Good Governance of the borderless Internet: Who should do what?

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Since the creation of the first institutional mechanisms for internet governance some thirty years ago until the present, the debate over jurisdictions of organizations involved in this governance has benefited certain governments, especially that of the U.S., in terms of intervening with internet regulations.

The terminology «Internet Governance» was coined by members of the Harvard Information Infrastructure Project (HIIP) in the 1990s. It described a mechanism of the management of the borderless Internet without the direct involvement of governments. The concept of «governance without governments» was seen as the most efficient way to coordinate the political and technical administration of the critical Internet resources (CIR) like the root server system, the Internet identifiers (domain names and IP addresses) as well as Internet Protocols. Internet Governance was narrowly defined and the coordination of the management was executed primarily by the technical community.

The institutional mechanisms for Internet Governance evolved in the 1970s and 1980s and were designed and operated by the developers, providers and the users of Internet services themselves. It included non-governmental and private sector organisations like the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), the Internet Architecture Board (IAB), the Internet Society (ISOC), the Internet Assigned Numbers Authority (IANA), Regional Internet Registries (RIR) like RIPE, ARIN and APNIC and the registries for ccTLDs and gTLDs as Network Solutions Inc. (NSI), which managed the .com, .org, .net and .edu domains and operated the A Root Server.

Jon Postel who developed in the 1980s together with Paul Mockapetris the Domain Name System (DNS) was the only manager of the DNS and delegated the management of Top Level Domains (TLDs) by handshake to trusted individuals. Postel also managed IANA which

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operated the TLD database and allocated IP address blocks to the RIRs. Some of these institutions, in particular IANA and NSI, operated under a contract with the US government which funded, first via the Department of Defence (DoD) and later via the National Science Foundation (NSF) Internet related research.

National governments or intergovernmental organisations were not involved in the governance of the Internet in these early days. Even the delegation of country code Top Level Domains (ccTLDs) took place without the involvement of the government or the parliament of the relevant country. While earlier technological innovations like the telegraph in the 19th century or radio broadcasting in the early 20th century provoked immediately a governmental regulation in form of national telecommunication and broadcasting laws – and later negotiations of international conventions and treaties – there were no similar governmental activities when the Internet emerged. The needed regulation for the borderless Internet was mainly technical by nature and done by technicians themselves or by the providers and users of the Internet (1).

Governance without Governments

The mainstream philosophy of the Internet pioneers in these early Internet days was that there is no need for the involvement of governments. Even more, many Internet experts explained the outstanding success of the Internet with the absence of governmental regulation and rejected any role of governments in the new emerging cyberspace. Dave Clark from the Laboratory of Computer Science at the Massachusetts Institute of Technology (MIT) did set the tone in a speech before the Internet Engineering Task Force (IETF) in 1992, titled «A Cloudy Crystal Ball – Visions of the Future». In his paper he formulated a principle which became the Leitmotiv for the global Internet community: «We do not believe in kings, presidents and voting. We believe in rough consensus, factual approach and running code» (2).

Tim Barners-Lee, the inventor of the World Wide Web said later: «There is the idea that society can run without a hierarchical bureaucratic government being involved at every step, if only we can hit on the right set of rules for peer-peer interaction. So where design of the Internet and the Web is a search for set of rules which will allow computers to work together in harmony, so our spiritual and social quest is for a set of rules which allow people to work work together in harmony.» (3)

The most outspoken and radical concept came later from John Peter Barlow in his «Declaration of Cyber Independence» which he published in Davos/Switzerland on February, 8, 1996 (4). In his declaration he described cyberspace as «the new home of mind» where governments are not welcome.

The fear within the Internet community was that governments, as soon as they would exercise control over the Internet, would restrict individual rights and freedoms – in particular the right to freedom of expression and the right to privacy – and would introduce time and cost consuming procedures which would turn down the speed of innovation in the development of new Internet services and applications. The preservation of the end-to-end principle and the P2P

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communication model was seen as a guarantee for the freedom of the net. De facto, freedom and flexibility was embedded into the architecture of the net and the Internet architecture was defined by technical code.

Based on this architecture with a multilayered system with many players, self-regulation, private sector leadership and bottom up policy development in an open, transparent and inclusive manner were seen as the key elements of the proposed policy and regulatory framework for the Internet.

In 1997, Done Heath, at this time president of the Internet Society (ISOC), said in a speech in Geneva: «We believe that for the Internet to reach its fullest potential, it will require self-governance. The Internet is without boundaries; it routes around barriers that are erected to thwart its reach – barriers of all kinds: technical, political, social, and, yes, even ethical, legal and economic. No single government can govern, regulate or otherwise control the internet, not should it. Most governments, the enlightened ones, will say that they endorse actions by responsible parties for efforts towards self-governance of the Internet. This does not mean that they should not be involved, they must be involved; they just need to exercise caution so that they don´t control and dominate by virtue of their intrinsic power.» (5)

Efficiency of Technical Regulation: Code is Law

The reason and justification for such a non-governmental approach, for «governance without governments», came from the practical and successful experiences of the first 20 years of the Internet. The absence of specific governmental legislation was seen by many observers as one of the main sources for the incredible chain of innovation which came with the Internet. The open and borderless architecture of the Internet enabled end-users to add at nearly zero administrative or material costs all kinds of applications. There was no need to ask for «permission» or a «licence» when young graduate students started amazon.com, ebay.com, yahoo.com, google.com or wikipedia.com in the 1990s. There was no «entrance fee» into the Internet and there was no need to have «big money» to start a successful online application.

