideological East-West cold war. Furthermore, the longer the debate continued, the more became clear, that a mainly “governmental approach” which ignores the growing role of non-governmental actors in the field of media, information and communication, leads to a dead-end. When the “Windhoek Declaration” of 1991 ended the NWICO debate, there was a global consensus that a regulatory system for international information and communications, based on the principle of state “information sovereignty,” risked opening the door for governmental censorship and state suppression of individual freedoms.

The Global Information Infrastructure Initiative (GII)

The end of the NWICO debate was not the end of the search for a global framework for international communication. In the early 1990s, the International Telecommunication Union (ITU), an intergovernmental specialized agency of the U.N. system, became the main forum for the continuing and evolving discussion. The ITU developed two innovations: first, it opened the door for non-governmental members. In 1994 the ITU adjusted its constitution and introduced a second category of membership. Next to governmental members (big M’s), institutions of the private sector (small m’s) could also join

4. See, inter alia: Kaarle Nordenstreng, *The Mass Media Declaration of UNESCO*, Ablex, 1984; Enrique Gonzales-Manet, Wolfgang Kleinwächter, Kaarle Nordenstreng, *The new World Information and Communication order: A Sourcebook*, Prague 1985; Wolfgang Kleinwächter, Three Waves of Debate, in: George Gerbner, Hamid Mowlana, Kaarle Nordenstreng, *The Global Media Debate: Its Rise, Fall and Renewal*, Ablex, 1993.

the ITU.⁵ Secondly, the ITU introduced a new kind of international consensus document. A number of intergovernmental ITU conferences with broad participation of the private sector ended not with the signing of a legally binding convention, but with the adoption of a "Memorandum of Understanding" (MoU). The MoU's on mobile telephony, global mobile personal communications by satellites (GMPCS) and Internet Domain Names, looked like a "convention" but were not legally binding documents. The MoU method liberated the ITU from a patt-situation where governments and the private sector did not want to risk to enter into legal obligations in areas which are still widely unknown in its consequences. A MoU documented the "rough consensus" at a certain moment. It produced some guidelines and political norms. But it gave all participants the flexibility to act within a relative broad bandwidth without risking the violation of a legal norm.

Two other Geneva-based U.N. Specialized Agencies, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), operated in a similar way. As intergovernmental organizations, they invited private industry to participate in the negotiations. They were looking for a new type of international agreement that combined the stability of traditional legal mechanisms with the flexibility needed to react to the challenges of quickly changing global markets in the field of information and communications.

While the efforts by the ITU, the WIPO and the WTO signaled a new approach to the challenges of the global information economy, they remained sectoral efforts with natural limitations. They did not answer the fundamental political and legal questions raised by the global information society. This new political challenge was seen first by U.S. Vice President Al Gore when he proposed to the ITU World Conference on Communication Development in Buenos Aires in March, 21st, 1994, the creation of an integrated global policy framework for the "information superhighway" and the development of a "Global Information Infrastructure" (GII).

Some months later, in February 1995, a G7 conference in Brussels defined a number of basic principles for a global information society. Both Al Gore and Martin Bangemann, the European Union Commissioner responsible for telecommunications and the information society, stressed during that meeting that a GII/GIS should not be built primarily by governments but the agenda should be driven by the private sector. Parallel to the G7 meeting in Brussels, a

5. Meanwhile ITU has 188 governmental and 461 private sector members.

so-called "Business Roundtable" brought together business leaders from the main telecommunications, media and computer companies of the world. The Business Roundtable defined a number of basic political principles for the global information economy that mirrored the governmental declaration, but differed in scope and priorities. The interesting aspect of the two conferences was, that media attention was less with the ministers and more with the CEOs. This "parallel approach" illustrated a remarkable powershift. It became visible that governments are no longer the only player in global communication negotiations. It also demonstrated a new self-confidence within the private industry, which was ready to play a greater independent policy role that went beyond their purely commercial interests and their traditional function as an "advisor" or "consultant" to a national government.

From a "parallel" to a "trilateral" approach

The "parallel approach" was further advanced by a landmark Ministerial Conference on "Global Information Networks," that took place in Bonn, Germany, July 6 - 8, 1997 with high level representation from both the public and the private sector of Europe and the United States.⁶ The conference adopted three declarations: a "Ministerial Declaration," an "Industry Declaration," and an "Users Declaration." All three documents cover the same issue: the global information society. All three documents try to define basic principles. But they approach the same subject from different corners with different ideas, interests and priorities.

Conceptually the Bonn conference went beyond the G7 Brussels meeting (1995) by also bringing the users (consumers/citizens) to the negotiating table, thus broadening the "parallel approach" into a "trilateral approach." This "new trilateralism" reflects more adequate the changing environment for policy and law making, where governments loose their monopolistic role and have to take into account also the growing role of globally acting private industry and the groups of users/consumers/citizens. The innovation of the Bonn conference was the recognition that the powershift goes beyond a "new deal" between governments and private industry on a global level. The user/consumer/citizen, e.g. the global civil society, is constituting itself as a third actor in its own rights who articulate that its interests are not fully covered neither by the

6. Global Information Networks, July, 6-8, 1997, Bonn, in:
http://europa.eu.int/ISPO/bonn/i_index.html

governmental representatives nor by the private industry but have to be taken into account if it comes to decision making on global information and communication issues.

The three groups have different roles, responsibilities and legal status. They have identical as well as conflicting interests. Certainly, governments, at least in a representative democracy, represent not only themselves but the whole society, including the private industry and the civil society. At the same time, on the global level, both private industry and civil society gets a legitimacy of its own, independent from national governments. Insofar none of the three groups can claim to represent entirely the interests of the other groups in cyberspace and no group can impose its interests against the others if the drafting of global regulatory frameworks and the building of global governance institutions should be successful. Only if all three parties are involved and inter-linked in the drafting and decision making processes, it will be possible to reach globally workable solutions. Each side has in principle and widely also de facto the potential to block a bilateral deal of the two other sides. The way back to classical top-down power policy becomes more and more a theoretical option, the way out to a bottom up policy coordination remains more and more the only alternative.

While the "Bonn Ministerial Declaration" defines the future role of government as "providing the framework," "stimulating new services," "building confidence," and "empowering the users," the "Industrial Declaration" formulates key principles for issues like convergence, intellectual property rights, encryption, data protection and taxation. In contrast to these two documents, the "Users Declaration" stresses that "sovereignty in the information society must belong to the people; their preferences should determine its uses and how the new technology will be applied." But it also recognizes that "public policy-makers and industry have already gone to great lengths in stimulating and developing the information society and global information networks. Currently the technological side is leading the process and stronger user participation is considered essential to bridge the current gap and ensure successful deployment." Security, confidentiality, data protection, media pluralism, reliability of services, consumer protection, education and training, and complaints mechanisms are issues raised by the Users Declaration.⁷

7. See: Wolfgang Kleinwächter, *The Peoples Right to Communicate and a "Global Communication Charter": How does Cyberspace Change the Legal Concepts of Humanm Rights and*

This "new trilateralism" is undoubtedly an innovation in international communications negotiations. Never before had a conference produced three separate documents representing the consensus of three different global groups, which did not fundamentally conflict against each other. The three declarations are a good example for the dialectic relationship of competition and cooperation. They are partly complementary but enlighten the different priorities and interests of the different stakeholders.

