BEYOND ICANN VS ITU?
How WSIS Tries to Enter the New Territory of Internet Governance

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Abstract / Internet governance became one of the most controversial issues in the WSIS process. While the subject was a marginal one during the initial phases of WSIS (PrepCom1, Geneva, June 2002), it moved gradually from the periphery of the debate to the top of the agenda. After the series of five regional ministerial conferences (from Bamako, May 2002, to Beirut, February 2003) Internet governance suddenly emerged as one of the 'hot items' at PrepCom2 (Geneva, February 2003). But neither PrepCom3 (Geneva, September 2003) nor PrepCom3bis (Geneva, November 2003) could reach an agreement. PrepCom3bis+ (Geneva, December 2003) finally 'agreed to disagree', to postpone the debate and to ask the UN secretary-general, Kofi Annan, 'to set up a working group on Internet Governance' with the mandate, 'to investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005'.[1] The second phase of the Summit is scheduled for Tunis, November 2005.

Keywords / ICANN / ITU / internet governance / multistakeholder approach / WSIS

What is Internet Governance?

The term 'internet governance', while undefined, rather vague and partly confusing, stands mainly for the global technical management of the core resources of the internet: domain names, IP addresses, internet protocols and the root server system. The question which arose during the WSIS process was how these core resources, which constitute the basic material infrastructure of the global information society, should be managed.

Some governments, mainly the US and the European Union, supported by private industry, argued that the private Internet Corporation for Assigned Names and Numbers (ICANN) with its narrowly defined technical mandate, should continue to be the central organization in this field. Other governments, led by China and members of the 'G20 group' like Brazil, South Africa and India, based their arguments on a broader definition. Their understanding of 'internet governance' included not only domain names and root servers but also other internet-related issues like spam and illegal content. They wanted to move the whole internet management system under the umbrella of an intergovernmental organization of the United Nations, notably the International Telecommunication Union (ITU), which hosted the first phase of the summit. Civil

society, while critical of ICANN, did not support an 'intergovernmental solution' but argued in favour of a 'decentralized mechanism' with different organizations with different core responsibilities.

The conflict between ITU supporters and ICANN supporters pulled the subject into the spotlight of global policy. Even the *Washington Post* asked the question, whether WSIS would 'hand over the control of the Internet to the United Nations'. Next to the battle around the proposed Digital Solidarity Fund the 'ICANN vs ITU' controversy became the main conflict of the final stage of the WSIS process in Geneva.

In the beginning it seemed that the controversial discussion was a debate on two not directly related levels: technicians discussed technical issues, politicians political issues. ICANN supporters argued that internet governance was a technical question and could be better handled by a private corporation. The ITU supporters argued that internet governance was a political problem and fell under the national sovereignty of the governments of UN member states. But any 'compromise', to separate technical and political issues and to give both organizations a number of responsibilities, could not be reached, because the question is not that simple.

The problem is that technical and political aspects of internet governance are interwoven in a way that they cannot be separated by cutting the issue into two pieces. The technical control of the root server system is linked to the stability and security of the internet, which is a precondition for the functioning of the global economy. The introduction of new top level domains, while basically a technical question of putting a zone file into the root, is like the creation of 'new territory in cyberspace' and has unavoidable economic and political implications. The marriage between mobile telephony and internet communication (ENUM) and the emergence of internet telephony (VoIP) leads to the convergence of the 'internet numbering system' and the 'telephone numbering system', which creates conflicts between two different allocation procedures: top-down under the sovereignty of national governments for telephone numbers vs bottom-up by global private networks for IP numbers. Issues which has been discussed and decided within ICANN like dispute resolution for domain names or the election/selection of representatives for individual internet users have a political component (Kleinwächter, 2000a).

In internet governance, there is no 'policy (regulation) here and technology (freedom) there'. The cyberspace, as Lawrence Lessig has argued, presents something new for those who think about regulation and freedom. 'It demands a new understanding of how regulation works and what regulates life there. It compels us to look beyond the traditional lawyer's scope – beyond laws, regulations and norms.' And, he added, 'In real space we recognize *how laws regulate* – through constitution, statutes and other legal codes. In cyberspace we must understand *how code regulates* – how the software and hardware that make cyberspace what it is, regulate cyberspace as it is' (Lessig, 1999: 6; emphasis added). In cyberspace 'Code is Law', says Lessig. In other words, in cyberspace the 'law makers' are the technical developers, the providers and users of internet services themselves.

The WSIS internet governance controversy is much more than a classical

interest conflict among two or more governments. It is a fundamental conceptual and philosophical conflict between different stakeholders about the question how the global internet should be organized, or more, how the global information society, which is based on the internet as its main infrastructure, should be governed (Kleinwächter, 2001a: 17ff.).

Looking Back to IANA and the IAHC (1988–98)

The controversy can only be understood by going back to history (see Kleinwächter, 2000b; Mueller, 2002). Since the 1970s the coordination and, where necessary, the management of the internet core resources have been developed bottom-up, mainly by the technical developers, by the providers and users of internet services themselves, and without governmental involvement. In contrast to telecommunication and broadcasting, where top-down governmental regulation channelled and framed the design of the media according to national political and economic interests, there was no similar legislative approach with regard to the internet. The necessary standards were developed and adopted by non-governmental organizations like the Internet Engineering Task Force (IETF) on the basis of the principle 'running code and rough consensus'. And it worked to the benefit of all. The tremendous growth of the internet is a proof that national or international legislation was not really missed.

