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Pondering the Politics of Private Procedures:  
The Case of ICANN

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Jay P. Kesan and Andres A. Gallo

## Abstract

The creation of ICANN was sought by the United States government to promote international cooperation in the governance of the Internet based on a bottom-up system in which government intervention was limited, if not eliminated. However, as the Internet has become a global phenomenon this initiative has faced important opposition from the international community. As we have shown in this work, the evolution of ICANN reveals how ICANN slowly departed from its mere technical role into a more political one, in which all groups and constituencies try to reach consensus about its policies. Furthermore, the mild success of ICANN in its first three years showed that a pure bottom-up model is unable to efficiently regulate the Internet. As the reform movement was initiated from inside ICANN, the different constituencies tried to exploit the situation by gaining power positions in the new structure. The initial proposal recognized a bigger role for international governments as a way to overcome structural deficiencies of a private institution. However, the political strength of different groups and constituencies within ICANN reversed some of the initial reforms and produced a totally new structure. Reform attempts from inside ICANN were complemented by reform attempts by the international community. These efforts concentrated on changing the main structure of ICANN into a multilateral organization controlled by international governments and removing the direct control of ICANN from the United States government. In the end, even though the proposals seem to look for different structures to regulate domain names and numbers on the Internet, they represent a political struggle between opposite points of view.

Among the results of our analysis we can highlight the following: first, as a result of the reform process, the private sector consolidated its political position in the ICANN structure, at least in the short run. With the new Bylaws, the private

sector could retain some of the power they had before and even gain more power. Among the winners of the reforms are: the GNSO constituencies, which gained important power spaces in the new design, ASO members, which had some gains, but more importantly, are still debating their future, possibly more expansive, relationship with ICANN, and the ccNSO, which were recognized as an independent Supporting Organization. The latter group will provide one of the few ways to cooperate with international organizations and governments. Nonetheless, the inside-out attempt to reform proved to be weak, because it failed to bring outside constituencies to the governance body and created opposition from the international community. Thus, Internet users are among the losers of the inside-out reform attempt because they lost the privilege to elect At-Large members by popular vote. The new Bylaws created a Nominating Committee, which undermined most of the original power Internet At-Large members had. PSO members lost more power than any other entity inside the ICANN organization. The PSO was eliminated and their members were transferred to the Technical Liaison Group (TLG) to serve mere advisory roles, with slight participation in selecting Board members. Even though, this group retained the capacity to give technical advice to the Board, it does not have as much say on the definitive implementation of policies. By reinforcing CGA as an advisory institution inside all major corporate groups and constituencies, ICANN initiated a new relationship with its governments, which could positively effect future policy implementation. However, the stakeholders of ICANN, who resisted governmental intervention, rapidly watered down the active role for governments suggested in the first reform proposal.

The inside-out reform process allowed us to examine the political strength of its different groups. This process also showed how ICANN has become more of a political instrument, instead of a technical corporation. An indication of this is that most of the debate on the reform was based on how to divide the power inside ICANN, more specifically inside the Board of Directors, and how to maximize the capacity of each group to enforce their policies.

Second, our analysis shows how the inside-out reforms sought to enhance international cooperation. Creating a Supporting Organization for the ccNSO and the incentives for international governments to participate in a better CGA opened the ICANN gates to more extensive international participation in policymaking. However, the international community did not respond adequately to the reform and tried to generate its own model for Internet Governance.

The response of the International community to the regulatory regime of ICANN was the creation of a new organization with international ties and controlled by governments. This proposal, as summarized in the WGIG report, sought to overhaul ICANN and take away the United States direct control of ICANN and the management of names and numbers on the Internet. As a result, we face a struggle between two different types of regulation, a bottom-up approach, with more participation from the private sector, and a top-down approach which intends to take Internet governance into the international arena.

As shown in this paper, Internet regulation has become a hot political issue, and the organizations in charge of managing the regulatory regime will reflect these political preferences. The effectiveness of any of these regulatory regimes will depend on how well the specific structure of power provides an opportunity for consensus. In the end, the reform and the political struggle behind it have unmasked the political nature of ICANN. As a result, its future will depend on the consensus of its constituents and on the struggle between state and private sectors. In this debate, the United States government is one of the only governments defending ICANN in its current structure, because of the contract that ties ICANN directly to the US Department of Commerce. On the other hand, the international community is pushing the United States to hand over its sole control of ICANN.

Given the tension between both parties, we believe that this transition could be pushed forward by the creation of a supranational entity in charge, not just of ICANN's responsibilities, but also of other areas related to the Internet, i.e., e-commerce, Internet security. We call this organization the World Internet Governance Organization (WIGO), managed by a board representing the developed countries and the technical groups with a stake in the Internet. This would entail an institution organized somewhere in between the unilateral regime represented by ICANN and the multilateral approach proposed by the United Nations. WIGO would allow both parties to obtain part of what they are looking for. The US would retain some power in designing the system, while other developed and developing countries would have more say in the direction of the system. A well-thought proposal that considers the foremost needs of the Internet will have a greater chance of succeeding than individual attempts to overtake over the governance of the Internet. Furthermore, it will generate a point of convergence for the diverse preferences of international stakeholders. Nonetheless, the success of such a proposal requires countries to realize that unorganized or individual attempts to regulate will not carry the day.

# Pondering the Politics of Private Procedures: The Case of ICANN

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## I. Introduction

The Internet has been portrayed as a place without government intervention or regulation.<sup>1</sup> In this new environment, Internet users have proudly relied on their own regulating abilities.<sup>2</sup> Businesses maintain that self-regulation has worked for the Internet and that government intervention remains unnecessary. The lack of government intervention was a good signal for some, but bad for others.<sup>3</sup> However, the absence of traditional politics did not mean that regulation was not needed.<sup>4</sup> Many private

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<sup>1</sup> See Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 447 (2000) (reviewing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)). Netanel comments on this characteristic: “In the eyes of its visionary pioneers, the Internet constituted a new kind of global community. The early Internet seemed to operate by a loose, informal consensus. It arose from universally accepted technical protocols for carrying on electronic conversation from remote locations and times, and it gave birth to common language, culture, and norms. Above all, its founders believed, the “Net” stood for the proposition that “information wants to be free.”

<sup>2</sup> This is not to say that there was no regulation at all. Technology helps to define the rules of the Internet and determines its regulatory framework. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999). See also Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to ‘Private’ Regulation*, 71 U. COLO. L. REV. 1263 (2000) (providing an analysis of this type of regulation).

<sup>3</sup> This debate has transcended the scholarly debate and attracted the attention of legislators, who have proposed regulation of the Internet in the last few years. See Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203 (2000) (analyzing the government’s attempts to regulate the Internet). Benkler conducted a survey of “all bills introduced in the United States Congress and all public laws passed by Congress and signed by the President, which use the terms ‘internet,’ ‘electronic commerce,’ ‘e-commerce,’ ‘world wide web,’ or ‘interactive’ close to ‘computer’ or ‘online.’” *Id.* at 1206. He found that “[t]here were 15 such bills and joint resolutions in the 101st Congress, 23 in the 102d Congress, 34 in the 103d Congress, 66 in the 104th Congress, 275 in the 105th Congress, and 348 introduced in the first session of the 106th Congress, for a total of 761.” *Id.* at 1206-07. See generally Charles L. Kerr & Oliver Metzger, *Online Privacy: Changing Exceptions—Changing Rules*, 632 PLI/PAT 147 (2001); Mike Hatch, *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, 27 WM. MITCHELL L. REV. 1457 (2001); Bill Luther, *A Commentary on the State of Online Privacy and the Efficacy of Self-Regulation*, 27 WM. MITCHELL L. REV. 2125 (2001); Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet’s Unregulated Character*, 85 MINN. L. REV. 215 (2000)

<sup>4</sup> See Jay P. Kesan & Andres A. Gallo, *Optimizing Regulation of Electronic Commerce*, 72 U. CIN. L. REV. 1497 (2004)(describing the debate between self regulators and government regulation on the Internet).

organizations and providers came together to control and regulate the Internet through code, i.e., technical definitions.<sup>5</sup>

In 1998, a new corporation was created to manage the addresses and numbers of the Internet.<sup>6</sup> This non-profit organization, the Internet Corporation for Assigned Names and Numbers (ICANN), was initiated as an instrument to manage the system from a technical point of view without government intervention or political influence.<sup>7</sup> In accord with its creators, particularly the United States government, ICANN began as the paradigm of bottom-up regulation, in which the private sector could design its own rules without the interference of politicians.<sup>8</sup> However, after only three years of existence, the rapid internationalization of the Internet led to some proposals for changing the governance structure of ICANN. The latest Bylaws were passed in October 2002 but not without significant debate and controversy.

The reform initiatives began when the President of ICANN introduced an inside-out proposal; he recognized that ICANN could not develop its tasks without cooperation

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<sup>5</sup> See Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace*, 5 COMMLAW CONSPECTUS 181 (1997). See also LESSIG, *supra* note 2.

<sup>6</sup> See MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002) (studying the management of numbers and addresses on the Internet and the creation of ICANN by the U.S. Government). See also Milton Mueller, *Success by Default: A New Profile of Domain Name Trademark Disputes under ICANN's UDRP*, Convergence Center, Syracuse University, June 2002.

<sup>7</sup> "The U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management. Most commentators shared this goal. While international organizations may provide specific expertise or act as advisors to the new corporation, the U.S. continues to believe, as do most commentators, that neither national governments acting as sovereigns nor intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses. Of course, national governments now have, and will continue to have, authority to manage or establish policy for their own ccTLDs." Management of Internet Names and Numbers, 63 Fed. Reg. 31741-01 (Jun. 10, 1998), available at <http://www.icann.org/general/white-paper-05jun98.htm>.

<sup>8</sup> *Id.*

among the United States and other national governments.<sup>9</sup> Throughout 2002 and 2003, the different stakeholders of ICANN debated the type and extent of the President's reform proposal.<sup>10</sup> Many of the constituencies of the reform process tried to avoid involving governments in ICANN, in direct opposition to the President's proposal. As such, they proposed a different kind of reform with a smaller role for the state, more participation of private international interests in ICANN and a reinforced role of the original private stakeholders. Despite the proposal's objection to political interference, we claim that even if the reforms succeeded in limiting government intervention, it also transformed ICANN into a political organization. As ICANN went through this reform process, the international community acting through the United Nations, has tried to create a different model of Internet governance shifting control away from the United States to the UN and converting ICANN into a multilateral organization (i.e., outside-in reform). In this scenario, ICANN would have stronger top-down governance, with a more powerful delegation system for naming its authorities. As a result, we are in the midst of a political struggle to define a regulatory regime for the Internet which, far from being solved, sees ICANN as the main target of these efforts.<sup>11</sup>

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<sup>9</sup> See M. STUART LYNN, PRESIDENT'S REPORT: ICANN – THE CASE FOR REFORM (2002) <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> (describing the shortcomings of the actual structure of ICANN and proposing a structural reform in which government should have an active role in the policymaking process).

<sup>10</sup> See generally ICANN, Links Concerning ICANN's 2002 Evolution and Reform Process, <http://www.icann.org/committees/evol-reform/links.htm> (last visited Feb. 27, 2007) (presenting papers and documentation regarding the political debate and position of each constituency).

<sup>11</sup> “[ICANN's] competitors, mostly foreign governments and the United Nations institutions, such as the International Communication Union (ITU), can offer the same or even better services than ICANN. These competitors refrain from doing so by “negative consensus” –none of the participants agree that any of the other will control the Internet naming and numbering system. Indeed, if the ICANN agenda threatened any of its competitors' vital interests, these competitors would signal that they are ready to take over, or consider taking over, ICANN's functions. While ICANN and its representatives may yearn for more

In this paper, we analyze how the interests of economic groups, countries, and users gave shape to the different governance proposals by employing a political economy framework. Each group holds a certain set of preferences for ICANN governance that favors its own interests. These interests may conflict with the most efficient management of ICANN. Allowing one nation to manage ICANN exacerbates this problem in the eyes of the international community. Rather than seeing ICANN as organized to ensure its efficacy, we shall see it structured according to the interests of the most powerful groups within ICANN. We use a simple preferences model to understand where each group stands, and we analyze how the success or failure of reform is based on such preferences.

First, we analyze how the political coalition of certain key private constituencies blocked the proposed reforms and revised them to promote their interests. Second, we explore how external pressure from the international community has challenged the status of ICANN along with the United States control over Internet regulation. As we show, the two opposing positions in this debate can be characterized as a preference for top-down versus a preference for bottom-up organization, although other political and economic factors also play an important role in determining each side's preferences. In Section II, we present background regarding ICANN and the Uniform Domain Resolution Policy (UDRP) to show how this paper fits in with previous studies and expands upon them. In Section III, we briefly discuss the history of ICANN to explain its origin. In Section IV, we describe the initial characteristics of ICANN's structure at its inception in 1998 and

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leverage with respect to governance of the system, its potential competitors effectively limit its ambitions.” Tamar Frankel, *Governing by Negotiation: The Internet Naming System*, 12 *CARDOZO J. INT'L & COMP. L.* 449, 452 (2004).

how it has evolved as a private corporation. In Section V, we present a model for the preferences of the groups holding a stake in Internet regulation. In Section VI, we present the reform proposal of ICANN's President and analyze the effects it would have had on the constituencies' distribution of political power. In Section VII, we analyze the attempts of the international community to take over ICANN from the United States and replace it with an international organization. Finally, we present our conclusions. Among them, we show that even though many observers criticized ICANN reform from a normative point of view, this reform was the one that was politically feasible. Given the political persuasion of those groups that maintained or increased their power, it is far from an efficient one, for it was not instituted based on an objective measure of efficiency, but rather to maintain the power of stakeholders already in place. Furthermore, we show how far ICANN is from being a representative organization in the management of the Internet by detailing the outcry of the international community, the extreme reforms proposed by the Working Group on Internet Governance (WGIG), and the heated debate during the last World Summit on the Information Society (WSIS).

## **II. ICANN in the Literature**

ICANN has been the focus of numerous studies. The creation of ICANN signified the creation of a style of regulation unique to the Internet environment. As Zittrain well explains:

ICANN has inherited an extraordinarily difficult situation, with high expectations all around, and with almost no discretionary room to move. The set of realistic options for substantive policy making and procedural structure is quite small. For better or worse, ICANN faces swift dispatch if it strays too far from the desires of any of the mainstream Internet

technical community, the United States and other governments (including executive, legislative, and judicial branches, which in turn may not agree) and powerful corporate interests. Indeed, those representing the "little guy" and/or those wanting a maximally unregulated Net – one where political concerns have no place in technical management – are quick to worry about capture of ICANN by one or another of these powerful interests.<sup>12</sup>

The special characteristics of ICANN and the existence of many different stakeholders generated an intense debate on issues of Internet regulation. Critics and supporters of the new system argued for and against the reform of ICANN. This debate involved all of the different areas managed by ICANN. Among them, the Uniform Domain Resolution Policy (UDRP) occupied a central role, since it became ICANN's preferred instrument to enforce domain name contracts with Internet users. As a result, ICANN became the de-facto and de-jure regulator for Internet domain names and numbers, according to its contract with the Department of Commerce. This section discusses the main approaches to studying ICANN and explains how this paper provides a new and useful analysis of its development.

