

# Internet Co-Governance

## Towards a Multilayer Multiplayer Mechanism of Consultation, Coordination and Cooperation (M<sub>3</sub>C<sub>3</sub>)

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The governance of the Internet, its regulation and in particular the management of its core resources, is one of the most controversial issues in the ongoing discussion on the future development of the global information society within the context of the Geneva World Summit (WSIS I).

While everybody agrees that there is a need for something like a global regulatory framework to guarantee the stability, flexibility and further development of the Internet, there is a broad range of different ideas, which kind of regulation should be developed and applied. Concepts of private sector led self-regulation stands versus governmental regulation with a broad variety of co-regulatory ideas in between.<sup>1</sup>

### ***The Myth of the Unregulated Internet***

Part of the problem is an often repeated myth of the early days of the internet that the “network of networks” is a “virtual space” which is separated from the “real places” and does not need any kind of regulation.<sup>2</sup> When futuristic visions, developed for “virtual netizens of cyberspace” by William Gibson, John Perry Barlow and others, were applied directly to the practical new issues, which emerged from the use of the Internet by “real citizens of sovereign states”, confusion grew. But confronted with the reality of life, it became also clear, that the myth of a “free and unregulated Internet” in its radical understanding was never true.

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<sup>1</sup> See, inter alia: Manuel Castells, *The Internet Galaxy: Reflections on the Internet, Business and Society*; Oxford University Press, 2001; Lawrence Lessig; *The Future of Ideas: The Fate of the Commons in a Connected World*; Vintage Books, New York 2002; Milton Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, Cambridge, MIT Press, 2002; Brian D. Loader (Ed.), *The Governance of Cyberspace*; Routledge, 1997, Susan J. Drucker & Gary Gumpert; *Real Law and Virtual Space: Regulation in Cyberspace*; Hampton Press, 1999, Francis Cairncross, *The Death of Distance: How the Communication Revolution is Changing our Lives*; Harvard Business School Press, 1997; Wolfgang Kleinwächter; *Governance in the Information Age*, Aarhus, 2001

<sup>2</sup> The ideas were widely popularized by John Perry Barlow's “Declaration of the Independence of Cyberspace”, where he declared “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”. And he argued that for netizens, “identities have no bodies, so unlike you, we cannot obtain order by coercion. We believe that from ethics, enlightened self-interest and the commonweal, our governance will emerge”. Published in: *Cyber Right Electronic List*, Davos, February, 8, 1996 <http://www.eff.org/~barlow/Declaration-Final.html>

The Internet never escaped from the existing broader framework of national and international legislation. What was illegal offline became not legal online

It is true that the development of the Internet in the 1980s and 1990s took place in a policy environment in the United States, which was dominated by concepts of “de-regulation” (under the Reagan Administration from 1980 – 1988) and “private sector leadership” (under the Clinton Administration from 1992 - 2000). And true is furthermore, that the regulatory mechanisms for the technical components of the Internet in a more narrow sense and the philosophy behind them were different from the traditional law making with regard to public policy issues: Neither national parliaments nor international diplomatic codification conferences were involved in the making of TCP/IP or the Domain Name System (DNS).<sup>3</sup> However, national governments, first the USA and later in Europe subsidized both the research and development and early implementation of the Internet.

The Internet standards, codes and guidelines, as described in the “Requests for Comments” (RFCs)<sup>4</sup> came not “top down” by “majority voting” of elected representatives, but drafted “bottom up” by the respected and competent key players of the global Internet community and their groups, the concerned and affected constituencies, mainly the technical developers, but also the providers and users of Internet services. The RFC procedure, which was used later also in other non-governmental standard making bodies, became a special form of legislation and broadened our understanding of regulation and governance in the Information Age.<sup>5</sup>

### ***Growing Interdependence between two Different Worlds***

In the early days of the Internet these two different worlds – public policy legislation in real places and technical standard codification in the virtual space – had no or little interdependence. This changed with an ongoing “informatization” of nearly all areas of daily life in the second half of the 1990s. Step by step it became evident, that the technical Internet codes and standards had deep political, economic and social implications and that more and more policies became dependent on the technical environment under which they had been developed. Technical and political aspects of “Internet Governance” became interwoven in a way which did not allow anymore a clear split of related issues into two different pieces: In Internet Governance, there is no “policy regulation here” and “technology freedom there”.

In “Code and other Laws of Cyberspace” (1999) Lawrence 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.”<sup>6</sup>

Lessig opens our eyes to the fact that traditional policy and law making, which frames public policy issues into national and international legislation, finds itself in a framework which is

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<sup>3</sup> 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>

<sup>4</sup> the series was started by Steve Crocker in the 1970s, later managed by Jon Postel and now in the hands of the IETF

<sup>5</sup> The RFC procedure differs from the traditional (intergovernmental) standards-makes process of, say ISO, IEC, or ITU, in that it is based on “rough consensus” rather than true consensus. Thus, the “bottoms up” approach is moderated by the fact that, at the end of the day, the IETF leadership makes decisions, which may not fully incorporate dissenting points of view.