The Bonn conference opened the door to a "new territory", but did not really enter the unknown space. It raised good questions, but did not give answers. Nothing was said about the interrelationship of the three documents. No mechanism was introduced to stimulate a "dialogue" among governments, industry, and users. And no formalized procedure on the future of the interaction among the three parties was proposed.

Nevertheless, the innovative aspect of the Bonn conference was, that for the first time, it was demonstrated in public, that not only governments and private industry but also users could constitute themselves as "global actor" in the GIS. And the conference demonstrated that these actors could no longer be grouped in traditional camps, defined by geography or ideology like "North vs. South" or "East vs. West". Neither geography nor ideology plays a central role any more. Rather, one's status as a private organization, a government or a user, defines special roles, interests, and concepts for policy and legislation. While industry looks first at markets, business opportunities, costs, shareholder value, and a return on investment, governments are more interested in public policy issues, in stability, security, and taxes. In contrast, users are concerned with prices, trust, quality of services, privacy, individual freedoms and human rights.

The new interdependence does not lead to the disappearance of conflicts among the partners. But while in the past such conflicts did lead normally to a zero-sum-game with winners and losers in a concrete conflict situation, the GIS produces, at least in its early stage of development, the opportunity for a win-win-constellation where the benefit of one side can produce useful results for the other sides.

Since the Bonn conference, the "new trilateralism" became (not without frictions and controversial debates) a blueprint for a new policy approach

Participation, in: *Journal of International Communication*, Volume 5, 1998, No. 1 & 2, p. 105 ff.

towards global problems. The private industry took the lead in many policy areas. Governments recognized, that they have to share their sovereign power, at least if it comes to implementation, with others. And in cases where the public was excluded from discussions and negotiations - like during the WTO meeting in Seattle in December 1999 - people raised their voices loudly in the streets. The "new trilateralism" (although with different distances among the three corners) is reflected also in the design of two new emerging institutions, which deal with key issues of the global information society: The "Global Business Dialogue on electronic Commerce" (GBDe), which covers the economic basis of the global information society and the "Internet Corporation for Assigned Names and Numbers" (ICANN), responsible for the core resources of the Internet (Domain Names, Addresses, Protocols and Root Servers).

The GBDe (www.gbde.org) was established in January 1999 by nearly 100 CEOs of private companies. The GBDe is a platform of business leaders representing the global players of the Internet, computer, telecommunications and media world. The Steering Committee of the GBDe is composed of 19 CEOs from companies like AOL/Time Warner, Bertelsmann, Vivendi, Fujitsu, IBM, Nokia, Daimler/Chrysler, Hewlett Packard, EDS, Telefonica, Mitsui, Alcatel, NEC, Toshiba, Cisneros and others. The GBDe promotes industry self-regulation concerning the Internet and rejects the emergence of "patchwork legislation" with dozens of different national Internet regulations. The GBDe has invited governments to co-operate in the development of global political and legal frameworks for e-commerce via global self-regulatory systems. And it is also looking for a dialogue with consumer and user organizations as well as with NGOs and institutions like the European Parliament.

ICANN (<http://www.icann.com>) was established in October 1998, mainly by the Department of Commerce of the US Government, but with broad involvement of the Global Internet Community and the European Commission. ICANN, although it has a more technical mandate, is the main global policy body responsible for the core resources of the Internet. ICANN is a private, global corporation incorporated under Californian law. Its board of directors is composed of 19 representatives of the private sector and of Internet users from all over the world. Governments are not allowed to send representatives to the board but can send (non-binding) recommendations via a "Governmental Advisory Committee" (GAC).

3. THE GLOBAL BUSINESS DIALOGUE ON E-COMMERCE (GBDE)

It is one of the ironies of life that a public policy governmental initiative has led to a private industry mechanism where governments are only "invited, if needed". The roots of the GBDe go back to a proposal which was launched by the then EU Commissioner for Telecommunications Policy, Martin Bangemann. In a speech at the "ITU World Inter@ctive Conference" in Geneva, in September 1997, he proposed the idea of a "Global Communications Charter." His proposal was driven by the recognition of the need to develop a global political and legal framework for the information economy and to harmonize relevant national approaches.

3.1 From the "Global Charter" to the "Global Dialogue"

According to Bangemann, such a Charter could summarize the main principles for the global information society. Like the "Universal Human Rights Declaration", such a "Global Communication Charter" could define minimum standards for everybody and guide all global and local players in their journey through the complexity of the cyberspace. During a G7 conference in Brussels in October 1997, Bangemann suggested that this Charter would not be a "binding legal convention," but a set of basic principles that would give orientation to governments, industries and users/citizens. Bangemann hoped to adopt the "Global Communications Charter" in December 1998, fifty years after the adoption of the "Universal Declaration on Human Rights," which was also not a legally binding instrument, but which got a high political profile with a great practical binding power for everybody.

The discussion of Bangemann's proposal, which was backed by the E.U. Commission, produced a basic dilemma. While there was a broad agreement on the general objective of the initiative, namely, the development of an universal political and legal framework for the Global Information Society, there was also uncertainty about the procedure to reach this target. Although Bangemann clarified several times that his initiative was not intended to create more governmental legislation, private industry and a number of non-governmental organizations argued that this will be exactly the result of the initiative. The fear of the private industry was that starting the drafting of a "Global Charter" under the leadership of a high governmental representative like Mr. Bangemann could have uncontrollable side-effects, re-open the NWICO debate and produce counter-productive discussions where reflections would dominate actions and

governments all over the world would encourage to adopt national legislation before a global consensus is reached. Consequently, the central issue of the debate became the question who should take the lead in the formulation of such a global policy and legal framework: governments or private industry?

Ira Magaziner, then the Internet adviser to U.S. President Bill Clinton, supported the idea in principle, but stressed that the private sector must take the lead in creating future frameworks. Based on the recommendations of the Clinton administration for electronic commerce, Magaziner told at G7 conference in Brussels in November 1997 that "the time is over where industry came to Congress to lobby for special legislation. In the future, government will have to go to industry to lobby, so that industry would take into account public interest while building the information highways and developing the traffic on it."

To get more industrial support for his "Global Communications Charter," Bangemann invited a group of business leaders from around the world to a "Business Round Table on Global Communications". The Round Table took place in July 1998. In its final communiqué, the participants agreed that the elaboration of unified global principles would be helpful because conflicting national policies, rules, over-regulation and regional patchwork legislation would create obstacles to all companies engaged in electronic commerce on a global scale. But they agreed also that the process of the elaboration of such principles and frameworks should be "led by the industry and driven by the market." Governments should only be "invited, if needed."