#### ***A. ICANN Legitimacy***

One of the main debates regarding ICANN was the question of whether the Department of Commerce had the authority to delegate the governance of the Internet to a private, nonprofit organization. First, some researchers argued that the United States government, which found itself in control of the Domain Name System (DNS) and its regulation,<sup>13</sup> could not delegate the management of the DNS to a private institution,

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<sup>12</sup> Jonathan Zittrain, *ICANN: Between the Public and the Private Comments Before Congress*, 14 BERKELEY TECH. L.J. 1071, 1091 (1999).

<sup>13</sup> "Without meaning to at first, the United States government found itself controlling this unique Internet chokepoint. When the Internet was small, the DNS was run by a combination of volunteers, the National Science Foundation (NSF), and U.S. government civilian and military contractors and grant recipients. As the paymaster for these contractors, the U.S. government became the de facto ruler of the DNS, although it barely exercised--and for a long time may not in any real sense have been aware of--its power. The Internet's exponential growth placed strains on the somewhat ad hoc system for managing the DNS, and what had been primarily technical issues became political, legal, and economic problems that attracted high-level official attention." Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 21-22 (2000).

without the approval of Congress.<sup>14</sup> As Froomkin argued, delegating a government regulatory function to a private organization can be considered unconstitutional.<sup>15</sup> As a result, giving regulatory power to a non-profit organization meant relinquishing government sovereignty and subjugating the federal government's Constitutional powers to a non-governmental entity.<sup>16</sup> Furthermore, as Froomkin observed, delegating the regulatory power to a private institution that has a stake in the issue to be regulated can create arbitrariness, lack of due process, and self-dealing, all of which are also unconstitutional.<sup>17</sup> As a solution to these conflicts of interest, Froomkin proposed a new system in which ICANN would be limited to handling technical functions, while the United States government would retain political control over the DNS.<sup>18</sup> To avoid international complaints, the United States government would share political control with a small group of foreign representatives and Internet constituents.<sup>19</sup> Nonetheless, Froomkin's advice remained unheeded.

The debate regarding the constitutionality of ICANN continued, and support for the Department of Commerce decision quickly appeared. Fuller argued that even though

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<sup>14</sup> *See id.*

<sup>15</sup> "In any event, nondelegation cases usually involve a contested statute. The issue then is whether Congress's attempt to vest power in an agency or a private body is constitutional. In the case of ICANN, there is no statute. Congress at no time determined that the DNS should be privatized, or, indeed, legislated anything about national DNS policy." *Id.* at 28.

<sup>16</sup> *See id.*

<sup>17</sup> "In contrast to the separation of powers concerns that animate the public nondelegation doctrine, the private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without being subjected to the shackles of proper administrative procedure." *Id.*, at 146.

<sup>18</sup> If the current quasi-privatization of the DNS is illegal, then DoC needs a new policy to deal with the DNS. DoC has at least four options: (1) design structures that limit ICANN to true technical policy; (2) get out of the DNS business by turning over the DNS to ICANN or another private body; (3) create a new public international body to take over the DNS or recruit an existing one to do the job; or (4) take advantage of the serendipity of U.S. government control of the DNS to make simple and enlightened rules that would help ensure Internet stability and satisfy legitimate foreign concerns as to U.S. dominance, while preserving the Internet's diversity. None of these options is without its costs, but a distinctly superior policy could be crafted by combining the first and the fourth into a hybrid plan." *Id.* at 171.

<sup>19</sup> "The policy partners could be, and should be, diverse. In addition to the United States itself, obvious choices include supra-regional bodies such as the EU and ASEAN. However, in the interest of maximizing diversity, domestic and foreign nongovernmental organizations should also be represented. Choosing a wide range of policy partners would make for a much greater private and "bottom-up" policy formation process than would be possible with a single centralized organization such as ICANN or DoC itself." *Id.* at 178-179.

Froomkin's arguments were convincing, they could be circumvented. Therefore, the contract with ICANN can remain in place.<sup>20</sup> Furthermore, Sims and Bauerly discredited Froomkin's claims on the basis of faulty legal interpretation and insufficient knowledge of the origins of the Internet and the DNS.<sup>21</sup> This debate continued as Froomkin and

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<sup>20</sup> "One problem with this argument is that, since Schechter was decided in 1935, times have changed. Congress now delegates policymaking functions to all kinds of private parties, mainly through contracts with various administrative agencies. What's wrong with Congress getting a little help from private industry? Schechter itself recognizes this possibility, noting that Congress may avail itself of "assistance" from private groups as long as it does not rise to the level of delegating legislative functions."

"One major problem with the due process argument is that it is not clear that these are the sorts of rights protected by due process. While the ability to pursue one's profession is considered part of "liberty," being able to conduct business in a particular gTLD may, or may not, be part of that protected right. Similarly, while intellectual property rights such as trademarks are certainly "property," being able to register a particular trademarked domain name may, or may not, be part of that protected right. Finally, ICANN could argue that its "notice and comment" procedures, described supra, are adequate to protect the due process rights of affected individuals, even if such procedures are insufficient for full compliance with the APA." Kathleen Fuller, *ICANN: The Debate Over Governing The Internet*. 2001 DUKE L. & TECH. REV. 2, 6 (2001).

<sup>21</sup> "In the article, Professor Froomkin argues that ICANN is either a governmental body, which, as a de facto extension of the DOC, is subject to the APA (which ICANN is admittedly not following), or that ICANN is not a governmental body, but is nonetheless carrying out governmental functions delegated to it by the USG in violation of the Constitution. Not only do both of these arguments lack merit, in the context of an accurate understanding of the facts, they border on being frivolous. The APA applies only to a federal "agency," which it defines as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." The term includes all units of the federal government "established by statute; executive order; presidential reorganization plan; or departmental order." It is axiomatic that "[t]he authority to act with the sanction of government behind it determines whether or not a governmental agency exists." ICANN was not "established" by any act of government. Neither Congress nor the President has authorized ICANN to exercise governmental regulatory authority (assuming any such authority exists in this area), and ICANN has no such authority. Therefore, the APA does not apply to ICANN's actions because ICANN is not a federal agency. The illegal delegation argument is even less persuasive. The nondelegation doctrine prohibits only Congress from delegating its legislative power to any other entity. Congress has not delegated any authority to ICANN. Even assuming the doctrine could be properly applied to agency action, it would not apply here because neither the DOC nor any other agency of the USG has delegated any governmental authority to ICANN. ICANN exercises no governmental or other power; indeed, it has no coercive power of any kind. Its "authority" derives from the voluntary cooperation of members of the global Internet community and contracts or similar agreements that various actors choose to enter into with ICANN. It is beyond debate that, if the bulk of the significant participants in that community chose to ignore ICANN, they could do so without fear that ICANN could do anything in reprisal. An important aspect of governmental regulation is the power to coerce compliance; ICANN has no such power. The argument that the DOC has "delegated" governmental power to ICANN is facially implausible. Unfortunately, Professor Froomkin ignores or misapplies controlling case law, assumes or asserts facts that are demonstrably incorrect, and, most critically, proceeds from the false premise that the USG had and has the legal and practical ability to control the operation of the DNS and therefore the Internet. In fact, the Internet is now, and has been for some time, beyond the regulatory control of any one government. Indeed, this fact precisely explains why the world's governments (and particularly the USG) encouraged and cooperated in the creation of ICANN." Joe Sims & Cynthia Bauerly, *A Response to*

Lemley argued that ICANN and its policies, which monopolize the DNS, violate United States antitrust law.<sup>22</sup> However, Blue argued that there is little room to charge ICANN or antitrust chargers, as the policies of ICANN are necessary to sustain the Internet and those policies do not create a monopoly.<sup>23</sup> In this respect, several authors supported ICANN as providing important standards and regulations for the Internet.<sup>24</sup>

A second issue that has come under scrutiny is the manner in which ICANN decides its regulations and norms. That is, what are the bases for legitimacy and consensus within

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*Professor Froomkin: Why ICANN Does Not Violate the APA or the Constitution.* 6 J. Small & Emerging Bus. L. 65, 68–70 (2002).

<sup>22</sup> “By delegating policy-making authority to ICANN, a private actor, without putting in place any real mechanisms for accountability, the government has created some unanticipated legal problems. It seems clear that the government itself could operate the legacy root in a way that excludes alternate roots without violating the antitrust laws. Similarly, the government should be able to impose a uniform domain name dispute resolution policy on registrars and registrants without antitrust liability, although this might require legislation. It could also delegate these tasks to a private entity like ICANN without antitrust liability if the government affirmatively set the policy and actively supervised ICANN's implementation of it. Under Noerr and the government immunity doctrines, the price of unsupervised delegation is antitrust scrutiny. And it is not clear that ICANN and those in a position to influence it will survive that scrutiny. To avoid antitrust liability, ICANN will have to consider carefully both its policy regarding alternate roots and likely its UDRP as well. These policies are not necessarily illegal, but ICANN will have to offer evidence that they are on balance good for competition-- something that to date it has not been obliged to do. At a minimum, ICANN's policies will be subject to increased scrutiny, and likely to protracted antitrust litigation.” Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*. 2003 U. ILL. L. REV. 1, 74–75 (2003).

<sup>23</sup> “Based on the discussion in this Note, ICANN and VeriSign may be subject to antitrust liability because they are independent, private organizations. However, the current claims against ICANN may have little merit. ICANN's policies and actions may be necessary to maintain a stable Internet and may not hinder competition to such a degree as to create a monopoly in the domain name market. Therefore, it is unlikely that ICANN would presently be subject to antitrust litigation.” Lily Blue, *Internet and Domain Name Governance: Antitrust Litigation*. 19 BERKELEY TECH. L.J. 387, 403 (2004).

<sup>24</sup> “In its Blueprint for Reform, ICANN took the bold step of affirming that it has a global policy role. This role is intended to be limited to those policy areas that are reasonably related to ICANN's technical mission. Although controversial, this is a step that deserves support from the global Internet community. It is also a challenge to ICANN's critics to develop a credible alternative to ICANN. In order to succeed, ICANN will require strong leadership. It is too early to assess the reforms that were initiated in 2002, and it remains to be seen whether the new Policy Development Process will stand the test of time. Self-regulation to date by the IETF, the W3C and ICANN should ultimately be judged by the result. No one has seriously argued that a US Government agency, or an EU body, or an inter-governmental body like the ITU could have done a better job in developing the standards that made the Internet and the World Wide Web possible. So far, the result speaks for itself - res ipsa loquitur. The work of the IETF, the W3C and ICANN has delivered tangible results in terms of improvements in the Internet's stability, inter-operability, technical performance, reliability, range of features, and simplicity.” Jose MA. Emmanuel Caral, *Lessons from ICANN: Is Self-Regulation of the Internet Fundamentally Flawed?*, 12 INT'L J.L. & INFO. TECH 1, 30–31 (2004).

ICANN?<sup>25</sup> This issue is closely related to the way in which the United States government delegated regulatory function to ICANN. Weinberg argued that ICANN has tried to pursue legitimacy under the same arguments as other federal government agencies<sup>26</sup>: representation<sup>27</sup> and consensus.<sup>28</sup> However, Weinberg maintained that ICANN cannot obtain legitimacy and form consensus under any of these bases.<sup>29</sup> As a result, ICANN should narrow the scope of its policies to minimize its intervention in an environment that

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<sup>25</sup> “Notwithstanding that ICANN had received the blessing of the U.S. government, its public legitimacy was open to serious challenge. Its board members had been chosen in a closed process, the details of which are still unclear. The board's early penchant for closed meetings intensified the air of secrecy surrounding the new organization; the Internet community knew neither who these people were nor how they were reaching their decisions. Many of the board members, further, were unfamiliar with Internet technical issues and Internet mores. They were slow to embrace openness and communication; for the most part, ICANN communicated to the outside world through its public relations firm and its 6 lawyers. All of this was massively problematic for an organization that sought control over Internet infrastructure as an organ of the Internet technical community. Because the U.S. government's authority over the DNS was murky, ICANN could not derive legitimacy from its designation by the government as the entity assigned to perform both ministerial and policymaking DNS functions. There were many in the Internet community who asserted that ICANN was simply illegitimate- that it had no right to the role it sought.” Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 212–213 (2000).

<sup>26</sup> “In developing structures, procedures, and rhetoric to establish its own legitimacy, ICANN has drawn on techniques that parallel the crucial philosophical justifications for the legitimacy of the unelected federal administrative agency. First, it has invoked what one might call the techniques of administrative law: it has, in important respect, structured itself so that it looks like a classic U.S. administrative agency, using, and purportedly bound by, the tools of bureaucratic rationality. Second, it has invoked the techniques of representation: it has adopted structures and procedures that make it resemble a representative (that is to say, elective) government body. Finally, it has invoked the techniques of consensus: it has asserted that its structure and rules ensure that it can only act in ways that reflect the consensus of the Internet community. None of these responses, though, seem satisfactory. The techniques of administrative law are inadequate in this context, for they do not provide meaningful constraint in the absence of judicial review. In the administrative agency context, it is judicial review for rationality and statutory faithfulness that drives the agency's own commitment to process and rationality. But there is no ICANN institution that performs the function that judicial review performs for administrative agencies. Absent such an institution, ICANN cannot make the claim that the values of the traditional administrative law model--bureaucratic rationality and procedural regularity-- will control its discretionary power, and there is nothing to confine ICANN within any particular sphere of authority.” *Id.* at 258.

<sup>27</sup> “The techniques of representation seem more promising. Yet representation is hardly straightforward: the current Domain Names Supporting Organization provides a good example of how not to structure a representative body. There may be no way to craft an elective mechanism that ensures that the immensely heterogeneous Internet community is represented, in any real sense, within ICANN's structure.” *Id.* at 258-59.

<sup>28</sup> “Nor will the techniques of consensus do the job. ICANN does not have procedures that would enable it to recognize consensus, or the lack of consensus, surrounding any given issue. It has commonly taken actions with no clear showing of consensus in the community at large, and its methods of determining that a particular action is supported by consensus have often seemed opaque.” *Id.* at 259.

<sup>29</sup> *Id.*

does not welcome it.<sup>30</sup> Many critics have explained that ICANN's decisions are far from democratic, since no role even exists for any democratic institution, such as Congress, international organizations, foreign governments, or Internet users.<sup>31</sup> As a result, under this view, consumers and citizens have no say on the specific design of Internet regulation. Nonetheless, Hunter argued that the legitimacy problem lies not in the nature of ICANN, but in our understanding of democracy.<sup>32</sup> He explains that ICANN critics put too much emphasis on an ideal definition of democracy, which is not representative of the reality we face on the Internet.<sup>33</sup> Even so, ICANN should try to pursue political commitments among different Internet stakeholders in order to improve its performance.<sup>34</sup>

The debate on legitimacy, democracy, representation, and consensus continues within ICANN and has led to the reform process we analyze in this paper. Palfrey claims that ICANN failed to bring democracy to the Internet and that it should be reformed accordingly.<sup>35</sup> Crawford, on the other hand, argues that democratic online representation

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<sup>30</sup> "This means that ICANN should resist the temptation to put infrastructure in place designed to advance particular constituencies' visions of a commercially hospitable Internet. It should not adopt policies that seem designed to further the interests of those segments of the business community that are closest to it. It should resist the temptation to raise the comfort level of trademark proponents by building new trademark protection mechanisms into the DNS. It should not load down the selection process for new top-level domain registries with extensive inquiries as to which application would best serve the public interest as ICANN sees it." *Id.* at 260.

