

ICANN – Governance by Technical Necessity

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1. Introduction

One of the most curious instances of international administrative governance is the Internet Corporation for Assigned Names and Numbers (ICANN). On the one hand, ICANN is neither an international or-

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ganization, nor even an entity under international law, but a non-profit corporation under Californian law. On the other hand, it administers access to the Internet and sets the standards around the world. The principal participants in setting the standards and organizing the Internet are private corporations. Although national governments are involved, they are formally reduced to an advisory role *vis-à-vis* the organization. The roles are generally reversed in international law, private persons function as consultants only and it is up to the governments as representatives of states to make binding decisions.¹ Under the standard model of international law an international organization or an international authority may set rules only after having been empowered to this end by states. ICANN, however, has never been vested with such powers by any international treaty. Further, international actors are usually bound by the rules established by an international organization or authority only by accepting such an obligation through international treaties and agreements. The rules set by ICANN, however, are accepted and implemented without any such international legal instrument having been concluded. Nevertheless, ICANN establishes rules which are of greater importance than most acts of international organizations and they are more widely and more strictly accepted and respected than binding decisions of most international organizations. One could make the argument that ICANN decisions are more authoritative than those of the UN Security Council in the sense that ICANN decisions are less frequently violated. The reason why ICANN's decisions enjoy such broad acceptance and are followed so strictly is practical in nature: ICANN's rules are necessary for the operation of the Internet, without which the Internet would not run, and without the Internet today's world would not run.

2. History of ICANN

None of the aspects of ICANN mentioned above can be understood without taking into consideration the development of the Internet. The Internet started out in the 1960s as a U.S. military research project.² At

¹ See Art. 71 UN Charter on the cooperation between the Economic and Social Council of the United Nations and non-governmental organizations.

² As a matter of fact the research into the possibility of establishing an Internet was undertaken by the Defense Advanced Research Projects Agency, which had been founded in 1958 in response to the sputnik shock in the USA.

a later stage educational and research institutions, government contractors, scientists and technology specialists were incorporated into the program.³ The object of the whole project was to connect computers for the purposes of exchanging information. The ultimate goal was to link different networks, which meant developing a network of networks.

The first rules and standards of this network were proposed by students who formed informal working groups. They cautiously called their ideas “Requests for Comments”, indicating that they intended the development of standards to be the result of an open discussion of the Internet community, a characteristic which continues today. The organization of this network was somewhat anarchic; whoever was interested could participate in the formulation of the rules which should govern the Internet. In 2000 ICANN even held elections in which all registered users should elect the members of the Board of Governors. However, owing to the deficient structure of the elections, the result did not really reflect the composition of the Internet users’ community.⁴ The attempt to involve the Internet users in the decision-making process through elections at a world level was accordingly ended by an ICANN decision in 2002.

Besides these bottom-up approaches to Internet governance the U.S. government was not disengaged from the development. The early responsibilities of the military were later transferred to the National Science Foundation, which entered into a cooperative agreement with the Network Solutions Incorporation.⁵ With the creation of ICANN in 1998 the U.S. government intended to guarantee a management of the Internet which was not government controlled and followed the bottom-up principle in the field of policy making. The stakeholders of the Internet had to be represented in its structures of the Internet. The main principles of the United States policy were laid down in the Memorandum

See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE LAW JOURNAL 187, 192 (2000/2001).

³ Peter K. Yu, *The Origins of CCTLD Policymaking*, 12 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 387 (2004).

⁴ Thus, the director of the Board who should represent Africa was elected by 67 of 130 votes, Africa having almost 800 million inhabitants, see Jochen von Bernstorff, *Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony*, 9 EUROPEAN LAW JOURNAL 511, 521 (2003).

⁵ Weinberg (note 2), at 198.

dum of Understanding in November 1998, which now forms the basic document by which the Department of Commerce delegates certain powers to corporations, and in the Bylaws of ICANN.⁶ It has to be stressed that by delegating powers to ICANN the U.S. government, although excluding governmental influences on ICANN, maintained an important supervisory function as it was able to revoke the delegated powers any time.

3. The Impact of the Assignment of Names and Numbers on the Internet⁷

One might wonder why the assignment of Internet numbers matters in politics. The Internet only functions if different computers can enter into contact with each other. In order to make this possible, number groups comparable to phone numbers (so-called Internet protocols) are assigned to each computer. Without such a number a computer cannot be contacted from an external location. As numbers are generally more difficult to remember it has become common practice to give names to the addresses, each number corresponding to one or several names. These names must have a specific structure, which is due to the complexity of the Internet. Therefore a Domain Name System was developed, the DNS. It turned out that it would not be feasible just to have names on the same level; it became evident that they had to be organized in a certain way. This organization was accomplished by the hierarchization of certain parts of the name, comparable to the area code of the telephone system. To this end so-called top level domains (TLDs) were introduced which either had a generic code such as “.com”, “.org”, or “.net”, covering specific areas of activities respectively

⁶ The Memorandum of Understanding can be found under <http://icann.org>. The Memorandum has been several times amended, see <http://www.ntia.doc.gov>; it was supplemented by a Joint Project Agreement between ICANN and the Department of Commerce, last amendment of 29 September 2006, <http://www.ntia.doc.gov/ntiahome/domainname/icann.htm>. The Bylaws are the “charter” of ICANN which has been adopted by ICANN, last amendment of 29 May 2008, <http://www.icann.org/en/general/bylaws.htm>. Amendments to the Bylaws require a majority of two thirds of the Board of Governors.

⁷ For the following see Daniel Karrenberg, *The Domain Name System Explained for Non-Experts*, in INTERNET GOVERNANCE: A GRAND COLLABORATION, UNITED NATIONS, 22 (Don MacLean ed., 2004).

(“.com” for commercial, “.org” for non-profit organizations, “.net” for network providers) or a country code, such as “.de” for Germany, “.us” for the United States, or “.uk” for the United Kingdom. The abbreviations of country names as a rule follow the standards set up by the International Organization for Standardization.⁸ On a lower level, one always finds the domain name, to the left of the TLD names. The TLD names are saved in specific servers; the location of servers is listed in the so-called root servers which are at the top of the hierarchy. The vast majority of these root servers are located in the USA, among them the Master of the root servers, which has the main steering function. These root servers contain all information about the location of TLDs. Therefore, as a rule, if a computer does not know where to send an email, the so-called cache server will address the root servers. When starting up, a cache server will address all root servers in order to get the current list of the root servers. This will enable it to know where to send the query for the location of the TLD. If the name of a top-level domain is not included in the list, the root servers will not indicate it. Everything there depends on the inclusion of the name insertion, *quod non est in actis non est in mundo*. If a TLD name is eliminated from the root servers, it will be impossible to contact any address containing this TLD name. All these addresses will be excluded from the normal Internet communication – death by silence, if you will. Therefore, the power to manage the list of the top-level domain names in the root servers comes close to the power to decide on life or death in the Internet.⁹

Although the administration of the Internet seems to concentrate on technical issues, a political impact cannot be excluded. It starts with the definition of a state. For example, does Palestine have a right to a top level domain name, such as “.ps”,¹⁰ or the European Union to the top level domain “.eu”,¹¹ although both of them are not in the list of states of the International Organization for Standardization? What is the situation of Catalonia, being only a *comunidad autonoma* of Spain, has

⁸ <http://www.ccnso.icann.org/workinggroups/draft-issues-paper-idn-cctlds.pdf>. However, there are exceptions: the abbreviation of the United Kingdom by the ISO is GB, not UK.