Also the domain name system (DNS) developed bottom-up. It was coordinated by its father, Jon Postel, with one assistant, in his Californian office in Marina del Rey until the early 1990s. He managed the zone files of a database and was not interested in being pulled into policy. His system for top level domains (TLDs) was simple and guided by practical reasons: one basket for generic names (gTLDs) and one basket for country names (ccTLDs). For the gTLDs he suggested three for the US – '.edu' for academic institutions, '.gov' for governmental bodies, '.mil' for the military – and three for 'the world' – '.com' for businesses, '.org' for organizations and '.net' for all other networks. For the ccTLDs he made explicitly clear in RFC 1951, that his delegation of ccTLDs is not a decision on what a country is or not. He linked zone files to units listed on the ISO 3166 list of the International Standardization Organization (ISO), the most comprehensive list, comprising 243 countries and territories, Postel could find at this time.[2] Technically, Postel could have delegated thousands of TLDs, but he wanted to keep the system easily understandable for users.

Until the end of the 1990s, the majority of the governments of the world did more or less ignore the internet, including the management of their country code TLD. The global internet system grew in the shadow of intergovernmental policy. When governments discussed the controversial subject of the 'New World Information and Communication Order' (NWICO) within UNESCO, nobody mentioned the internet. When the European Commission published its White Book on employment and economic development in 1993, the word 'internet' did not appear on the 250 pages of the report. Even the ITU Kyodo Plenipotentiary Conference in 1994 did not discuss an intergovernmental strategy for internet policy.

Only the US government, which financed internet research first via the Department of Defence (DoD) and later via the National Science Foundation (NSF), developed something like a 'soft internet policy'. The Reagan administration (1980–8) created with its 'deregulation' philosophy a flexible and open legal environment for internet developers. Only when the registration of internet domain names grew to more than 100,000 in the late 1980s, did the Bush Sr administration propose to institutionalize the management of the domain name system. In a contract between the US Department of Commerce (DoC) and Postel's Information Science Institute (ISI) at the University of Southern California, signed in 1989, the Internet Assigned Numbers Authority (IANA) was established. IANA – a one-person organization – became the recognized coordinator of internet resources. IANA managed the TLD databases and allocated IP address blocks to the regional internet registries (RIRs).

In the early 1990s, when the number of domain name holders crossed the 1 million mark and the internet became, stimulated by Tim Berners-Lee's invention of the World Wide Web, a commercial platform, the political and economic dimensions of the technical coordination of the internet resources became more and more visible. In 1995, Postel, realizing the need for a more stable and comprehensive DNS management system, wanted to move the IANA function under the umbrella of the Internet Society (ISOC), a policy-oriented network of internet technicians, established in 1992. But his effort faced opposition both from the US government and parts of the private industry, which argued that 'technicians' do not understand the political and commercial dimension of the '.com revolution'.

In particular, Network Solutions Inc. (NSI), which operated, on the basis of a contract with the DoC, the A-Root Server and managed the registry and registrar functions for the gTLDs .com, .org, .net and .edu, feared that Postel's ISOC plan, to introduce 150 new gTLDs, could undermine its fast-growing multimillion business in the registration of domain names. In 1995, the NSF stopped financial support for the internet and the DoC allowed NSI, one of the beneficiaries of the NSF support, to introduce an annual registration fee of US$35.00 for domain names. In 1996, NSI had already more than 10 million registered names in its database.

A growing interest in something like an 'internet governance policy' was developed also by the trademark community. Numerous conflicts between holders of registered domain names and owners of registered trademark names made visible the need for a consistent dispute resolution mechanism which would protect trademarked brand names in cyberspace.

The European Commission discovered 'internet governance' as an issue in the context of its new Information Society Programme, started under Commissioner Bangemann at the EU Summit in Corfu, June 1994. The EU also opposed Postel's proposed ISOC solution. It wanted to see a greater role for both European governments and European businesses in the fast-growing new sector of the internet economy.

Postel, who wanted to avoid both governmental and commercial control of the DNS, tried to find a 'third way'. In summer 1996, he initiated the so-called Interim Ad Hoc Committee (IAHC). The IAHC was a network which linked

together three 'technical' organizations – IANA, ISOC and the Internet Architecture Board (IAB) – two UN intergovernmental organizations – the Geneva-based International Telecommunication Union (ITU) and the World Intellectual Property Organization (WIPO) – and a business group – the International Trademark Association (INTA). The plan was to establish a Policy Oversight Committee (POC), composed of the six groups, as the highest decision-making body for the management of domain names, to introduce seven new gTLDs, to license 28 registrars and to move the A-Root Server from Herndon, Virginia to Geneva, Switzerland. For Postel, it was important that both governmental and business institutions were involved, but the voting majority in the POC was in the hands of the three technical organizations, IANA, ISOC and IAB.

The 'Memorandum of Understanding on Generic Top Level Domains' (IAHC gTLD-MoU) was signed on 2 May 1997 and celebrated in particular by the ITU, which became its depositar. ITU secretary-general Pekka Tarjanne qualified the MoU as the beginning of a new global internet policy and a turning point in international law. The MoU was not an intergovernmental treaty. It was a legally non-binding recommendation signed by about 80 governmental and business institutions. The majority of ITU member did no participate in the IAHC negotiations.

But the MoU also faced substantial opposition. The US government was not amused by the plan to move the A-Root Server to Lac Leman. US Secretary of State Madeleine Albright wrote a critical letter to Pekka Tarjanne, arguing that the ITU secretary-general had gone beyond his mandate when he signed the IAHC gTLD-MoU without any further consultation among the ITU member states. NSI, which saw its monopoly in the registrar and registry business of gTLD name registration challenged, opposed the MoU fundamentally and lobbied the US Congress to turn the gTLD-MoU down. Furthermore, the registries of ccTLDs, which were not included into the gTLD-MoU, criticized this exclusion.