The needed technical Internet regulation, mainly in form of codes, standards and protocols, were discussed among the technicians in an open, transparent and inclusive bottom up policy development process (PDP) which led to a new type of «law», known as RFC (Request for Comment).

RFCs were introduced by Steve Crocker, one of the Internet pioneers from Stanford University, in 1969 as a form to document consensus among the involved and affected parties on specific Internet related issues. According to the rules which evolved over the years within the Internet Engineering Task Force (IETF), the host organisation for RFCs, everybody can start to draft a RFC: But for adoption it needs a critical mass of supporters and finally a «rough consensus» among the involved parties. There was no voting in the relevant IETF working groups. If a substantial majority signalled the agreement about an issue with a loud «Hummm» in the room, the chair – if the «Hummm» was loud enough – declared the RFC as adopted.

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Meanwhile more than 5500 RFCs has been adopted since 1969 (6) and they constitute something like the «book of law» for the Internet. The IETF is today linked via the Technical Liaison Group (TLG) also with the Internet Corporation for Assigned Names and Numbers (ICANN) and operates in cooperation with the Internet Society (ISOC) and RFCs are also recognized by the intergovernmental International Telecommunication Union (ITU).

In 1999 Lawrence Lessig described Code as the Law of Cyberspace and analyzed the pro and contra of such an approach. Lessig argued, that «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 makes cyberspace what it is, regulate cyberspace as it is.» And he continued: «This code presents the greatest threat to liberal or libertarian ideals, as well as their greatest promise. We can build, or architect, or code cyberspace to protect values that we believe are fundamental, or we can build, or architect, or code cyberspace to allow those values to disappear. There is no middle ground. There is no choice that does not include some kind of building. Code is never found, it is only ever made, and only ever made by us.» (7)

With other words: In the industrial age the law makers defined the real space in which technological innovations could take place in a legal way. In the information age the code makers create the virtual space in which then the law makers have to deal with the political, economic and social consequences of the code.
Lessig makes clear that it is nearly impossible to separate technical regulations from its political implications. One of the critical issues in this context is that while law makers are accountable to their constituencies where they get their mandate from via elections, there is no similar mechanism which would make the code makers accountability to the global Internet community. This was not such a big problem when the Internet community was small and was based on a «netiquette» of trusted relationships among its members which followed certain basic rules like Postels slogan, defined in RFC 1122: «Be liberal in what you accept, and conservative in what you send.» (8) However the issue how to develop a trusted accountability mechanism for the non-governmental Internet institutions like ICANN is part of the challenges of the future.

Role of US Government: Oversight over the Root

Although the Internet research and development was continuously financed since the 1960s by the US government via its «Defence Advanced Research Project Agency» (DARPA), a subsidiary body of the US Department of Defence (DoD) the interference of the administration into the day-to-day operations of the researchers and service providers, in particular with governmental regulatory activities, remained low. The role of the US government was mainly funding the project and keeping the ultimate oversight over the process (9).

This did not change when at the end of the 1980s funding moved from the US Department of Defence (DoD) to the National Science Foundation (NSF). The US Department of Commerce (DoC) became the oversight body and signed two contracts with the Information Science Institute (ISI) of the University of Southern California (USC) and Network Solutions Inc. (NSI)

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which defined the various responsibilities of the involved parties and established the Internet Assigned Numbers Authority (IANA), a one man organisation headed by Jon Postel.

ISI´s Jon Postel managed substantial parts of the critical Internet resources in particular Top Level Domains (TLDs) and IP address blocks via IANA. NSI managed the registry and registrar services for the Top Level Domains .com, .net, .org and .edu as well as the A-Root Server. The DoC – via its National Telecommunication and Information Adminstration (NTIA) – executed a more technical oversight and did not interfere into the day-to-day operations of neither ISI nor NSI. However, the DoC kept its right to authorize the deletion, addition or modification of root zone files for TLDs in the A-Root Server. The A Root Server (today the so-called Hidden Server) keeps the master copy of all TLD root zone files for the other 12 root servers which constitute together with the meanwhile about 100 anycast root servers the legacy root of the present Internet.

This approach – no governmental involvement but oversight control over the Internet root to guarantee stability and security of the Net – remained the position of the US government also during the 1990s. In 1994, two years after the World Wide Web emerged, Jon Postel had the idea, to move the management of some of the critical Internet resources under the umbrella of the Internet Society (ISOC). ISOC was established in 1993 as a platform for discussion of the socio-economic and political implications of the Internet. Postels plan was to introduce 150 new gTLDs. However the US government, referring to its contractual role with regard to the oversight over the root, did not support Postel ambitions and blocked it.

When after 1995 more and more national governments – in particular the European Commission, Canada and Australia – asked for a special role of governments in the process of the management of the critical Internet core resources, Postel launched another plan to modify the mechanisms for Internet Governance which was also rejected by the US government.

Postels new plan was to bring the management of the DNS and the IP addresses under the control of a more institutionalized technical dominated Internet community (via IANA, IAB and ISOC) and to involve to a certain degree both private commercial institutions (via the International Trademark Association/INTA) and governments (via two Geneva based intergovernmental organisations / the International TeIecommunication Union/ITU and the World Intellectual Property Organisation/WIPO). The so-called «Interim Ad Hoc Committee» (IAHC), where the six institutions collaborated under Postels leadership, signed a Memorandum of Understanding in May 1997 in Geneva. The IAHC gTLD MoU created a Political Oversight Committee (POC), a Political Advisory Board (PAB) and a Council of Registrars (CORE). The plan was again to introduce new gTLDs (this time only seven). Furthermore new registrars for the registration of gTLD names should be recognized to bring down the monopoly position of NSI. Additionally the A Root Server should be moved from Herndon/Virginia to Geneva in Switzerland.