⁹ Stefan Bechtold, *Governance in Namespaces*, 36 LOYOLA OF LOS ANGELES LAW REVIEW 1256 *et seq.* (2003).

¹⁰ The question has been answered affirmatively.

¹¹ In 2005 the top level domain name “.eu” has been introduced by a resolution of ICANN, see <http://www.icann.org/en/announcements/announcement-23mar05.htm>.

it a right to an own country code?¹² When should the use of “.su” for Soviet Union – actually phased out – end, or that of “.zr” for Zaire? Does Taiwan have a right to the top level domain name “.tw”? The Peoples’ Republic of China contested it in 2003, without, however, insisting in the withdrawal of this name.¹³ Furthermore, what is the character of country codes? Do they form part of the national heritage and are they therefore not subject to free disposal by a private corporation, as South Africa, for instance, claims? To what extent can states dispose of their country code? Lucky Tuvalu, one of the smallest states in the world, with the very appealing country code “.tv”, has already increased its state income by more than \$ 20 million by leasing its country code to television companies.

A further not purely technical problem linked to the administration of the Internet is which generic top-level domains should be established. Recently, a conflict broke out over a new top level domain name “.xxx” which was supposed to be reserved exclusively for pornographic material. As pornographic sites are among those most frequented in the Internet – 25% of all Internet researches are directed to pornographic sites¹⁴ – one could come to the conclusion that it would make sense to supplement the top level domains by an “.xxx”, from a standpoint focusing exclusively on demand. However, political concerns, especially of the United States, prevailed, and in the end the proposal was not adopted.¹⁵

It has long been disputed whether domain names will only be available in ASCII characters¹⁶ or whether internationalized domain names will be admissible in other additional scripts, such as Cyrillic,¹⁷ Chinese,

¹² In 2005, “.cat” for Catalanian speaking persons or organizations has been introduced, though not as a country code top level domain name, but rather as a generic top level domain name, *see* <http://www.icann.org/en/minutes/resolutions-15sep05.htm>.

¹³ It should be mentioned that Hong Kong possesses its own country code top level domain, namely “.hk”.

¹⁴ <http://Internet-filter-review.toptenreviews.com/Internet-pornography-statistics.html>.

¹⁵ The proposal was rejected by ICANN in 2006 and again in 2007.

¹⁶ ASCII means American Standard Code for Information Interchange and is based on the English alphabet.

¹⁷ The President of the Russian Federation demanded that the Cyrillic alphabet be introduced into the Internet, http://technology.timesonline.co.uk/tol/news/tech_and_web/article4119960.ece.

Arabic or Hebrew.¹⁸ This is not only a technical question, but concerns the representation of different cultures in the Internet. Further problems may arise out of trademark concerns. Who may use which name? Will it be sufficient to follow the principle of first come first served or will it be necessary to grant minimum protection for trade marks against so-called DNS squatters who try to get domain names which they can sell? Finally, it falls within the administration of the Internet to decide who should register and administer the domain names below the top level. The policy in this context will decide on the structure of the administration – monopolistic, oligarchic or free market oriented.

4. Structure, Functions and Competences of ICANN

4.1. Structure of ICANN

Although ICANN is a private organization (as explained above), it is not a creation of private persons. Rather, its activities are governed by a Memorandum of Understanding of 25 November 1998 (MoU) between the U.S. government, represented by the Department of Commerce (DoC) and ICANN. The MoU's objective was to implement a DoC policy statement, in which the intention was expressed to privatize the technical management of the Internet names and addresses in order to allow for the development of robust competition. ICANN's effectiveness depends on its recognition by the DoC, which can withdraw the recognition at anytime and transfer the functions of ICANN to another organization.¹⁹ To a certain extent it fulfills the tasks of a U.S. government state agency. Consequently, the traditional models of (national)

¹⁸ ICANN issued guidelines for the use of internationalized domain names in 2003, <http://www.icann.org/general/idn-guidelines-20jun03.htm>. In March 2008, the ICANN board voted to develop final fast-track implementation proposals for a limited number of International Domain Names with respect to the country code top level domain names. In the future, the ccTLD names can be written not only in ASCII, but likewise in other characters than ASCII, such as Cyrillic, Hebrew, Chinese or Arabic.

¹⁹ See para. 5 of the Amendment to the Memorandum of Understanding between the Department of Commerce (DoC) and the Internet Corporation for Assigned Names and Numbers (ICANN), 4 November 1999, <http://www.icann.org/en/nsi/amend1-jpamou-04nov99.htm>.

administration would qualify ICANN as a state actor²⁰ or a public private partnership.²¹

The main body of ICANN is the Governing Board, which has the exclusive power to decide on the corporation's policy and which finalizes the contracts with the registries through the CEO, who is a member of the Governing Board. Six members of the Board are elected by so-called support organizations, which represent different interest groups maintaining business contacts with ICANN, such as the Country Code Names Supporting Organization, the Generic Name Supporting Organization, and the Address Supporting Organization. Pursuant to Art. VII of the Bylaws, a further eight members are elected by a nominating committee. According to a complex formula, the principal interests should be represented, for example the Intellectual Property Constituency of the Generic Names Supporting Organization, an entity which was designed to reflect academic interests. Consumer and other public interest groups are also represented on the Board. These groups are selected by the Noncommercial Users Constituency of the Generic Names Supporting Organization, which represents the interests of users having no commercial interest in the Internet. This constituency forms the largest group of persons in this system. In addition, representatives of the so-called advisory committees are non-voting members in the nominating committee. There are four advisory committees: the Governmental Advisory Committee (GAC), the At-Large Advisory Committee, the Security and Stability Advisory Committee, the Root

²⁰ Jennifer Arnette-Mitchell, *State Action Debate Reborn Again: Why the Constitution Should Act as a Checking Mechanism for ICANN's Uniform Dispute Resolution Policy*, 27 *HAMLIN JOURNAL OF PUBLIC LAW AND POLICY* 307, 310 (2006); this view is not shared by Volker Röben, *International Internet Governance*, 32 *GERMAN YEARBOOK OF INTERNATIONAL LAW* 416 (2000). Röben focuses on the fact that the effectiveness of the administration relies on the acceptance by the Internet Service Providers, but he overlooks the fact that the powers of this corporation derive from a delegation of power by the U.S. Department of Commerce.

²¹ ICANN President's Report: ICANN – The Case for Reform, 24 February 2002, www.icann.org/general/lynn-reform-proposal-24feb02.htm; Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administration in the International Legal Order*, 17 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 3 (2006); Robert Uerpman-Witzack, *Multilevel Internet Governance, Involving the European Union, Nation States and NGO's*, in *MULTILEVEL REGULATION AND THE EU*, 163 (Andreas Follesdal, Ramses A. Wessel & Jan Wouters eds., 2008).