The Making of ICANN

Only two months later, 1 July 1997, the US government introduced an alternative plan. The report 'A Framework for Global Electronic Commerce', published by the White House and signed by US President Bill Clinton and US Vice-President Al Gore, suggested privatization of the DNS. The US report, which did not mention a single word on IAHC gTLD-MoU or the ITU, became the starting point for a process which led directly to the foundation of ICANN in November 1998.

A first conceptual Green Paper was published by the DoC in early 1998. The proposal was to create a 'new private, non-commercial corporation' (NewCo), to introduce competition into the domain name registration business and to develop a mechanism for the resolution of disputes over domain names. At the same time, the DoC announced that it would terminate its contracts with NSI and IANA by 30 September 1998.

The Green Paper provoked another wave of criticism, this time mainly from the European Commission. The EU criticized the US domination and called for

an 'international representative body' for future internet governance: 'The European Union and its Member States would wish to emphasize our concern that the future management of the Internet should reflect the fact that it is already a global communication medium and the subject of valid international interests.'[3]

Ira Magaziner, US President Clinton's internet adviser and the main architect of what later became ICANN, replied in a hearing before the US Congress to the European criticism: 'The purpose of the Commerce Department proposal is to improve the technical management of the DNS only. The Green Paper does not propose a monolithic Internet Governance system. Frankly we doubt that the Internet should be governed by a single body or plan.'[4] Magaziner recognized, that 'the Internet has become an international medium for commerce, education and communication' and 'has outgrown the legacy system of technical management'. He accepted the idea of an 'international representative body' and proposed that the composition of a board of directors of a NewCo should be balanced and represent the functional and geographic diversity of the Internet.

A more moderate and balanced White Paper, published by the DoC in June 1998, defined four guiding principles for a NewCo:

• Stability of the internet,
• Competition in the domain name market,
• Private bottom-up policy coordination,
• Global representation.

DoC spokesperson Becky Burr added:

> We are looking for a globally and functionally representative organization, operating on the basis of sound and transparent processes that protect against capture by self-interested factions and that provides robust, professional management. The new entity's process needs to be fair, open and pro-competitive. And the new entity needs to have a mechanism for evolving to reflect the changes in the constituency of Internet stakeholders.[5]

Within a couple of weeks the bylaws of the NewCo were drafted. Its design came mainly from Ira Magaziner, the final text mainly from Jon Postel. While on the one hand the drafting process was rather open and transparent – all drafts were published on the internet and included an open discussion period for public comment – the making of ICANN was seen, on the other hand, by groups which were not involved in the final drafting or which had no idea about the existence of such a kind of 'virtual negotiations' as a 'great conspiracy'.

Postel, who died some weeks later, defended his approach when he presented the final result to the US Congress. 'We listened to everyone who wanted to offer comments or suggestions, and we then tried to turn those suggestions into actual documents. Group discussion is very valuable, group drafting less productive.' And he added: 'This new organization will be unique in the world – a non-governmental organization with significant responsibilities for administering what is becoming an important global resource.'[6]

ICANN was incorporated as a 'private non-for-profit-organisation'

representing the 'global internet community' under Californian law. The design of ICANN was based on the idea that the providers and users of internet services themselves should have the decision-making capacity, while governments should have only an advisory role. Consequently, the board of directors was composed of 19 members chosen from three so-called supporting organizations for domain names, internet addresses and IP protocols, representing the providers and developers of internet services (the private sector), and nine directors who should represent the public at large, that is the individual internet users. Governmental representatives were not eligible as ICANN directors. A Governmental Advisory Committee (GAC) for the 180+ governments of the world, was invited to give 'advise' to the board of directors on issues of public interests. But according to the ICANN bylaws, the recommendation of the GAC had no binding power for the ICANN directors (Kleinwächter, 2001b).

The 'making of ICANN' made the IAHC gTLD-MoU obsolete. When ITU had its Plenipotentiary Conference in Minneapolis in October/November 1998, the gTLD-MoU was treated as a 'non-existent paper'. Even the ITU Resolution 102, which referred to 'Management of Domain Names and Internet Addresses', did not refer to the gTLD-MoU with a single word. It invited instead the secretary-general of the ITU, 'to take an active part in the international discussion and initiatives of the management of domain names and internet addresses, *which is being led by the private sector*' (emphasis added).[7]

The 'Minneapolis Deal' was reached by classic diplomatic 'assymetric compromise'. The US government withdrew its opposition to the plans of the ITU to prepare a world conference on the information society and got in exchange the recognition of the private sector leadership in internet governance. Eight days later, the interim ICANN board of directors had its first meeting in Cambridge, MA. And on 25 November 1998, the DoC recognized ICANN as the 'NewCo'. The Memorandum of Understanding between the DoC and ICANN was for a transition period only. After two years and under the condition that ICANN fulfilled its functions, the DoC wanted to transfer the remaining responsibilities, including the control over the A-Root Server and the IANA function, to ICANN.

ITU secretary-general Pekka Tarjanne accused President Clinton's internet adviser, Ira Magziner, during the World Economic Forum in Davos, January 1999, of hypocrisy. The US government was arguing for self-governance of the internet by the providers and users of services without governmental involvement, but was reserving for itself a special role by placing the DoC as the final overseeing body for ICANN. Magziner defended his position by referring to the 'two year transition period' and the foreseeable end of the special role of the DoC.

But the idealism of the founding fathers of ICANN was not fulfilled in its original sense. Although the board was composed of representatives from all regions of the world, with US directors in a minority, as a fact of the economic realities in the internet economy and the domain name market, ICANN became very US oriented, with VeriSign (former NSI) as a main player. The idea that nine 'at large directors', representing the internet users, should balance the interests of the private internet industry was never implemented. And the US

government continued to be an overseeing body for ICANN. Clinton left the Oval Office without finishing his internet governance business. The Bush Jr administration renewed the ICANN DoC-MoU and extended it until 30 September 2006.