<sup>6</sup> Lawrence Lessig, Code and other Laws of Cyberspace, Basic Books, 1999, p. 6

constituted by technical codes and standards. Like the natural laws of physics, the architecture of the Internet determines the spaces in which public policy can be developed and executed. But while the law of physics are not made by man, the architecture of the cyberspace is constructed by individuals and institutions.

As a consequences, we have two different, but interlinked problems:

1. how public policy is framed inside the global Internet architecture and
2. how the technical architecture of the Internet itself is designed.

### ***Public Internet Policy: United Nations***

For the first category – public policy regulation for eGovernment, eCommerce, eLearning, content distribution in the Internet, privacy protection in cyberspace, Spam etc. – the problem is not “Internet regulation” as such. The majority of countries have a national legislation for all these issues, which can be more or less easily adopted and/or adjusted to Internet based applications. The problem is whether the regulation is liberal or restrictive, that is promotes or blocks the development of the Internet and, how such policies and regulation can be executed in concrete cases if different jurisdictions are involved.

The global character of the Internet has not changed the existing legal system. But it has made simple regulatory issue more complex, a phenomenon which arises also (and is pushed further forward as a result of the opportunities offered by the Internet) in other areas like competition policy, the pharmaceutical market, air transport, etc.

With trans-border transactions, any kind of communication between two or more end-users can be legally treated by the jurisdiction of the state under which

- a. the sender lives,
- b. the service providers and the servers, which enable the communication between the end users, operate, and/or
- c. the receiver lives.

This leads unavoidably to collisions between national legislation in areas, where no “harmonized” global legal framework is available.

To take only one example: While the selling of Adolf Hitler’s fascist book “Mein Kampf” is forbidden by law in Germany, it is allowed under the “First Amendment” of the US Constitution. US-online book shops like “amazon.com” offer it for 20.00 USD in a paperback version.<sup>7</sup> If it arrives via s-mail in Germany, German customs will confiscate it. But what to do, when it comes as an attached file via e-Mail? Other cases like the political and legal controversies around “racism and yahoo.com” in France or “terrorism and batasuna.org” in Spain and the discussion on implementation of national data protection laws in the global cyberspace have demonstrated the complexity of the problem. And they have also shown the limits of the existing system of international law, based on the sovereign nation state and the jus cogens principles enshrined in the United Nations Charter.

This does not mean that the traditional system is broken. It works and it remains an achievement of history. Insofar “global harmonization” of all relevant national legislation via diplomatic codification conferences is and will remain an option, but it won’t work in the traditional sense in a growing number of concrete cases for simple practical reasons:

- Number one is the time factor. Big codification projects like the “Law of the Sea Convention” or the “Rome Statute of the International Criminal Court” needed two or

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<sup>7</sup> see an offer by amazon.com under: [http://www.amazon.com/exec/obidos/tg/detail/-/0395083621/qid=1092478384/sr=1-7/ref=sr\\_1\\_7/103-7687623-7247836?v=glance&s=books](http://www.amazon.com/exec/obidos/tg/detail/-/0395083621/qid=1092478384/sr=1-7/ref=sr_1_7/103-7687623-7247836?v=glance&s=books)

more decades of intergovernmental expert negotiations. If governments could agree on a mandate for an “International Internet Law Codification Conference” now, an “International Internet Convention” would probably – in an optimistic scenario - ready for signature in 2020 or 2030.<sup>8</sup> What will be the rule in between? The “Law of the Cyberjungle”?

- Number two is the universality factor. While an international convention does not need the ratification by all UN member states to become effective, an Internet treaty with only a limited number of signatories would make no sense. It would be like a permanent invitation for “country shopping” by cybercriminals. They would search for “Internet Paradises” in Pacific or Caribic islands with “liberal” Internet and ccTLD policies.

### ***Technical Internet Policy: United Constituencies<sup>9</sup>***

For the second category – technical standard codification for Internet Protocols, IP addresses, Domain Names etc. - this is different. As shown above, the architecture of the Internet – which is constituted by these codes - has been developed neither within “national places”, nor by sovereign “top down” governmental regulation. They emerged as a result of a “bottom up” policy development process in the “global space” on the basis of the principle “rough consensus and running code” by the concerned and affected constituencies.