Immediately after the Bangemann-Round Table business leaders started the process under their leadership. Thomas Middelhoff, CEO of the Bertelsmann AG, wrote in an outreach letter, dated August, 28th, 1998, that "business needs to urgently develop common and meaningful positions on industry's self-regulation, which should be the preferred approach. Where regulation can not be avoided, we will need to aim towards speaking with one voice in order to place joint pressure on politicians against over-regulation and patchwork legislation". (Thomas Middelhoff, Outreach Letter, August, 28th, 1998, in: <http://www.gbd.org/structure/corr.htm>) Already 179 days later, on January 14th, 1999, business leaders from about 100 leading global computer, telecommunications and media companies agreed in New York to establish the "Global Business Dialogue on electronic Commerce" (GBDe).

The GBDe is not an incorporated institution. It is a voluntary platform, led by a steering committee composed of 29 CEOs. Thomas Middelhoff, CEO of the

Bertelsmann AG, was elected as the first chairman with Gerald Levin, CEO of Time Warner and Michio Naruto, CEO of Fujitsu as his deputies.⁸ Steering committee members include personalities like Louis Gerstner, CEO of IBM, Steve Case, CEO of AOL, Jean Marie Messier, CEO of Vivendi, Martin Velasco, CEO of Telefonica, Joe Forehand, CEO of Andersen Consulting, Dich Brown, CEO of EDS and Jorma Ollila, CEO of Nokia, . Government representatives are not included.

The GBDe discusses global solutions with regard to international electronic commerce and gives recommendations to governments and intergovernmental organizations such as the WTO, the ITU and the WIPO. At the first meeting, the GBDe established a number of "issue groups" for subjects which belonged as public policy issues in the past mainly to the responsibilities of governments like privacy, taxation, tariffs, intellectual property rights, encryption, authentication and liability. "We feel we have a role to play in the shaping of public policy," said Gerald Levin after the inaugural meeting of the GBDe. "We are capable of rising above narrow geographic issues and competitive issues to realize the majesty of the new medium."

The GBDe established nine working groups and prepared a 1st World Conference that took place in Paris in September 1999. During the Paris GBDe conference, the working groups presented their policy papers with recommendations to governments. The GBDe recommendations are not economic and/or commercial by nature but step into a public policy territory, which was exclusively dominated by governments in the past. They call for the Internet as a "tax free zone", deal with consumer rights und regulation of information content. The general spirit of the Paris GBDe recommendations was that governments should be very restrictive in passing national legislation with regard to the Internet. A "patchwork legislation" with numerous national laws on Internet issues would not only block the development of the economic potential of the Internet but would also backfire to the "over-regulated" countries. As the Position Paper on Content Regulation says: "Nations that attribute a high priority to job creation in the digital content sector must, therefore, be particularly mindful of the need to attract capital investment. Excessive national regulation of any sort, including content restrictions, could distort the global market and adversely affect competitiveness. More

8. The chair changes every year. In September 1999 Gerald Levin, CEO of Time Warner und Steve Case, CEO of AOL overtook together the GBDe Chair. Im September 2000 the Chair moved to Michio Naruto, Fujitso.

specifically, national content restrictions could drive away potential investment, or drive up access costs to the end-user by otherwise limiting revenue opportunities." (GBDe Content Issue Group, Draft 2, 1st of June 1999). Consequently, the GBDe proposed that governments should trust "industry self-regulation" and not waste resources on laws that could be already outdated when they are adopted.

During the plenary session of the Paris conference there was an interesting dialogue between Steve Case, CEO of AOL and Lionel Jospin, prime minister of France. After Jospin explained the approach of the French government to Internet legislation, Case commented that the Internet will develop faster than the law makers can react. While both sides, private industry and governments, agreed that some regulation is needed for the Internet, it remained an open question as to what kind of regulation should be developed and by whom – and who should take the lead in which part of the process.

3.2 Co-regulation or Policy Coordination?

After the Paris conference, governments and the GBDe held a series of joint meetings that paved the way for a 2nd World Conference, held in Miami in September 2000. (GBDe Miami Conference, 2000 Working Group Conference Papers, Miami, September, 25 - 26, 2000). During this process, governments recognized the changing environment for policy and law making in the Internet age. During the European IST Conference in Helsinki in December 1999, Jospin's Internet adviser, Jean Pierre Tronc, proposed a system of "co-regulation". In a "co-regulatory" system, he said, private industry could take the lead in a number of areas while in other areas governments would be the leader. Core responsibilities in different fields could be defined to determine the complementary roles of private industry and governments, while the ultimate public authority would remain in the hands of governments. On the other side, the private sector recognized that governments have and will continue to have key responsibility for a number of areas like fighting against cybercrime and protecting intellectual property. But the GBDe preferred the use of the term "policy co-ordination" instead of "co-regulation" to define the relationship between governments and the private sector in the GIS.

The terminological differences enlightened both the conflicting concepts and the pragmatism of the two sides. While there was no need to clarify theoretically who will top whom in a concrete conflict case, it was more important to move forward in partnership to create flexible frameworks for the

development of eCommerce.

The Miami GBDe Conference in September 2000 reflected this pragmatic approach. The debate was less about leadership and more about substance. The conference was attended by high-ranking governmental representatives,⁹ who did not concur with a basic agreement. The list of public policy issues, covered by the GBDe became even longer and included also consumer confidence, alternative dispute resolution, trustmarks, cybercrime and the digital divide. For the first time, the GBDe invited also representatives of the "third sector", recognizing, that in the eWorld the user/consumer is sitting in the "drivers seat".

Although all sides agreed in Miami in principle to find quick solutions for the main pressing areas, the details remained controversial and the procedures for coming to an universal regulatory framework are as nebulous as they had been since Bangemann launched the idea of the "Global Communications Charter" in 1997. The way down from the "mountains of visions" to the "valleys of realities" is a difficult and stony one. The 3rd GBDe Conference is scheduled for Tokyo in September 2001.

After the burst of the "New Economy Bubble" in winter 2000/2001 the process will become even more complex. On the one hand, governments will use the slow down of the e-economy to demonstrate that regardless of all the "powershifts" they are "in control". On the other hand, the re-grouping of the industry could lead to less but even more powerful global players which call for more independent policy making space in the new e-commerce areas. Whether the "third force", the users, will be able to play an independent role based on their power as "consumers" or whether the ordinary citizen only has to pay the bill of the risking gambles of others, remains to be seen. Nevertheless, all three parties are now even stronger dependent from each other. To revitalize economic growth and to promote a sustainable development makes a policy based on the "new trilateralism" a pre-condition.

9. Inter alia Norman Mineta, Secretary of Commerce of the U.S. Government, Erkki Liikanen, E.U. Commissioner for the Information Society, Tatsuya Ito, State Secretary of State of the Japanese Ministry for International Trade and Industry, Ashmed Nazif, Egyptian Minister of Communications, and Henocho Domingo Aguiar, Minister for Communications of the Government of Argentina.

4. THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

On the 2nd of October 1998 the Internet Corporation for Assignment of Names and Numbers (ICANN) was incorporated as a not-for-profit private corporation under Californian law. ICANN is the result of a decade long negotiations among different stakeholder about the question, how to create a governance system for the core resources of the Internet, that is Internet domain names, internet addresses, internet protocols and the internet root server system.¹⁰

In the late 1980s and early 1990s the US Government, which financed the research for the development of the Internet, contracted the "Internet Assigned Numbers Authority" (IANA), a one-man institution, represented by Jon Postel¹¹, the originator of the Domain Name System (DNS), with the DNS management. When the Internet became commercialized and a global medium, the need for a broader based and more stable global management system became obvious. In the middle of the 1990s, Jan Postel wanted to bring IANA under the umbrella of the "Internet Society" (ISOC). At this time, the number of registered domain names had already crossed the ten-million-line. At this stage, national governments and private industry stepped in and called for more governmental and business influence in management of the core of the Internet.

For a moment in 1996 and 1997, the ITU tried to get the lead to become the "governor of the Internet". But the idea, to bring the "Global Internet Community", represented by IANA and the ISOC, the governments, represented by the ITU and WIPO and the business world, represented by the "International Trademark Association" under one roof in a so-called "International ad Hoc Committee" (IAHC), worked only for a short time. The IAHC produced a "Memorandum of Understanding on generic Top Level Domains (gTLD-MoU). The MoU was signed by about 100 governmental and non-governmental actors in Geneva on May, 2nd, 1997. The ITU got the role of the depositary of the "gTLD-

10. See: Christos J. P. Moschovitis, Hilary Poole, Tami Schuyler, Theresa M. Senft, *History of the Internet: A Chronology from 1943 to the Present*, ABC-CLIO, Santa Barbara, 1999; Wolfgang Kleinwächter, ICANN as the "United Nations" of the Global Information Society?, in: *Gazette*, Vol. 62 (6), p. 451-476, Sage Publications, London 2000.

11. Jon Postel was involved in the Internet development since 1969 where he participated in the ARPANet project of the US Department of Defence. Later he worked with the Information Science Institute (ISI) at the University of Southern California (USC) in Marina del Rey and became the editor of the RFC Series.

MoU" and its then Secretary General, Pekka Tarjanne, spoke about a "turning point in international law". But the project failed because substantial groups, from internet users via national governments to major businesses were not adequately represented by the IAHC and disagreed with key parts of the MoU.

In the fall of 1997 the Clinton Administration started an alternative initiative and proposed the development of an Internet Governance System under US private sector leadership. The Clinton/Gore e-Commerce paper from July 1997 states, inter alia, that governments should play, if any, only a limited role in Internet governance. The US "Green Paper", which was very US-centric, was strongly criticized both by the European Commission and Internet Users from all over the world. The Clinton Administration, by ignoring totally the ITU-MoU on Domain Names, moved one step backwards and published a modified "White Paper" in June 1998, which finally paved the way for the incorporation of ICANN. In October 1998 the US Department of Commerce recognized ICANN as the global Internet governance corporation. A "MoU", which was signed by the Department of Commerce (DoC) and ICANN, intends to transform gradually all functions of Internet governance to ICANN within a two-year period. After the two years ended in September 2000, the transition was not yet completed. The DoC enlarged the contract until October 1, 2001 and it is now with the Bush administration to complete the transition.

Although ICANN is responsible for one of the key global issues of the 21st century, its constitution, structure and membership does not fit into similar political and organizational schemes that have been established to manage global phenomena in the past. ICANN is neither an intergovernmental treaty organization (IGO) nor a classical non-governmental organization with individual or institutional members (NGO). It is also not a typical profit-oriented transnational corporation (TNC). ICANN is a new type of global organization without any precedent, representing different types of stakeholders from all over the world. It is structured uniquely with elected bodies and nominated representatives, numerous committees, councils, constituencies, and supporting organizations. ICANN creates an unusual triangle where the "business world" and the "Internet community" are equally represented in the highest decision making body, while governments take a backseat with only an "advisory" function.

ICANNs highest body, the "Board of Directors", consists of 19 members. Nine directors are elected by three "Supporting Organisations" (for Domain Names/DNSO, Protocols/PSO and Adresses/ASO), representing the providers of

all kind of Internet services and the technical community, that is (mainly) the private industry. The other nine directors are elected by the "Membership at Large", representing the Internet Service Users, that is (to a certain degree) the civil society. The 19th member of the Board is the selected CEO. The Board is led by a Chair who gets support from a small Executive Committee.¹²

ICANN is based on the principles of stability, competition, bottom up policy coordination and global representation. Governmental representatives or representatives of intergovernmental organizations are not eligible for a seat in the Board of Directors. The "Governmental Advisory Committee", where the 180+ governments are represented, can give "advise", but the GAC recommendations are not binding for the Board.

From the very first day an ongoing debate circles around the question whether ICANN is only a "technical body" responsible for the practical management of a technical resource or whether ICANN is something like the "world government of the Internet", dealing with public policy issues, effecting equally all Internet Users and Service Providers around the world and managing the material heart of the global information society. Many commentators feel that the truth is in between. While the narrow legal mandate of ICANN, described in Article 2 of its bylaws, gives the corporation formally only a "technical mandate," ICANN's decisions concerning the management of the Internet resources has substantial political, economic, cultural, and social implications. A formal separation into "technical" and "non-technical" issues will not work because it ignores the reality and complexity of the Internet.

ICANN's bylaws describe the private corporation as a "nonprofit public benefit corporation" that "is not organized for the private gain of any person." It is organized under the "Californian Nonprofit Public Benefit Corporation Law for Charitable and Public Purposes" and will be operated "exclusively for charitable, educational and scientific purposes."¹³ Although this "constitutional mandate" is primarily a technical task, it will be nearly impossible for ICANN to avoid political conflicts. Conflicts will appear as inherent elements of technical

12. ICANNs first Chair was Esther Dyson, America's "First Lady of the Internet" (1998-2000), followed by Vint Cerf (2000-2002), Vice-President of MCI/Worldcom and as the originator of the TCP/IP protocol one of the "Fathers of the Internet". From 1998 - 2001 Mike Roberts, the first Secretary General of ISOC, served as CEO. In March 2001 Stuart Lynn became ICANN's new CEO.

13. ICANN Bylaws, in: <http://www.icann.com>

decisions. And they will even grow because ICANN will be unable to avoid the entering of policy fields. This can be seen, in particular, in the following six areas:

4.1 Stimulating Competition in Domain Name Registration (Registrars)

One of the driving forces behind the launching of ICANN was the need to de-monopolize the registration business of domain names. The domain name system was introduced at a time when the registration of .edu domains (used by the educational institutions that first started the Internet) outnumbered the dot-com domains and registration was for free. Based on a contract with the U.S. Department of Commerce (DOC), Network Solutions Inc. (NSI), a private company based in Herndon/Virginia, received a de facto monopoly from the U.S. government for the registration of domain names in the open generic Top Level Domain Name space (gTLDs). When the U.S. government stopped its financial support of the Internet via the National Science Foundation (NSF) in 1995, NSI started to charge for registration of domain names in the .com, .org and .net areas \$35 U.S. per year.