After the burst of the .com bubble and the terrorist attacks of 11 September 2001, the broader political and economic environment for internet governance changed dramatically. To guarantee security and stability of the internet became the first priority. ICANN turned from a project on 'cyberdemocracy' into a instrument for 'cybersecurity'. ICANN started a process of reform and redesigned its management structure. While the representation of internet users was fundamentally reduced, the role of governments was strengthened. The original principles remained the same, but ICANN 2.0 became a little bit less a self-regulatory body and a little bit more a 'public–private partnership' organization (see Froomkin, 2003).

WSIS and Internet Governance

The irony of history was that the 'Minneapolis Deal' of October 1998 – to give ITU a world summit and to leave internet governance in the hands of the private sector – began to turn into a reality when preparations for the first WSIS phase started with PrepCom1 in June 2002. At this time, ICANN was in the middle of its reform process and the ITU prepared its next plenipotentiary conference for Marrakesh, which had, inter alia, a re-evaluation of Resolution 102 on its agenda. Internet governance was not an issue at PrepCom1. But during the series of regional ministerial WSIS conferences, it got more and more attention.

The African Regional WSIS Conference in Bamako, 30 May 2002, ignored the subject. None of the 14 content-related preparatory workshops for Bamako dealt with internet governance. The nine pages of the Bamako Declaration do not include a single word or paragraph on internet governance.[8]

The European WSIS Regional Ministerial Meeting in Bucharest, November 2002, raised one aspect of the issue, the management of domain names, but with low priority. Principle 5 of the Bucharest Declaration includes under the heading 'Setting up an enabling environment, including legal, regulatory and policy frameworks', one sentence which says, that

> . . . the information society is, by nature, a global phenomenon and issues such as privacy protection, consumer trust, management of domain names, facilitation of e-commerce, protection of intellectual property rights, open source solutions etc., should be addressed with the active participation of all stakeholders. (emphasis added)[9]

The Asian WSIS Regional Ministerial Conference in Tokyo (January 2003) followed the Bucharest Declaration, but added to 'domain names' also the management of 'IP addresses'. The Tokyo Declaration stated:

> The transition to the Information Society requires the creation of appropriate and transparent legal, regulatory and policy frameworks at the global, regional and national levels. These frameworks should give due regard to the rights and obligations of all stakeholders in such areas as freedom of expression, privacy, security, management of Internet addresses and

domain names, and consumer protection, while also maintaining economic incentives and ensuring trust and confidence for business activities. (emphasis added)[10]

One step further went the Latin American WSIS Regional Ministerial Conference in Bavaro (January 2002) in the Dominican Republic. Here, for the first time, the term 'internet governance' appears in a WSIS document. The relevant paragraph of the Bavaro Declaration says:

Establishing appropriate national legislative frameworks that safeguard the public and general interest and intellectual property and that foster electronic communications and transactions. Protection from civil and criminal offences ('cybercrime'), settlement and clearance issues, network security and assurance of the confidentiality of personal information are essential in order to build trust in information networks. Multilateral, transparent and democratic Internet Governance should form part of this effort, taking into account the needs of the public and private sectors, as well as those of civil society. (emphasis added)[11]

The final Regional WSIS Ministerial Conference for West Asia (Beirut, February 2003) took this one big step further by introducing ideas like 'suitable international organization', 'multilingualism' and 'national sovereignty' with regard to internet governance. Article 2, para. 4 of the 'Beirut Declaration', stated that:

. . . the responsibility for root directories and domain names should rest with a suitable international organization and should take multilingualism into consideration. Countries' top-level-domain-names and Internet Protocol (IP) address assignment should be the sovereign right of countries. The sovereignty of each nation should be protected and respected. Internet governance should be multilateral, democratic and transparent and should take into account the needs of the public and private sectors as well as those of the civil society. (emphasis added)[12]

It is worth noting that in parallel to the WSIS Regional Conferences the ITU had its own plenipotentiary conference in Marrakesh, Morocco (October 2002). During the Marrakesh conference a bitterly controversial debate about private sector leadership and the future role of ITU in internet governance took place. In Marrakesh, US and EU governments, supported by private ITU sector members, expressed their satisfaction with the ICANN reform process and argued in favour of a continuation of the leading role of ICANN in internet governance. On the other hand, a growing number of third world countries discovered the management of domain names and IP addresses as an issue related to their sovereignty and economic development. They felt underrepresented in ICANN and blamed the California-based private corporation for being US dominated and widening the 'digital divide'. They felt that they did not have adequate opportunities to participate in the bottom-up decision-making process in such a private corporation. And they criticized the control function for the A-Root Server of the US government. Additionally, some governments came with the idea to regulate the internet in general – similar to telecommunication and broadcasting – to protect unspecified national economic or political interests in areas like content control, cybercrime or VoIP.