Server System Advisory Committee and the Technical Liaison Group. Among these advisory committees, the At-Large Advisory Committee is of a specific interest.²² It was created in 2002 in order to give Internet users the possibility of participating in the formulation of ICANN's Internet policies. The Committee is composed of 15 members from the five regions as defined by ICANN. In each of these regions a Regional At-Large Conference deals with questions pertaining to the Internet. In certain cases, the At-Large Advisory Committee may have a non-voting representative in the Subdivisions of the ICANN, *i.e.* the Generic Names Supporting Organization and the Country Code Names Supporting Organization. Similarly, it may have liaisons in the working groups of ICANN, including the Board of Governors. It also appoints 5 members – one from each region – to the Nominating Committee. Its impact on the ICANN's activities is mainly advisory in nature.

The Governmental Advisory Committee (GAC) has been given a specific role which reflects the development of the Internet governance. The GAC is composed of representatives of state governments, public authorities and representatives of international organizations such as the International Telecommunication Union. According to its founding principles, ICANN should be free from government influences – with the exception of the U.S. government. At the very beginning the Bylaws of ICANN excluded all government representatives from being members of ICANN organs.²³ The GAC was conceived as a type of independent governmental conference which cooperated with ICANN; it did not qualify as an organ of ICANN in a strict sense.²⁴ The situation changed with the reform of the ICANN Bylaws in 2002 when, due to the pressure from governments outside the United States and as a consequence of the terror attacks of 2001, it became evident that public interests, among them security interests, were concerned by the management of the Internet. Since 2002 the GAC may send non-voting liaison to all ICANN bodies, the Board of Governors included. In this way the governments are integrated in the structure of ICANN and they gain influence although they do not have voting rights.²⁵ The private structure of ICANN was upheld in the reform of 2002, however, a pro-

²² Art. XI(2(4)) of the Bylaws.

²³ Art. V, sec. 5 of the Bylaws of 1998.

²⁴ Wolfgang Kleinwachter, *From Self-governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources*, 36 LOYOLA OF LOS ANGELES LAW REVIEW 1104 (2003).

²⁵ Art. VI, sec. 1, 9.1.a of the Bylaws of 2002.

vision was included in the Bylaws according to which ICANN recognizes that governments and public authorities are responsible for public policy and duly takes into account governments' or public authorities' recommendations.²⁶ This has been implemented by the obligation of the Board of Governors to grant a special treatment to proposals made by the GAC. The GAC can put issues to the Board of Governors and its advice on public policy matters must be duly taken into account. If the Board of Governors does not want to follow the advice, it must therefore provide reasons whereupon the GAC and the Board will then seek a mutually acceptable solution; if they do not reach such a solution, the Board of Governors has to explain why it cannot follow the advice of the GAC, and the statement will be without prejudice to the rights or obligations of GAC members with respect to public policy issues falling within their responsibilities.²⁷ The GAC cannot force ICANN to follow its proposals.²⁸ Nevertheless some authors assume that it is factually impossible for ICANN to take decisions against the will of the GAC, as states preserve their competences for public policy issues which include the competence to take the administration of the Internet under control by means of a national frame.²⁹

4.2. Functions and Powers of ICANN

In order to fulfill its mission to coordinate the Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems, ICANN assigns, through its Board of Governors, the principal identifiers for the Internet, especially the domain names and the Internet protocols.³⁰ In order to implement its decisions, ICANN enters into agreements with the

²⁶ Art. I, sec. 2.11 of the Bylaws of 2002.

²⁷ Art. XI sec. 2 (21)(k) of the Bylaws of 2002.

²⁸ Principle 2 of the Operating Principles of GAC reads: "The GAC shall provide advice and communicate issues and views to the ICANN Board. The GAC is not a decision making body. Such advice given by the GAC shall be without prejudice to the responsibilities of any public authority with regard to the bodies and activities of ICANN, including the Supporting Organisations and Councils." See: http://gac.icann.org/web/home/GAC_Operating_Principles.pdf.

²⁹ Uerpman-Witzack (note 21), at 156 *et seq.*

³⁰ Art. I sec. 1 of the Bylaws.

registries of domain names. It is not within ICANN's powers to administer the registries where Internet users have to subscribe in order to have access to the Internet as set up by ICANN. Instead, the domain names are administered by registries which might be private corporations, state entities or public private partnerships managing a TLD name, be it a generic TLD (gTLD) or a country code TLD (ccTLD). The registries conclude contracts with the registrars. As a rule, the latter are private corporations which assign Internet addresses to users. If a new ccTLD name is introduced the respective state has to determine the registry which should manage the top level domain and which has to be accredited by ICANN, for example DENIC for ".de", AFNIC for ".fr",³¹ Nominet for ".uk", or EURid for ".eu".³² As far as generic top-level domains are concerned, ICANN may choose the company which should administer the respective domain, for example VeriSign for the gTLD ".com". Despite its monopoly position, ICANN is generally free to decide whether or not to enter into any such agreement with a specific registry.

The registry agreements between ICANN and the registries of gTDL establish commitments of these registries to respect the policies of ICANN and to oblige the registrars to follow them.³³ This obligation includes even policies which come into force after the conclusion of the registry agreement.³⁴ The policies of ICANN to be respected embrace for example the principle of allocating registered names on a first come first served basis, prohibitions in warehousing or speculation of domain names, maintenance of and access to accurate and up-to-date informa-

³¹ Association à but non lucrative, *see*: www.afnic.fr.

³² Uerpmann-Witzack (note 21), at 146 *et seq.*

³³ Evelyn Lagrange, *L'Internet Corporation for Assigned Names and Numbers: un essai d'identification*, 108 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC 295, 333 (2004).

³⁴ *See e.g.* Art. III sec. 3.1(b) of the Registry Agreement between ICANN and VeriSign of 1 March 2006: "At all times during the term of this Agreement and subject to the terms hereof, Registry Operator will fully comply with and implement all Consensus Policies found at: <http://www.icann.org/general/consensus-policies.htm>, as of the Effective Date and as may in the future be developed and adopted in accordance with ICANN's Bylaws and as set forth below." The agreement is available at <http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-01mar06.htm>.

tion concerning domain name registrations, and so on.³⁵ In this way ICANN can enforce its policies throughout the Internet. In case of repeated violations of the policies, punitive, exemplary or other damages might be awarded by arbitrators. If the registry fails to cure a fundamental and material breach and if such a breach and failure has been finally determined by an arbitrator or court, ICANN may terminate a registry agreement.³⁶ Beyond these sanctions it can refuse the renewal of an agreement if the registry violated its obligations. ICANN's monetary liability under these registry agreements is limited to the amount of the registry fees.