The plan faced strong opposition by the US government and by NSI, which lobbied also the US Congress against the IAHC project. The DOC remembered Postel that the individual introduction of new TLDs and the oversight over the A-Root Server was not subject of ISIs contract with the DoC. New TLDs would need the approval by the DoC/NTIA. US Secretary of

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State, Madeleine Albright, intervened in a letter to ITU Secretary General and criticized Pekka Tarjane that he did not consult with ITU member states before signing the MoU.

The IAHC-gTLD-MoU got no ratification by the following ITU Plenipotentiary Conference which took place in Minneapolis in October 1998. The plan with the seven new TLDs was never implemented, POC and PAB did never start real work. And the A-Root Server remained in Herndon under control of NSI, which was bought in 2001 by VeriSign.

The Making of ICANN

In July 1997 the US government started an alternative process. It reviewed its two contracts with ISI and NSI, which terminated in September 1998, and came to the conclusion that there should be as less as possible governmental involvement in the management of critical Internet resources. The proposal which was made first in the «Global Framework for eCommerce», a policy paper signed by US President Bill Clinton and US Vice President Al Gore, in July 1997 – two months after the signing of the IAHC gTLD MoU in Geneva – called for a privatization of the Domain Name System (DNS) (10).

When the Department of Commerce (DOC) published a Green Paper in January 1998 (11) which proposed the establishment of a new private corporation (NewCo) for the management of CIRs, critical remarks came mainly from the European Commission which was in principle in favour of the privatization of the management of the DNS but argued that the Internet is not any more a US project. The EU stated that the Internet is a global public resource and needs a global management. It should not be governed by the US government and US private sector entities alone. The EU underlined the need to include more international stakeholders in Internet Governance (12).

Ira Magaziner, at this time Special Internet Adviser to President Bill Clinton, acknowledged the argument and added to the proposed three Green Paper principles for the NewCo («security and stability of the Internet», «competition in the DNS market» and «bottom up policy development») a fourth principle «global representation».
These four principles, laid down in a «White Paper» (June 1998) (13) paved the way for the establishment of the «Internet Corporation for Assigned Names and Numbers (ICANN) in October 1998.

ICANN was established as a non-for profit private corporation under Californian law (14). It entered into a Memorandum of Understanding with the US Department of Commerce (15). The DoC continued with its final unilateral oversight over IANA and the A Root Server. At the same time, the ITU Plenipotentiary Conference in Minneapolis recognized – after heated political debates behind closed doors – «that the development of the Internet must essentially be market-led and driven by private initiative» (16).

However, in ICANNs Articles of Incorporation it is said that ICANN operates not outside the framework of international law: Paragraph 4 states: » The Corporation shall operate for the

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benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.» (17)

In the original ICANN bylaws the decision making capacity was delegated to a Board of Directors with 19 members. It was the plan to have nine directors from the provider of Internet services (the private sector units managing the domain names, the IP addresses and the Internet protocols) and nine directors from the users of Internet services (the so-called «At Large Membership»/ALM) with the CEO as the 19th member of the Board. The role of governments was rather limited.

Governmental representatives were not eligible for the ICANN Board. Governments were invited to join a «Governmental Advisory Committee» (GAC) which could give «advise» to the ICANN Board in form of recommendations. However, such a governmental advise did not have any legal binding force. The ICANN Board was not obliged to follow such an advice or to argue with the GAC.

The original plan was that the ICANN-DOC-MoU will terminate after a transition period of two years. In October 2000 it became clear that ICANN was not yet ready to overtake the full responsibility for the DNS and Root Server System management. Consequently the MoU was enlarged until October 2001. The Bush Administration did not undertake any special effort to end the MoU and renewed the contract several times until October 2006 when the MoU was substituted by a new «Joint Project Agreement» (JPA) which will terminate in October 2009.

With other words, the US government kept the principal oversight over ICANN and continued to authorize the publication of zone files in the Internet Root. It will be one of the responsibilities of the new US administration under president Obama to implement what the Clinton administration has promised.

In November 2001 ICANN started an internal reform process. This was pushed forward by and took place in a political atmosphere, determined by the terrorist attacks of September 11, 2001. The Bush administration defined the Internet after 9/11 as a critical infrastructure and ICANN became less a project for cyberdemocracy and more an instrument for cybersecurity.

Part of the reform process was a rearrangement of the internal relationship among the various ICANN stakeholders, including the relations between the ICANN Board, the Internet users and the GAC. Under ICANN 2.0 the representation of Internet users – in 2000 global online elections resulted in the delegation of five At Large directors to the Board – was drastically reduced. Instead of nine voting directors the users got just one non-voting liaison nominated by an At Large Advisory Committee (ALAC) in the ICANN Board. On the other hand governments got something like a «political Veto-Right» for ICANN decisions which touch public policy issues. Under the new bylaws the ICANN Board, if it rejects a GAC advise, is now obliged to explain to the GAC why it has rejected or ignored the «advice». In such a case, the GAC can ask for «consultations». If the consultations fail, ICANN has to explain to the global Internet

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community why it ignores the governmental advice and governments will keep the right to act independently from ICANN decisions within their territorial sovereignty.

The problem with the GAC is, that de jure the GAC is an «advisory body» with no decision making capacity. And furthermore, although it has meanwhile more than 100 members, it is not universal like the «United Nations», and, in practice most of the 100+ member states do not attend the meetings, which are tend to be dominated by OECD states (18).