<sup>31</sup> *Id.*; Froomkin, *supra* note 13; Fuller, *supra* note 20..

<sup>32</sup> See Dan Hunter, *ICANN and the Concept of Democratic Deficit*, 36 LOY. L.A. L. REV. 1149 (2003).

<sup>33</sup> "Democracy is an empty concept that fails to describe few, if any, of our genuine political commitments. In the real world, the failings inherent in democracy have been papered over by some unusual characteristics of the physical political process. However, in genuine cyberspace environments, democracy is exposed as a poor substitute for a number of other conceptions of our political commitments." *Id.* at 1153.

<sup>34</sup> "Much of the discussion above has endeavored to articulate some views of those critical of ICANN. Much of this criticism, I argue, has to do with assumptions about democracy, especially direct democracy within online institutions. We see similar problems emerge not just from critics of ICANN, but those inside it as well. One of the basic problems with ICANN is, I think, its allegedly core political commitment. It adheres to "consensus" as the basis of its legitimacy and as justification for the actions it undertakes. This idea of consensus is never very well articulated, and many times it is simply ignored." *Id.* at 1181.

<sup>35</sup> ICANN's ambitious experiment was to create its own legitimacy by harnessing the power of the Internet's potential for openness and representation. From the perspective of some stakeholders and onlookers, ICANN's central mission was to use the technologies, power, and attractiveness of the Internet to experiment in democratic governance on a global scale. It sought to empower the Internet user community, including the private sector, to manage a system necessary for the stable operation of the Internet. Its novel, though ultimately flawed, structure has enabled a coalition of private-sector interest groups to manage the

is impossible.<sup>36</sup> As a result, we can justify the reliance of ICANN on a consensus model.<sup>37</sup> However, Crawford decries that the reform of 2002 has not brought about constructive reform.<sup>38</sup> As Johnson, Post, and Crawford argue, ICANN reform led to a more centralized, top-down, regime for Internet regulation.<sup>39</sup>

With the globalization of the Internet, advocates of the democracy and consensus approach started to support opening up ICANN to other governments, especially through the United Nations.<sup>40</sup> According to this view, the United States government should relinquish its control of ICANN to the United Nations, which should then create an

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domain name system ("DNS") with broad input from individual users and limited but growing input from nation states. However, ICANN has failed to attract and incorporate sufficient public involvement to serve as the blueprint for building legitimacy through the Internet. Those who sought through ICANN to prove a point about Internet and democracy have misplaced their emphasis, because ICANN's narrow technical mandate has not lent itself to broad-based public involvement in the decision-making process." John Palfrey, *The End of the Experiment: How ICANN's Foray Into Global Democracy Failed*. 17 HARV. J. L. & TECH. 409, 411-412 (2004).

<sup>36</sup> "In a context in which democratic representation is impossible, the virtue of consensus is that it can support those few uniform solutions that have widespread (if not complete) support and no substantial opposition, thereby allocating decisions efficiently among levels of policy-makers, and facilitating constructive deliberation. It may be that the consensus theory provides for free, in a networked context, what all theories of legitimacy strive for: a demonstration of voluntary agreement to resulting rules." Susan Crawford, *The ICANN Experiment*, 12 CARDOZO J. INT'L & COMP. L. 409, 447 (2004).

<sup>37</sup> "It is clear that ICANN must be restructured so as to work toward consensus more effectively, and that the 2002 spasm of reform has been utterly ineffective in this respect. ICANN's goal should be to make it possible for stakeholders to decide collectively when global, mandatory rules are necessary and legitimate. Seizing more power to make that decision centrally does not serve ICANN's core mission (as set forth in its Memorandum of Understanding with the Department of Commerce) of preserving decentralized decision-making." *Id.* at 446.

<sup>38</sup> See *supra* note 21.

<sup>39</sup> "We believe that abandoning consensus as the basis for ICANN policy-making is neither in ICANN's best interests nor in the best interests of the Internet community. It will substantially undermine ICANN's authority, as it eliminates the only answer that now exists to the question that more and more people will ask: "What gives ICANN the right to tell anyone what to do?" David R. Johnson et al., *A Commentary on the ICANN "Blueprint" for Evolution and Reform*, 36 LOY. L.A. L. REV. 1127, 1127-28 (2003). See Michael Froomkin, *ICANN 2.0: Meet the New Boss*, 36 LOY. L.A. L. REV. 1087 (analyzing a series of studies that show how ICANN reform reduced the participation of Internet users and constituencies.)

<sup>40</sup> "In spite of the apparent success of ICANN, criticism continues to be widespread. International bodies have been perhaps ICANN's most vocal critic. States are fearful ICANN control of the DNS will threaten their sovereignty and national security. ICANN policy making has been challenged as biased in favor of U.S. interests. Human rights concerns remain unaddressed under current dispute resolution procedures. Recognizing the threats posed by U.S. Internet dominance, many States have called for greater transparency and accountability within ICANN, and have demanded control of the DNS. The conflict reached a crescendo at the recent United Nations World Summit on the Information Society (WSIS) meetings in Tunis, where a coalition of nations called for the transfer of DNS control to an international body." Reece Roman, *What if ICANN Can't?: Can the United Nations Really Save the Internet?* 2006 SYRACUSE SCI. & TECH. L. REP. 6, 7 (2006).

international organization to regulate the Internet.<sup>41</sup> In the policy arena, the International Telecommunications Union (ITU) became the main supporter of this approach and confronted ICANN with competing proposals for Internet governance.<sup>42</sup> The most recent proposals came from the World Summit on the Information Society (WSIS) and the Working Group on Internet Governance (WGIG). Despite these international efforts, as we will analyze below, ICANN continues to maintain control of names and numbers. Nevertheless, the heated debate concerning the legitimacy and structure of ICANN and the role of the United States continues.

### ***B. ICANN UDRP: Attempting Global Regulation***

The Uniform Domain Resolution Policy (UDRP) is one of the main policies ICANN implemented to regulate complaints among domain name owners and, as such, it has been subject to deep scrutiny.<sup>43</sup> This dispute resolution system for domain name owners is the first ambitious attempt to generate a regulatory system for the Internet. Many studies have focused on the performance of this regime, trying to ascertain whether the system provides adequate redress for Internet users and business around the world. Many of the findings of these studies have undermined the legitimacy of the UDRP and have cast suspicion on the ability of ICANN to produce effective and unbiased regulations.<sup>44</sup> White found the UDRP a good way to combat cyber squatting, but warned

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<sup>41</sup> *Id.* (showing the debate over Internet governance).

<sup>42</sup> See Kim G. von Arx, *ICANN—Now and Then: ICANN's Reform and its Problems*, 2003 DUKE L. & TECH. REV. 7 (2003) (proposing international cooperation for the management of ICANN).

<sup>43</sup> "ICANN also instituted mandatory arbitration of trademark claims. ICANN's "Uniform Dispute Resolution Policy" (UDRP) requires every registrant in .com, .org, or .net to agree to arbitration before ICANN-selected arbitration providers if any trademark owners anywhere in the world feel aggrieved by their registration of a term similar to that trademark. As a result of this policy, registrants are now subject to an idiosyncratic set of arbitration rules and procedures that benefit third-party trademark holders at the expense of registrants and do not necessarily conform to U.S. trademark law. ICANN also chose to keep in place and step up enforcement of some policies that it inherited, notably NSI's anti-privacy rule requiring that every registrant of a domain name agree to have his name, address, email, and telephone number placed in a database readable by any Internet user in the world." Froomkin, *supra* note 2, at 25.

<sup>44</sup> "Possibly the best solution is to attempt to formulate domain name policy based on consensus within the Internet community. In fact, ICANN's president, Esther Dyson, has testified before Congress that ICANN's purpose and objective are to implement policies based on this '[Internet] community-wide consensus.' Yet as some observers have noted, consensus is elusive if not impossible in a Pareto-optimal game. For domain name disputes, a Pareto-optimal result may be inevitable. The continued surge in domain name

that the UDRP should be flexible in order to consider specific situations.<sup>45</sup> A year after its implementation, Badgley argued that the low quality of decisions was linked to problems in the UDRP design and not to bad arbitrators.<sup>46</sup> Badgley proposed a series of reforms needed to improve UDRP's efficiency.<sup>47</sup> After these initial reactions, which proposed reforms to improve UDRP performance, different studies became more critical of this regulatory regime. Sorkin argued that United States Courts should not rely on the decisions reached by the UDRP system, given the problems of its procedure.<sup>48</sup>

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registrations coupled with a limited number of desirable domain names usually ensures that one party must lose. In this win-lose environment, a consensus-based policy may well be unworkable. Instead, the focus should shift from attempting to represent the interests of the domain name holder against the often conflicting interests of the trademark owner to a focus on representing the interests of the Internet users, both corporate and individual.” Luke Walker, *ICANN's Uniform Domain Name Dispute Resolution Policy*, 15 BERKELEY TECH. L. J. 289, 303-304 (2000).

<sup>45</sup> John White, *ICANN's Uniform Domain Name Dispute Resolution Policy in Action*, 16 BERKELEY TECH. L. J. 229 (2001); Gillian Hadfield, *Privatizing Commercial Law: Lessons from ICANN*, 6 J. SMALL & EMERGING BUS. L. 257 (2002).

<sup>46</sup> Robert Badgley, *Improving ICANN in Ten Easy Steps: Ten Suggestions for ICANN to Improve its Anti-Cybersquatting Arbitration System*, 2001 U. ILL. J. L. TECH. & POL'Y 109 (2001).

<sup>47</sup> The ten proposed changes are : Clarify the effect of a “defaulting” respondent; clarify whether the panel has the discretion to accept unsolicited supplemental pleadings; extend the time for enforcement of a panel's transfer order; abrogate the Manchester airport statement regarding settlement communications; penalize bad-faith complaints; clarify the analysis required to establish identity or confusing similarity; confirm that “sucks.com” Domain Name is not identical or confusingly similar to the complainant's trademark; clarify the relationship between free-speech rights and trademark rights in the context of “gripe web sites”; clarify the definition of competitors; clarify the burden of proof on the rights or legitimate interests element. *See id.* (analyzing how each of these reforms will improve UDRP quality).

<sup>48</sup> “Judicial deference to UDRP decisions is problematic in part because of significant differences in the scope and substance of parallel UDRP and legal proceedings. At least in theory, the UDRP is intended to cover only a narrow range of domain name disputes: claims of “abusive registration” of a domain name made with the intent to profit from another's trademark. The UDRP itself contemplates that most domain name disputes, including all “legitimate” disputes, are beyond its scope. Furthermore, although parallel legal proceedings are sometimes described as appeals of UDRP decisions, in fact a UDRP decision lacks formal legal status, unlike a court judgment or an arbitration award. A legal action that challenges a UDRP decision therefore does so only incidentally to the legal claims that the action involves, claims potentially involving trademark and unfair competition law, contract law, fraud, conversion, privacy and personality rights, free speech, due process, public policy, and other matters related to the parties' overarching dispute. The scope of UDRP proceedings, on the other hand, is extremely narrow, encompassing only the three elements set forth in the policy (identity/similarity to a trademark, lack of legitimate interests, and bad faith registration and use). While a UDRP panel also has discretion to consider other matters, it is unusual for panels to journey far beyond the UDRP and general principles of trademark law.” David Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH L. J. 35, 46-47 (2001). *See also* Nolanjana Chatterjee, *Arbitration Proceedings Under ICANN's Uniform Domain Name Dispute Resolution Policy – Myth or Reality?*, 10 VINDOBONA J. OF INT'L COM. L. & ARB. 67 (2006). *See also* Richard E. Speidel, *ICANN Domain Name Dispute Resolution, The Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law*, 6 J. SMALL & EMERGING BUS. L. 167 (2002) (analyzing why the UDRP cannot be included into United States arbitration law).

Conversely, Meyers argued that the Courts should give UDRP the same treatment they give federal agencies.<sup>49</sup> A more dire diagnosis is offered by Froomkin, who criticized ICANN for privatizing and internationalizing trademark law and creating an artificial, centralized system for managing DNS, which eliminates the ability of other forms of regulation for conflict resolution.<sup>50</sup> As with most of the other researchers, Froomkin also offered a list of possible solutions for the UDRP.<sup>51</sup> Thornburg criticized the UDRP for offering a limited arbitration policy that lacks the basic characteristics necessary for an adequate regime.<sup>52</sup> Geist provided the first statistical analysis of ICANN's arbitration system and finds differences in decisions when the panel is composed by three arbitrators, and bias within UDRP caseload allocation, which leads to strong forum shopping.<sup>53</sup> Kesan and Gallo provided further empirical evidence on the problems of

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<sup>49</sup> "In the end, though similar, ICANN is not an administrative agency. ICANN is not an authority of the U.S. government; its power to regulate the domain name system does not come from any organic statute passed by Congress. Yet treating ICANN like an agency by granting UDRP decisions deference addresses the due process concerns and larger legitimacy concerns faced by ICANN and its UDRP." Katherine Meyers, *Domain Name Dispute Resolution in U.S. Courts: Should ICANN be Given Deference?*, 43 B.C. L. REV. 1177, 1199 (2002).

<sup>50</sup> The UDRP derives its force from ICANN's de facto control of a critical Internet resource. Anyone who wishes to have a domain name visible to the Internet at large must acquire it from a registrar who has the right to inscribe names in an ICANN-approved domain name registry. ICANN determines which registries are authoritative. This power to make and break registries allows ICANN to require registries (and also registrars) to promise to subject all registrants to a mandatory third-party beneficiary clause in which every registrant agrees to submit to ICANN's UDRP upon the request of aggrieved third parties who believe they have a superior claim to the registrant's domain name. In so doing, the UDRP has, to some extent, privatized and internationalized trademark law, although it co-exists with national law. In the United States, for example, abusive registration of domain names is regulated by the Anti-Cybersquatting Consumer Protection Act ("ACPA"), enacted almost simultaneously with ICANN's adoption of the UDRP. Michael Froomkin, *ICANN's Uniform Dispute Resolution Policy—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 612 (2002).

<sup>51</sup> *See id.*

<sup>52</sup> Elizabeth Thornburg, *Fast, Cheap, and Out of Control: Lessons From the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191 (2002).

<sup>53</sup> "This study provides compelling evidence that forum shopping has become an integral part of the UDRP and that the system may indeed be biased in favor of trademark holders. Both WIPO and the NAF, the two dominant ICANN-accredited arbitration providers, feature case allocation data that suggests that the panelist selection process is not random. Rather, it appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists. Moreover, the data shows that there is a correlation between provider panelist selection and case outcome. When providers control who decides a case, as they do for all single panel cases, complainants win just over 83% of the time. As provider influence over panelists diminishes, as occurs in three-member panel cases, the complainant winning percentage drops to 60%." Michael Geist, *Fair.Com? An Examination of the Allegations of systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 936 (2002).

forum shopping by complainants and performance differences across UDRP providers.<sup>54</sup> As a consequence, the questions regarding the legitimacy of ICANN have been transferred to the UDRP, and the critics have grown because of the technical problems of the arbitration process.