The economic impact of the agreements between ICANN and the registries should not be underestimated. For example, the contract with VeriSign, a U.S. corporation, on the management of the generic domain name ".com", is of a high economic value.³⁷ VeriSign at one time controlled 85% of the market of generic registrations.³⁸

ICANN does not conclude registry agreements with ccTLD registries as with the gTLD registries. However, the national registries authorized by each state for the assignment of names under its ccTLD have to be accredited by ICANN.³⁹ For this purpose, the national registries exchange letters with ICANN in which they commit themselves to securing and enhancing the stability and interoperability of the Internet's Domain Name System.⁴⁰ Starting with the German TLD registry DENIC in 2006 the national registries somehow unilaterally undertake the commitments vis-à-vis ICANN. As a rule there is no general obligation to follow all policies of ICANN, and no sanctions are foreseen in the event that a national registry violates ICANN policies. The

³⁵ ".com" Registry Agreement between ICANN and VeriSign of 1 March 2006 (note 34).

³⁶ See e.g. Art. VI sec. 6.1. of the Registry Agreement between ICANN and VeriSign of 1 March 2006 (note 34).

³⁷ Guillaume Le Floche, *Le sommet mondial de Tunis sur la Société de l'information*, 51 ANNUAIRE FRANÇAIS DE DROIT INTERNACIONAL 470 (2005).

³⁸ Milton Mueller, John Mathiason & Lee W. McKnights, *Making Sense of "Internet Governance": Defining Principles and Norms in a Policy Context*, in MacLean (note 7), 118.

³⁹ Lagrange (note 33), 295, 336.

⁴⁰ See e.g. exchange of letters between the Egyptian University Network as registry of ".eg" and ICANN, <http://www.icann.org/en/cctlds/eg/eg-icann-letters-02nov08-en.pdf>; further exchange of letters between national registries and ICANN can be found under the same link.

ccTLD registries are considered to form part of the public interest. The Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains, which have been adopted by the GAC in 2005 enshrined in section 4.1.1.: “Ultimate public policy authority over the relevant ccTLD rests with the relevant government or public authority; how this authority is exercised is determined by applicable law.”⁴¹ Thereby, any supervisory function exercised by ICANN is excluded.

The powers of a registry are delegated by the respective government, and only the government may re-delegate these powers.⁴² ICANN’s role is reduced to coordinating the Internet’s system of top-level unique identifiers, and to ensure their stable and secure operation.⁴³ In the past, however, ICANN exercised the power to suspend or to end the use of a top level domain name. It froze the “.iq” (Iraq’s country code), because the Chef Executive Officer of the registry managing this country code – the InfoCom – was accused of being a terrorist.⁴⁴ The Iraqis were forced to use generic domain names to continue their Internet presence. It is also not quite clear if ICANN has such a power after the ccTLD registries were qualified as part of public interest not subject to any supervision by ICANN. As a matter of fact, ICANN has the technical capacity to disconnect a registry of a specific ccTLD from the Internet.

The above described structure of the administration of domain names in the Internet on the one hand guarantees certain competitiveness, as ICANN concludes agreements with various registries; the registries contract with different registrars, so that registrants, that are users, ultimately have a certain choice where to register. On the other hand, ICANN can enforce its policies, at least vis-à-vis the gTLD registries, by stipulating in the registry agreements an obligation to respect these policies, and as ICANN (as the chief administrator of the Internet domain names) has a monopolistic position; the registries have to accept these commitments.

Apart from establishing contacts with the registries, ICANN’s most important task is to develop the policies which are to govern the Inter-

⁴¹ http://gac.icann.org/web/home/ccTLD_Principles.pdf; Wittzack (note 21), at 158.

⁴² Sec. 7.1 of the The Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains.

⁴³ Sec. 6.1.

⁴⁴ Le Floche (note 37), at 464, 473.

net. These include, for example, the Inter-Registrar Transfer Policy which allows registrants to transfer their domain from one accredited registrar to another.⁴⁵ This possibility is designed to promote competition in the domain name space. Another policy develops principles for the allocation of Autonomous System Numbers to Regional Registries.⁴⁶

Another – and perhaps one of the most important – policy of ICANN concerns the settlement of disputes surrounding domain names. ICANN developed a rapid, cheap and reasonable procedure for the resolution of conflicts over domain name ownership. It did so in close cooperation with WIPO, which led to the establishment of the Uniform Dispute Resolution Policy, which entered into force on 1 November 1999.⁴⁷ Pursuant to this policy, disputes are to be decided by an arbitration tribunal composed of three judges. According to paragraph 15 (a) of the Rules for a Uniform Domain Name Dispute Settlement the arbitration panel shall decide a dispute “on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable”. The panel may transfer or cancel a domain name,⁴⁸ it may not grant any form of compensation. At the time of writing, almost 6,000 cases have been settled. The decisions of these tribunals do not prevent the parties to the dispute from submitting the dispute to a competent municipal court.⁴⁹ These courts are not limited in their decisions to the legal rules which have been applied by the arbitration tribunal under the Uniform Domain Name Dispute Settlement Policy, but may come to different con-

⁴⁵ See for the Inter-Registrar Transfer Policy: <http://www.icann.org/en/transfers/>.

⁴⁶ See for the Allocation Policy of Autonomous System Numbers to Regional Registries: <http://www.icann.org/en/general/global-policy-asn-blocks-31jul08-en.htm>.

⁴⁷ <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

⁴⁸ Sec. 3(b) of the Uniform Domain Name Dispute Settlement Policy, <http://www.icann.org/dndr/udrp/policy.htm>.

⁴⁹ See Section 4(k) of the Uniform Domain Name Dispute Resolutions Policy, <http://www.domainregistry.de/disputeresolution.html>; Karen Webb, *The “Appeal” of the Internet – Looking at the Uniform Domain Name Dispute Resolution Policy and How it is Newly Influenced by the Anticybersquatting Consumer Protection Act*, 43 SANTA CLARA LAW REVIEW 1431 (2003).

clusions.⁵⁰ While a case is pending before a municipal court and after the decision of such a court the decision of the arbitration tribunal will not be executed; the competent registry will neither cancel nor transfer the domain name under dispute.

5. Governance

Governance of the Internet has two facets: first, who is governing ICANN, and second, how is ICANN governing the Internet.

5.1. Who Is Governing ICANN?

This question is implicitly answered by ICANN's structure as described above. To sum up the main characteristics: following the philosophy of the bottom-up approach, governments formally play an advisory role within ICANN. ICANN's policies are formulated after input from various stakeholders, such as the registries and commercial and noncommercial users. As a rule, they participate in two ways in ICANN's decision-making procedures: first, they exercise advisory and consulting functions, the Board of Governors being the competent organ making the final decisions. The Board of Governors was conceived as a coordinator of the network and a translator of community consensus into decisions.⁵¹ This structure contrasts with the classical model of international organizations, which are normally governed by the member states through their representatives in the decision-making organs. In ICANN the national governments are somehow bypassed. Instead, private individuals, be they physical or legal persons, are directly acting at an international level and are responsible for maintaining and foster-

⁵⁰ See the case between the Spanish city of Barcelona and a private enterprise which used "barcelona.com" as an internet address. The Administration Panel under the Uniform Domain Name Dispute Resolution Policy of 5 May 2000 decided that domain name had to be transferred to the city of Barcelona, see <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0505.html>; the United States Court of Appeals for the Fourth Circuit decided that the Spanish trademark law was not applicable by U.S. courts, and that under U.S. law the private enterprise was the legitimate owner of the domain name, see <http://www.icannwatch.org/article.pl?sid=03/06/03/0056220&mode=thread>.