The Challenge of WSIS

When the process of the World Summit on the Information Society» (WSIS) started in 2002, more and more governments realized that bridging the digital divide – the original main mandate of WSIS – is inseparable linked to the management of the Internet. The Internet was recognized as the basic critical infrastructure for the information society both internationally and nationally.

Insofar it was not a surprise that governments, which more or less ignored the Internet in the 1990s, looked now deeper into the details how the Internet core resources are managed. And they realized that they have only limited access rights to the policy development and decision making process with regard to the management of root servers, domain names and IP addresses. All these resources are mainly administered by private entities like root server operators, ccTLD and gTLD registries, Regional Internet Registries (RIR), the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C) and others. However, the private management of these resources has proofed to be a guarantee for the functioning of the Internet. The decentralized multilayer multiplayer mechanism, which emerged from the development of the Internet, was able to manage the growth of the Internet from one million users in the early 1990s to more than 1.6 billion Internet users in 2009.

On the other hand, some governments, like the People´s Republic of China, India, Brazil and South Africa argued in the first WSIS phase, that the principle of private sector leadership was good for an Internet with one million users. But an Internet with one billion users would need a stronger involvement of governments. The Chinese government proposed at WSIS PrepCom3 in September 2003 to move the function fulfilled by the private ICANN to the intergovernmental ITU.

The proposal to substitute the principle of private sector leadership by a principle of governmental leadership was strongly rejected by the private sector, civil society, the technical and academic community and a number of mainly western government who feared that a stronger governmental involvement could lead to restrictions of individual rights and freedoms, a slow down of technical and commercial innovations and to a bureaucratic system which would not be flexible enough the react to a fast changing technical environment of new Internet services and applications. Vint Cerf, one of the fathers of the Internet, argued that the first principle should be «Do No Harm». Interventions into the multilayer multiplayer mechanism should take place only where needed. «If it isn´t broken, don´t fix it» (19).

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There was no consensus during WSIS I. There was no common understanding what «Internet Governance» means. There was disagreement about the relationship between governments and the private sector. And there were different approaches to the needed institutional framework for Internet Governance. The only thing the various negotiating parties could agree was to ask UN Secretary General Kofi Annan to establish a Working Group on Internet Governance (WGIG) and to give the group a mandate to elaborate a definition of Internet Governance, to identify the public policy aspects of the technical management of critical Internet resources and to clarify the role and responsibilities of the various stakeholders, involved in Internet Governance.

Interestingly the decision to establish the WGIG had an important side effect. According to the Geneva compromise, the WGIG was constituted not as an intergovernmental working group – as it is the common practice in the UN context – but as a multistakeholder group with members both from governments, the private sector and civil society, including the technical and academic community which all were invited to participate on equal footing. Indirectly the composition of the WGIG paved the way for the recognition of the principle of multistakeholderism – that is neither private sector nor governmental leadership – as the main guiding principle for Internet Governance (20).

The complexity of the challenges was formulated by EU Commissioner Erkki Liikanen as follows: «It is not realistic to expect governments to take a back seat completely and leave the Internet solely to market forces. Whatever the relative merits of a government initiative might be, we will not be thanked by Internet users if any measure has the down-stream effect of destabilising the Internet´s underlying architecture. The challenge for policy makers will be to find a policy approach that reinforces the Internet´s reliability without hindering its potential for further growth.» (21)

The situation was summarized by UN Secretary General Kofi Annan during the Global Governance Forum in New York in March 2004: «The issues are numerous and complex. Even the definition of what mean by Internet governance is a subject of debate. But the world has a common interest in ensuring the security and the dependability of this new medium. Equally important, we need to develop inclusive and participatory models of governance. The medium must be made accessible and responsive to the needs of all the world´s people». And he added that «in managing, promoting and protecting (the Internet´s) presence in our lives, we need to be no less creative than those who invented it. Clearly, there is a need for governance, but that does not necessarily mean that it has to be done in the traditional way, for something that is so very different.» (22)

The Working Group on Internet Governance

Kofi Annan`s call for «political creativity» became the main guiding principle for the WGIG. The WGIG produced a broad definition on Internet Governance which went far beyond the management of Internet names and numbers. WGIG defined Internet Governance as «the development and application by Governments, the private sector and civil society, in their

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respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.» (23)

A key element in this definition is that it recognizes that all stakeholders have to be involved in Internet Governance, but in «its respective role». There is no «leadership» or «subordination». «Respective role» means new and innovative forms of communication, coordination and collaboration among involved parties according to the specific needs of a concrete issue on equal footing. Such a new «network governance model», which links governmental and non-governmental stakeholder «in their specific roles» on equal footing together is rather different from the traditional «hierarchical governance model» of the intergovernmental system with the sovereign nation state at the top of a decision making hierarchy.

With other words, WGIG concluded that the Internet should not be governed by one single entity top down but its management should be improved by better communication, coordination and cooperation among different organisations and stakeholder groups bottom up. WGIG rejected the idea of the establishment of an intergovernmental UN Internet Organisation (UNIO) but recommended, inter alia, to introduce a new high level discussion space for Internet Governance issues by the creation of a multistakeholder «Internet Governance Forum» (IGF) convened by the UN Secretary General. The intention was to fill «a vacuum within the context of existing structures» and to address «issues that are cross-cutting and multidimensional and that either affect more than one institution, are not dealt with by any institution or are not addressed in a coordinated manner». Such a IGF should have no decisions making capacity but should inspire intergovernmental and non-governmental organisations, dealing with aspects of the Internet, to enhance their inter-institutional cooperation and to make informed decisions within their constitutional competences in the light of the deliberations of the IGF.