Despite these debates on the legitimacy and performance of ICANN, no one has analyzed the political evolution of ICANN as an endogenous process of change. Different studies analyzed ICANN and its alternatives as static, feasible versions for Internet regulation. These normative proposals have been based on ideal models of optimal regulatory regimes, without taking into account the limits and opportunities offered by the ICANN experience. These different visions regarding regulation confront different Internet constituencies: Internet users – early developers and Internet libertarians – who oppose proprietary interests and government intervention; and also, defenders of the United States role as the sole source of regulatory power as opposed to those who favor a multi-country, decentralized approach based on the United Nations model for Internet governance. In addition, these debates fail to explain how these positions have created a dynamic process of political change. ICANN, despite its dependence on the United States

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<sup>54</sup> “In conclusion, we show that, even though some panelists have a different performance than the providers they are working for, they are affected by the structure of the providers. Moreover, although three member panels are as efficient as single member panels, panelists’ behavior differs depending on the provider for which they work. Therefore, the system’s efficiency could be improved by identifying the characteristics of these panelists that make them different and faster than the rest of the system. These characteristics could be implemented within the rules and procedures of the providers, thereby improving the efficiency of the system as a whole. The procedural rules should be changed to provide an equitable procedure for both parties. Because of the well-known pro-complainant “bias,” the geographic differences and the disparate behavior of panelists, the selection of providers should be independent of the decision of each party. Therefore, ICANN should introduce a system of assigning claims to different providers without delegating this task to one of the parties, in this case, the complainants. This change will not hurt competition based on prices because there is currently very little price competition. In addition, here we have competition in a very concentrated market because ICANN does not allow any private ADR provider to participate. Alternatively, in an oligopolistic market, competitors tend to collude and to compete on the quality of the service, which, in this case, is based on speed and complainant bias, rather than on prices. Another change that should be introduced to improve the performance of the UDRP is increasing the availability of appeals. The parties should be able to appeal the verdict of any of the providers, thereby providing a chance to review procedures and outcomes at a lower level. Even though this change could increase the cost of the service, it is important for this regime to gain the trust of consumers and the private sector.” Jay P. Kesan, Andres A. Gallo, *The Market for Private Dispute Resolution Services – An Empirical Re-assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. TECH. L. REV. 285, 368-69 (2005).

government, is not isolated from the political pressure of other countries and other Internet constituencies.

This paper shows how this debate has induced changes in the internal political structure of ICANN as well as induced external attempts to create an organization that would provide a more diverse model for Internet regulation. As a result, this paper provides an analytical framework to understand changes in ICANN, and the possible evolutions of its political structure in the future. To understand this process it is imperative to explain how Internet regulation will change over time, and the challenges and opportunities inherent in creating a global regulatory framework.

### III. History of ICANN

Initially, as the Internet was limited to the United States, the American government was solely in charge of regulating its functioning.<sup>55</sup> Despite the fact that the Internet became an international phenomenon, the United States government has continued to provide the main instruments that enable the Internet to function.<sup>56</sup> Two

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<sup>55</sup> See, Mueller, *supra* note 6 (describing the creation of ICANN by the U.S. government and the evolution of the regime for management of names and numbers).

<sup>56</sup> See *id.*; Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 *Duke L. J.* 17 (2000); Michael Froomkin, *Form and Substance in Cyberspace*, 6 *J. Small & Emerging Bus. L.* 93 (2002); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 *VAND. J. ENT. L. & PRAC.* 70 (2000).

“Nevertheless, ICANN is strongly bound to the United States. It is a nonprofit corporation organized and governed under California state law, although a very strange type of nonprofit corporation indeed; it still exercises vague and semi-governmental powers. It is a subject of the jurisdiction of the United States courts and the California Attorney General. In addition, although the Executive cannot control ICANN as a government corporation, the Executive may, under American law, contract with private sector corporations for the performance of services. The Department of Commerce has entered into such a contract with ICANN and with the actual operator of the root (Verisign). The Executive has discretion to change the operator and manager of the root by contract, because the contracting party is the Department of Commerce, Congress has a measure of power to supervise the Department, and its activities including the contractual arrangements it has made with ICANN. Congress can also require the General Accounting Office to research and investigate such contract arrangements, and the Office has indeed done so upon request from Congress. Nonetheless, the U.S. government in fact has the ultimate power over the root. ICANN is ‘potentially in a position to say no [to requests by other countries] but the United States has its thumb fully on the group that if the United States says someone doesn’t get on, then they don’t get on.’” Frankel, *supra* note 11, at 454.

organizations were responsible for managing Internet addresses and names. The domain name system was delegated to Network Solutions Inc. (NSI), a private for-profit firm, through a special contract with the Department of Commerce.<sup>57</sup> The management of numerical addresses on the Internet was charged to the Internet Assigned Numbers Authority (IANA), an operating unit of ICANN.<sup>58</sup>

Due to the internationalization of the Internet, in 1997 the U.S. government identified the need for a new institution, without ties to the government, which would provide these services for the Internet.<sup>59</sup> This need and the preference for a privately controlled regulatory system were reinforced in *The Management of Internet Names and Addresses*, a White Paper document released by the U.S. Department of Commerce in 1998.<sup>60</sup> In the White Paper, the government proposed creating a private, non-profit

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<sup>57</sup> *Id.*

<sup>58</sup> See <http://www.iana.org/>.

<sup>59</sup> “Though government played a role in financing the initial development of the Internet, its expansion has been driven primarily by the private sector. For electronic commerce to flourish, the private sector must continue to lead. Innovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not in an environment that operates as a regulated industry.

Accordingly, governments should encourage industry self-regulation wherever appropriate and support the efforts of private sector organizations to develop mechanisms to facilitate the successful operation of the Internet. Even where collective agreements or standards are necessary, private entities should, where possible, take the lead in organizing them. Where government action or intergovernmental agreements are necessary, on taxation for example, private sector participation should be a formal part of the policy making process. See *A Framework for Global Electronic Commerce*, The White House, July 1 1997, <http://www.ta.doc.gov/digeconomy/frameworkr.htm> (last visited Feb. 27, 2007).

<sup>60</sup> From its origins as a U.S.-based research vehicle, the Internet is rapidly becoming an international medium for commerce, education and communication. The traditional means of organizing its technical functions need to evolve as well. The pressures for change are coming from many different quarters:

- \_ There is widespread dissatisfaction about the absence of competition in domain name registration.
- \_ Conflicts between trademark holders and domain name holders are becoming more common. Mechanisms for resolving these conflicts are expensive and cumbersome.
- \_ Many commercial interests, staking their future on the successful growth of the Internet, are calling for a more formal and robust management structure.
- \_ An increasing percentage of Internet users reside outside of the U.S., and those stakeholders want to participate in Internet coordination.
- \_ As Internet names increasingly have commercial value, the decision to add new top-level domains cannot

organization for the management of names and addresses on the Internet.<sup>61</sup> As a result, in 1998, ICANN was created with the main purpose of managing the system of addresses and names on the Internet.<sup>62</sup> This non-profit organization, based in California, was intended to be an international corporation.<sup>63</sup> The Memorandum of Understanding, signed between the U.S. government and ICANN, established the objectives of the newly created institution.<sup>64</sup>

Since then, ICANN has been in charge of both the management of Internet names and numbers and the implementation of policies to solve problems and conflicts involving the system.<sup>65</sup> These responsibilities are not limited to technological issues alone. The ICANN Board is also concerned with the political responsibility of creating an

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be made on an *ad hoc* basis by entities or individuals that are not formally accountable to the Internet community.

As the Internet becomes commercial, it becomes less appropriate for U.S. research agencies to direct and fund these functions.

See United States Department of Commerce, Management of Internet Names and Addresses, [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm) (last visited Feb. 27, 2007).

<sup>61</sup> See *id.* (describing the preferences for a private organization).

<sup>62</sup> See ICANN, Articles of Incorporation (As Revised) <http://www.icann.org/general/articles.htm> (last visited Feb. 27, 2007) (enumerating the purposes of ICANN).

<sup>63</sup> “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.” *Id.*

<sup>64</sup> See Memorandum of Understanding Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers, <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> (last visited Feb. 27, 2007).

<sup>65</sup> “The Internet Corporation for Assigned Names and Numbers (ICANN) is a private sector initiative to assume responsibility for overseeing the technical coordination of the Domain Name System (DNS), which allows Internet addresses (for example, web pages and email accounts) to be found by easy-to-remember names, instead of numbers. Thanks to the DNS, users can find the server at 140.147.248.209 simply by typing [www.congress.gov](http://www.congress.gov) into their browsers.

Incorporated and headquartered in California, ICANN is a non-profit corporation structured to make decisions on the basis of Internet community consensus. As ICANN's start-up phase progresses, its Board of Directors will be elected in part by a global membership of individual members of the Internet community, and in part by supporting organizations representing the business, technical, non-commercial and academic communities.” ICANN, Background Points, <http://www.icann.org/general/background.htm> (last visited Feb. 27, 2007).

institutional structure that facilitates the participation of ICANN's different constituencies.<sup>66</sup> As a result, ICANN has become the locus of debate on most of the policies regarding addresses and numbers on the Internet and has been subject to pressure from many interest groups and countries.

The major successes of ICANN include the creation of the Uniform Dispute Resolution Policy (UDRP),<sup>67</sup> the creation of new top domain names and the expansion of ICANN's influence all over the world.<sup>68</sup> However, recently many commentators have criticized ICANN for its failure to create a forum for the many constituencies of the Internet.<sup>69</sup> The most recent and important of these complaints came during the first and second phases of the World Summit on the Information Society in Geneva (2003) and Tunis (2005), respectively, where a set of proposals for changes to Internet governance, particularly concerning ICANN, were discussed.<sup>70</sup> As a result, an internal and external movement to change the political mechanism of ICANN to one that promotes cooperation and consensus has emerged. In the next section, we explore the changes to

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<sup>66</sup> See *infra* Part III.

<sup>67</sup> See, Jay Kesan & Andres Gallo, *ICANN's UDRP Performance*, Working Paper, September 2004 (discussing and evaluating the performance of the UDRP system).

<sup>68</sup> See Mueller, *supra* note 6 (discussing and criticizing the policy of ICANN with respect to the creation of new gTLDs). See also Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy" Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 618 (2002); Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 Brook. J. Int'l L. 903 (2002); Michael Geist, *Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP*, <http://aix1.uottawa.ca/~geist/fairupdate.pdf> (last visited Feb. 27, 2007); Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001); Kur, A., 2002, UDRP, Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich and Institute for Intellectual Property Law and Market Law, University of Stockholm, Institute for Information Law, Technical University of Karlsruhe, at <http://www.intellecprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf>; Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191 (2002).

<sup>69</sup> See, Kesan & Gallo, *supra* note 23.

<sup>70</sup> See World Summit on the Information Society, [www.wsis.org](http://www.wsis.org) (last visited Feb. 27, 2007) (providing information on these meetings and documents related to Internet governance).

the structure and command of ICANN as a result of the ICANN President's 2002 proposal as well as considering the proposals from the international community.

#### **IV. Political Evolution and Structure of ICANN**

ICANN has not been without changes in its structure.<sup>71</sup> Most changes that took place between its creation in 1998 and 2002 were intended to provide a governance structure inside ICANN that allowed the participation of different groups and constituencies in the policymaking process.<sup>72</sup>

At the beginning, ICANN had an Initial Board, which was in charge of ICANN's management and policymaking.<sup>73</sup> Nine members from the At-Large constituency of ICANN with the authority to manage and develop its main structure composed this Board.<sup>74</sup>

In its first Bylaws, enacted by the Initial Board, the ICANN structure included a Board of Directors in charge of all the decisions of ICANN and three Supporting Organizations, which contained the main constituencies with interests in the activities of

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<sup>71</sup> See ICANN, Bylaws Archive, <http://www.icann.org/general/archive-bylaws/> (last visited Feb. 27, 2007) (providing a complete evolution of the bylaws that regulated the policymaking process of ICANN).

"...ICANN's organizational structure is evolving. The identity of the stakeholders is still subject to debate and continuously study. The ability of the recognized stakeholders to nominate governing bodies is not secure. In fact, the idea that ICANN should reflect a democracy, and especially that the democracy should include users, has all but been abandoned as unworkable. There is too great a danger of capture by unacceptable elements and too great a danger of unacceptable nominees to the board and other governing bodies." Frankel, *supra* note 11, at 457.

<sup>72</sup> *Id.*

<sup>73</sup> See, U.S. Department of Commerce, White Paper, *supra* note 7 (designing the guidelines for the creation of the first Board of Directors of ICANN).

<sup>74</sup> "Except as otherwise provided in the Articles of Incorporation or these Bylaws (including Section 1(c) of Article VI which sets forth responsibilities of Supporting Organizations), the powers of the Corporation will be exercised, its property controlled and its business and affairs conducted by or under the direction of the Board." See ICANN, Bylaws, 6 November 1998, , Article IV, Section 1.(a), <http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm> (last visited Feb. 27, 2007).

ICANN (Figure 1).<sup>75</sup> According to the Bylaws, the ICANN Board consisted of nineteen Directors elected by the Supporting Organizations (three each) and by the At-Large members (nine) of ICANN.<sup>76</sup> This structure also provided for three Advisory Committees<sup>77</sup> with the task of helping the Board in the policymaking process.<sup>78</sup> The initial Bylaws did not define a specific composition for the different Supporting Organizations, leaving this task open to future reviews by the Board of Directors upon consultation with specific groups and constituencies.<sup>79</sup> As a consequence, even though the structure of ICANN was subject to further reform, the power inside ICANN was divided among the private constituencies – the members of each Supporting Organization – with a role in developing the Internet.

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<sup>75</sup> *See id.*

<sup>76</sup> *See id.* at Article V, Section 3, 4.

<sup>77</sup> *See id.* at Article VII, Section 3. The three Advisory Committees were: the Government Advisory Committee (GAC), composed by international governments, multinational governmental organizations and treaty organizations; the DNS Root Server System Advisory Committee (RSSAC), composed by the organizations responsible for the operation of the world's thirteen root name servers and other organizations related to the root server system; the Advisory Committee on Membership (ACM) with members appointed by the Board (temporary committee).

<sup>78</sup> According to the Bylaws, the role of each Committee was:

GAC “should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements. The Board will notify the chairman of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b) and will consider any response to that notification prior to taking action.” *Id.* at Article VII, Section 3(a).

RSSAC: “The responsibility of the Root Server System Advisory Committee shall be to advise the Board about the operation of the root name servers of the domain name system. The Root Server System Advisory Committee should consider and provide advice on the operational requirements of root name servers, including host hardware capacities, operating systems and name server software versions, network connectivity and physical environment. The Root Server System Advisory Committee should examine and advise on the security aspects of the root name server system. Further, the Root Server System Advisory Committee should review the number, location, and distribution of root name servers considering the total system performance, robustness, and reliability.” *Id.* at Article VII, Section 3(b).

ACM: “The responsibility of the Advisory Committee on Membership shall be to advise the Board on the creation of the membership structure called for in Section 9(c) of Article V [At Large members].” *Id.* at Article VII, Section 3(c).

<sup>79</sup> *See id.* at Article VI: Supporting Organizations.