The controversy in Marrakesh produced a renewed Resolution 102, where

the relationship between private industry leadership and governmental involvement was rebalanced. The 'key role' and the 'leadership' the private sector got in the 1998 resolution, was replaced by the recognition of a 'very important role'. On the other side, the sovereignty of national governments over the ccTLD space was strengthened. The resolution tried furthermore to separate the technical from the policy issues. It emphasized

> . . . that the management of Internet domain names and addresses includes technical and coordination tasks, for which technical private bodies can be responsible, and public interest matters (for example, stability, security, freedom of use, protection of individual rights, sovereignty, competition rules and equal access for all), for which governments or intergovernmental organizations are responsible and to which qualified international organizations contribute. (emphasis added)[13]

The ITU secretary-general got the instruction 'to take a *significant* role in the international discussions and initiatives on the management of Internet domain names and addresses' and 'to encourage all Member States to participate in the discussions on international management of Internet domain names and addresses, so that worldwide representation in the debates can be ensured.'[14]

Additionally, the conference adopted another Resolution 133 on the 'role of administrations of Member States in the management of internationalized (multilingual) domain names'. The Resolution says, inter alia, that 'it is estimated that in the coming years the majority of Internet users will prefer to conduct online activities in their own language' and that 'the current domain name system mapping does not reflect the growing language needs of all users'. It emphasizes that 'the future management of the registration and allocation of Internet domain names and addresses must fully reflect the geographical and functional nature of the Internet, taking into account an equitable balance of interests of all stakeholders, in particular of administrations, businesses and consumers'. And it recognizes 'the existing role and sovereignty of ITU Member States with respect to allocation and management of their respective country code numbering resources'. The ITU secretary-general is instructed 'to take any necessary action to ensure the sovereignty of ITU Member States with regard to country code numbering plans and addresses will be fully maintained, as enshrined in Recommendation E.164 of the ITU Telecommunication Standardization Sector, in whatever application they are used'.[15]

It is interesting to see that substantial parts of the Marrakesh resolutions made their way into the language proposed by the Beirut Declaration. In PrepCom2, which took place one week after Beirut, internet governance suddenly became a major WSIS topic. The recommendation of the Beirut conference was like throwing a stone into a negotiation room, where so far the digital divide, human rights, cybersecurity and the establishment of a Digital Solidarity Fund had dominated the debate. In one of the experts' round-tables during PrepCom2, organized by the Civil Society Internet ICT Governance Caucus, representatives from governments, private industry and civil society exchanged rather controversial positions about how internet governance should be included in the WSIS agenda. Immediately after PreCom2, the ITU hosted

an expert seminar on ccTLD issues, which was aimed to create more aware-ness among national governments on the issue.

During the following WSIS InterSessional Conference (Paris, July 2003), governments created an Internet Governance Ad Hoc Working Group, which became the main negotiation body until December 2003. According to the 'multi-stakeholder approach', which was introduced by UN Resolution 56/183 (12 December 2001) for the WSIS preparatory process, private industry and civil society were directly involved in the discussions from the early beginning. During the first meeting of the Ad Hoc Working Group, non-governmental observers participated in the meeting and offered welcome special expertise. But during PrepCom3 (September 2003), when observers with their laptops started blogging live from inside the group sessions – as is common in ICANN meetings – some governments pushed the observers out of the room. They were granted only the right to make a brief statement in the beginning of a session and could ask for a briefing by the chair after the end of the session. Also, during PrepCom3bis (November 2003) and PrepCom3bis+ (December 2003), observers, including ICANN president, Paul Twomey, had to leave the room. Ironically, some governmental delegates, who did not agree with the exclusion, informed privately in detail the observers sitting outside the conference room.

The Role of ICANN's Governmental Advisory Committee

The relationship between ICANN and ITU can be described as something like a 'cold war'. This had consequences also for ICANN's Governmental Advisory Committee (GAC), the body for channelling governmental input into ICANN's policy development processes. ITU is a full GAC member and its Tele-communication Standardization Sector (ITU-T) was also a member of ICANN's Protocol Supporting Organization (PSO) under ICANN 1.0.

During the ccTLD Workshop, organized by ITU in March 2003, some governments from third world countries called for a special 'Intergovernmen-tal Internet Governance Organization'. Others proposed to bring the manage-ment of the DNS and IP addresses under the umbrella of an 'ITU Study Group' of the ITU-T. In the workshop, ITU offered its services to take over more responsibility in internet governance by presenting itself as

> . . . unique in being a partnership between governments and industry for information and communication technology. It is widely acknowledged that the ITU-T performs its tasks to the general satisfaction of industry, governments and the public at large using processes that are open, transparent and ensure accountability to all stakeholders.[16]

The ITU proposals were countered by the GAC chair, Mohamed Sharil Tarmizi, who argued that governments already had with the GAC a channel to participate in internet governance policy development. In the ITU, governments would be mainly represented by the ministries for telecommunication, while the GAC members were also representing ministries for economics and labour, for technology and development and even foreign affairs. Sharil argued that within ITU study groups public policy issues would be seen through the narrow eyes of telcos. GAC, however, would take a broader view. He called for a better

coordination within national governments, for the development of coherent national strategies and for a broader engagement of third world governments in the GAC.

The GAC is open to all UN member states, intergovernmental organizations and other invited units. But the GAC also has a number of deficiencies. Only 86 governments have been accredited (February 2004) as GAC members and in the GAC meetings the average number of participants is substantially lower, very often no more than about 40. According to its operating principles, the GAC is an advisory body which does not take decisions. An additional point of conflict is that the government of China does not recognize the membership of Taiwan in the GAC.

But while the GAC is indeed de jure only an advisory body, since the ICANN reform the GAC is de facto an intergovernmental organization. It develops policies and agrees on positions. And the GAC has now something akin to a 'veto right' against the ICANN board of directors. In cases where the ICANN board rejects a GAC recommendation, the GAC can under ICANN 2.0 ask for a 'consultation'. If this consultation fails, ICANN is obliged to explain to the global internet community why no consensus could be reached and governments reserve their rights to act on their behalf in the area of the controversial issue.[17]

Sharil's observations, that national governments often speak via different ministries with different voices, was proven by the practical political process. While governments in GAC meetings supported the ICANN reform, the same governments opposed ICANN in WSIS.