The introduction of a fee coincided with the beginning of the dot-com boom. While in the beginning there were only a couple of thousand dot-com registrations, the dot-com registration exploded in the second half of the 1990s. From the more of 100 million registered domain names in January 2001 there are more than 40 million registrations in the .com area.¹⁴ Registration of domain names became "big business" with hundreds of millions of U.S. dollars at stake.

One of the first activities undertaken by ICANN was to adopt a policy for the accreditation and licensing of registrars in the generic Top Level Domain Area (.com, .org and .net). After a testbed in April 1999 with five hand-picked Registrars, ICANN has recognized nearly 200 registrars worldwide up to April 2001. Although NSI, which was bought by VeriSign in March 2000, is still a de facto monopolist in the gTLD area, its market share in the registration of new domain names has fallen down to nearly 50 % since 1999.

Registrars who want to enter the Domain Name Registration Business, have to enter into an agreement with ICANN. The agreement includes a number of policy obligations for the registrar, including its commitment to the adoption of the "Universal Dispute Resolution Policy" (UDRP) for the settlement of conflicts

14. Internet Domain Survey, January 2001, in: <http://www.isc.org>

on Domain Names in the gTLD area. Recognizing Registrars could be a purely technical task, that means to look whether the applicant fulfills the technical criteria to start the business and to register the company. But already the inclusion of policy obligations, like the recognition of UDRP, into the registrar agreement goes beyond a technical arrangement. The accreditation of registrars has consequences for the global competition in the field of Domain Name Registration. When 50 per cent of the market is shared by more than 100 registrars, while the other 50 per cent is dominated by one registrar, ICANN can not be ignorant as it can not be silent, if registered registrars collapse economically or are merging with others. And, by the way, ICANN acts like a political supervisory body by "regulating" the area via changing the accreditation fees for registrars. The FCC like behavior is an action which is much more than a "technical decision".

4.2 Broadening the Domain Name Space by Introducing new gTLDs (Registries)

The fact that there are only seven "generic TLDs" in comparison with 243 "country code TLDs" has no technical explanation. Jon Postel defined the gTLDs according to the user needs in the middle of the 1980s. While .edu (for educational institutions), .mil (for the military) and .gov (for governmental institutions) were to be used in the U.S. only, the .int domain was reserved for intergovernmental treaty organizations. Only .com, .org, and .net were globally available. In the early 1990s Postel advocated for the definition of up to 150 new gTLDs, according to the growing needs for new domain names. Technically, there can be as many gTLDs as ccTLDs and even more. The Root Server can handle millions of TLDs.

Postels plan for 150 gTLDs was watered down mainly by the trademark-owners who feared an exploding wave of disputes over the use of brands in domain names. The IAHC took in 1997 a more restrictive approach and proposed seven new gTLDs. Also this failed. Later, in 1998, U.S. President Clinton's Internet adviser Ira Magaziner argued for five new gTLDs but said that ICANN should make the final decision.

When ICANN was established, its Board of Directors looked first to WIPO. In its report on Domain Name Disputes from May 1999 WIPO recommended that new gTLDs should be introduced only after the adoption of a dispute resolution policy for domain names. The adoption of the UDRP in August 1999 removed the barriers against the introduction of new gTLDs. The "Domain Name Supporting

Organisation" established a working group and recommended in April 2000 to start with a limited number of new gTLDs in a phased process. On its Board meeting in Yokohama in July 2000 ICANN started the process. Four months later it selected seven new gTLDs (.info, .name, .coop, .biz, .pro, .aero, .museum) from about 200 proposal, presented by 45 companies.

The introduction of new gTLDs is like the creation of new land in cyberspace. Market studies proofed that, to take only one example, a .web domain would generate 20 million registrations within two years. If you multiply the number of potential registrants with the annual 20 - 30 USD fee you can estimate the market value of such a decision. No wonder that the new gTLDs became the target of hot commercial and political battle.

Like on the registrar level, ICANNs decision has also on the registry level far reaching consequences for global competition. The recognition of a new gTLD could be a purely technical task, but under the concrete circumstances it is unavoidable a political, economic and social decision. The question, whether VeriSign should continue to be the registry for .com (44.3 million registrations), .net (32.2 million registrations) and .org (13.8 million registrations) or whether VeriSign, if it gives up .net and .org, can keep the registry and the registrar function under one roof, is not a technical issue. The adoption of the agreement between ICANN and VeriSign at the 2nd of April in 2001 influences global competition and creates even competition policy (as far as the separation of registry and registrar businesses is concerned). It influences the business plans of new registries and accredited registrars in a domain name market, which has an estimated value of more than 30 billion USD up to the year 2005.

4.3 Uniform Dispute Resolution Policy

Another reason for the launching of ICANN was the need to create a system for the settlement of disputes between trademark holders and domain name holders. Registration of domain names was handled on a "first come, first served" basis, a principle that was used by the ITU in its early days for the registration of broadcasting frequencies. A side effect of the rather simple, cheap and liberal practice of domain name registration was the emergence of "cyber-squatting." Individuals made a living from registering (cheaply) brand names and selling the registered domain name to a higher price directly to the trademark owner (or its competitor). They also misused branded names for own business activities, riding under wrong flags, misleading users and creating consumer confusion.

While trademark owners called for an extension of the copyright and trademark system to the Internet, a wider part of the Internet community opposed such an extension. Freedom of expression and free speech, they argued, includes the right to choose freely a domain name. For example, if an individual named Jeff McDonald uses his own personal name he should not be sued by McDonald's Restaurants and punished for a trademark infringement. Furthermore, critics of McDonald's should have the right to use the branded and trademarked name in domain names for critical evaluation or even parody of the practice of the company as part of their right to freedom of expression.

The settlement of the fast growing number of domain name conflicts by courts became increasingly difficult, time consuming and expensive, in particular when the conflicting parties were in different jurisdictions. ICANN was asked to look for a solution. Based on an extensive report of the World Intellectual Property Organization (WIPO),¹⁵ the ICANN Board of Directors developed an "Uniform Dispute Resolution Policy" (UDRP) that allows conflicting parties, regardless of the national jurisdiction under which they live, to settle their conflicts in the gTLDs .com, .org and .net online as an alternative to a procedure under an ordinary court.

The UDRP, which ICANN adopted in August 1999,¹⁶ concentrates on cases of a "behavior in bad faith" in the gTLD space. Complainers can go to one of the four UDRP Service Providers ("Cybercourts") who administer lists with accredited Panelists ("Cyberjudges"). The nominated panel (there are two categories of panels with one or three panelists) will decide the case after hearing both sides online within two months. The whole procedure is fast and cheap (not more than \$2000 U.S. per case). Nearly 4000 cases were brought to the UDRP between December 1999 and December 2000 and settled, including cases like madonna.com, sting.com, barcelona.com, matterhorn.com and the worldwidewrestlingfederation.com. While each conflicting party has the right after the end of an UDRP procedure to go to an ordinary court, the majority of the cases has led to an acceptable solution.