The reality has proven that the norms and principles, which has been developed by non-governmental networks are as successful and workable globally, as traditional governmental regulation nationally. Even more, the innovative bottom up procedures – at least in the early days of the Internet - had introduced a high level of efficiency: Regulation was developed only, where needed, decisions could be achieved with high speed, the rough consensus principle guaranteed an effective implementation by all main stakeholders and produced the needed flexibility to adjust the set of rules according to technical innovations.<sup>10</sup>

The Internet Architecture is a non-material infrastructure. Although it uses physical networks and servers, which can be geographically localized and operate under special national legislation, the zone files of top level domains in the root server, the Internet protocols which enable the communication between networks and servers and the domain names, which constitute something like “the territory of cyberspace” on which whole companies like “ebay.com” or “google.com” have created their “empires”, are virtual resources which should have no “nationality” and can not be directly linked to a “real place”.<sup>11</sup>

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<sup>8</sup> Even the Budapest Cybercrime Convention of November, 23, 2001 is an illustration for the sceptical arguments. Negotiations on a “computer crime convention” among member states of the Council of Europe started in the middle of the 1980s. In 1996 the mandate of the negotiation group was enlarged to “Cybercrime”. Five years there was no progress. It remains open, whether the convention would have been signed without the terrorist attacks of September, 11, 2001, which pushed a substantial number of governments across their “wait and see” line. 34 governments signed the treaty in Budapest in 2001, but until Fall 2004, only six countries (Albania, Croatia, Estonia, Hungary, Lithuania, and Romania.) have ratified the convention. See: <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>

<sup>9</sup> I use the term „constituencies“ in the sense of the different non-governmental groups which have constituted themselves within the process of the making of ICANN. „Constituencies“ are networked groups of (competent and informed) individuals and institutions with different citizenships which have common interests, share responsibilities, organize themselves around certain values, speak a similar (technical) language, communicate online and offline and can not be linked to a special country. ICANN is constituted by six constituencies under the GNSO (Registries, Registrars, ISPs, IPR, Business, Non-Commercial), one constituencies with potentially 243 ccTLDs Registries under the emerging CNSO, five constituencies under the ASO (the Regional Internet Registries), five regional constituencies under the ALAC, and a number of other constituencies under the Technical Liaison Group, the Stability and Security Advisory Committee and the Root Server Advisory Committee. All these „constituencies“ are independent and sovereign organisations and networks, but are „united“ under the ICANN Bylaws.

<sup>10</sup> While this procedure has made an innovative contribution on the application level it has also its limits. It worked well and fast for an Internet with one million users, but it is much slower for an Internet with one billion users.

<sup>11</sup> In practice, the issue is more complex as long as all root servers obtain their data from one “hidden” authoritative server, operated by VeriSign under a contract with the US Department of Commerce (DoC) and DoC must approve any changes to the entries in that authoritative server and can control the entries in all root servers.

## ***Real Places and Virtual Spaces***

The two categories reflect the contrast between two different types of actors who represent two different forms of social organisations with different legal status: On the one side there are hierarchies, sovereign governments, organized in the “United Nations”. On the other side there are networks, competent non-governmental groups from private industry and civil society, organized in “United Constituencies”.

A formal and rough comparison between “national hierarchies” of the “United Nations” and “global networks” of “United Constituencies” make visible, that they deal with similar issues but are rather different if it comes to organisational structures, procedures and objectives. United Nations represent more the culture of the “Industrial Society”, “United Constituencies” can be linked more to the culture of the “Information Society”.

*Table 1: Comparison between United Nations and United Constituencies*

<b>Issue</b>	<b>United Nations</b>	<b>United Constituencies</b>
Actors	Governments	Private Industry/ Civil Society
Structure	Hierachies	Networks
Codification	National Laws	Universal Codes
International Agreements	Legally Binding Treaties	Memorandum of Understanding
Mission	Broad	Narrow
Policy Development	Top Down	Bottom Up
Decision Making	Formally specified Majority Voting	Informally specified Rough Consensus
Representation	Elections by All	Delegation by competent Constituencies or via NomComs
Policy Making	Formally Restricted Access and limited Participation	Formally Open Access and broad Participation
Negotiations	Mainly closed to outsiders,	Mainly transparent rather open for outsiders
Result	Stability and Predictability	Flexibility

It is a fact that both the “real places” and the “virtual spaces” cannot be separated in the information age. Without its virtual components, the real world would not be able to produce the extra value, which the Internet is offering. And the virtual world needs the real world to make use of its potential. Every virtual communication among netizens starts and ends with a real citizen.

## ***Constructive Co-Existence***

This approach brings us closer to the core of the challenge of “governance in the information age”: the interdependence between the two different worlds of the “borderless cyberspace” and the “bordered real space”. Governmental regulation – from data protection to taxation - is linked to a defined geographical territory. Technical standards and codes for the Internet - from the TCP/IP protocol to http-language and MPEGs – do not know the frontiers of a geographically defined territory, they are universal.

The subject here is not to have an “either-or approach”. The question is not whether governmental top down regulation should be enlarged to the “technical world” or whether it should be substituted by non-governmental bottom up private sector and civil society self-regulation. The issue is not about “replacement”. In cyberspace, the “United Nations” need the “United Constituencies” and the “United Constituencies” need the “United Nations”. Governance in the information age needs co-regulatory models which take into consideration both the sovereignty of the nation state *and* the universality of global networks. There is a need both to raise the level of “global harmonization of legislation” by sovereign states *and* to improve the self-regulatory mechanisms of non-governmental networks and to bring the two procedures into a productive interaction.