⁵¹ von Bernstorff (note 4), at 519.

ing international interest and goodwill, namely transnational communication. The second way in which stakeholders participate in the governance of ICANN are the elections as described below (9.2).

The only, albeit important, exception to the exclusion of direct governmental participation in the activities of ICANN is the role assumed by the U.S. government through the Department of Commerce. It gave the concession to ICANN to manage the domain name system and the Internet, and it can revoke this concession at any time, as described above. Even if the United States has yet to exercise direct influence on how ICANN fulfills its task, its position is strong because ICANN derives its power from the U.S. government.

5.2. How Is ICANN Governing the Internet?

As a counterpart to ICANN's horizontal structure – and its character as a private corporation – it does not govern through unilateral binding decrees or resolutions. Rather, ICANN enforces its policies through the conclusion of contracts with the registries which have to respect these. If ICANN decides that a certain TLD name should not be admitted, this decision is not binding in the sense that states or the Internet users have to respect it. ICANN just does not include such a name in its offer. This is true for all gTLD names, and to a certain degree also with regard to ccTLD names; for even if they form part of the public interest of the respective state, at least in doubtful cases – e.g. Palestine or Taiwan – ICANN has to decide whether it assigns a TLD name to such an entity or not.

Although ICANN policies do not have a directly binding effect on registries, registrars and Internet users, the registry agreements concluded between ICANN and the registries refer to these policies and oblige the registries to respect the policies. Of course, no registry is forced to conclude such an agreement with ICANN. Any relation with ICANN seems to presuppose voluntariness. However, as ICANN is the only organization which can give access to the Internet as it is structured today, that is through the assignment of TLDs, everybody who wants to be connected to the Internet, be it directly, as a registry, or indirectly, as registrar or user, has to enter into a contractual relationship and thereby to bow down to the conditions of ICANN. The monopoly position of ICANN in its crucial role for the Internet domain name system leaves no choice. As previously mentioned, the situation of ccTLD registries is somehow different, since ICANN has to accredit those which are em-

powered by the respective state organ without any freedom of choice. But even the ccTLD registries accept the policies of ICANN through the above mentioned letters of exchange for fear of a disintegration of the Internet if they do not respect the rules established by ICANN. The nature of the Internet, or in other words, the need for uniformity of the basic rules which govern the Internet is the most forceful argument for the recognition of these rules.

Therefore, the powerful position of ICANN is derived from its monopoly over Internet administration which is due to the structure of the Internet. The basic principle of the Internet is the interconnectivity of different computers and networks. This interconnectivity can be guaranteed only if there are rules which make it possible for different computers to contact each other. It seems evident that the question of addresses is of utmost importance: whoever wants to take part in Internet communication has to comply with the rules concerning the assignment of Internet addresses. It seems quite logical that the uniformity of the rules is best guaranteed by a single “legislator”. The logic of the Internet favors monopolistic structures. Of course, everybody is free to establish an alternative Internet.⁵² However, this would run counter to the Internet’s objective of having a universal scope, that is, everybody being able to communicate with everybody else. If there were an alternative Internet, the question of compatibility and interconnectivity would arise again on a higher level, and again institutions would have to be created in order to establish the necessary links and the rules which govern them. In other words, the Internet does not “run itself”, but requires management, which in turn means that someone must set the rules. At present, this task is incumbent upon ICANN. The structure of the Internet facilitates the need to respect ICANN’s policies: the lack

⁵² There are other options, such as the Open Root Server Network, which, however, is considered to be just a supplement to ICANN. It shall guarantee that, in case a certain root zone is eliminated from the root server – for example, all addresses which end .de – the addresses can be reached. The idea behind the establishment of such an Open Root Server Network is to reduce the power of the U.S. agencies, *see* Wissenschaftliche Dienste des Deutschen Bundestages, Die Regulierung des Internets – Strukturen, Aufgaben und Arbeitsweisen von ICANN, DENIC, CENTR, CORE und ORSN, 28 November 2005, 29, http://www.bundestag.de/wissen/analysen/2005/2005_11_281.pdf.

of an alternative and the fear of Internet disintegration provide the strongest incentives for complying with ICANN's rules.⁵³

6. Legal Principles Governing the Activities of ICANN

ICANN is not acting in a space without legal rules. The first layer of legal principles is established by ICANN itself, *i.e.* in the Bylaws, especially in Art. 1 sec. 2. They include the enhancement of the operational stability, reliability, security, and global interoperability of the Internet, the self-limitation to matters which require global coordination, participation of groups affected by the Internet governance, competition in the registration of domain names, transparency in the decision-making, neutrality – that is nobody should be privileged or discriminated for reasons not pertaining to the operability of the Internet –, and accountability – that is ICANN should be controlled in a due procedure. The only principle comparable to a fundamental right is the commitment to fairness⁵⁴ and the principle of non-discrimination.⁵⁵

The Bylaws themselves stipulate in Art. 1 sec. 2: “These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated. Moreover, because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

Principles which have a specific impact on ICANN's activities are transparency, accountability and participation. These principles are

⁵³ Tamar Frankel, *Governing by Negotiation: The Internet Naming System*, 12 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 449, 453 (2004).

⁵⁴ Art. I sec. 2 item 8 of the Bylaws.

⁵⁵ Art. II sec. 3 of the Bylaws.

elaborated in greater detail in a document of January 2008 entitled “ICANN Accountability and Transparency Frameworks and Principles” (the “Frameworks and Principles Paper”), which synthesizes the philosophy of ICANN in this regard.⁵⁶ It states that there are three dimensions of accountability:

- a. towards the stakeholders as represented in the various organs and bodies of ICANN;
- b. corporate and legal accountability, which covers the obligations that ICANN has under through the U.S. legal system and under its Bylaws; and
- c. participating community accountability, which is designed to ensure that the Board performs its tasks in keeping with the wishes and expectations of the ICANN community.

The only express reference in the Frameworks and Principles Paper to legal norms is the section on corporate and legal accountability. The legal obligations are derived from Californian and U.S. American law, albeit in a very generic way. Given that ICANN is constituted under Californian law, this is hardly surprising. Apart from this reference to legal norms, the Frameworks and Principles Paper does not specify the notion of accountability. Accountability is differentiated only with respect to various groups involved in ICANN’s work. The quintessence of accountability is that ICANN has to pay due attention to the interests of these groups. The wishes and expectations which are submitted by them should be duly considered. In this sense the content of the accountability is not substantive but procedural by nature; exaggerating somewhat, one could say that the supreme law of the corporation is the will of its stakeholders and of the Internet community. This very generic way of identifying accountability criteria makes it quite difficult to implement the principle. By making the wishes of the stakeholders and the Internet community the focus, it becomes difficult to prove a violation of the accountability principle. The various stakeholders and Internet users do not share an identical interest. ICANN always has to strike a balance between conflicting interests. Therefore, it will be difficult to prove that in a given decision ICANN did not duly take into consideration the wishes of an affected group.