An important milestone was the ICANN/GAC meetings in Bucharest (June 2002), one week before PrepCom1. At this ICANN meeting the governments evaluated in detail the ICANN reform plans and gave clear advice to a broad number of issues, including core values, mission, etc. of ICANN.

The GAC shared the view 'that a private-sector/public-sector partnership will be essential to ICANN's future success'. This view underlies a number of statements issued by the GAC and in particular the Principles for Delegation and Administration of Country Code Top Level Domains of 23 February 2000. The majority of GAC members agreed that the GAC was the principal forum for the international discussion of public policy issues related to the ICANN mission and the DNS.[18] But for the first time in GAC's history, that GAC Communique was not adopted by consensus. In a special statement, the ITU disassociated itself 'from portions of this document'. Also two other GAC members, France and Germany, disassociated themselves from parts of the GAC Communique. The two governments stated that 'due to the evolutionary nature of ICANN's mission, a different organisation of government participation, on a different legal basis, may be contemplated in the future'.[19]

Two weeks after the ITU Plenipotentiary Conference in Marrakesh, ICANN and GAC had their next regular meetings, in Shanghai. Although the renewed ITU Resolution 102 encourages the 185 ITU member states to participate more actively in the discussion on internet governance, only fewer than 50 governments came to China. Even the Chinese government, hosting the ICANN meeting, showed a very low profile in the conference. The GAC Communique

included no reference to the ITU Resolutions 102 and 133. The governments present in the GAC meeting gave a green light to the proposed new ICANN bylaws and its continuous leading role. ITU representative Richard Hill, in a special meeting of the ccTLD constituency, explained at length the spirit of the ITU Resolution 102 and entered into a controversial discussion with Marylin Cade, member of the GNSO (Generic Domain Name Organization) Council, representing also ITU sector member AT&T. But no ICANN body took official note of Resolution 102.

After an extraordinary ICANN meeting adopted the new ICANN bylaws and created ICANN 2.0 (Amsterdam, December 2002), ICANN/GAC had their next regular meetings in Rio de Janeiro, two weeks after the end of PrepCom2. A controversial issue of the Rio meeting was the planned Country Code Domain Name Supporting Organization (CNSO). A number of mainly European ccTLD managers made clear that they would not accept any top-down decision by the ICANN board with regard to the management of their ccTLDs. They wanted to keep their full sovereignty and argued that, even if they operated as private corporations, they had to respect the national legal environment of their country. The GAC Rio Communique, again, had no reference to ITU Resolutions 102 and 133. With regard to the CNSO, that GAC recalled 'that its role in providing advice on public policy, as described in the ICANN bylaws, includes policy issues to be addressed by the proposed ccNSO. To this effect, GAC has already issued policy advice in the form of the Principles for the Delegation and Administration of ccTLDs'.[20]

In the ICANN/GAC meetings in Montreal (June 2003), two weeks before the WSIS InterSessional in Paris, ITU did not participate. After the GAC adopted its regular communique, the ITU distanced itself openly from the final text: 'The ITU has not participated in this ICANN GAC meeting and therefore dissociates itself from this Communiqué.' ITU also had strong reservations with regard to GAC recommendations on iDNs, where the ITU dissociated itself 'from this statement because it is not yet clear whether ICANN's decisions, taken as a whole, will facilitate or hinder deployment of IDN'. And with regard to the ccTLDs, the ITU dissociated itself 'from the support for the proposed bylaws regarding ccNSO because the proposed bylaws may be inconsistent with fundamental principles such as national sovereignty, freedom of commercial actors, non-binding recommendations, and consensus decision-making'.[21]

The following ICANN/GAC meetings in Carthage, Tunisia (October 2003), between PrepCom3 and PrepCom3bis, again saw no ITU participation. On the other hand, the public meeting of the ICANN board did not have WSIS on its official agenda. Only a separate round-table, organized by ICANN's At Large Advisory Committee (ALAC), discussed aspects of the relationship between ICANN and WSIS with regard to internet governance. Also, the GAC Carthage Communique avoided any reference to WSIS. With regard to one of the most controversial internet governance issues in WSIS, the root servers, the GAC took note of

> . . . the efforts to date in deployment of Anycast to mirror the root servers and recognises the
> efforts undertaken by the root server operators to increase the security and stability of the

root servers-system for the benefit of the whole Internet Community. GAC encourages the root server operators to make more information available in order to increase awareness and understanding of these issues.[22]

In this context it is interesting to note that two days after the start of PrepCom2 in Geneva the US government renewed in Washington its MoU with ICANN for another three years until 30 September 2006.[23] WSIS phase two, which will get a report with recommendations for decisions on internet governance from a new WSIS working group, is scheduled for November 2005 in Tunis.

The Governmental Compromise: Agree to Disagree and Postpone

The WSIS controversy over internet governance is not settled. The issue remained unresolved until the last hour of PrepCom3bis+. The final compromise was to agree to disagree and to postpone the discussion until WSIS phase two. UN secretary-general Kofi Annan has been asked to establish a working group which will have the task to elaborate recommendations for the Tunis Summit in November 2005.

On the other hand, both the WSIS Declaration and the WSIS Plan of Action define a number of principles which constitute already the framework for future actions. The WSIS internet governance principles include both conceptual and procedural guidelines.

The conceptual guidelines can be summarized in four points. Articles 48, 49 and 50 of the WSIS Declaration state:

1. That the 'international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations';
2. That internet governance 'should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism';
3. That the management of the Internet 'encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations' and
4. That 'International Internet governance issues should be addressed in a coordinated manner'.[24]

For two other controversial issues – ccTLDs and root servers – the WSIS Plan of Action gives more vague and general recommendations. Governments are invited to 'manage or supervise, *as appropriate*, their respective country code top-level domain name (ccTLD)'. And they should '*in cooperation with the relevant stakeholders*, promote regional root servers and the use of internationalized domain names in order to overcome barriers to access' (Articles 13.c.ii and 13.d; emphasis added).