Decisive is not the formal legal status of an individual solution for a special issue, decisive is the substance: It has to be adequate, efficient, accountable, predictable, fair, balanced, inclusive, workable and it must avoid the emergence of “responsibility wholes” in important areas. What is needed is a constructive co-existence among the different stakeholders, the development of new and innovative models of “Co-Governance”.

There is no “one size fits all” solution. Neither governmental top down regulation nor private sector or civil society bottom up self-regulation alone is able to manage the totality of issues raised by the global information society. The weakness of one partner in one area can be compensated by the strength of the other and vice versa.

## ***Growing Complexity: From the Industrial Society to the Information Society***

We know from the theory of media, that “new media” does not substitute “old media” but changes the way in which old media operate in the new environment. Practically each new media adds a new layer to the whole media landscape and is regulated in a specific way.

This “layer theory” was used also by Alvin Toffler when he wrote his “Third Wave” three decades ago. He concluded that the “information revolution” added a new layer to the “industrial society” like the “industrial revolution” added a new “layer” to the “agrarian society”.<sup>12</sup>

The information revolution of today does not remove the industrial economy of yesterday. But it has introduced a “new layer” - the “new (information) economy” - into the global economy.<sup>13</sup> Such an economic development has political consequences. It challenges the established governance mechanisms, which has been developed in the 19<sup>th</sup> and 20<sup>th</sup> century. The “new information economy” of the 21<sup>st</sup> century is organized around (global) networks. And this architecture is mirrored in the new governance mechanisms, which have been developed with the growth of the Internet and which are different from the traditional (national) power hierarchies.

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<sup>12</sup> Alvin Toffler; *The Third Wave*, Bantam Books, 1980

<sup>13</sup> see inter alia Marc Porat, *The Information Economy*, US Office of Telecommunication, Washington 1978, Dave Tapscott; *The Digital Economy: Promise and Peril in the Age of Network Intelligence*; McGraw Hill, 1996

While the hierarchical nation state will not disappear within the next 100 years, a number of issues which go beyond the national sovereignty of nation states, can be better managed, and governed by these new networks. The challenge is to find ways how the two different bodies with the different cultures can live and work together to the benefit of all, both citizens and netizens.

Nation states have to learn to share power with non-governmental actors, at least on the global level, while global networks have to accept that they operate in a political and legal environment defined by sovereign nation states. Governments have to understand, that the legitimacy they got from national democratic elections, includes today a greater international responsibility also for a global community. The global networks have still to prove their legitimacy and to demonstrate that they understand that the rights and freedoms they are calling for are linked to duties and responsibilities.

**Global Governance**

The discussion around “Governance” or “Global Governance” in the information age is not new in political science. Daniel Bell in his “The Coming of the Post-Industrial Society: A Venture in Social Forecasting” observed already in 1976, that “the nation state has to become too small for the big problems of life and too big for the small problems” and he concluded that a consequence would be that neither more centralization nor more de-centralization should be the answer but a diffusion of governance activities in several directions at the same time. Some functions “may migrate to a supragovernmental or transnational level. Some may devolve to local units. Other aspects of governance may migrate to the private sector.”

In “Powershift” (1990), Alvin Toffler, went one step further: “We live at a moment when the entire structure of power that held the world together is now disintegrating.” And he argued, that the powershift, he describes, “does not merely transfer power, it transforms it.”<sup>14</sup> Joseph Nye from Harvard’s JFK School of Government mapped this later in a matrix which illustrated “the possible diffusion of activities away from central governments, vertically to other levels of government and horizontally to market and private non-market actors, the so-called third sector”.

Table 2: The Diffusion of Governance

Level	Private	Public	Third Sector
Supranational	Transnational Corporations	Intergovernmental Organisations	Nongovernmental Organisations
National	National Corporations	^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^ << 20th Century >> <<<<Model>>>> <<<<National>>>> <<<<Government>>>> ^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^	National Nonprofits
Subnational	Local Business	Local Government	Local Groups

Source: Joseph S. Nye Jr.; Information Technology and Democratic Government, in: democracy.com? Governance in a Networkd World, Hollins Publishing, 1999

<sup>14</sup> Alvin Toffler, Powershift: Knowledge, Wealth, and Violence at the Edge of the 21st Century; Bantam Books, 1990, p. 3/4

The discussion was pushed forward in the 1990s, when US President Clinton argued that “the era of big government is over” and that non-governmental actors, in particular from the private sector, have to take the lead in a growing number of global issues.<sup>15</sup>

The „United Nations Commission on Global Governance” adopted this idea in 1995 and tried to define in its report "Our Global Neighbourhood" the concept as follows: “Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is the continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be their interest”.<sup>16</sup>

Later, in 2001, the “OECD Forum for the Future” concluded after a series of conferences, that “first old forms of governance in both the public and private sectors are becoming increasingly ineffective; second the new forms of governance that are likely to be needed over the next few decades will involve a much broader angel of active players and third, two of the primary attributes to today’s governance system – the usually fixed and permanent allocations of power that are engraved in the structures and constitutions of many organisations and the tendency to vest initiative exclusively in the hands of those in senior positions in the hierarchy – look set to undergo fundamental changes:”<sup>17</sup>