The principle of accountability is related to the principle of transparency. Transparency involves *inter alia* informing the Internet commu-

⁵⁶ <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>.

nity of proposals, plans and policies of ICANN. This enables the various interest groups to articulate their interests and participate in the elaboration of ICANN's policies. The principle of transparency is implemented by means of an Information Disclosure Policy,⁵⁷ a statement on Financial Accountability, and an external audit process.

The principle of participation is closely linked to the principles of accountability and transparency. The principle of participation mandates the participation of the Internet community and the various stakeholders in ICANN's decision-making process. It is an expression of the above-described bottom-up approach, which endows ICANN with a democratic character. The basic principle of ICANN does not consist of values such as human dignity or freedom of expression, or the protection of property (none of which are mentioned in the Bylaws) but in implementing the will of the diverse interest groups.

Since there are no international agreements which steer ICANN's policies, no guiding principles for this organization are established at an international level by treaty. A more difficult question is whether ICANN is bound by customary international law. Not being a classical international organization, and for that reason not a subject under international law, ICANN is not a direct addressee of any obligations under international law. But the question is whether ICANN has to respect certain rules of international law which could be relevant to its activities due to the fact that it is exercising functions of an international public interest. A private corporation exercising public functions for the international community is – with very few exceptions⁵⁸ – such a new phenomenon in international law that to date conventions on this subject matter have not been concluded and customary law has not yet developed any applicable principles. However, one could imagine that, in the future, should it become common practice for governance in the international field to be exercised by private corporations, certain rules and limitations under international law would be developed with regard to the form and the manner in which these functions are fulfilled. These rules would have to be respected irrespectively of the character of the actor who is exercising this function.

⁵⁷ <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>.

⁵⁸ See e.g. the International Committee of the Red Cross which was established as an association under Swiss law.

All in all, one can say that the scarcity of substantive rules which could guide the policy of ICANN reflects the basic character of this institution as a private corporation. Private corporations do not establish a bill of rights, but very concrete policies which are closely related to their activities. ICANN is aware of its importance for the Internet community. Therefore it formulates rules, which in a way will provide a procedural means which tempers its enormous power over the Internet by involving the Internet community in its decision-making procedures and by establishing accountability towards the Internet community.

7. Judicial Control

As described above ICANN is not beyond the law. The obligations deriving from its own Bylaws as well as and Californian and United States law can be enforced through a combination of quasi-judicial and judicial procedures. ICANN's Bylaws provide for an internal reconsideration of a decision at the request of an individual affected by the decision; this procedure provides for an internal review of decisions made by the Board of Directors in case a person feels unfairly treated or believes that a decision of the Board of Directors violates procedural requirements.⁵⁹ The so-called Reconsideration Committee is a subsidiary organ of ICANN's Board of Directors. It can issue recommendations, amend or overturn a decision which has not been taken by the Board of Directors as a whole. Second, the Bylaws provide for an Independent Review Panel, which is operated by an international arbitration provider, the International Centre for Dispute Resolution, a body which provides mediation and alternative dispute resolution services.⁶⁰ This Review Panel can be addressed by any person materially affected by a decision of ICANN. The International Review Panel can declare an action of ICANN incompatible with the Articles of Incorporation or the Bylaws and may make recommendations to the Board of Directors. Fi-

⁵⁹ Art. IV sec. 2 of the Bylaws. In 2008 no such request was lodged, *see* Board Reconsideration, Annual Report 2008, <https://cai.icann.org/files/meetings/cairo2008/reconsideration-report-06nov08.pdf>; in the years before not many requests were filed, *see* list of requests at <http://www.icann.org/en/committees/reconsideration/>.

⁶⁰ Art. IV sec. 3 of the Bylaws.

nally, an ombudsman is appointed who can investigate, publish his findings and give recommendations to the Board of Directors.⁶¹

The specific internal review procedure shows that ICANN does not conceive itself as a “normal” corporation under civil and corporate private law. By granting additional internal legal protection ICANN recognizes that specific interests of its users are at stake which go beyond the interests involved in a normal private contractual relationship. This type of dispute settlement is much more common with public administrations, where the parties are quite often involved (especially the individuals) try to find a solution to the conflict before internal organs of the respective entity or authority. This may help to avoid long lasting proceedings before courts. The reason why this internal dispute settlement is more likely to be found within public administrations derives the fact that, in contrast to private corporations, public administrations are not supposed to defend their own interest, but take into consideration the common interest, including the interests of individuals. ICANN by providing such dispute settlements just proves its proximity in character to organs of public administration.

The dispute settlement procedures established in the Bylaws can be considered to be effective and swift. However, a closer scrutiny shows that they correspond to the requirements of a judicial control only to a limited extent: the Reconsideration Committee is not an independent body and, therefore, can only offer “administrative” self-regulation. The ombudsman is independent, but as all classical ombudsmen he has no real judicial powers. While the ombudsman may investigate conflicts between affected persons and ICANN, he cannot deliver binding decisions. The Independent Review Panel may hand down such decisions as it is an independent body, but it has no power to quash a decision of the Board of Directors or to grant compensation. It is limited to a declaration of incompatibility with an act found in the ICANN Bylaws. The Uniform Domain Name Dispute Resolution Policy may only reconstitute a cybersquatted domain name, it cannot decide on damage claims. Those have to be brought before U.S. courts.⁶²

If a dispute should arise between ICANN and a Registry, the registry agreements provide for a settlement of the dispute by arbitration pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce; the arbitration procedure should take

⁶¹ Art. V of the Bylaws.

⁶² <http://cybersquatting.com/index.php?page=legal-actions>.

place in the Los Angeles County in English.⁶³ As described above, ICANN cannot impose sanctions, such as the termination of a registry agreement, on a registry without an anterior decision by an arbitration court which determines a breach of the registry agreement. ICANN has no right to unilateral sanctions against registries. In this context the judicial control has an enormous importance for the limitation of ICANN's power.

An individual affected by the decision of ICANN can lodge a law suite against ICANN before a U.S. court, which will apply Californian or U.S. law respectively.⁶⁴ In this regard, ICANN is treated as a normal private corporation, and as long as it has this legal form it will be subject to U.S. jurisdiction. As the case may be a lawsuit between ICANN and another private person could also arise before a municipal court of another state.⁶⁵

8. Legitimacy

8.1. The Problem of Legitimacy

The question of ICANN's legitimacy is of specific interest. Although the corporation manages an international public good, that is the access to the Internet, it is not formed by or subject to an international agreement, but rather is the creation of the U.S. government and has been delegated its authority by this government.⁶⁶ Therefore, the classical form of legitimacy of an international organization, that is the principle of consent which is achieved by the accession of the member states to the treaty establishing the international organization, as well as their participation in the bodies of the international organization, does not apply to ICANN.

⁶³ Art. 5 sec. 5.2 b of the .biz Registry Agreement; Art. 5 sec. 5.1 b .com Registry Agreement of 1 March 2006, <http://www.icann.org/en/tlds/-agreements/verisign/registry-agmt-com-01mar06.htm>.