Having endured many changes in its first two years, the governing structure of ICANN was almost complete by the beginning of 2000 (Figure 2). At last, the Address, Domain Name and Protocol Supporting Organizations were structured with well-defined roles inside ICANN. In the case of the At-Large Supporting Organization, its members finally could express their preferences through the election of representatives to the Board of Directors. Nonetheless, the performance of ICANN during 2001 left many people wondering if this particular structure was working properly. Since then, many reforms have been proposed, and a global debate has arisen on how ICANN should be structured and what regulatory power it should have. In the next section, we analyze the different proposals and how the preferences of different actors have a role in shaping the direction of the reforms.

Figure 1: Initial Structure of ICANN

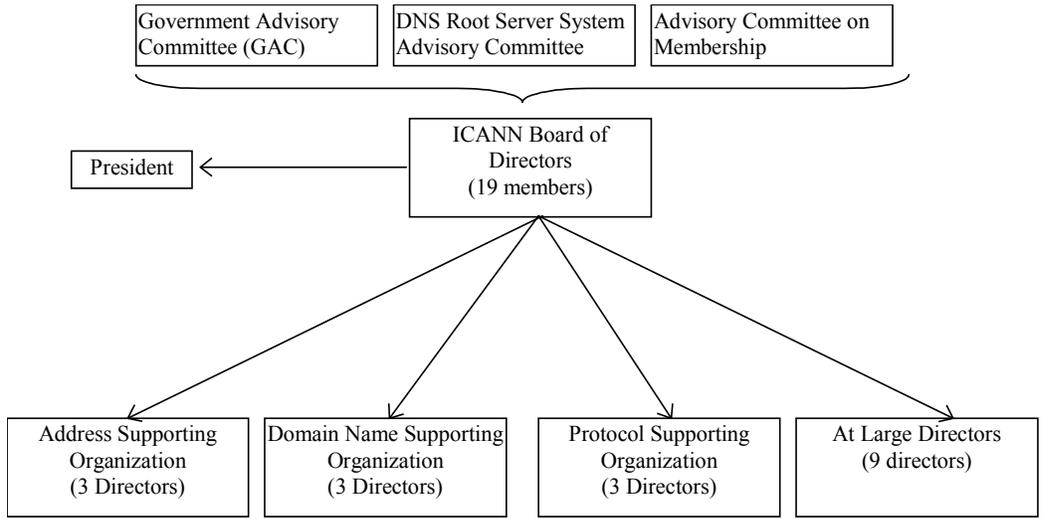
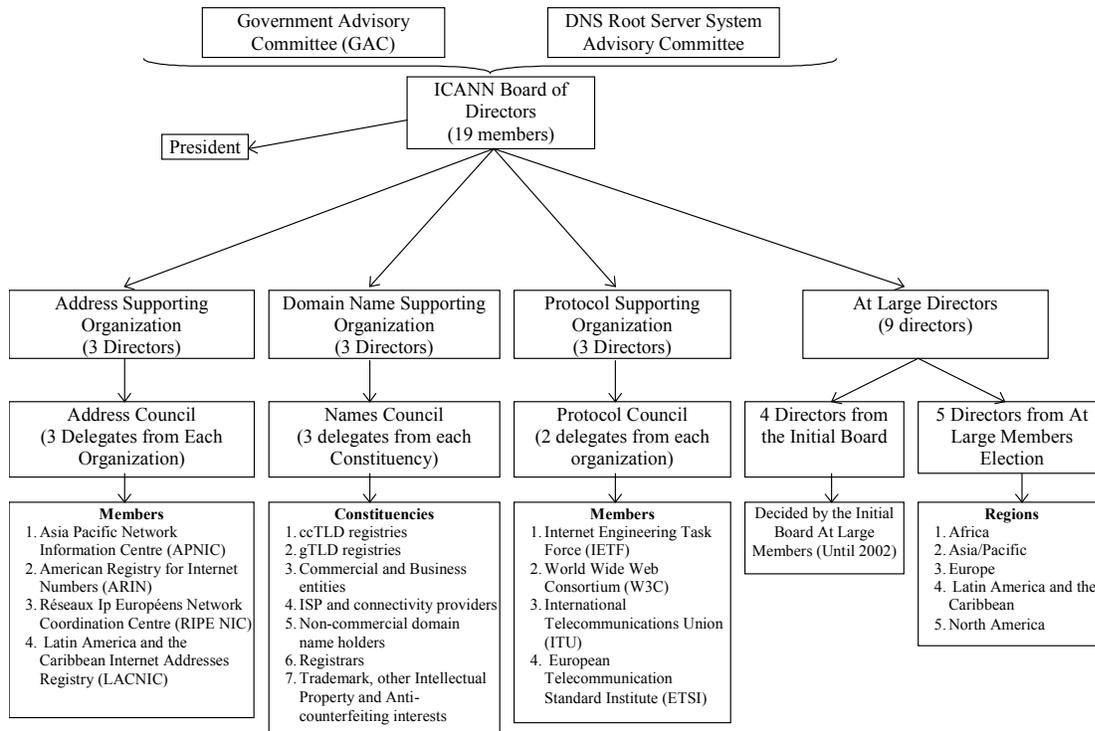


Figure 2: ICANN Structure Year 2001



## V. Modeling Preferences

In order to analyze the various proposed reforms to ICANN and the reaction of the many constituencies represented, and even those not represented, in ICANN's Board, we present a model that spatially represents preferences. This model helps to understand the stake of economic groups and countries in ICANN and the political nature of this process. Since the creation of ICANN, the private sector has had the advantage of defining regulation according to its economic interests in the Internet. Nonetheless, the growing influence of Internet users as well as other countries has led them to challenge the private control of ICANN. As the Internet grows, more actors start to appear who will try to influence the decision-making process of ICANN. In order to understand the intention behind each of these proposals, we construct a model taking into account the preferences of each actor. We assume that the disagreements among the groups concern two issues: the level of government involvement in ICANN and the means of representation (i.e., direct votes or delegates).

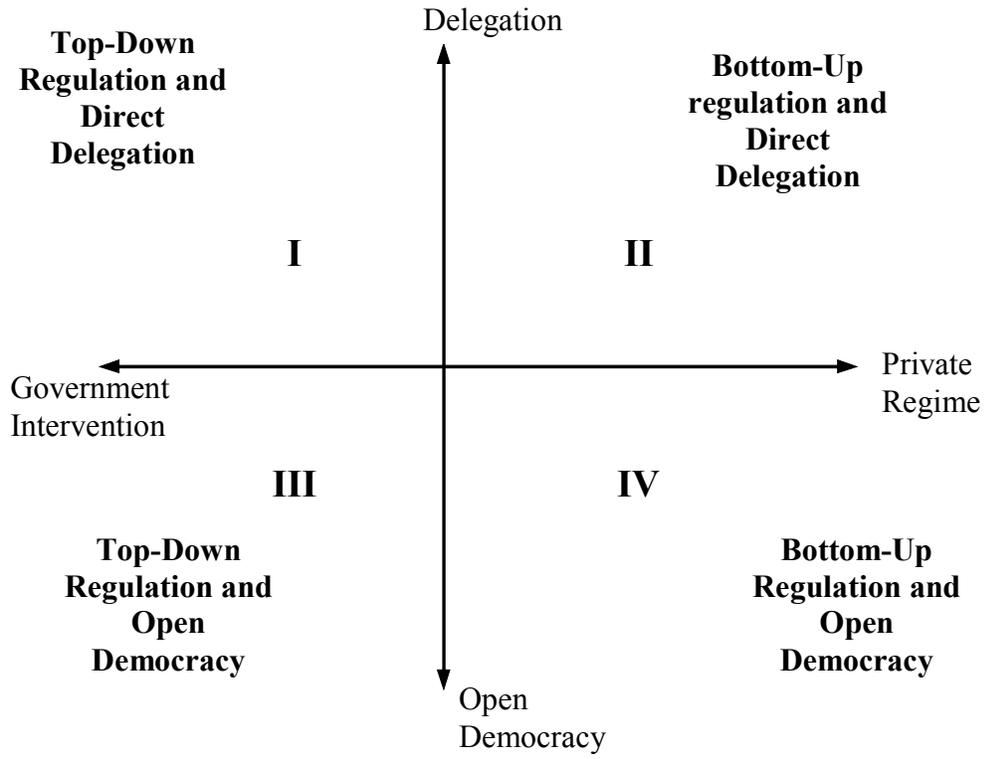
The system for regulating the Internet can be based on a bottom-up or a top-down approach. Since its inception, decision-making in ICANN has followed a bottom-up approach, and this method was defended by most of the constituencies represented on the Board of Directors. The top-down approach to decision-making has not been fully applied to the Internet, because governments, with the exception of the United States, do not have much say on ICANN regulations. Consequently, the internationalization of the Internet has increased the preference of governments to have a more active role in

regulatory issues. On the other hand, Internet users proposed a more decentralized bottom-up system, in which the Board of Directors is elected by direct vote from net-citizens. In this case, users without much intervention from governments or the private sector would perform the governance of the Internet. Accordingly, this dimension of state versus private sector control constitutes the first line of disagreement about the reforms.

The second disagreement involves the type of representation ICANN should have. On one hand, private sector representatives prefer a system of direct delegation from the private firms that design and manage the structure of the Internet through ICANN. Governments who want to name delegates to ICANN's Board also prefer this type of organization. On the other hand are Internet users, who gained representation through direct elections in 1999. These users would like to participate more in the decision-making process in order to institute friendlier policies for consumers and users.

As a result, the spectrum of debate for the upcoming changes in ICANN structure shifted along these two dimensions, represented in Figure 3. As we can see, combining these two issues presents four different policy spaces concerning regulation and delegation. In the first policy space (I), we have a system in which the government creates the rules for regulation, and the composition of the Board of ICANN is dictated by direct representation from governments and other constituencies. This system has a strong top-down regime, in which governments would be influential. Even though the private sector's power would be limited by government intervention, it could still influence government decisions if some representation were given to their constituencies.

Figure 3: Policy Spaces



Under the second policy space of structure for ICANN (II), the private sector dictates who will be in charge of defining and managing the rules. ICANN representation would be chosen by direct delegation from the constituencies. Such an electoral system would reinforce the control of proprietary interests in the policymaking process of ICANN. In the third space (III), a system emerges in which the government still defines the rules for regulating the Internet, but now representation is subject to a more democratic process. This would allow users greater participation in the decision-making process, even though their representatives would be operating under a strong government regime. Finally, in the fourth space (IV), a system appears in which open democracy is applied to a bottom-up regulatory regime. This type of regime would give more control to users and their advocates. However, under this regime both governments and the private sector would not have enough power to directly participate in the policymaking process, which would make this system highly unstable.

Given the potential room for debate regarding the new structure of ICANN, we should identify the current ICANN structure, the proposed changes and the preferences of its constituencies. By analyzing their various preferences, we can determine the chances of success for the different reforms as well as the groups that will support a given reform. We consider two main proposals for reform. First, there is an inside-out process of reform, initiated by ICANN's President in 2002. Even though this process looked like a consensual process to modify ICANN, it was an attempt by ICANN's President to include more international constituencies and, at the same time, maintain the private sector's involvement on the Board. We analyze how this reform evolved in the next

section. Second, an outside-in reform attempt was headed by the United Nations and the International Telecommunications Union (ITU) in 2003 through the World Summit on the Information Society (WSIS). It can be understood as an attempt to strip ICANN and the United States government of their monopoly of domain names and numbers regulation and transfer it to an international organization under the direct control of the United Nations or the ITU. In the following sections we analyze these proposed reforms in terms of our preferences model. We show how the debate for Internet regulation is far from over and how it has become more complex and political.

## **VI. Inside-out Reform: ICANN's President Proposal**

In February 2002, the President of ICANN proposed a set of changes to the structure of ICANN, particularly with respect to composition of the Board and the election of its Directors.<sup>80</sup> Among the factors mentioned by the President as instigating the changes:

ICANN is still not fully organized, and it is certainly not yet capable of shouldering the entire responsibility of global DNS management and coordination. ICANN has also not shown that it can be effective, nimble, and quick to react to problems. ICANN is overburdened with process, and at the same time underfunded and understaffed. For these and other more fundamental reasons, ICANN in its current form has not become the effective steward of the global Internet's naming and address allocation systems as conceived by its founders. Perhaps even more importantly, the passage of time has not increased the confidence that it can meet its original expectations and hopes.<sup>81</sup>

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<sup>80</sup> M. STUART LYNN, PRESIDENT'S REPORT: ICANN – THE CASE FOR REFORM (2002), <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>.

<sup>81</sup> *Id.*

This short paragraph summarizes the main problems ICANN faced just two years after its foundation. Throughout ICANN, it was well known that reform was needed, as we will see shortly. As for the direction of the changes, the President proposed the following,

I have come to the conclusion that the original concept of a purely private sector body, based on consensus and consent, has been shown to be impractical. The fact that many of those critical to global coordination are still not willing to participate fully and effectively in the ICANN process is strong evidence of this fact. But I also am convinced that, for a resource as changeable and dynamic as the Internet, a traditional government approach as an alternative to ICANN remains a bad idea. The Internet needs effective, lightweight, and sensible global coordination in a few limited areas, allowing ample room for the innovation and change that makes this unique resource so useful and valuable.<sup>82</sup>

In this paragraph the President blames most of the failures of ICANN to the pure bottom-up approach of its structure. As a result, he advocates for a more active role of government, even when he is reluctant to endorse a purely top-down approach. This proposal seems to recognize a need to move toward a mixed system with cooperation among governments and the private sector.<sup>83</sup> Advocating active participation from both public and private entities, the newly proposed structure of ICANN was presented for debate.

The President's proposal was an ambitious plan to open ICANN governance to other important Internet constituencies. In particular, it offered an important role to foreign governments, relegating some of the previous Supporting Organizations to an advisory position. According to the President's proposal, the Board of Directors is

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

transformed into a Board of Trustees with fifteen members (rather than nineteen),<sup>84</sup> five nominated by governments (one from each geographic area),<sup>85</sup> five nominated by a Nominating Committee and confirmed by the remaining Board of Trustees,<sup>86</sup> and five ex-officio trustees appointed by the President, the chairs of the Policy Councils, and the Technical Advisory Committee chair.<sup>87</sup> <sup>88</sup> The Supporting Organizations are eliminated and replaced by three Policy Councils.<sup>89</sup> These Councils are (1) Address and Numbering Policy Council,<sup>90</sup> (2) Generic TLD Names Policy Council<sup>91</sup> and (3) Geographic TLD

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<sup>84</sup> *Id.*

<sup>85</sup> “a. Five (one from each ICANN geographic region) nominated by governments (process to be determined) and confirmed by the Board of Trustees” *Id.*

<sup>86</sup> b. Five nominated by open nominating process and confirmed by the Board of Trustees

(i) Nominating Committee made up of: (a) nonvoting Chair, appointed by ICANN CEO after wide consultation; (b) three Trustees whose terms are not expiring; and (c) four other persons selected by the Board of Trustees, after wide consultation.

(ii) Nominations process open to all suggestions and inputs, widely publicized, with adequate time to do thorough work. The Nominating Committee is expected to consult with a broad range of the ICANN communities for input to its deliberations.