### **Internet Governance**

The coining of the term “Internet Governance” was neither the result of a serious academic discussion nor of an organized technical standardization process. There is no RFC which describes in detail what “Internet Governance” is. The term “Internet Governance” did not appear explicitly in the 1993 “National Information Infrastructure Initiative” (NII) of the US government, which can be seen as the first comprehensive policy framework for the information age. It was also not used in the “Bangemann Report” of the European Commission in 1994, the European answer to the NII, which underlined the leading role of the private sector. Even in the “Global Information Infrastructure: A Agenda for Cooperation” (GII), a global policy concept which was presented by US Vice President Al Gore to the ITU World Telecommunication Development Conference in Buenos Aires in 1994 and later to the G 7 Information Society Conference in Brussel, February 1995, “Internet Governance” was not singled out as a special problem. .

“Internet Governance” was used as a “catchword” by some academicians, working mainly under the “Harvard Information Infrastructure Project” (HIIP) in the middle of the 1990s. It was seen as a “term of art” to describe some management functions related to the core resources of the Internet: the root server service, the adoption of Internet Protocols, the assignment of IP addresses and the management of the Internet Domain Name System.

With more than ten million registered domain names in 1995 it became clear that the management of these resources will go beyond a purely technical coordination. The consensus among the main players at this time was that Internet should not be “governed” by “governments”. Insofar the term “Internet Governance” offered an opportunity to make a difference to “Internet Government” and to support a concept of “Self-Regulation” by the technical developers, providers and users of Internet services.<sup>18</sup>

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<sup>15</sup> But it remains the role of the state to (1) create an appropriate legal framework (2) ensure that companies don't break the law (3) use tax incentives and/or subsidies to achieve goals other than maximizing profits.

<sup>16</sup> [United Nations Commission on Global Governance](#); Our Global Neighborhood; New York 1995.

<sup>17</sup> Governance in the 21st Century, Future Studies, OECD, Paris 2001

<sup>18</sup> This did not work in other languages. In the German language, where “Government” means “Regierung” ,it is difficult to find an adequate word for “Governance”. While some Germans proposed “Management” or “Administration”, the majority of authors decided to use the English term “Governance” in the German language.

In 1997, Don 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.”<sup>19</sup>

This was echoed by ITU Secretary General Pekka Tarjanne as head of an intergovernmental organisation of the UN system when he used the term “Internet Governance” as a synonym for “multilateral voluntarism”.<sup>20</sup>

### ***The Making of ICANN***

After 1997 the term “Internet Governance” became more and more popular not only among academicians. It made its way also into the official language of the US government, the European Commission and the ITU. It became a not disputed “umbrella concept” for the management of the technical core resources of the Internet which were mandated in 1998 by the US government to the private “Internet Corporation for Assigned Names and Numbers” (ICANN).

ICANNs first bylaws reflected this idea of “Self-Governance” by a “network organisation”. The “Board of Directors” as the highest decision making body of a whole mechanism of related organisations, representing different constituencies, included only representatives of non-governmental groups – technical developers, providers and users of Internet services – while the role of governments was described as “advisory”.<sup>21</sup>

The Clinton administration wanted to avoid imposing on the Internet the burdensome governmental regulatory framework that had impeded the development of telecommunications in the USA; thus, it supported self-regulation by the private sector for Internet.. ICANN got a rather limited technical mandate. Its governance structure reflected a mixture of the technical architecture of the Internet (a network of constituencies) and the power structure of the major commercial interests (big players with a privileged position). of the Internet at time.

The conceptual idea was, that the policy is developed bottom up via the various constituencies of supporting organisations (SO), which should try to find a rough consensus for policy recommendations to the Board of Directors. And the Board should represent a balance between providers and user of services: Under ICANN 1.0, nine directors should have come from the supporting organisations, representing the private industry, nine other directors should have come from the “At-Large Membership”, representing civil society.<sup>22</sup>

Unfortunately the conceptual ideas became lost when ICANN started its business. The first ICANN Board acted more top down than bottom up, it behaved like a “governor”, it never elected nine At Large directors, it became involved in a permanent discussion around

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<sup>19</sup> 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>

<sup>20</sup> Pekka Tarjanne, Internet Governance, Towards Multilateral Voluntarism, Geneva, April, 29, 1997; in: <http://www.itu.int/newsarchive/projects/dns-meet/KeynoteAddress.html>

<sup>21</sup> see: Wolfgang Kleinwächter; The Silent Subversive: ICANN and the New Global Governance; in: Info: The Journal of Policy, Regulation and Strategy for Telecommunication, Vol 3, No. 4, Fall 2001

<sup>22</sup> see ICANN’s first bylaws from November, 6, 1998, in: <http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm>