On the other hand WGIG could not agree about the oversight function and the specific role of the US government with regard to the authorization of the publication of TLD zone files in the Internet root and the oversight over ICANN and IANA. Instead it proposed four models ranging from «Status Quo Minus (withdrawal of the US und full privatization) via Status Quo and Status Quo Plus (public-private partnership) to Status Quo Plus Plus (a new intergovernmental mechanism).

The Road to the Tunis Internet Governance Compromise

Before the re-start of the WSIS negotiations, the US Department of Commerce published a statement reiterating four basic principles for Internet Governance. In the statement from June, 30, 2005 the US Government made clear that it does not consider to give away its historically grown specific role and responsibility. «The United States Government intends to preserve the security and stability of the Internet's Domain Name and Addressing System (DNS). Given the Internet´s importance to the world's economy, it is essential that the underlying DNS of the Internet remain stable and secure. As such, the United States is committed to taking no action that would have the potential to adversely impact the effective and efficient operation of the DNS and will therefore maintain its historic role in authorizing changes or modifications to the

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authoritative root zone file.» (24)

In the same statement, the US government also recognized the interests sovereign governments have with regard to their ccTLDs. Furthermore the DOC reconfirmed its full backing of ICANNs role as the main technical organisation for the management of the Internet core resources. And it supported a continuation of dialogue on Internet Governance within and outside existing organisations.

While the main point in the US statement was certainly the reconfirmation of the oversight role, justified with the argument that such a role is needed to guarantee the stability and security of the Internet, the other principles had equal importance. The formal recognition of the national sovereignty of a government over the domain name space defined by its ccTLD was in particular of interest for the government of the Peoples Repiblic of China and many governments in third world countries which feared that the present Internet management system will allow the US government to interfere into their national Internet policies and harm Internet communication by blocking the publication of the ccTLD zone file in the Internet root.

Such an assurance, that the US government does not intend to interfere into communication related to the ccTLD was an important message for developing countries and eased the negotiations when the diplomats came back to Geneva in September 2005.

When the WGIG report was presented to PrepCom3 of WSIS II in September 2005 in Geneva, the European Union (EU) tried to bridge the controversy between the principles of private sector and governmental leadership by proposing a public-private partnership mechanism in form of a «New Cooperation Model» (NewCoMo). The idea of the EU was on the one hand to confirm the principle of private sector leadership for the day-to-day operations and on the other hand to strengthen the role of governments at the level of principle (25).

The proposal got mixed reactions. In particular the US government was critical with regard to the NewCoMo and asked questions where the «level of principle» ends and the «day to day operation» starts. It remained rather unclear whether under such a NewCoMo the introduction of a top level domain like .xxx would be treated as a day to day operation or a question of principle. Similar questions were asked with regard to the transition from IPv4 to IPv6, new gTLDs and internationalized Domain Names (iDN).

After furious negotiations at the eve of the second WSIS Summit in Tunis, November 2005, the final compromise allowed all parties to agree (to disagree) and to move forward without taking a definite decision, neither in favour nor against a «NewCoMo». The compromise included a package of several interrelated issues.
1. There was an agreement of a number of basic principles for Internet Governance, including multistakehoderism, security and stability of the Internet, national sovereignty over ccTLD domain name space and equal role of all governments in Internet Governance
2. There was an agreement on the establishment of an Internet Governance Forum as a multistakeholder discussion platform without a decisions making capacity
3. There was an agreement to start a process of enhanced cooperation among «relevant organisations» (26).

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The language of this compromise – to turn the proposed establishment of a «new cooperation model» into a process towards «enhanced cooperation» – is vague and ambiguous. Paragraph 70 of the Tunis Agenda says, inter alia: «Using relevant international organisations, such cooperation should include the development of globally applicable principles on public policy issued associated with the coordination and management of critical Internet resources. In this regard we call upon the organisations responsible for the essential task associated with the Internet to contribute to creating an environment that facilitates this development of public policy issues.» (27)

It is rather unclear, who should do what in such a process of enhanced cooperation. «Relevant international organisations» are both governmental and non-governmental organisations. The following paragraph 71 which invites the UN Secretary General to start a process on enhanced cooperation «involving all relevant organisations» is also rather unspecified.

Consequently the «process of enhanced cooperation», as agreed in Tunis, became the subject of various diverging interpretations. One group argued that enhanced cooperation is not more than a better flow of communication among existing organisations like ITU, WIPO, UNESCO (inter-governmental) and ICANN IETF, RIRs (non-governmental) among others. Other argued that the process of enhanced cooperation is aimed at the creation of a «New Cooperation Model» for the management of critical Internet resources. However, the Tunis Agenda does not include any mandate for an intergovernmental negotiations process. The only thing what Paragraph 69 is saying is, that the process of enhanced cooperation should «enable government, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the Internet, but not in the day to day technical and operational matters, that do not impact on international public policy issues». (28)

Also the language of paragraph 69 leaves it open what the public policy dimension of a technical issue is if it comes to very concrete questions with regard to root servers, domain names and IP addresses. The only concrete new element in the Tunis Agenda is that such a cooperation among governments should take place on an «equal footing».

This formulation reflects the dissatisfaction among the majority of the member states of the United Nations with the special role of the US government in unilaterally overseeing elements of the critical Internet resources. But while there was a consensus among the majority of governments that this system should be transformed towards a model where all governments have equal rights this principle is very general and does not include any implementation mechanism, procedures or a timetable.