(iii) To assure open communications and substantive input from all major stakeholders, there will be at least the following nonvoting liaisons to the Nominating Committee: designees or representatives of IAB, IP address registries, domain name registries and registrars, root name server operators, and the immediately preceding chair of the Nominating Committee.

(iv) Nominating Committee makes nominations based on well-defined criteria, clearly stated in advance for each position: outstanding professional accomplishment, technical understanding, record of leadership, reputation for good judgment, record of public service, independence and willingness to commit time and effort; all with due regard for geographic diversity and differentiated experience objectives.

(v) When making nominations to a particular Council, the Nominating Committee will consult widely with the most affected stakeholder communities. For example, in making nominations for the Address and Numbering Steering Group, the Nominating Committee will consult with the IAB, RIR Boards and staff, and ISPs.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> “The [Address and Numbering Policy Council] ANPC would essentially combine the functions of the current PSO and ASO into a single body, with appropriate staff support and a single Steering Group. The ANPC would have responsibility for advising the Board on the very limited range of policy issues relating to IP address allocation, and any policy or operational issues that arise in connection with ICANN's performance of the IANA protocol numbering functions.” *Id.*

<sup>91</sup> “The GNPC would replace the current DNSO, again with appropriate staff and with a Steering Group partly representing stakeholder groups and partially selected by the Board of Trustees.” *Id.*

Names Policy Council.<sup>92</sup> The new proposal considers creating two new committees: the Government and Technical Standing Advisory Committees.<sup>93</sup> These Committees would advise the Board on policy decisions. Finally, two other more technical committees proposed were the Root Name Server Operations Committee<sup>94</sup> and the Security Committee.<sup>95</sup> Finally, the figure of an Ombudsman was proposed<sup>96</sup> to oversee public comments and ensure the general transparency of the operations.<sup>97</sup> Figure 4 shows the new structure of ICANN under this proposal.

The proposed ICANN of Figure 4 offers a simpler and more manageable structure than that currently seen in Figure 2. As we can see, the number of Directors, now named Trustees, would decrease from nineteen to fifteen.<sup>98</sup> Furthermore, direct elections by the At-Large members would be eliminated and replaced with election by the governments.<sup>99</sup>

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<sup>92</sup> “The ccNPC would be a new entity, intended to provide both policy advice to the Board of Trustees where needed and to serve as a service and policy advisory body to the 243 ccTLDs. It would have appropriate staff support, and a Steering Group made up of both ccTLD representatives and other persons with relevant knowledge or experience that could contribute to these objectives.” *Id.*

<sup>93</sup> “The GAC should continue to be a forum for governments to discuss DNS policy issues, but should have appropriate staff support, and full membership should require a funding contribution per some tiered schedule (requiring little or no contribution from less developed nations). The GAC Chair would serve as an *ex officio* liaison to the ICANN Board of Trustees.” “The TAC will advise the ICANN Board and staff on the technical aspects of ICANN’s operational responsibilities. For example, the TAC would be the body to provide advice on testing the use of shared addresses for the root name servers, or for testing the ability to deploy internationalized TLDs in the root zone file.” *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

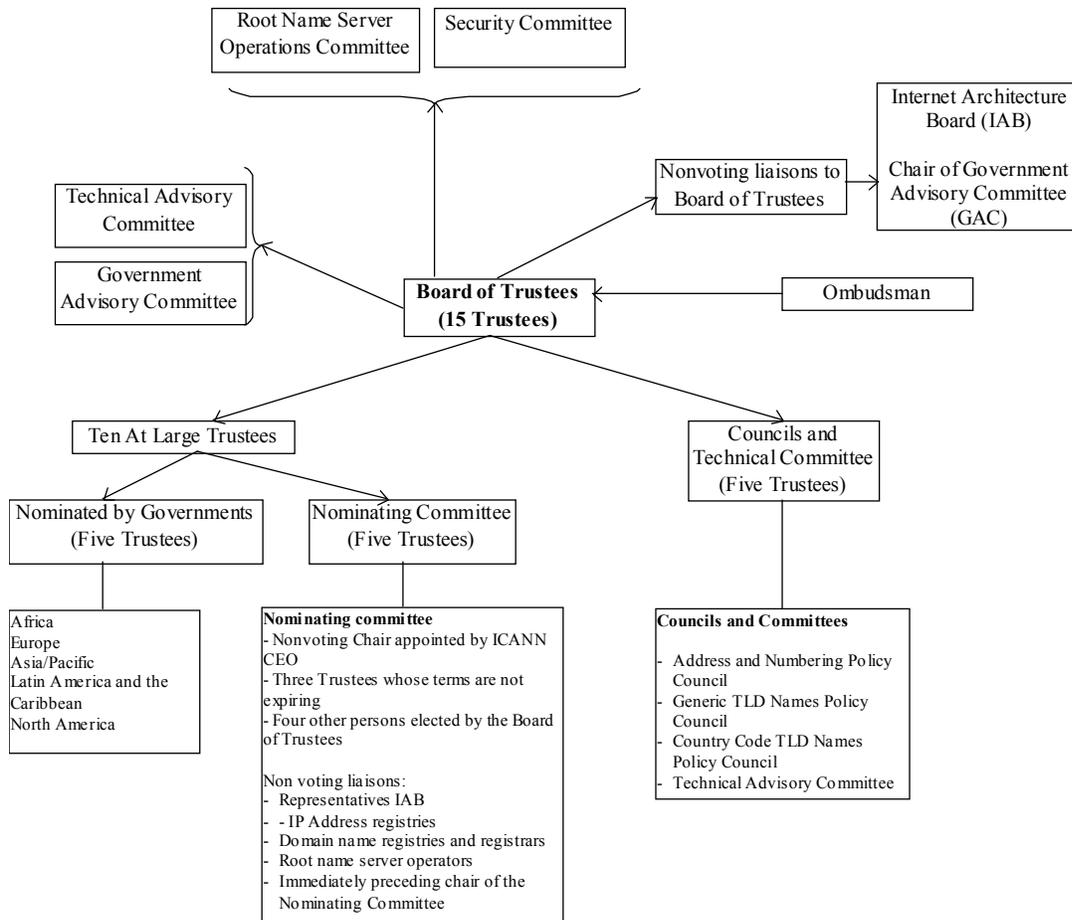
<sup>98</sup> “The current Board, I believe, is somewhat larger than desirable, and thus I would reduce the new Board of Trustees to 15 people.” 1. Board of Trustees, *Id.*

<sup>99</sup> “Obviously, this proposed Board of Trustees, while still representative of the ICANN stakeholder communities, is largely not the product of elections. This is because the principal objective is to produce an effective Board of Trustees, not to allocate seats to interest groups or constituencies, or to replicate online the vast array of governmental institutions needed to assure fair elections. Of course, it will be critical that all portions of the community feel that their interests are understood and given due consideration by the

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Board of Trustees, but that does not mean that the selection process must inevitably be electoral, in the sense of governmental elections based on universal suffrage.” 1. Board of Trustees, *Id.*

Figure 4: Proposed Change to ICANN Structure



This more-centralized structure proposed increases Board power and, therefore, makes Board representation crucial for the actors within ICANN. The Councils replacing the Supporting Organizations would elect just one Trustee each, instead of the current three per Supporting Organization.<sup>100</sup> Finally, the final five Trustees are elected by the newly-created Nominating Committee, composed of a nonvoting Chair appointed by the ICANN CEO, three Trustees whose terms do not expire, and four other members elected by the Board of Trustees. As a result, the Board of Trustees has strong control over the Nominating Committee.<sup>101</sup>

The power of the Board is divided among governments, different private sectors (through the Councils), and some independent Trustees that would be elected by the Nominating Committee. Governments and technical organizations would also have an important role in advising the Board through two new Advisory Committees and the two

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<sup>100</sup> “The current ICANN concept is based on the notion of “bottom-up” policy development, with the Supporting Organizations responsible for the development of policy and the Board theoretically just the implementing device for those policies. In hindsight, the notion of truly “bottom-up” consensus decision-making simply has not proven workable, partly because the process is too exposed to capture by special interests and partly because ICANN relies entirely on volunteers to do all the work. Furthermore, those who are affected by policy decisions should have a clear role in generating the record on which those policy decisions are based and in providing thoughtful advice to the Board of Trustees.

This analysis leads me to suggest the replacement of the current Supporting Organizations with several Policy Councils. These would include an Address and Numbering Policy Council, a Generic TLD Names Policy Council, and a Geographic TLD Names Policy Council. In order for them to be most effective, each of these Councils should be supported by the appropriate staff, and should be managed by a Steering Committee made up of some *ex officio* seats (for representatives of various categories of entities) and some persons nominated through the NomCom process described above, and confirmed by the Board of Trustees. In addition, the Governmental Advisory Committee would continue, and a new Technical Advisory Committee would be created. The current Root Server System Advisory Committee would continue as the Root Name Server Operations Committee. Finally, the newly formed Security Committee would continue to have responsibility for advice and coordination in its critical area.” 3.Policy Development Structure, *Id.*

“These five *Ex Officio* Trustees should include the CEO, the three Chairs of the Policy Councils described below, and the Chair of the Technical Advisory Committee.” 1. Board of Trustees, *Id.*

<sup>101</sup> *Id.*

non-voting liaisons in the Board.<sup>102</sup> As a consequence, this proposed structure of ICANN fosters stronger involvement from both governments and the private sector, and requires less participation from independent Internet users who compose the At-Large members. If one envisioned democratic representation within ICANN where users could vote and directly participate, then this proposal took the opposite direction by constructing a new Board with more control of the decision-making and directly responsible to governments and the private sector.

This proposal was widely discussed and criticized. In the end, the Bylaws approved were quite different from those envisioned by the President's initiative. As we discuss in the next section, the current stakeholders of ICANN, with a veto power over the proposed changes, gave the reform process a different direction, one that accorded better with their preferences.

#### ***A. Constituencies' Preferences Shape Institutional Reform***

Following our preferences model developed in section IV (Figure 3), Figure 5 shows the preference points for each group in the current organization of ICANN. Each point in Figure 5 represents the system that each constituency prefers for ICANN. The point labeled "ICANN" represents the structure of ICANN before the proposal of 2002, i.e., a private corporation relatively free from government intervention with a quasi-direct system of delegation. The point labeled "President Proposal" represents the preference point for the President, according to the proposal he presented in early 2002. As indicated

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<sup>102</sup> *Id.*

before, this proposal was intended to restructure ICANN and allow more participation from governments and reduce the direct involvement of the private sector. However, it did not try to create an alternative democratic system for ICANN. The preferences of the private constituencies of ICANN, particularly ASO (Address Supporting Organization), DNSO (Domain Name Supporting Organization) and ccTLD (Country Code Top Level Domains) are represented by a set of points labeled with their names. These constituencies would prefer a system in which ICANN policymaking is based on a bottom-up regime, with little direct participation from users, i.e., a system controlled by the private sector. As a consequence, they would strongly oppose the reform proposed by the President. Finally, Internet users would prefer a relatively decentralized system with little government intervention but not completely controlled by proprietary interests. At the same time, they would like to have open, democratic access to the ICANN governing body.

To further elucidate each party's preference, given the current make-up of ICANN, Figure 6 illustrates the politics of ICANN reform. The point of intersection is labeled "ICANN" and is considered the status quo, because it represents the current structure of ICANN under debate. As in Figure 5, each point represents the preferred regime for each constituency. The farther the status quo is from the preference point of a given constituency, the lower the level of utility that group receives from the current organization. Finally, the circle for each constituency or group represents the preferred set of options in the political space.

Figure 5: Preferences of ICANN

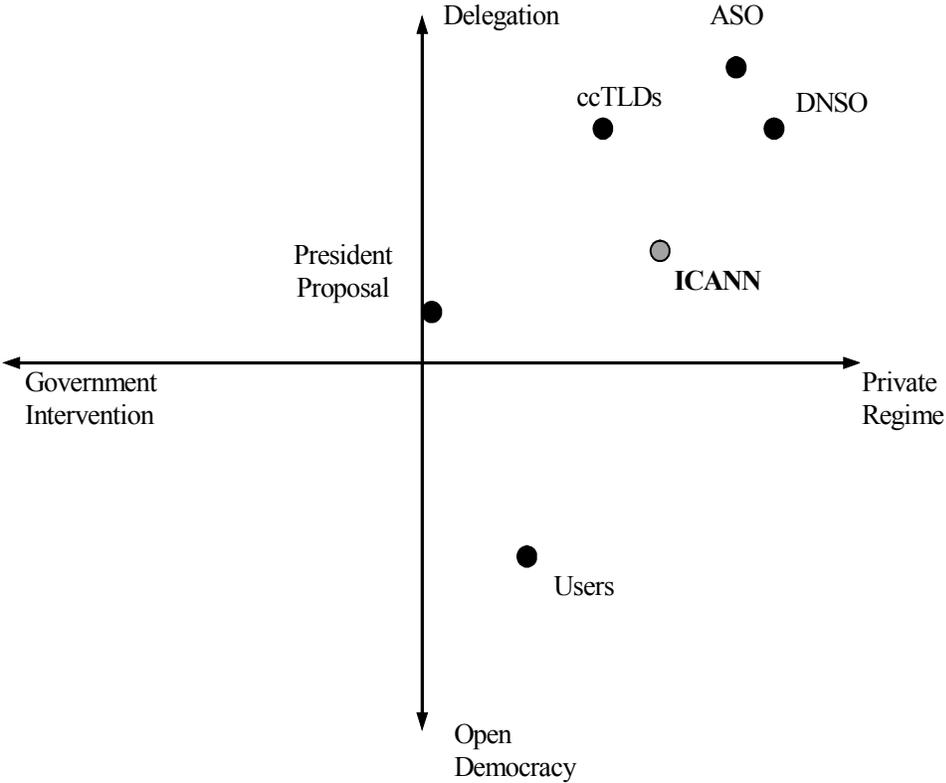
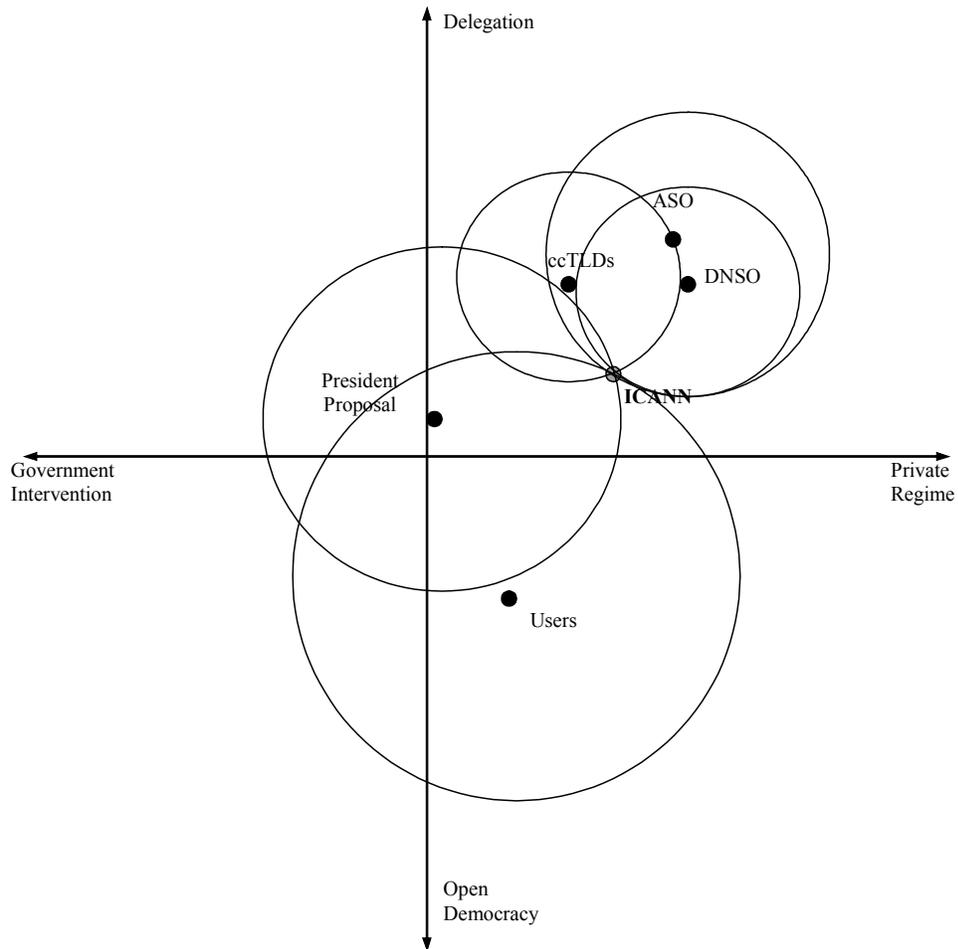


Figure 6: Preferences and Optimal Sets for Reform



Accordingly, all the points inside the circle are preferred to the status quo, i.e., the current ICANN structure, since the distance from the preferred point to any of the points inside the circle is shorter than the distance to the status quo. For example, in the case of the President, his bliss point represents the most preferred point, but he would accept any reform that is within the circle, given that the distance to its bliss point inside the circle is shorter than the actual ICANN structure. Coalition among different constituencies can happen in those areas where the preferred sets of two or more groups coincide. Furthermore, a given constituency will not accept a reform that lies outside its circle. In such a case, this group would be better off with the current structure of ICANN.