“mission creep” and it did not get its full independence from the US government.<sup>23</sup> “In many ways”, said EU Commissioner Erkki Liikanen in a speech in April 2004, “ICANN is a unique experiment in self-regulation. The expectation among governments at the outset was that ICANN would provide a neutral platform for consensus-building between the key actors who operate the naming and addressing infrastructure. It was also hoped that ICANN would provide a way for the US government to withdraw from its supervisory role. In this way, we could achieve a greater internationalisation and privatisation of certain key functions. While ICANN has had its successes, it has yet to fully deliver on either of these objectives.”<sup>24</sup>

### ***Different Interpretations***

Under such circumstances, the broader public perceived this new innovative corporation ICANN – which had no precedent in international policy - indeed as something like the “World Government of the Internet”<sup>25</sup>, which was never true. ICANN had neither a mandate nor the power to adopt decisions, which would be in conflict with international conventions and which would call for changes in national legislation of a UN member state.

ICANN’s Article of Incorporation stated (Article 4) clearly that “the Corporation shall operate for the 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. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.”<sup>26</sup>

To guarantee a channel of communication between the ICANN Board and national governments, a Governmental Advisory Committee (GAC) was established. While under ICANN 1.0 the GAC could make only non-binding recommendation to the Board, under ICANN 2.0 governments got something like a “political Veto-Right” for ICANN decisions which touch public policy issues. 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 about 90 members, it is not universal like the “United Nations”, and, in practice most of the 90 members do not attend the meetings, which are tend to be dominated by OECD states.<sup>27</sup>

For a large number of governments, which have not been involved in the Internet development from its early days and which do not participate in the GAC, the Internet is not primarily a technical “network of networks” with virtual core resources, it is seen as a real political phenomenon, affecting their national economy and impinges substantially on their national policy and regulation. In the industrial age, governments could react against unwanted interference from outside with traditional means of stricter border control, protecting legislation and bi- or multilateral agreements. In the information age, these instruments are much less effective and harder to implement.

As a consequence, the vaguely defined concept of “Internet Governance” was given different interpretations by different groups of governments. While one group used it in a narrow

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<sup>23</sup> see: Wolfgang Kleinwächter; ICANN between Technical Mandate and Political Challenge; in: Telecommunication Policy, Vol. 24, London 2000

<sup>24</sup> 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>

<sup>25</sup> When ICANN organized global public elections for five Board Directors, representing individual internet users, in summer 2000, the German news magazine “Der Spiegel”, called its readers to participate in the election of the “World Government of the Internet”.

<sup>26</sup> ICANN’s Article of Incorporation, November, 21, 1998, in: <http://www.icann.org/general/articles.htm>

<sup>27</sup> see: Wolfgang Kleinwächter; From Self-Governance to Public Private Partnership: The Changing Role of Governments in the Management of the Internet’s Core Resources; in: Loyola Law Review of Los Angeles; Vol, 36, No. 3, Spring 2003

sense, only marginally affecting “national sovereignty”, the other one included everything related to the Internet and saw it as a major challenge to their national sovereign rights.

## **WSIS and WGIG**

Before the World Summit on the Information Society (WSIS), the two conflicting “schools of thought” came only marginal in a practical political conflict.<sup>28</sup> While ICANN, with the support of the governments of the developed countries, claimed to represent the “United Constituencies”, some countries claimed that the ITU, with a majority of developing countries in its membership, represented the “United Nations”. Both organisations had different core businesses and only little interaction. ICANN was not a sector member of the ITU, ITU had no seat in the ICANN Board. On the other hand, ITU had always been a full member of the GAC and ITU’s Standardization Sector had always been a member of ICANN’s Protocol Supporting Organisation (PSO) under iCANN 1.0.

The ITU Secretariat had little to say about GAC recommendations until 2002, when it started to take reservations on topics for which there was no consensus in ITU. In October 2002, ITU’s Plenipotentiary Conference in Marrakesh adopted two resolutions, which called for a greater role of national governments in public policy related internet governance issues.<sup>29</sup> After the conference it became clear, that a separation of the two camps or a “mutual ignorance” could no longer last. WSIS pushed the “United Nations” and the “United Constituencies” under one roof. But WSIS was unable to find a common language for the issue and postponed any decision to WSIS II.<sup>30</sup>

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.”<sup>31</sup>

The “Geneva Compromise” established a “Working Group on Internet Governance” (WGIG) and gave it the mandate first to define what “Internet Governance” is and then to make recommendations for further actions. But additionally WSIS agreed also on some important principles like “Multistakeholderism”, “Transparency”, “Openness” and “Inclusion”. Practically, the WGIG framework is based on an understanding that the “United Nations” and the “United Constituencies” have to work together in a spirit of “constructive co-existence”. The problem is that no principles for such a constructive co-existence have been written so far. WGIG is pushed into new territory with a lot of troubled water.