ICANN's role is to recognize the UDRP Service providers, to oversee the development of the dispute settlement system and to stimulate its further development. Recognizing "Cybercourts" and "Cyberjudges" is certainly not a

15. Final Report of the WIPO Internet Domain Name Process, Geneva, April 30, 1999, In:

<http://ecommerce.wipo.int/domains/process/eng/processhome.html>

16. Uniform Domain Name Dispute Resolution Policy, in: <http://www.icann.org/udrp/udrp.htm>

"technical issue". With the UDRP ICANN has entered into one of the basic branches of the governmental system, the judiciary. The success of ICANN's UDRP will lead to a broadening and deepening of the system. WIPO is already working on a second report that does include not only domain name registration in bad faith but the protection of pharmaceutical names, names of intergovernmental organizations, personal names, geographic names and trade names in domain name registration. And the UDRP is used now as a model to develop another alternative dispute resolution mechanism (ADR) for the settlement of conflicts in eCommerce, where disputes between businesses (B2B) and consumers (B2C), which involve different national jurisdictions, will undoubtable arise.

The UDRP is also carefully watched by governments who have a mixed feeling. On the one hand they support the development because it helps to reduce the work load for national courts which often do not have the expertise to deal with these new and complex issues. On the other hand it is a well-protected privilege of governments to establish courts and to nominate judges. The UDRP does not undermine the national sovereignty or the national court system. Parties can go to a national court, if they are not satisfied with a decision of the panel. The UDRP gives "netizens" complementary opportunities beyond their national territories. "Cybercourts" do not substitute "Real Courts" but their appearance mirror in a specific way the process towards the emergence of "co-regulatory systems". Non-governmental actors enter the fields of public policy, which were in the past an exclusive turf for state actors only.

4.4 The Role of the ccTLD

When Jon Postel introduced Top Level Domain Names for countries (ccTLDs), he wanted to avoid any policy involvement. The Internet community, he said, is not in a position to define what a country is or recognize a territory or another geographical unit as a "country." Postel used the ISO 3166 code based on a United Nations register of 243 "recognized territories" and asked individuals or academic institutions in these countries to overtake the responsibility for the management of the ccTLD. ¹⁷ No governments have been involved in the definition of ccTLDs and its delegation to a manager. The operations of the relevant national registries and registrars started without any legal foundations

17. ISI 3166-1: The Code list, in:

<http://www.din.de/gremien/nas/nabd/iso3166ma/codlstp1.html>

in the "territories." By following the ISO list, Postel added the two letter code to all the "recognized territories," to full member of the United Nations system like Germany (.de), China (.cn) and Mexico (.mx), to "territories" like the British "Isle of Man (.im) or the Australian "Christmas Islands" (.cx) and to small Islands with Vanuatu (.vu), Nuie (.nu) Svalbard and Jan Mayen Islands (.sj) and Saint Kitts and Nevis (.kn).

The ccTLDs have a natural monopoly in their countries. In principle there is no difference between the ccTLDs and between ccTLDs and gTLDs. All TLDs are equally accessible and can deal with the same numbers of Secondary Level Domain Names (SLDs). There are different kinds of ccTLDs. Some are restricted for national citizens and institutions only, others are managed like an open gTLD.

In particular small or poor countries have discovered the ccTLD as an additional resource which can be sold. The pacific islands of Tuvalu with the .tv domain and Tonga with the .to domain sold the management for several million Dollars to US companies (Dottv Corporation in Los Angeles and Tonic Corporation in San Francisco). From the net income, Tonga financed the establishment of its first university. Laos has sold in 2001 its .la domain to a Hongkong based company which advertises now the registration of .la domain names in the Los Angeles area. And there are other examples with exotic and useful two-letter-codes like Antigua (.ag), Turkmenistan (.tm), Northern Mariana Islands (.mp), the Federal States of Micronesia (.fm) and Barbados (.bb).

As long as there were only a limited number of registered domain names in the 180+ countries of the world, this system was workable. However, when the number of registered domain names grew beyond a critical mass, some governments started to investigate the practice and the legal basis for a ccTLD registry. In the highly over-regulated Germany for instance, where the number of registrations in the .de domain crossed the four million line in March 2001, no reference exists in the German legal system – from the Telecommunications Law to the Multimedia Law – that specifically regulates the German ccTLD. Neither the German government nor the DENIC Corporation, the .de manager, views this as a problem at the moment. The federal government and DENIC enjoy a friendly bilateral relationship in which the government does not interfere into the registration business and DENIC respects the general laws. Nevertheless the German government indicated in February 2001 that theoretically it could adopt a Domain Name Law and put the Registry under a governmental institutional control.

The situation can become controversial if a government is dissatisfied with the practice of the registration in a given country and wants to change the registry and the registrar. What will happen if the government of Iraq or of North Korea is dissatisfied with the policy of the national ccTLD registry and wants a change? Or if a prime minister of a corrupt government wants to give the right for the profitable ccTLD management to his brother-in-law? Can the government send an order to ICANN to complete the re-delegation? Even the European Union and its 15 national leaders can not decide alone without the consent of ICANN (and at the moment also the consent of the US Department of Commerce) to introduce the .eu Domain, which was adopted by an European Council meeting in June 2000, into the Internet Root Server system. Under such circumstances ICANN is pulled into political conflicts, even if it tries to remain outside.

The "Governmental Advisory Committee" has adopted a set of principles for the relationship between national governments, ccTLD managers and ICANN¹⁸. The political core of the GAC principles is that they confirm the "ultimate public authority" of a national government over the national domain name space. What governments want to have is a triangular contractual arrangement which gives the governments the right to determine when ICANN has to change the delegation and to put a ccTLD into or out of the root.

ICANN wants to avoid to become subordinated under a governmental order and argues that it serves primarily the "Global Internet Community". In a case of a re-delegation ICANN would act only if there is a consensus of the "Local Internet Community" (LIC), where the government is only one part of it. The ccTLDs, by recognizing the legal fact that they are operating under a national jurisdiction, want to have clear criteria for a re-delegation. The ccTLDs, representing the LIC, want to avoid a situation where they are becoming the "football of politics". Re-delegation should be acceptable only in cases of technical failure and not as a result of a change of the government or other politically motivated actions.

After long complicated negotiations a policy was agreed during ICANNs meeting in Melbourne in March 2001, which produced a interesting compromise. According to this policy ICANN would enter into bilateral contracts with the ccTLDs by taking into consideration that ccTLD managers will have another

18. Principles for the delegation and administration of country code domains, in:

<http://www.noie.gov.au/projects/international/DNS/gac/index.htm>

bilateral relationship with their national governments. But there will be no direct contractual relationship between ICANN and the 180+ national governments. Additionally, a "best practice" document should reduce wishes of re-delegation for the ccTLD management by governments to cases of technical failure. ICANN would follow the wish of a government for re-delegation only if there is the consent of the "local Internet community".