Based on the distribution of preferences we have made the following inferences in our study. First, the President's proposal is far from politically feasible since it is not part of the preferred set for the majority of the Board. The only group that would reach an agreement with the President regarding the proposal is Internet users, but Internet users do not have enough representation on the Board to pass the reform.<sup>103</sup> Second, the natural allies in this situation are the DNSO and ASO groups, since they prefer similar systems, totally decentralized from the government and their own delegates on the Board. Third, these constituencies could establish a common point with the ccTLD representatives, who were gaining influence inside ICANN, presenting the possibility of reforming ICANN by coming together. However, their preferences would be contrary to the reforms endorsed by the President. From this analysis, the only feasible political coalition that could be

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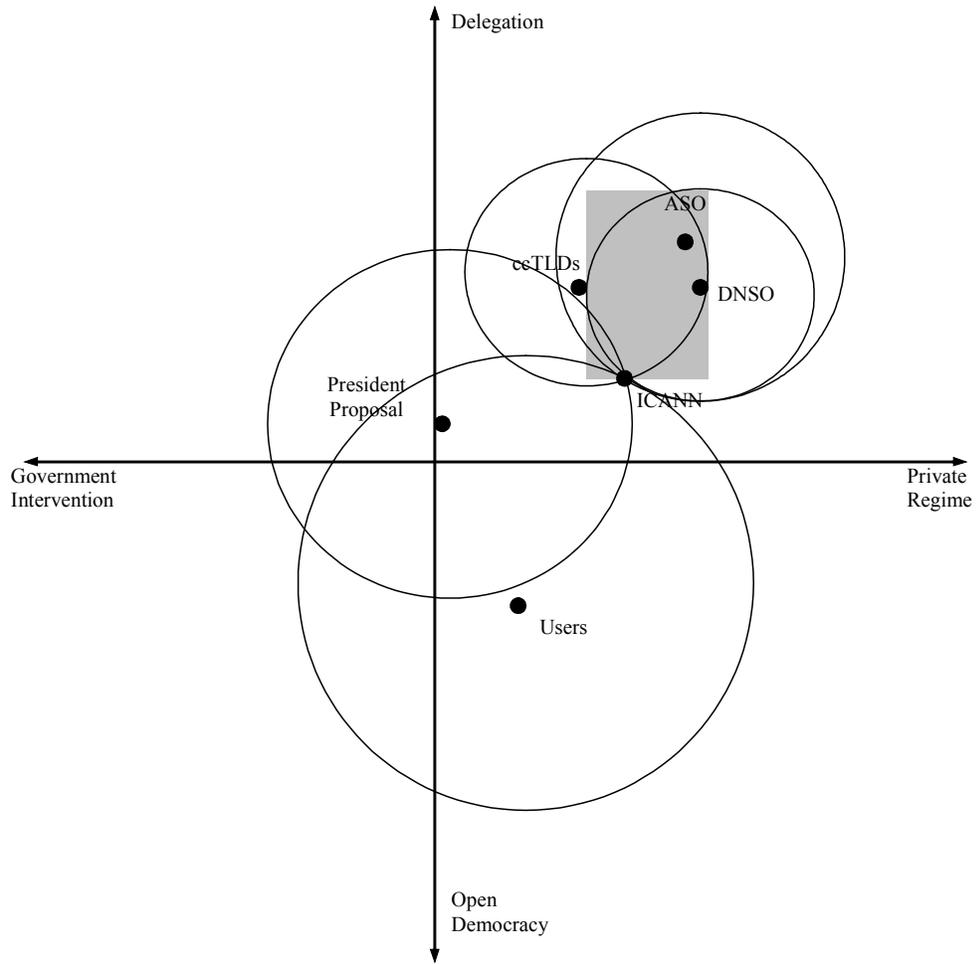
<sup>103</sup> Of the 19 directors voting the reforms only 5 were directly elected by Internet users, and of these 5 just 2 were not proposed by ICANN Board.

formed to successfully change ICANN is that formed by the ccTLD, DNSO and ASO constituencies.

The shadowed area in Figure 7 shows the set of possible changes for the structure of ICANN, in accord with the shared utility of the political coalition described above. Considering this possible set of results, the new structure of ICANN will likely give more policymaking power to the private sector. Furthermore, it will then also reduce the direct participation of users in the formation of the Board.

In the following section, we show how ICANN constituency preferences influenced the President's proposal. Additionally, we show how a coalition of private sector representatives could turn the reform in their favor. Finally, we show the balance of power inside ICANN after the reform.

Figure 7: Optimal Policy Result



**B. Political Debate: The Fight for Representation**

In March 2002, right after the President made his reform proposal, the Board of Directors renamed the newly formed Committee of Restructuring (created in November 2001) the Committee on ICANN Evolution and Reform (ERC).<sup>104</sup> The Committee examined the proposed changes and tried to address the varying concerns of the different constituencies and groups with an interest in how ICANN would function. As a result, the Committee provided the main platform upon which each of the constituencies could voice their concerns and preferences.

In developing these recommendations, the ERC has listened carefully to comments and suggestions of all segments of the ICANN community – both written and verbal statements, most of them public. We have considered and evaluated all of the many constructive suggestions received by the ERC.<sup>105</sup>

Finally, in June 2002, the Committee published its proposal for reform called *A Blueprint for Reform*.<sup>106</sup> In this document, the Committee elaborated on the President's proposal, introduced some changes and requested the Board's approval.<sup>107</sup> The structure of ICANN envisioned in the *Blueprint* is shown in Figure 8.

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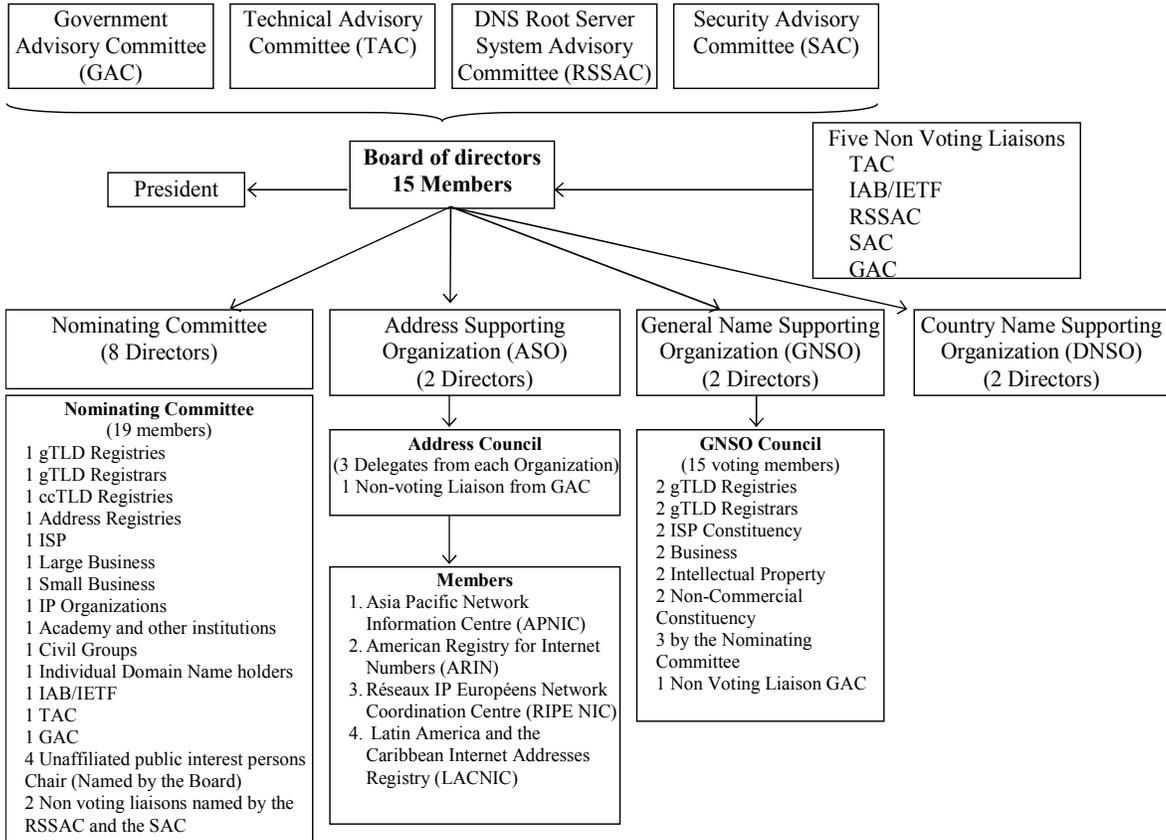
<sup>104</sup> See ICANN, Preliminary Report 14 March 2002, <http://www.icann.org/minutes/prelim-report-14mar02.htm> (last visited Feb. 28, 2007).

<sup>105</sup> See ICANN, ICANN: A Blueprint for Reform, 20 June 2002, , <http://www.icann.org/committees/evolution-reform/blueprint-20jun02.htm> (last visited Feb. 27, 2007).

<sup>106</sup> See *id.*

<sup>107</sup> *Id.*

Figure 8: Blue Print Proposal by the ERC



As we can see, after extensive debate and bargaining, the ERC ended up with a proposal that differed substantially from the initial one coming from the President.

In the *Blueprint*, the role of the government was reduced, even though it is still more important than under the original governance structure.<sup>108</sup> Government representatives can be found in every organization of ICANN. Thus, the Committee sought to relate government to all areas in which ICANN policies were discussed. Nonetheless, the *Blueprint* eliminated some of the more radical reforms proposed by the President. Political pressure from different constituencies and organizations preserved some of the old structure from reform.<sup>109</sup> For example, the ASO and the General Name Supporting Organization (GNSO, formerly DNSO) were reinstated in their previous form. Furthermore, the proposal left open the possibility to a new arrangement among the Country Code Top Level Domains (ccTLDs), International Governments and the ICANN Board in order to create a new structure inside ICANN that would better address the interests of ccTLDs.<sup>110</sup>

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<sup>108</sup> “To strengthen the GAC’s integration into ICANN and to strengthen representation of the public interest, the GAC should appoint (a) a non-voting liaison to the Board (b) one delegate to the Nominating Committee, and (c) non-voting liaisons to each of the SO Councils and to the RSSAC, the TAC, and the SAC. The GAC would decide whether or not any or all of these liaisons are members of the GAC. In each case, the liaisons should have sufficient expertise to participate effectively in each of these bodies. The GAC should be requested to appoint a contact individual to coordinate when necessary between the IANA and particular government officials when there are delegations or redelegations pending, and to provide a focus for advice and information to other government officials. The GAC should be requested to participate in a dialog with ICANN and the ccTLD community to understand what steps might be taken to facilitate the consummation of agreements between ICANN and the ccTLDs that provide a framework of accountability, and other aspects of integration of the ccTLD community in ways that reflect its global diversity (see ccTLD Agreements above under the CNSO heading).” (Committee on ICANN Evolution and Reform, 2002, 6. Government Participation).

<sup>109</sup> See *infra* Part VI.C.

<sup>110</sup> “In the original Lynn document “ICANN: A Case for Reform”, one problem that was highlighted was the challenge associated with consummating stakeholder agreements. This problem has not been addressed thus far in detail in the work of the Committee on Evolution and Reform. Nowhere is this problem more

The creation of a new framework for ccTLDs, with a more active role in ICANN, was a direct result of pressure from the country code managers and of pressure from other countries to expand ICANN to the international arena.<sup>111</sup> The Protocol Advisory Organization was eliminated, and their organization members were transferred to the Technical Advisory Committee. One of the most important proposals involved creating a more ambitious nominating committee, with nineteen members<sup>112</sup> coming from different constituencies and groups. This committee would have the power to name more than half of the members of the Board (Committee on ICANN Evolution and Reform, 2002a).

In summary, the proposal of the ERC seemed to reflect a compromise between the extensive reforms proposed by the ICANN President and the competing interests among the different organizations and constituencies with a stake in the current structure and policymaking process of ICANN. In the next sections, we explore the debate between the ERC and the different organizations and groups inside ICANN that led to its present Bylaws.

### ***C. Organizations and Constituencies Reactions***

Both the proposal introduced by the President of ICANN and the *Blueprint* delivered by the ERC to the Board, received many comments and critiques from different

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complex than in the case of reaching agreements with ccTLDs, although some progress has been made and more can be anticipated. ICANN operates within the framework of ICP-1.

As a step towards addressing this issue and possibly considering whether policy changes may be required, the Committee on Evolution and Reform recommends that the Board encourage the GAC and delegates from the global ccTLD community to explore possible paths to resolution of this problem.” Id., Supporting Organizations.

<sup>111</sup> See *infra* Part VI.C.

<sup>112</sup> There are 18 voting members, as the President of the board is a non-voting member. See ICANN, ICANN: A Blueprint for Reform, 20 June 2002, <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm> (last visited Feb. 27, 2007).

constituencies and organizations with an interest in the political process of ICANN. In this section, we summarize the position of these groups with respect to the reforms.