The difficulty for WGIG is that the group can base their deliberations neither on a clear consensus on the concepts of “multistakeholderism”, “bottom up” and “transparency” nor on an accepted definition of “Internet Governance”. During the WSIS phase, there were two

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<sup>28</sup> There has been a controversial discussion during the ITU Plenipotentiary Conference in Minneapolis in October 1998 about principles for Internet Governance which ended with the compromise, that the DNS should be managed under „private sector leadership“. This was revised partly during the ITU Plenipotentiary Conference in Marrakesh, October 2002.

<sup>29</sup> see in particular ITU Resolution 102, Management of Internet Domain Names and Addresses, Marrakesh, November 2002; The resolutions says, inter alia:” that the management of Internet domain names and addresses includes: a.technical and coordination tasks, for which technical private bodies can be responsible, and; b. 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; in: <http://www.itu.int/osg/spu/resolutions/2002/res102.html>

<sup>30</sup> see Wolfgang Kleinwächter; Beyond ICANN vs. ITU? How WSIS Tries to Enter the New Territory of Internet Governance, in: Gazette: The International Journal for Communication Studies, Sage Publications, Vol. 66/ No. 3-4, 2004

<sup>31</sup> 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>

different ideas about what Internet Governance is. While the supporters of a non-governmental system preferred to use a “narrow definition”, which concentrated on the technical core resources like root server, domain names, IP addresses and Internet Protocols, the supporter of an intergovernmental approach used a “broad definition” and included spam, content, cybercrime and eCommerce.

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.”<sup>32</sup>

But what the “innovative creation” could be is still an open question.

### ***Many Layers, Many Players, One Mechanism (M3)***

The Internet is not a single body but a network of networks where end users communicate to each other via servers, linked together by the TCP/IP protocol. With other words: a technical non-material infrastructure - zone files in servers, protocols, domain names - enables the peer-to-peer communication and the delivery of different application services from providers to users.

Such an approach allows a distinction between two basic categories:

- basic services, which enable communication
- enhanced services, which deliver value

While the “basic service” is primarily a technical issue which has a public policy component in some of its elements, the “enhanced service” is primarily a political, economic and social issue which has a technical component. Both services are interlinked. Basic services make no sense without enhanced services while enhanced services do not work without the basic services. Such a distinction between different but interdependent layers is not new, but can be helpful in the process of problem identification, policy development and the creation of governance mechanisms. It enables (governmental and non-governmental) policy makers to deal with the elements of a “big package” piece by piece. And it helps to build a matrix which brings more light into the options and scenarios for a differentiated approach.

“Basic Internet Governance” (BIG) on the lower level includes drafting Internet Protocols and allocating IP Addresses. On the higher level it includes primarily the management of the Domain Name System (DNS) with all its components like Root Servers, TLDs, Whois, Names Transfer, iDNs, Dispute Resolution etc. Basic Internet Governance deals mainly with enabling services. It is rather neutral, political and economic interests are more indirectly involved and it represents no real “content”. It enables users to provide value - from eCommerce to eGovernment.

The public policy problems, which are identified by governments, concern both basic services (issues such as legal intercept, emergency services, access for the disabled, equal access, control of dominant market players) as well as enhanced services, related to its

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<sup>32</sup> Kofi Annan, Internet Governance Issues are Numerous and Complex, New York, March, 25, 2004, in: <http://www.unicttaskforce.org/perl/showdoc.pl?id=1333>

content (issues such as intellectual property, data privacy, content control). Since the issues are different, "Enhanced Internet Governance" (EIG)<sup>33</sup> is consequently different. It is not neutral, concrete political, economic and social interests are directly involved. It also can be divided into sub-categories. There is a need for general rules in a more constitutional sense, and there is a need for specific regulation for specific issues.

"United Constituencies" are often better equipped to manage the "Basic Internet Governance". But they need governmental help if the technical questions they are dealing with involve public policy components.

"United Nations" is often better equipped to deal with "Enhanced Internet Governance". But governments will also need the participation of non-governmental stakeholders – both from private industry and civil society - when it comes to frameworks or specific issues that have either a technical component or a policy component of importance to the general public.

In other words, all kinds of Internet Governance need the involvement of all stakeholders, but the concrete level of involvement of the individual stakeholders for a special issue is dependent on the nature of the question and the level of the layer.

It makes sense to go through the different layers issue by issue; to determine on a case by case basis the most adequate triangular stakeholder combination. As a general rule one can conclude that the options range from "dominant private sector leadership" on the lowest layer to "dominant governmental leadership" on the highest layer with different co-governance combinations on the layers in between, according to the specific nature of the service.

Each layer and each service would have a special governance model. Each player would remain "sovereign" and "independent" with an own decision making power according to its individual constitution and mandate. But all layers and players would have to work together to make the system as a whole functioning and efficient. Even more, all layers and players are becoming dependent from each other and constitute in their entirety a global Internet Governance model which could be described as a "Multilayer-Multiplayer Mechanism". (M3)

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<sup>33</sup> Enhanced Internet Governance could be also labeled as „Information Society Governance“ or „Information and Communication Technology Governance“ because it takes everything on board which is related also indirectly to the internet.