Although ICANN wants to channel the issue into a purely technical avenue based on "technical performance", it will undoubtedly be pulled into non-technical conflicts if a government calls for a politically motivated re-delegation against the outspoken wish of the local Internet community.

4.5 At Large Membership

The agreement, that nine of the ICANN directors should be elected by the Internet Users, was a precondition for the recognition of ICANN by the US Department of Commerce. It was in particular Ira Magaziner who pushed the idea through against the will of Jon Postel.¹⁹ But the final agreement reached in October 1998 with the 9 : 9 constellation in the Board of Directors did not produce a solution how an ICANN At Large Membership (ALM) could be defined and constituted and the nine ALM directors could be elected.

To clarify the status of an ordinary "ICANN member", the ICANN Board established a "Membership Advisory Committee" (MAC) in January 1999. The MAC, which got assistance from the Harvard Law School, presented its final recommendations to the ICANN Board in May 1999. According to the recommendation each Internet user with an e-mail and postal address who is older than 16 years of age should be seen as a potential ICANN member and should be invited to participate in the election of the nine directors. The recommendation passed the board in principle and with some modifications. Instead of nine only five director seats were opened for elections in a first test phase. In early 2000 the first global election of ICANN directors started. In October 2000 five directors were elected.

While ICANN expected that not more than 5000 to 20 000 users would participate in the election, the call for membership produced an astonishing figure of 160 000 interested users. More than 200 candidates were running for the five seats, partly nominated by an ICANN Nomination Committee and partly

19. Jon Postel passed away after a heart surgery in October 1998, ten days after the final agreement on ICANN.

self-nominated with the support of a membership quorum. The finally elected five directors included individuals like Karl Auerbach, an ingenieur who is also Vice President of Cisco System, Nil Quaynor, the manager of the ccTLD of Ghana and Andy Mueller Maguhn, a famous "Hacker" from the German Chaos Computer Club.

The election was seen as an great innovation and a huge success. But they were not free from deficiencies. Besides of technical problems which arose in the management of the 160 000 applications there was also a tendency of capture by some countries, where the local media organized public campaigns for national candidates to become the country's representative in the "world government of the Internet".

While ICANN membership and global online elections remains a controversial issue, which needs more study and clarification (in January 2001 ICANN established an "At Large Membership Study Committee" under the chairmanship of the former Swedish Prime Minister Carl Bildt) it is clear that the subject is not a technical one. If 160 000+ Internet Users start to organize themselves, eventually in form of an "Internet Users Supporting Organization", the third sector could become an strong organizational structure. It is unavoidable, that ICANN, by implementing its constitutional mandate to build a membership, is pulled into a political debate about cyberdemocracy, legitimacy and representation.

With global direct elections of some of its directors ICANN enters another fundamental public policy area. Elections are the main source for the legitimacy of a government. If millions of Internet users would participate in global elections, ICANN could become a real political factor in international politics. There was an interesting dispute about legitimacy and who represents whom during the ICANN Meeting in Marina del Rey in November 2000 between Michael Leibrandt, the German ministerial representative in the GAC, and, Andy Mueller Maguhn, the new elected German ICANN director. While Leibrandt argued that the German Internet community, as part of the German electorate, has given him via the election of the national parliament the legitimacy to act on behalf of the German Internet users, Mueller Maguhn argued that his legitimacy comes directly from the European Internet users, including the German users, who have elected him in direct elections. The dispute did not produce a consensus but it signalled the beginning of a new debate about legitimacy and representative democracy.

4.6 The Root Server System

The Domain Name System works via name servers. If somebody sends an e-mail or goes to a website, the name server asks the root server for the relevant Top Level Domain and finds so the way to the wanted computer. The root server, who manages the Top Level Domains (TLD), can be seen as the material heart of the Internet. Without the root server Internet communication could end like the building of the tower of Babel. There are 13 root-servers at the moment in the world, ten of them based in the United States. Each root server mirrors the TLDs of the A root server which is based in Herndon/Virginia, managed by NSI and still under control of the US government.

The control over the A Root Server is an issue of a growing controversial debate. Although it was not clearly said that ICANN will overtake one day also the full control over the A Root Server, it is the expectation of the global Internet community, that the sole control of the US government over the A Root server should come to an end. The Bush administration has not yet indicated what their position is. In March 2001 a Committee of the US Senate has asked the "General Accounting Office" of the US Congress to investigate the fact whether the Department of Commerce has the right to transfer the control over the A root server to ICANN.

The issue of the "ultimate control" over such a critical element of the global information infrastructure is also of concern for a number of governments. A representative of the German government has asked in an academic conference in February 2001 in Zurich, whether it would be possible, that the US government could use its ultimate control over the A root server as a potential weapon in a trade conflict with another nation. The controller of the A root server is in a position to take TLDs out of the root. Insofar there is a theoretical option that as part of a political sanction against another government the ccTLD of a given country could be taken out of the root.

The US government, who has financed the research for the development of the Internet, has managed the control over the A root server in a very responsible way being aware that it acts on behalf of the global Internet community. Nevertheless, from a legal point of view, it would be not enough, that ICANN enters into a contractual relationship with the Root Server operators. There is also a need to clarify legally the role of the US government so that other governments do not have to trust the US only but have a legal title in their hands in form of an international treaty.

The control over the root server constitutes a very sensitive security

problem. While the management of the root server is primarily a technical task, its role for the global Internet brings ICANN into the spotlight of even the global security policy.

4.7 ICANN as a Blueprint for other "Internet Corporations"?

The global character of the Internet calls for a global system of governance. National governments and intergovernmental organizations now understand that traditional law and policy-making cannot be simply transferred to the Internet. Although the "Governmental Advisory Committee" stresses continuously that the "ultimate public policy authority" is in the hands of the national governments, it is more a theoretical position than a decisive practical factor. What the government of Mexico or Burundi or even Sweden can do, if ICANN introduces new gTLDs, adopt dispute resolution policies and organizes global elections?

The issue is not, who has the "final sovereignty". What is at stake is the need to avoid the appearance of a "responsibility vacuum", a situation where nobody is in charge. Whether ICANN wants it or not, as the first and (at the moment) only "new global Internet corporation" it can't escape its political responsibility. ICANN is certainly not the "World Government of the Internet", but its design, its composition, structure, working methods, decision making procedures, dispute settlement mechanism etc. have produced innovative elements of a new type of governance. ICANN fills a gap, which can't be closed by governments. ICANN guarantees that the stability and the efficiency of the Internet is kept and its key resources are managed in a way which serves the interests of the global internet community.

While ICANN is still far away to get labeled as a "success story", it is on the other hand an interesting "policy pilot project" which could be used also as a blueprint to launch other "Internet Corporations" dealing with other controversial issues emerging from the development of the Internet and the global information society, from the regulation of content of information to strengthening consumer protection online to the fighting of cybercrime. ICANN's governance model with an equal representation of service providers and service users in the main decision making body and with governments in an "advisory capacity" is an interesting innovation which moves the "new trilateralism" onto the next level by turning the "triangle" around and bringing the "real people" (private industry and civil society) into a direct contact with governments on the sideline as an observer and, possibly, as a moderator who keeps (theoretically) the "ultimate public authority" but does not intervene into the day to day

operations.