Internet Governance in the Post Tunis Phase

Since 2006 the Internet Governance debate continued in a less controversial climate. Some important steps had been taken to implement some of the Tunis decisions.

Most importantly was the substitution of the ICANN-DOC-MoU by a new «Joint Project

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Agreement» (JPA) between ICANN and the DoC (29). The JPA gives ICANN a little bit more independence from the US government. ICANN is not obliged anymore to report periodically to the US Department of Commerce but has to report to the global Internet community annually. Furthermore there is no direct subordination of ICANN under the DoC anymore. ICANN is obliged to have on a regular basis «consultations» with the DoC but it can have also similar consultations with other governments or group of other governments. The EU Commissioner Vivian Reding welcomed the JPA underlining the point that this new agreement is a step into the right direction, of reduced governmental involvement in the day-to-day operation of the management of the Internet resources. The JPA will terminate in October 2009. In 2008 the DoC had a mid term review of the JPA. As a result ICANN was encouraged to make more efforts to fulfil the milestones of the JPA. In April 2009 the DoC published a Notice of Inquiry (NOI) and asked for comments how to proceed further after the termination of the JPA. However, the so-called IANA contract, which defines the role of the US government in overseeing the Internet root, is not subject of the JPA and does not terminate in October 2009.

ICANN itself has speed up its reform process by trying to position itself more as a global organisation and as a model of a multistakeholder organisation in the information age. It opened two regional offices in Europe and Asia and created a network of 13 regional liaisons which also work together with national governments in the respective region. ICANN improved its relationship with the ccTLDs by entering into formal or informal arrangements with key ccTLD managers. It made substantial progress with the development of policies for the introduction of new gTLDs and internationalized domain names (iDNs). And it improved substantially the role of the At Large Membership (ALM) via the conclusion of MoUs with the five new Regional At Large Organisations (RALOs). In March 2009, ICANN hosted the first

At Large Summit (ATLAS I) which brought together about 100 Internet users organisations from around the world, representing millions of Internet users, during its regular meeting in Mexico City. Additionally, the relationship between GAC and the ICANN board was further improved and institutionalized via closer cooperation in joint working groups, ad hoc committees and task forces. However conflicts within the GAC on issues like the introduction of the .xxx TLD or the level of data protection in the WHOIS data base slowed down the speed of progress.

The first Internet Governance Forum (IGF) took place in November 2006 in Athens and became a greet success (30). More than 1500 experts – representing all stakeholder groups from developed and developing countries – discussed in six plenary sessions and more than 30 workshops on a high level key internet issues like openness, diversity, access and security. The following IGFs in Rio de Janeiro (November 2007) and Hyderabad (December 2008) stabilized the success of the first IGF and offered a unique opportunity to discuss all controversial issues related to Internet Governance on a high level among governments, private sector, civil society and the technical and academic community, including issues related to the oversight and the management of critical internet resources (CIRs).

The IGF with its multistakeholder mechanism is seen as a real innovation in international politics. Although under the umbrella of the UN, the IGF does not follow UN procedures. There are no special name badges, reserved seats or special speaking rights for the individual stakeholder groups. Governmental and non-governmental experts discuss on equal footing

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open questions. The decision not to draft a final document liberated the discussion from the pressure to agree at the end of the meeting on certain issues. Such an informality gave the IGF additional dynamics which led also to the creation of another new political innovation: the so-called «Dynamic Coalitions» (DyCo). In such an IGF-DyCo representatives from governments, private sector and civil society work together on a voluntary basis. on individual Internet issues like Spam, Cybersecurity, Privacy or Freedom of Expression etc. It is up to them to send messages or make recommendations to various bodies and invite them to act, within their constitutional mandate. Such a decentralized, open, transparent and inclusive bottom up policy development process reflects in an innovative way the technical architecture of the Internet.

All debates of the IGF are webcasted and archived. Proceedings are published in a book. The messages of the IGF are summarized in concluding remarks by the Chair. It remains to be seen whether the IGF and its DyCo`s will have the potential to produce also effective results and will be taken by the relevant organisations and institutions as a basis for concrete decisions.

The IGF itself is prepared by a «IGF Multistakeholder Advisory Group» (MAG), nominated by the UN Secretary General. The MAG worked under the chairmanship of Nitin Desai, a former Deputy Secretary General of the United Nations who has served already as Chairman of the Working Group on Internet Governance (WGIG) and is supported by a small secretariat in Geneva. The MAG has three open consultations followed by a two day internal meeting annually (February, May and September). Two more IGFs are scheduled: Sharm el Sheikh in 2009 and Vilnjus in 2010. Meanwhiole a series of national (IGF-UK, IGF-D, IGF France, IGF Italy) and regional (EURODIH, Westafrican IGF, Caribbean IGF) IGFs have emerged. Until 2010 the UN Secretary General has to review the IGF and UN member states, based on recommendations by the UN Commission for Science and Technology Development (UNCSTD) and ECOSOC have to decide whether the IGF should continue to work.