Table 3: Multilayer Multiplayer Mechanism (M<sub>3</sub>)

Category	Service	Regulatory level			
		Governmental	Non-Governmental		
			Private Sector	Technical Developers	Civil Society
<b>Basic Internet Governance</b>					
Technical Services	IP Adresses Internet Protocols	Medium	High	Very high	Medium
Enabling Services	Root Server DNS iDNs Whois	High	Very High	Medium	High
<b>Enhanced Internet Governance</b>					
Specific Services	eCommerce eContent eMusic eGovernment	High	High	High	High
General Services	Cybercrime Spam IPR Privacy	Very High	Medium	Medium	Medium

- “multilayer” means to differentiate between different layers and to find adequate governance models for each individual layer;
- “multiplayer” means to identify for each layer the main (governmental and non-governmental) players who have to be involved for effective and workable solutions;
- “mechanism” means no single hierarchical central organisation but a network of different governmental and non-governmental institutions.

### **Communication, Coordination and Cooperation (C<sub>3</sub>)**

There is a high level of interdependence among the different layers and players which have to interact in various ways. The “Multilayer-Multiplayer Mechanism” (M<sub>3</sub>) would have no central or final authority. The involved governmental and non-governmental organisations and institutions are not subordinated to each other. All institutions are “independent” in their “internal affairs”, but “dependent” from the other institutions in their “external affairs”.

Every institution has its own responsibility for the global Internet community. But this is only part of a general responsibility, which all players, regardless of their legal status, have to share. To make the system work a high level of communication, coordination and cooperation (C<sub>3</sub>) among all members of the mechanism is needed. A system of “communication channels” and “liaisons” has to link the players together. To make the mechanism stable, a net of bilateral arrangements in this multilateral environment can be developed, where needed.

- “Communication” means that each member of the mechanism should establish permanent communication channels with other members of the mechanism so that everybody is "informed" what is going on inside the other individual organisations.
- “Coordination” means that if a communication signals that two or more members of the mechanism are doing similar things (with different priorities) they should enter into consultation and should, where needed, coordinate their activities. This could be done, where needed, via "liaisons".
- “Cooperation” means that if coordination signals, that there are overlapping or conflicting activities of different members of the mechanism, formal "cooperative agreements" (MoUs) among the affected and/or concerned members of the mechanism should be signed.

Communication channels, liaisons and agreements need a certain structure which brings an “order” into the C3 processes. Here the technical Internet architecture itself can be a source of inspiration,

In the Internet, a query from one end user is send via an ISP and a name server to a root server which points the query back via name servers and ISPs to the wanted end user. While the root servers are essential for the communication, they have nothing to say to “content” and do not really have decision making power. The only thing they can say is “yes” or “no”. What users expect from a root server is the knowledge in which domain the wanted e-mail or web address is located. And if one root server is not available, others will overtake the task of delivering the query from A to the final destination B.

In the context of the present Internet Governance debate, one could imagine a mechanism which is designed accordingly. A WGIG type of multistakeholder organisation – something like a “clearinghouse”<sup>34</sup> - which includes both “United Nations” and “United Constituencies”, could function as a “governance root server”: It would not need a decision making power, but all the knowledge about all “top level domains”, it would have to know “who is doing what where with which capacity”, and it have to guide queries to the right place for policy development and decision making.

Furthermore, ITU and ICANN, as the most qualified representatives of the “United Nations” and the “United Constituencies”, could function like a name server. They have a special “domain” under their radar: ITU has its “study groups”, ICANN has its “Supporting Organisations”. All of them will become active, if issues under their competence will be raised or if they asked to develop recommendations for actions. Furthermore, other organisations like UNESCO, WIPO, OECD, GBDe, IETF, ISOC, ICC etc. can also function like a “name server”: they manage their “own internet governance domains” under their own constitutions with their own constituencies. And in cases they need something from another “domain”, they could go down the road to the root and ask who in the mechanism deals with the relevant issue.

### ***Looking Forward***

Internet Governance, both on the basic and the enhanced layer, needs the participation of all affected and concerned governmental and non-governmental constituencies. There is no Internet for a single country or single group. The Internet is a global public resource, which is owned by nobody but brings benefits to everybody. But it is too big that it could be governed, managed and/or coordinated by somebody.

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<sup>34</sup> Such an institution could produce an annual report about the state of the art of the Internet development with a full directory of all old and new emerging members of the Multilayer Multiplayer Mechanism

WGIG has a tremendous task but a great opportunity. WGIG is not for negotiations but for fact finding. This enables the group to produce as a first step a comprehensive map with options and scenarios which would allow all sides to see clearer the strengths and weaknesses, the opportunities and threats of different individual solutions. There is a long way to go. If such a “roadmap” could be produced by WSIS II, this would be a big step forward. And this would enable the coming Tunis summit to negotiate a mandate for another multistakeholder group, which could then – between WSIS II and WSIS III – produce a framework for a multilayer multiplayer mechanism which is based on communication, coordination and cooperation.

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