Furthermore, the WSIS Declaration tries to distribute different

responsibilities to different stakeholders, recognizing that no stakeholder alone can 'govern the Internet'. Article 49 of the WSIS Declaration states that:

a) Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues;

b) The private sector has had and should continue to have an important role in the development of the Internet, both in the technical and economic fields;

c) Civil society has also played an important role on Internet matters, especially at community level, and should continue to play such a role;

d) Intergovernmental organizations have had and should continue to have a facilitating role in the coordination of Internet-related public policy issues;

e) International organizations have also had and should continue to have an important role in the development of Internet-related technical standards and relevant policies.

Article 49 is a de facto recognition of the need for a 'multi-stakeholder approach' to internet governance. It reaffirms, on the one hand, the sovereignty of states, in particular for 'public policy issues'. And it recognizes, on the other hand, 'the important role' of the private sector (in the technical and economic fields) and civil society (at community level). The interesting point is that 'intergovernmental organizations' like the ITU should have primarily a 'facilitating role', while other (private) international organizations like ICANN, IETF, W3C (World Wide Web Consortium) and others 'should continue to have an important role', mainly in the field of 'technical standards and relevant policies'.

The description of different roles of the stakeholders and its treating them as (relatively) equal partners with different functions is not yet an answer to how the political implications of technical issues (and vice versa, the technical implications of political issues) should be handled and who decides what. Article 49 says nothing on the distribution of functions, rights, duties, freedoms, responsibilities and power among the three main stakeholder groups and the two types of international organizations. To find out how an interactive and decentralized mechanism for cooperation, coordination and consultation among all the players can be developed will be the task of the 'Kofi Annan Group'.

The WSIS Plan of Action specifies the process, the composition of the working group and its mandate. According to Article 13.b of the Plan of Action, the process should be 'open and inclusive'. Active participants in the working group should be 'governments, the private sector and civil society from both developing and developed countries'. Intergovernmental and international organizations should be 'involved'. And the mandate includes the formulation of 'a working definition of Internet governance', the identification of 'public policy issues that are relevant to Internet governance' and the development of 'a common understanding of the respective roles and responsibilities' of the different stakeholders and organizations. The group has to 'prepare a report on the results of this activity to be presented for consideration and appropriate action for the second phase of WSIS in Tunis in 2005'.[25]

From the 'Diplomacy of the Industrial Age' to a 'Diplomacy of the Information Age'

It remains to be seen how the WSIS internet governance compromise will work. Will the new group be able to escape from the 'ITU vs ICANN' deadlock and to create an innovative triangular governance mechanism which includes both the stability governmental organizations can offer and the flexibility private sector and civil society organizations can offer? Will we see the emergence of a new co-regulatory model for internet governance which could become a blueprint for a governance mechanism also for other key areas of the global information society from e-commerce to cybercrime, from privacy protection to content regulation, from IPR to trade in services?

One of the conclusions from the WSIS phase one process is that the traditional diplomacy of intergovernmental 'horse-trading behind closed doors' does not function anymore as it did in the industrial age. The internet-related issues are more complex and need the inclusion of all concerned and affected groups, that is all main stakeholders. The classic, exclusive governmental top-down policy along hierarchies, very often general, closed and non-transparent, does not function in the borderless cyberspace. Policy-making has to be turned around and to develop *bottom-up* as an inclusive, open and transparent process within and among *networks*. And it has to be very specific.

The challenge is to develop a 'new diplomacy of the 21st century', which goes beyond the 'diplomacy of the 20th century'. While in the industrial age diplomacy was rather simple and mainly a bilateral deal between governmental representatives of nation-states, which allowed a more or less balanced 'give and take' ('I give you some money for a fund and you give me some human rights'), the diplomacy of the information age has to be much more complex and multidimensional. There are more stakeholders than governments – private industry and civil society – and there are different interests not only among the stakeholders but also within the different stakeholders groups. And the different interests differ from issue to issue. There is no 'black or white', no 'good guys vs bad guys' anymore. As a result of this growing complexity, we observe the emergence of numerous 'rainbow coalitions'. Private sector, civil society and some governments vs some other governments with regard to DNS; third world governments and civil society vs private industry and first world governments in IPR; liberal first world governments, civil society and some private industry vs more restrictive governments and other parts of private industry in internet-related privacy issues.

We live in a period of transformation, 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.

In a certain sense, WSIS is testing out how a new 'multi-stakeholder approach', driven mainly by market needs and user interests, could work. Somebody – governments, private industry, civil society – has to be in charge. Bilateral relationships in such a triangular environment offer new opportunities

for shared responsibilities among groups that have both common and divergent interests. Neither stronger government regulation nor industry or civil society self-regulation alone will deliver the solutions. Flexible co-regulatory systems, designed according to special needs on a case by case basis, combined with open, inclusive and transparent bottom-up policy development processes, can produce workable frameworks for all parties – governments, industry and civil society – which combine in an efficient way stability and flexibility.

Four hundred years ago, after the beginning of the industrial revolution, the first 'new industrialists' realized that the governance system at that 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 monarch and the feudal institutions (the old system) had still some concrete power inherited by birth, new institutions that gained power and legitimacy through elections were established, like national parliaments and bourgeois governments (the new 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 and a representative democracy, but they opened the door for the emergence of a new governance system and they enabled philosophers like Montesquieu, Rousseau, Madison, Jefferson and others to develop a more detailed system of governance with concepts like the division of the branches of power and the social contract. And later, organized efforts and input by trade unions and democratic parties paved the way for the social welfare state.