There is no need to broaden ICANN's mandate or to give ICANN more power. To label ICANN as the "United Nations of the Information Age" is a journalistic exaggeration. But the truth is that regardless of what ICANN decides, even if it restricts itself to a very narrow interpretation of its technical mandate, very concrete political conflicts will emerge which mirror the overriding general problems of the transformation period from the industrial to the information society and which always leads to the problem to build bottom up a "rough consensus" which is accepted likewise by the private industry, the internet users and the national governments.

Decisions concerning Internet Domain Names, Internet Addresses, Internet Protocols and the Internet Root Server System will open channels or close avenues for economic and social developments. The technical aspects of protocols, addresses and domain names are interwoven with political, economic and social processes. The control over the root server system is even seen as a critical security issue. In the global information society, "technical solutions" are determining to a high degree "political options". As Larry Lessig has stated in his book "Code and other Laws of Cyberspace", in the Internet Age the "Code is the Law". (Lessig, 1999).

5. GROWING COMPLEXITY: GOVERNANCE AND SELF-GOVERNANCE FOR CITIZENS AND NETIZENS

The "information revolution" which is changing the economic basis of the society, has far reaching consequences for the systems of governance. We live in a transformation period where the "old governance system", rooted in the concept of the sovereign nation state, is complemented by an emerging "new governance system", which is global by nature and includes more actors than the 180+ national governments and their intergovernmental international organizations.

ICANN, the GBDe or other new institutions are reflecting this process, which is driven by market needs and user interests. The question is not whether this new global non-governmental institutions want to play a more political role or not. The question is whether new global issues need a new system of global governance. Somebody – governments, private industry, civil society – has to be in charge. The "new trilateralism" offers an opportunity for shared responsibilities among groups that have both common and divergent interests.

While neither stronger government regulation nor industry self-regulation offer an answer, a new system of co-regulation offers the opportunity for governments, industry and the public to develop bottom-up policy and legal frameworks that would give all partners stability and flexibility.

While this trilateral relationship sounds good in theory, it is much more unclear how this could work in practice. Who will define the aims, norms, principles, criteria, priorities and procedures? How will the three "global players" constitute themselves and agree on an interaction? Where the legitimacy comes from? Where are the "checks and balances" and the safeguards if something goes wrong or parties are unable to agree? Where are the risks and the threats? How such a trilateral relationship for the global information society interacts with the traditional political, economic and social system of the real world, which does not disappear when the door to cyberspace is opening?

The pressure for new, innovative answers comes from the practical reality. With increasing Internet-related governance problems, the call for a functioning system without "holes" will become louder, regardless of whether such a system is constituted by governmental or non-governmental actors. And it is without any doubt, that the way towards such a new governance system is paved with all kinds of political, economic, cultural and social conflicts because power, wealth and influence is at stake

It is obvious that we live in a transition period. The "information revolution" has led to a "social evolution" that will lead to a new quality of political life. Rules and values are changing. In his "Cluetrain Manifesto" Christopher Locke puts it in this way: "The future will be about subtle differences, not wholesale conformity; about diversity, not homogeneity; about breaking rules, not enforcing them; about pushing the envelope, not punching the clock; about invitation, not protection; about doing it first, not doing it "right"; about making it better, not making it perfect, about telling the truth, not spinning bigger lies; about turning people on, not packaging them; and perhaps above all, about building convivial communities and knowledge ecologies, not leveraging demographic sectors." And he adds that the revolution takes already place in the streets. "But if you are looking for Molotov cocktails and tear gas, beleaguered cops and firebrand radicals, you are bound to miss what is really happening. Just because you are not seeing a revolution - or what Hollywood has told you a revolution ought to look like - does not mean there is not one going on (Locke, 2000: 175)."

Four hundred years ago, after the beginning of the industrial revolution,

the first "new industrialists" realized that the governance system at this time, based on kingdoms with an absolutist monarch at the top, did not satisfy the new needs of the industrial age. The search for a "new governance system" in the 17th century led to a historical and grand political compromise: the introduction of a constitutional monarchy. The constitutional monarchy was to a certain degree a "co-regulatory system." While the king and the feudal institutions (the old system) had still some concrete power inherited by birth, new institutions that gained power through elections, were established, like national parliaments and bourgeois governments (the new system). At this time, nobody wanted to abolish the kingdoms in general (and even today there are still numerous kingdoms in existence with kings and queens trying to keep their role and influence). But the need for more stable rules that would function independently of an absolutist monarch, produced a new alternative system. The first constitutions of the 17th century in which rights and duties of citizens and governments were defined, did not yet create a "republic" but they opened the door for the emergence of a new governance system. The "constitutional monarchy" enabled philosophers like Montesquieu, Rousseau and others to develop a more detailed system of governance with concepts like the "division of the branches of power" and the "social contract." Only in 1789 the king was killed in a revolution, which paved the way for our present system of representative democracies. A simple system became more complex.

The present system of governance in the 21st century with nearly 200 nation-states has functioned more or less satisfactorily over the last 200 years. But with globalization, the system based on the sovereign nation-state, shows some cracks when confronted with global challenges. Like in the early days of the "industrial revolution", the call is not to change the system but to make it more flexible for a changing economic environment.

The call for co-regulatory systems tries to combine the positive values of stable governmental regulation within and among nation-states, with the new flexibility needed to meet the challenges of globalization in the information age. One result of this process is a new diversification of power on a global level. New actors which create new institutions are emerging and move into the new territory, filling emerging gaps regardless whether there is a governmental order or not. National governments will not disappear the next century but they will become one actor among others, obliged to join into co-operative networks and consensual arrangements with other global actors and to share power with them. On the other hand the new emerging global actors, both the private

industry and the global civil society (still in its infant stage) have not only to proof their legitimacy but they have also to learn, that the rights and freedoms they are fighting for are linked to duties and responsibilities.

While it is still too early to make any predictions, how a new governance system could look like, it seems clear that the present complex governmental system will look simple in comparison with a new global governance system. Complexity is further growing and conflicts will remain the main driving force for development. In such a complex system is space for many "governments". Why not to have a global governance system with 180+ national governments that govern "citizens" and 180+ subject-oriented non-governmental "governments" that govern "netizens?" To define which areas of life will fall under "citizenship" and which will come under "netizenship" and how to organize a multi-dimensional co-existence between different governance bodies needs more than one Montesquieu and one Rousseau. We are only in the beginning of the emergence of the global knowledge-based information society, nobody can predict the future but the excitement is already here.

This text is a revised version of a lecture given by Wolfgang Kleinwächter at the conference "Approaches to the Internet" arranged by the Department of Information and Media Studies, and the Centre for Cultural Research, Faculty of the Arts, Aarhus University. The conference was held in Aarhus, Denmark, October 18th-20th, 2000.

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