The process of enhanced cooperation has started in form of informal consultations with and among stakeholders, facilitated by Nitin Desai, Special Internet Adviser of the UN Secretary General, in May 2006. The vague definition of the concept provoked a broad debate what enhanced cooperation could mean. In an expert meeting in Meissen/Germany in July 2007, participants proposed an interpretation that «enhanced cooperation» in Internet Governance stands for «enhanced communication, enhanced coordination and enhanced collaboration among governmental and non-governmental stakeholders» (EC^3). In a report by the United Nations Department for Economic and Social Affairs (UNDESO) from April 2009, UN Under Secretary General Sha Zukang recognized «that the term ‘enhanced cooperation’ does not seem to provide much guidance as to what constitutes an enhanced level of cooperation in practice». He summarized the feedback the UN got from various consultations: «First, the meaning of enhanced cooperation, as understood by most organizations concerned, is to facilitate and contribute to multi-stakeholder dialogue; Second, the purpose of such cooperation ranges from information and experience sharing, consensus building and fund-raising to technical knowledge transfer and capacity building; Third, the thematic focuses of the cooperation arrangements covered by these organizations are very much in line with those being discussed at the IGF and here at the WTPF; Fourth, some of these cooperative arrangements have already taken place among these core organizations, and more are being developed with other partners and these organizations.» (31)
The International Telecommunication Union (ITU) continued also with its efforts to take care on

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various aspects related to Internet Governance. At its Plenipotentiary Conference in Antalya/Turkey in November 2006, the ITU adopted a number resolution dealing with iDNs, IP address allocation and ccTLDs. In a special resolution member states and sector members were invited to comment on the process of enhanced cooperation. (32) At the same time, the new elected ITU Secretary General Hammodou Toure made clear that the ITU under his leadership has no intention «to govern the Internet». Toure came to the ICANN meeting in Cairo, October 2008, and offered a new level of cooperation between ITU and ICANN on Internet Governance issues. In 2009 the ITU hosted an own «World Telecommunication Policy Form» (WTPF) where ITU members discussed, inter alia, alson public policy related aspects of Internet Governance and adopted the «Lisbon Consensus» (33) which includes an «Opinion» on «Internet Related Public Policy Matters» which summarizes WSIS and previous ITU decisions and invited member states to contribute to a relevant ITU Council Working Group. The next ITU Plenipotentiary Conference takes Place in Mexico in October 2010. But also http://www.itu.int/md/S09-WTPF-C-0004/enwithin the ITU progress of «enhanced cooperation» at the intergovernmental level remains low and there is a continuing confusion among ITU members states what «EC» means for governments.

Read the 2nd part: Good Governance of the borderless Internet (II)

Notes:

[1] See, inter alia: Christos J.P. Moschovitis, Hilary Poole, Tami Schuyler, Theresa M. Senft; History of the Internet: A Chronology;, ABC-Clio, Sanata Barbara, 1999, Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff; A Brief History of the Internet, in: http://www.isoc.org/internet/history/brief.shtml, Wolfgang Kleinwächter; Governance in the Information Age, Aarhus, 2001, Wolfgang Kleinwächter, The History of Internet Governance, in: Christian Möller & Arnaud Amouroux (ed.), Governing the Internet, OSCE Vienna 2007, P. 41 – 90.

[2] David D. Clark, A Cloudy Crytsal Ball for the Future, Speech at IETF, 1992, http://ietf20.isoc.org/videos/future_ietf_92.pdf

[3] Tim Berners-Lee, The World Wide Web and the «Web of Life», http://www.w3.org/People/Berners-Lee/UU.html

[4] John Peter Barlow, Declaration of Cyber Independence, Davos, February, 8, 1996.: «Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to

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fear. Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders.»
http://www.worldtrans.org/sov/cyberindependence.html

[5] Don Heath; Beginnings: Internet Self-Governance a Requirement to Fulfill the Promise, Geneva, April 29, 1997, in: http://www.itu.int/newsarchive/projects/dns-meet/HeathAddress.html

[6] There are varios categories of RFC: (adopted) Standard, Proposed Standard, Draft Standard, Best Current Practice, Experimental, Informational, Historic).
[7] Lawrence Lessig, Code and other Laws of Cyberspace, Basic Books, 1999, p. 6.

[8] See: ISI Jon Postel, http://www.postel.org/postel.html , see also RFC 1122, Requirement for Internet Hosts, October 1989, ftp://ftp.isi.edu/in-notes/rfc1122.txt

[9] It is worth to remember that the Internet emerged as a special project within the «Advanced Research Project Agency» (ARPA). ARPA, like NASA, was established in 1958 by the Eisenhower Administration to respond to the challenges of the first Soviet Sputnik which was launched October, 4, 1957. The «Sputnik Shock» had deep consequences for political and military strategic thinking in the United States as it was reflected, inter alia, by Henry Kissingers analyse in his landmark book «Nuclear Weapons and Foreign Policy», published in 1958 when he was still a professor at Harvard University. Kssinger became later the National Security Adviser and the Secretary of State under US President Richard Nixon. Part of the research in ARPA, which was financed by the US Department of Defence, was a project which was aimed to explore the possibility of a decentralized (military) communication network which would it make difficult for the soviet nuclear Intercontinental Ballistic Missiles (ICBMs) to destroy it with one hit. As a result ARPANet emerged in 1968 as a device for load sharing among the large computers serving research facilities around the country. Its design specifications called for providing secure communications in the advent of an outbreak of war, so that no centralized node would be vulnerable to destroying the entire network. The experiments in the 1960s ended successfully: In December 1969 when four computers, based at the University of California Los Angeles, University of Santa Barbara, the Stanford Research Institute und the University of Utah were linked together and communicated messages among each other. The option to link computers for communication spread quickly beyond the military sector. When more and more networks emerged, two researchers – Vint Cerf and Bob Kahn – developed in 1974 a protocol known as Transfer Control Protocol/Internet Protocol or TCP/IP – which enabled not only computers but also different networks to communicate to each other. The TCP/IP opened the door for the building of a «network of networks» which finally became the «Internet».