⁶⁴ See list of law-suites in which ICANN has been involved, available at: <http://www.icann.org/en/general/litigation-moore.htm>.

⁶⁵ See *pool.com v. ICANN*, before the Superior Court of Justice, Ontario, Canada, <http://www.icann.org/en/general/litigation-pool.htm>.

⁶⁶ Lagrange (note 33), at 295, 337 *et seq.*

The question of legitimacy is likewise not solved by the fact that ICANN is established as a private corporation and that it concludes contracts with its partners who “voluntarily” enter into the agreements. As a rule, the question of legitimacy does not arise in contractual relations with the same intensity as it does in public law relations, which are mostly vertical. The consent which the partners give to the contract justifies all obligations resulting therefrom. *Volenti non fit iniuria*. However, as it has been described above, the partners of ICANN do not enjoy a free choice when dealing with ICANN. Contracting with ICANN is not the result of their free will. Rather, they are forced to do so for lack of an alternative if they want to participate in the Internet. Due to its monopoly, ICANN’s position in the administration of a public good, that is access to the Internet more closely resembles that of a state agency. The legitimacy of state agencies, which as a rule are not established through direct elections, is in great part derived from the legal framework and the substantive principles which give direction to the decisions of these organs. As has been shown above, the principles which ICANN has to respect are quite vague, so that it would be difficult to enforce them.

8.2. Input Legitimacy

The lack of legitimacy conveyed by governments is compensated by two forms of input legitimacy. First, the groups and persons affected by the ICANN decisions participate in the decision-making process by exercising an advisory function. Their comments and proposals are to be duly taken into consideration by the Board of Directors. In a way, it is the weakest form of input legitimacy as there is no real obligation to follow the proposals. However, in practice interest groups’ proposals play an important role in the development of ICANN policies. A defect in this type of legitimacy lies in the difference between the power of the interest groups affected by ICANN. As it turned out, the commercial interests are much better represented before ICANN than the interests of the common users.⁶⁷

The second form of input legitimacy derives from the participation in the election of the members of the executive and advisory and electoral bodies by the respective interest groups which have a seat in specific

⁶⁷ von Bernstorff (note 4), at 522 *et seq.*

ICANN organs. In some of these bodies the “transmission belt” of democratic legitimacy is continued in the sense that its members are elected by the respective groups. For example, the At-large Constituency, which is elected at a regional level by Internet users, participates in the election of the Board of Governors through the nomination of five members to the nomination committee.

8.3. Output Legitimacy

For ICANN, output legitimacy is much more important than input legitimacy. Whether an institution has output legitimacy depends on how it fulfills its functions. Legitimacy does not require that the institution has the highest performance in an absolute sense. An institution already enjoys legitimacy if without its activities the situation were worse. If an institution cannot be replaced in the fulfillment of its functions because there is no alternative, its legitimacy also derives from its position.

In the case of ICANN output legitimacy flows from the efficient management of the Internet, which is mostly undisputed, and from the fact that ICANN actually, as a matter of fact, cannot be substituted by another organization as it holds the monopoly in the distribution of the top level domain names. Everybody who wants to use the connectivity of the Internet has to defer to the rules set up by ICANN. The rules of ICANN are accepted if for no other reason than the fact that there is no alternative. It does not mean that all decisions of ICANN are undisputed, but it does mean that, once they have been taken, they have to be complied with. This situation was concisely phrased as “Code is Law”.⁶⁸

9. Criticism of ICANN

The administration of the Internet by ICANN is not free from criticism. It is considered inappropriate that a national corporation under Californian law and under the supervision by the U.S. Department of Commerce manages the Internet which is considered to be a common good. Therefore, the World Summit of the Internet Society, which took

⁶⁸ Wolfgang Kleinwächter, *Beyond ICANN vs. ITU*, in MacLean (note 7), 33.

place in Geneva in 2003 and in Tunis in 2005, discussed the topic extensively. The Tunis Agenda for the Information Society emphasized in para. 29 the full involvement of governments in the management of the Internet, and it places the governments even before the private sector.⁶⁹ In para. 35 lit. a the Tunis Agenda underlines that “policy authority for Internet-related public issues is the sovereign right of states. They have rights and responsibilities for international Internet-related public policy issues.” It does not exclude the private sector when stating: “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 field.” The governments should have “an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet”.⁷⁰ Besides, questions concerning the interests of only one state should not be decided by other states. In this sense the Tunis Agenda declares in para. 63: “Countries should not be involved in decisions regarding another country’s country code Top-Level Domain (ccTLD).”

A Working Group on Internet Governance, established by the Secretary General of the United Nations, identified as one problem of the Internet governance that “a vacuum within the context of existing structures, since there is no global multi-stakeholder forum to address Internet-related public policy issues. It came to the conclusion that there would be merit in creating such a space for dialogue among all stakeholders. This space could address these issues, as well as emerging 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.”⁷¹ The Working Group proposed four models. One of them aims at strengthening the participation of the governments and at the replacement of the U.S. government in the supervision of ICANN. A more radical proposal envisages the transfer of the most important competences of ICANN to a World Internet Corporation for Assigned Names and Numbers. A third one declares that a specific oversight organization is not required, but like-

⁶⁹ Available at: <http://www.itu.int/wsis>; the same ranking between the governments and the private sector can be found in para. 24 dealing with Internet governance.

⁷⁰ Para. 68 of the Tunis Agenda for the Information Society.

⁷¹ Para. 40 of the report of the Working Group on Internet Governance to the Tunis World Summit of the Information Society, <http://www.wgig.org/docs/WGIGREPORT.pdf>.

wise favors more government participation. The fourth model proposes the establishment of an International Internet Council which should defend the interests of the public vis-à-vis ICANN. All the proposals share the common position of national governments in that the administration of the Internet should be strengthened. This should be an answer to the critique that in the management of the Internet public interests are at stake on which not only a private corporation under the supervision of one government should take decisions.

The U.S. government, while recognizing that public interests are concerned by the Internet administration and accepting the responsibility of each country for its ccTLD, strictly rejects the idea of giving up its supervisory function. In 2008 the government declared that it does not intend to transfer the authoritative control over the Internet administration to ICANN,⁷² and the European Union did not insist in such a transfer fearing that the Internet governance could become too bureaucratic and open to abuse by governments which want to obstruct the freedom of information. Therefore, the basic structures of the Internet administration were maintained, including the competences of ICANN. To date, the World Summit of the Information Society has not had an impact on a substantial readjustment of the structure of ICANN to meet the requirement of an adequate consideration of the interests at stake. As a result of the World Summit of the Information Society, an Internet Governance Forum has been established by the UN Secretary General.⁷³ The Internet Government Forum is to offer a multi-stakeholder policy forum for discussion on the further development of the Internet outside ICANN. Thus far, three meetings have been held.⁷⁴

⁷² Letter of the National Telecommunications and Information Administration to the Chairman of ICANN of 30 July 2008, http://www.ntia.doc.gov/comments/2008/ICANN_080730.html; this letter refers to a former declaration of 2005 by the Government on the U.S. Principles on the Internet's Domain Name and Addressing System, Kieren McCarthy, *Bush Administration Annexes Internet*, THE REGISTER, 1 July 2005, http://www.theregister.co.uk/2005/07/01/bush_net_policy/.