The present system of governance 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 is showing some cracks when confronted with transnational challenges. As in the early days of the industrial revolution, the challenge is to make the system more flexible for a changing economic environment by balancing the legitimate interests, rights and freedoms of all involved and affected stakeholders.

New actors which create new institutions for new challenges will move into the new territory, filling emerging gaps regardless of whether there is a governmental order or not. National governments will not disappear in the next century but they will become one actor among others, obliged to join into cooperative networks and consensual arrangements with other global actors and to share power with them. Governments will become in some of the new areas less an actor on their own but more a moderator and facilitator for other acting stakeholders. This will lead unavoidably to broader diversification of power.

It would be naive to expect that this power shift will move forward without a power struggle. In this coming struggle, which will also overshadow the 'Road to Tunis', the new emerging global actors, both private industry and the global civil society (still in its infant stage), have not only to prove their legitimacy but they have also to learn that the rights and freedoms they are fighting for are linked to duties and responsibilities.

Notes

1. See WSIS Declaration of Principles; Building the Information Society: A Global Challenge in the New Millennium; 12 December 2003; at: www.itu.int/wsis/index.html. The Declaration is also reproduced in the Documentation Section at the end of this issue of *Gazette*.

2. RFC 1951 'Domain Name System Structure and Delegation' says with regard to country codes in paragraph 4.2 'The IANA is not in the business of deciding what is and what is not a country. The selection of the ISO 3166 list as a basis for country code top-level domain names was made with the knowledge that ISO has a procedure for determining which entities should be and should not be on that list' (March 1994). The ISO list includes 243 units, mainly countries, but also 'territories' like the Isle of Man (.im), Guernsey (.gg) and the British Indian Ocean Territory (.io). The so-called 'Reserve List 2' of ISO 3166 includes also the 'European Union' (.eu).

3. Reply by the EU and its member states to the US Green Paper on Internet Governance, Brussels, 20 March1998. The EU called 'to reach a balance of interests and responsibilities, so that the international character of the Internet is recognized with respect to the relevant jurisdictions around the world'.

4. Ira Magaziner, Written Statement to a Hearing on Domain Name Issues before the Sub-Committee on Basic Research of the Committee of Science of the House of Representatives, Washington, 31 March 1998.

5. Remarks by Becky Burr, DoC Press Conference, Washington, 5 June 1998.

6. Jon Postel, Testimony before the Sub Committee on Basic Research of the Committee on Science of the House of Representatives, Washington, 7 October 1998.

7. Resolution 102 on Management of Internet Domain Names and Addresses, ITU Plenipotentiary Conference, Minneapolis, 6 November 1998.

8. Bamako Declaration, 30 May 2002; at: www.itu.int/wsis/preparatory/regional/bamako.html

9. Bucharest Declaration, 30 November 2002; at: www.itu.int/wsis/preparatory/regional/bucharest.html

10. Tokyo Declaration, 15 January 2003; at: www.itu.int/wsis/preparatory/regional/tokyo.html

11. Bavaro Declaration, 31 January 2003; at: www.itu.int/wsis/preparatory/regional/bavaro.html

12. Beirut Declaration, 6 February 2003; at: www.itu.int/wsis/preparatory/regional/beirut.html

13. Resolution 102, ITU Plenipotentiary Conference, Marrakesh, October 2002; at: www.itu.int/osg/spu/resolutions/2002/resplen5.html

14. Resolution 102, ITU Plenipotentiary Conference, Marrakesh, October 2002; at: www.itu.int/osg/spu/resolutions/2002/resplen5.html

15. Resolution 133, ITU Plenipotentiary Conference, Marrakesh, October 2002; at: www.itu.int/osg/spu/resolutions/2002/resplen5.html

16. Review of Cooperation between ITU-T and ICANN and ccTLD issues, ITU-ccTLD Doc 30, Geneva, 3 March 2003; at: www.itu.int/itudoc/itu-t/workshop/cctld/cctld030.pdf

17. See ICANN Bylaws (latest version of 23 June 2003), Article XI, Section 1, www.icann.org/general/archive-bylaws/bylaws-26jun03.htm

18. GAC Statement on ICANN Evaluation and Reform, Bucharest, 26 June 2002; at: www.gac-icann.org/web/meetings/mtg13/gac13statement.htm

19. Annex I, GAC Statement on ICANN Evaluation and Reform, Bucharest, 26 June 2002; at: www.gac-icann.org/web/meetings/mtg13/gac13statement.htm

20. GAC Communique, Rio de Janeiro, 25 March 2003; at: www.gac-icann.org/web/meetings/mtg15/CommuniqueRioDeJaneiro.htm

21. ITU Dissociation from the GAC Montreal Communique, 30 June 2003; at: www.gac-icann.org/web/meetings/mtg16/Index.shtml

22. GAC Communique, Carthage, 28 October 2003; at: www.gac-icann.org/web/meetings/mtg17/index.shtml

23. Amendement 6 to the ICANN/DOC Memorandum of Understanding, 17 September 2003; at: www.icann.org/general/amend6-jpamou-17sep03.htm

24. WSIS Declaration of Principles, 12 December 2003; at: www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf. The Declaration is also reproduced in this issue of *Gazette* in the Documentation Section.

25. WSIS Plan of Action, 12 December 2003; at: www.itu.int/dms_pub/itu-s/md/03/wsis/ doc/S03-WSIS-DOC-0005!!PDF-E.pdf. The Plan of Action is also reproduced in this issue of *Gazette* in the Documentation Section.

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