[10] Bill Clinton & Al Gore, Global Framework for eCommerce, Washington, July 1, 1997, in: http://www.ecommerce.gov

[11] A Proposal to Improve the Technical Management of Internet Names and Addresses (The Green Paper), Federal Register Washington, February 20, 1998, in: http://www.ntia.doc.gov

[12] Reply by the EU and its Member States to the US Green Paper on Internet Governance,

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Brussels, February 28, 1998. 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.»

[13] Management of Internet Names and Addresses (The White Paper), US Department of Commerce, June, 5, 1998, in:
http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_3_

14] ICANN Articles of Incorporation, November 21, 1998, in:
http://www.icann.org/general/articles.htm

[15] Memorandum of Understanding (MOU) Between ICANN and U.S. Department of Commerce, November, 25, 1998, in: http://www.icann.org/general/icann-mou-25nov98.htm

[16] Minneapolis Resolution 102 Management of Internet domain names and addresses, in
http://www.itu.int/osg/csd/resolutions/1998/res102.html

[17] ICANNs Articles of Incorporation, November 21, 1998,
http://www.icann.org/en/general/articles.htm

[18] See: Wolfgang Kleinwächter; From Self-Governance to Public Private Partnership: The Changing Role of Governments in the Management of the Internet´s Core Ressources; in: Loyola Law Revies of Los Angeles; Vol, 36, No. 3, Spring 2003 , see
http://llr.lls.edu/volumes/v36-issue3/kleinwaechter.pdf

[19] Vint Cerf , First: Do no Harm, in: Don Mc Lean (ed.), Internet Governance: A Grand Collaboration, UNICTTF, Series No. 5, New York 2004, p. 13 ff.

[20] The three key paragraphs for Internet Governance in the Geneva Declaration of Principles reads as follows: «48: The Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. 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. It 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. 49: The management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations. In this respect it is recognized 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. 50.

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International Internet governance issues should be addressed in a coordinated manner. We ask the Secretary-General of the United Nations to set up a working group on Internet governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005.» In: http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf

[21] Erkki Liikanen; Internet Governance: The Way Ahead; The Hague, April, 15, 2004; in: http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/191&format=HTML&aged=0&language=EN&guiLanguage=en

[22] Kofi Annan, Internet Governance Issues are Numerous and Complex, New York, March, 25, 2004, in: http://www.unicttaskforce.org/perl/showdoc.pl?id=1333, see also: Wolfgang Kleinwächter, WSIS, ICANN, GBDe: How Global Governance is Changing in the Information Age; in: Bart De Schutter & Johan Pas (ed.); About Globalisation: Views of the Trajectory of Mondialisation; Brussels University Press, Brussels, 2004, p. 205 – 226, Wolfgang Kleinwächter, Internet Co-governance: Towards a multilayer multiplayer mechanism of consultation, coordination and cooperation (M3C3), in: E-Learning, Oxford, Vol. 3, No. 3, 2006, p.473 – 487; Wolfgang Kleinwächter, Internet Governance: Auf dem Weg zu einem strukturierten Dialog, in: D. Klumpp/H.Kubicek/A.Roßnagel/W.Schulz (ed.); Medien, Ordnung und Innovation, Springer Verlag 2006.

[23] Final Report of the Working Group on Internet Governance, Geneva, July 2005, in: http://www.wgig.org/docs/WGIGREPORT.doc

[24] US Principles on the Internet´s Domain Name and Adressing System, US Department of Commerce, Washington, June, 30, 2005, in: http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm

[25] The EU proposal from September, 30, 2005 included the following paragraph: «The new model for international cooperation … should adhere… to the following guiding principles: a. it should not replace existing mechanisms or institutions, but should build on the existing structures of Internet Governance, with a special emphasis on the complementarity between all the actors involved in this process, including governments, the private sector, civil society and international organisations each of them in its field of competence; b. this new public-private co-operation model should contribute to the sustainable stability and robustness of the Internet by addressing appropriately public policy issues related to key elements of Internet Governance; c. the role of governments in the new cooperation model should be mainly focused on principle issues of public policy, excluding any involvement in the day-to-day operations; d. the importance of respecting the architectural principles of the Internet, including the interoperability, openness and the end-to-end principle. In: http://www.itu.int/wsis/docs2/pc3/working/dt21.doc

[26] Tunis Agenda for the Informaiton Society, November 18, 2005, Part II: Internet Governance, Paragrpah 28 – 82, in: http://www.itu.int/wsis/docs2/tunis/off/6rev1.doc, see also: Wolfgang Kleinwächter, WSIS and Internet Governance: The Struggle over the Core Resources

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of the Internet, in: Communications Law, Totttel Publishing, Vol.11, No. 1, 2006, p. 3 – 12.

[27] Paragraph 70, Ibid.

[28] Paragraph 69, Ibid.

[29] Joint Project Agreement between ICANN and the US Department of Commerce, Washington, September 29, 2006, in: http://www.icann.org/general/JPA-29sep06.pdf

[30] Internet Governance Forum, Athens, Octopber 30 – November 2, 2006, in: http://www.intgovforum.org/meeting.htm

[31] Statement by Mr. Sha Zukang, UN Under-Secretary-General for Economic and Social Affairs, ITU World Telecommunication Policy Forum, Lisbon, April 21, 2009, in: http://www.itu.int/osg/csd/wtpf/wtpf2009/statements/un.html

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