⁷³ See para. 72 of the Tunis Agenda for the Information Society.

⁷⁴ See <http://www.intgovforum.org/cms/index.php/aboutifg>.

10. ICANN: Private Corporation or Public Authority?

The analysis of ICANN raises the question whether this organization can be ranked among international institutions which exercise international public authority as understood in the frame of this project.⁷⁵ In the case of ICANN, each of the three terms contained in the concept of “international public authority” involves difficulties that require detailed consideration.

10.1. The Public Character of ICANN

Prima facie, the private law character of ICANN and the contracts it concludes seem to exclude any assumption that it exercises *public* authority. However, upon closer inspection, ICANN loses its purely private law character. This has to do, first, with the existence of some principal-actor relationships linking ICANN to the will of public entities. The competences of ICANN are delegated by the U.S. government, and the U.S. government can re-delegate these competences if it wishes to do so. The U.S. government further exercises supervisory functions in the public interest. Further, even if government representatives do not participate in the voting by the organs of ICANN they factually play an important role by influencing how ICANN exercises its functions. They have liaison persons in various organs of ICANN, among them the Board of Directors. A special provision obliges ICANN to take into consideration the proposals of governments. ICANN further recognizes the public interests of each state in the management of its ccTLD. By accepting the policies and administration of the states in this field ICANN integrates decisions of public actors into its

Second, the functions which ICANN carries out are of a public character. ICANN administers a scarce common good, which is the access to the Internet, and decides on its assignment. Scarce technical facilities which serve basic needs of society normally are managed by the state, other public entities, or under their supervision. A prominent example is the International Telecommunication Union, being among other

⁷⁵ See Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in this volume.

things in charge of the administration of radio frequencies.⁷⁶ It is shaped as a classical international organization based on an international treaty and composed of and controlled by the member states. Even if the purely technical administration of the Internet can be fulfilled by a private corporation it is beyond doubt that issues of public interest are at stake. ICANN's Bylaws recognize public law interests linked to the administration of the Internet. The management of the ccTLDs is qualified as forming part of public interests. It fits into this line of argumentation that the World Summit of the Information Society tried to enlarge the state control over the Internet, because it identified in the Internet governance public policy issues.

It follows from this that ICANN can be qualified as exercising *public* authority. This conclusion is in line with the views of other scholars who qualify ICANN's activities without hesitation as an element of global administration.⁷⁷ Even though their concept of global administration might differ from the concept of international public authority which lies at the core of this project, there seems to be a shared conviction that the mentioned public elements in the organizational setup of ICANN justify this qualification.

10.2. The International Character of ICANN

The *international* character of the functions carried out by ICANN could be cast into doubt because of the stronghold of the U.S. government on the basic infrastructure and its unwillingness to share its power with other states. However, in order to get an idea of the true character of ICANN, one has to take into consideration two important aspects: first, international stakeholders, especially of the governments of almost all states participate in the administration of the internet access. Second,

⁷⁶ Art. 1 para. 2(a) of the ITU Constitution.

⁷⁷ Bruno Carotti & Lorenzo Casini, *Complex Governance Forms: Hybrid, Multilevel, Informal*, in GLOBAL ADMINISTRATIVE LAW, 29 *et seq.* (Sabino Cassese et. al., eds., 2008). Available at: http://iilj.org/GAL/documents/GAL_Casebook2008.pdf. In the preface to this book the editors emphasize with respect to private organizations exercising global governance: "Moreover, there are other significant examples of innovative governance methods, mechanisms and principles, of which any fully-rounded theory of global administration would have to take account."; Krisch & Kingsbury (note 21), at 3; Kleinwächter (note 24), at 1104; von Bernstorff (note 4), at 511.

ICANN's activities do not only have an factual impact on the internet management in all countries, but it is the objective of this corporation to influence and form a communication system on an international level. For both reasons one has to qualify ICANN as an international institution.

10.3. Does ICANN Exercise Public Authority?

A third question is whether ICANN exercises public *authority* by the unilateral legal determination of others. If the question is put directly in this manner it has to be answered negatively. The policies of ICANN are not directly binding; ICANN does not unilaterally issue acts which establish obligations for individuals or states. ICANN enters into contact with private parties only through contracts which establish obligations for the other party. Nevertheless, ICANN could be considered exercising authority by factually determining others in a unilateral way. One has to take into account the monopoly which ICANN exercises in the administration of Internet access by the assignment of Internet addresses. ICANN decides with which registry of gTLD names it concludes a registry agreement. Even if ICANN has to respect the principle of non-discrimination, it is free to choose among corporations which want to function as registry. As ICANN is the only organization offering access to the Internet via assignment of Internet addresses, there will normally be more than one competitor. In such a constellation the choice of ICANN with whom it concludes the contract is a unilateral act. The corporations which want to become a registry of a gTLD have no choice but to conclude the agreement with ICANN for lack of an alternative.⁷⁸ They have to accept the conditions under which ICANN concludes the agreement, among them all the policies which ICANN has elaborated. The registry agreements, as a rule, do not only refer to current policies concerning the conclusion of an agreement, as has been shown above, but also to policies adopted at a later stage. So, a corporation has no choice with whom to conclude the registry agreement, it has no real influence on the content of these agreements and it has even to accept a subsequent unilateral change of the content of the

⁷⁸ As has been shown above, the situation with the ccTLD is different, as ICANN's power is somehow counterbalanced by the obligation to accredit the proposed registries of the ccTLD names. In this sense a balance is struck between the public authority of ICANN and the public interest of the States.

agreement. Therefore, the agreement cannot be conceived as being based on the free consent but is somehow unilaterally dictated by ICANN. In spite of the form of an agreement through which ICANN enforces its policies, in essence ICANN unilaterally exercises public authority through the administration of a public good.

With regard to the ccTLD registries, ICANN is not exercising unilateral authority in the same way as with regard to gTLD registries because, as explained above, states consider the management of the ccTLD as part of their public interest. There is no contract regulating the division of authority between the states and ICANN in the management of the ccTLD. ICANN unilaterally recognizes the public interests of states in its Bylaws, and the ccTLD registries which derive their powers from the respective states somehow unilaterally declare their compliance with the policies of ICANN. They do so because they recognize the crucial role of ICANN in the management of the Internet and for lack of an alternative. ICANN can enforce its policies because of its unique position.

The case of ICANN is of special interest for the legal conceptualization of global governance for it shows that private law elements may be introduced into the administration of international public goods. This parallels the development in municipal administrative law, where an ongoing privatization of the legal forms of administration can be observed. The case of ICANN exemplifies that the main criteria for what is international public authority is not the form in which it is exercised. More important is the objective of the administration. If it is a public good, there is a public interest. Wherever the public interest is at stake, organs or organizations are established which should take care of the public interest, and at the last instance they exercise unilateral power to fulfill their task.