### **1. The Debate with Address Supporting Organization Members**

The ASO members are the Regional Internet Registries (RIR) who manage addresses in their respective regions.<sup>113</sup> In the proposed reform by the President of ICANN, the role of these RIRs would be strongly limited. First, it would eliminate the ASO, replacing it with a Council. Second, it would mix the former ASO members with the Protocol Supporting Organization members. Third, the Nomination Committee would appoint an Internet Engineering Task Force (IETF) member to the Address Council. The IETF is an international technical community “concerned with the evolution of the Internet architecture and the smooth operation of the Internet.” Fourth, it would reduce the number of directors that the RIRs could elect. Fifth, it advocated for similar policies for all councils and organizations. Sixth, it created the Technical Advisory Committee in which the RIRs were included. Seventh, it proposed that the Technical Advisory Committee would supervise IANA policies.<sup>114</sup>

These proposals were strongly rejected by all RIRs, who expressed their disapproval in a submission to the ERC on June 20, 2002.<sup>115</sup> They countered with their own proposal that would put the majority of decision-making power into their hands. Not

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<sup>113</sup> See also ICANN Address Supporting Organization, <http://www.aso.icann.org/> (last visited Feb. 27, 2007) (giving general information about ASO composition, history, tasks and proposals).

<sup>114</sup> See *supra* note 9.

<sup>115</sup> See ICANN, Regional Internet Registry Joint Statement on ICANN Evolution and Reform, <http://www.icann.org/committees/evol-reform/second-joint-rir-statement-20jun02.htm> (last visited Feb. 27, 2007).

only would the ASO be preserved, but IANA operational functions, i.e., maintaining IANA address registry, would be transferred to them. The ASO would also undertake responsibility for the formal adoption of global RIR policies. The role of the ICANN Board, therefore, would be to oversee the ASO actions, and it would take over the Board's responsibility of evaluating and approving new RIRs. Given the extent of their control, the RIRs would be willing to have only one director that represents them on the Board.<sup>116</sup> Thus, the RIRs considered a future organization without the involvement of ICANN.<sup>117</sup>

The counteroffer from the RIRs generated an answer from the ERC, which supported some of the changes but strongly opposed others.<sup>118</sup> Among the accepted changes were that first, ASO would be preserved in its original form. Second, management of ASO was left completely to the RIRs without the introduction of an IETF member by the Nominating Committee. Third, the ASO would elect two Directors to the ICANN Board. Fourth, the rules and policies for each association would reflect the particular characteristics of its members. Fifth, RIRs are not included in the Technical Advisory Committee nor would this committee supervise IANA policies.

However, the ERC strongly rejected three of their requirements: first, address policies would stay in the ICANN Board jurisdiction instead of being transferred to the

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<sup>116</sup> *Id.*

<sup>117</sup> "Given the discussion about ICANN reform the future of ICANN is by no means assured, and it is essential that we can ensure that the Internet and its associated infrastructure service roles should continue to function even if ICANN fails. Part of the intent of these proposals is to ensure that the Internet is not critically dependent on the continuation of one of the operational roles of ICANN, and that ICANN can operate as an efficient entity that can provide the appropriate levels of oversight and review to the RIR role without becoming a critical single point of failure for the entire network." 6.General Comment, *Id.*

<sup>118</sup> See ICANN, Update Regarding RIR Submissions, 16 September 2002, , , <http://www.icann.org/committees/evol-reform/update-16sep02.htm> (last visited Feb. 27, 2007).

ASO. Second, the inclusion of new RIRs would be studied and decided by the ICANN Board. Third, the Board's IANA policies would not be transferred to the ASO<sup>119</sup>.

After this exchange of proposals, the RIRs responded in October 2002 with a *Blueprint for Evolution and Reform of Internet Address Management*.<sup>120</sup> In this proposal they persist with some of the ideas rejected by the ERC. As a result, the ERC decided to leave the articles regarding ASO activities open to further amendment as the debate between the RIRs and the ERC continued.<sup>121</sup> This debate concerning the role of each organization in the policymaking of ICANN reflects both the short life of ICANN as a recognized institution for regulating the Internet and its quest to maintain balance among the various political demands of its members. In the first case, because ICANN is a new corporation which has managed Internet addresses and numbers for only a few years, the debates around policymaking will continue for some time. Additionally, the Internet is still in its infancy and, therefore, matters of regulation and structure and the roles of each group and constituency are still not well defined.

The final result of this process will depend on the political and economic strength of each party. This is strongly related to the second point, which is that ICANN is not a mere technical corporation with an administrative function; it is now a political organization with different constituencies and groups fighting for power and control. As such, the specific political structure that distributes power among groups and

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<sup>119</sup> *Id.*

<sup>120</sup> See ICANN, RIR Blueprint for Evolution and Reform of Internet Address Management, <http://www.icann.org/committees/evol-reform/joint-rir-blueprint-09oct02.htm> (last visited Feb. 27, 2007).

<sup>121</sup> "The Evolution and Reform Committee is carefully reviewing the details of the RIR proposal, as well as the reactions to the proposal from all segments of the Internet community" ICANN, Fourth Status Report: Formation of ccNSO Assistance Group, 12 October 2002, <http://www.icann.org/committees/evol-reform/status-report-12oct02.htm> (last visited Feb. 27, 2007).

constituencies will be the key in defining the direction of ICANN policies in the coming years.

## **2. The Creation of a New Supporting Organization: The Case of ccTLDs**

One of the changes supported by all constituencies of ICANN was improving the relationship between ICANN and the country code registries. Since the beginning of ICANN operations, ccTLD members felt that the DNSO was mostly concerned with Generic Top Level Domain (gTLD) issues and that the relationship between ICANN and ccTLDs should be reinforced.<sup>122</sup> Furthermore, the number of ccTLDs grew at high rates during the 1990s and had an important role in the process of the internationalization of the Internet. As a result, once the reform of ICANN was proposed, the initiative of the ccTLD constituency to be recognized as an independent Supporting Organization was one of the first issues in the reform agenda of the ERC. The step to form a separate

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<sup>122</sup> “Almost from the beginning, members have been withdrawing from participation in the activities of the DNSO, despite the continuing participation by our Names Council members. In summary, members have felt that the DNSO structure, composition and work is devoted to gTLD issues and matters of only limited importance to members' interests within ICANN. The absence of Board representation, and the unlikeliness of this occurring, despite the fact that cc domain names constitute approximately one third of all domain names and that members are expected to contribute one third of the ICANN budget is a particular feature of the problems of the current relationship”

“The ccTLD Constituency meeting unanimously approved the plan (see details below) to become a Supporting Organisation of ICANN. The decision acknowledges that a Supporting Organisation structure will better serve our local Internet communities, as well as the global Internet community, within the ICANN process. The proposed Country Code Supporting Organisation (ccSO), with its focus on ccTLD issues, will join with the PSO (Protocol Supporting Organisation), ASO (Address Supporting Organisation) and the DNSO (Domain Name Supporting Organisation) in equal partnership to support the work of ICANN. At a joint meeting, representatives of the Business, Intellectual Property, ISPCP, and Registrar Constituencies voiced their support for the formation of the new ccSO, and a process for ongoing communication was established. The next step involves continuing the discussions with the other Constituencies in the DNSO, the ICANN Board and Staff, and our own members.” ccTLD Constituency of ICANN, World Wide Alliance of Top Level Domain-Names, Communiqué from Stockholm Meeting, June 1st 2001, [http://www.dnso.org/constituency/cctld/docs/20010601\\_ccTLDstockholm-communique.html](http://www.dnso.org/constituency/cctld/docs/20010601_ccTLDstockholm-communique.html) (last visited Feb. 27, 2007).

organization was reaffirmed in the Montevideo meeting in September and the Marina del Rey meeting in November of 2001.<sup>123</sup> Nevertheless, the first proposal of ICANN reform presented by the President in February 2002 fell short of recognizing the ccTLD constituency as an independent group.<sup>124</sup>

The important role of the ccTLD constituency was recognized in the ERC proposal by creating a separate Council for it, but limited its capacity for action by delegating the formation of this Council to a steering group comprised mostly by members of the Board. This Council was allowed to name just one Trustee.<sup>125</sup> As a result the ccTLD constituency reacted negatively to the President's proposal at the March 2002 meeting at ACCRA.<sup>126</sup> A series of discussions and debates between the ccTLD constituency and the ERC helped to resolve some of the differences with respect to the final role of the constituency in ICANN.<sup>127</sup>

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<sup>123</sup> See, [http://www.wwtld.org/communique/ccTLDMontevideo\\_communique\\_09Sep2001.html](http://www.wwtld.org/communique/ccTLDMontevideo_communique_09Sep2001.html) and [http://www.wwtld.org/communique/ccTLDMDR\\_communique\\_12Nov2001.html](http://www.wwtld.org/communique/ccTLDMDR_communique_12Nov2001.html)

<sup>124</sup> See *supra* note 35.

<sup>125</sup> “3. Geographic TLD Names Policy Council

a. Made up of ccTLD organizations and other organizations interested in policy issues related to this topic  
b. Managed by Steering Group of nine members appointed by the Board of Trustees – five ex officio [one representative of ccTLD registries from each ICANN region, chosen from among those that have existing agreements with ICANN], and four other persons nominated through NomCom process and confirmed by Board

c. Consider funding mechanism for those participants that do not have agreements with ICANN, perhaps tiered to recognize size and ability to pay.

d. Chair elected by Steering Group, and holds ex officio seat on ICANN Board of Trustees

[The ccNPC would be a new entity, intended to provide both policy advice to the Board of Trustees where needed and to serve as a service and policy advisory body to the 243 ccTLDs. It would have appropriate staff support, and a Steering Group made up of both ccTLD representatives and other persons with relevant knowledge or experience that could contribute to these objectives.]”

See M. STUART LYNN, PRESIDENT'S REPORT: ICANN – THE CASE FOR REFORM (2002),

<http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>.

<sup>126</sup> See ccTLD, World Wide Alliance of Top-level Domain Names, Communique from Accra Meeting, <http://www.wwtld.org/communique/20020313.ccTLDaccra-communique.html> (last visited Feb. 27, 2007).

<sup>127</sup> See ICANN, Links Concerning ICANN's 2002 Evolution and Reform Process, <http://www.icann.org/committees/evol-reform/links.htm> (last visited Feb. 27, 2007) (listing all the

As a result, in September 2002, the ERC created a Country Code Names Supporting Organization (ccNSO) Assistance Group in order to generate a structure for the ccNSO and to help them reach an agreement regarding the relationship between this new Supporting Organization and ICANN.<sup>128</sup> Since then the ccNSO Assistant Group has been working on forming a proposal that permits the ccNSO and ICANN to agree on a common structure and policy.<sup>129</sup> Still, in the new Bylaws of December 15, the ccNSO was expected to elect two directors to the Board.<sup>130</sup> Continuing discussions for the new Supporting Organization, the ccNSO Assistant Group produced a set of recommendations for the creation of the ccNSO in February 2003.<sup>131</sup> Based on this report and on the comments received from ccTLD members, the ERC published a report on the creation and structure of the ccNSO in April 2003.<sup>132</sup>

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documents and exchange of ideas with all the organizations and constituencies participating of the reforms).

<sup>128</sup> “The ERC has established an additional Assistance Group to help complete its work on the implementation of the Blueprint’s Country Names Supporting Organization. The Assistance Group for the ccNSO will be responsible for providing recommendations on the structure, membership, scope, and processes of the ccNSO within the framework of the Blueprint. The following ccTLD managers, participants of the GAC, and other knowledgeable members of the community have agreed to participate in this Assistance Group: Sebastian Bachollet; Bart Boswinkel; Becky Burr; Chris Disspain; Hartmut Glaser; Alf Hansen; Hiro Hotta; Geoff Huston; Michael Katundu; Christian de Larrinaga; Pierre Ouedraogo; Patricio Poblete; Oscar Robles; Philip Sheppard; Mohd Sharil Tarmizi; Kiyoshi Tsuru; and Bernard Turcotte. All participants, including those who are also participants in the GAC, are contributing to the Assistance Group in their individual capacities and based on their personal views and experience.”

<sup>129</sup> There are several reports of the Assistant Group as well as drafts of proposals for structure of the ccNSO. See *supra* note 127.

<sup>130</sup> See ICANN, Bylaws, 15 December 2002, <http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm> (last visited Feb. 27, 2007).

<sup>131</sup> See ICANN, ccNSO Assistance Group: Compiled Recommendations, 26 February 2003 <http://www.icann.org/committees/evol-reform/ccnsoag-report-26feb03.htm> (last visited Feb. 27, 2007).

<sup>132</sup> See ICANN, ERC’s Fifth Supplemental Implementation Report, 22 April 2003, <http://www.icann.org/committees/evol-reform/fifth-supplemental-implementation-report-22apr03.htm> (last visited Feb. 27, 2007).

Finally, at the Montreal meetings, the ccNSO was formed based on the recommendations of the Committee.<sup>133</sup> As a result, the new Bylaws were amended, leading to the formation of a ccNSO Council, one similar in structure to the other Supporting Organizations.<sup>134</sup>

As we can see with the debates regarding the role of ASO members and the creation of the ccNSO,<sup>135</sup> the reform process has not been smooth. The bargaining and debate among the committees and the many constituencies has been a long political process.<sup>136</sup> As shown, in the case of the ASO, this process is still in progress, and the final result is not yet obvious. How they will solve the differences will depend mostly on the political strength of each party inside and outside ICANN.

Other constituencies, committees and Supporting Organizations also expressed their ideas and proposals with respect to the reforms.<sup>137</sup> The exchange of ideas and the political pressure exerted on the Board to impose certain constituencies' preferences led to many revisions of the President's original proposal and to the ERC *Blueprint*. Although defining the relationships among the ICANN Board and the groups that were part of ICANN was still a topic of discussion, the Board of Directors approved the new modified Bylaws in October 2002.<sup>138</sup> After bargaining with ccNSO, the Board approved a new set of Bylaws that included the structure and functions of the new Supporting

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<sup>133</sup> See ICANN, ICANN Montreal Meeting Topic: ccNSO Formation, <http://www.icann.org/montreal/ccnso-organization-topic.htm> (last visited Feb. 27, 2007).

<sup>134</sup> See Article IX.

<sup>135</sup> See *supra* Fig. 9.

<sup>136</sup> See ICANN, Bylaws, 28 February 2006, Article IX, <http://www.icann.org/general/bylaws.htm#IX> (last visited February 28, 2007).

<sup>137</sup> See Appendix A for a description of the different points of view with respect to the proposed reform.

<sup>138</sup> For the minutes of the meeting and approval of the new bylaws see, <http://www.icann.org/shanghai/captioning-31oct02.htm>.

Organization.<sup>139</sup> The structure of ICANN was finally defined as shown in Figure 9. When comparing this final structure of ICANN with the initial proposal from the President (Figure 8) we find many differences. First, the role of the government was reduced.<sup>140</sup> In the President's proposal, the Government Advisory Committee (GAC) was supposed to elect five directors (1/3 of the total Board). In the final structure, GAC may not elect even one director.<sup>141</sup> Still, the role of governments has increased, as GAC now has more direct participation in all groups of ICANN.<sup>142</sup> Nonetheless, as we analyze in section IX, many countries left GAC or would not participate in GAC, as they felt that their voices were not heard.<sup>143</sup> This prompted the international community to ask for a change in the governance regime for ICANN.

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<sup>139</sup> See ICANN, Bylaws, 28 February 2006, <http://www.icann.org/general/bylaws.htm> (last visited Feb 28, 2007).

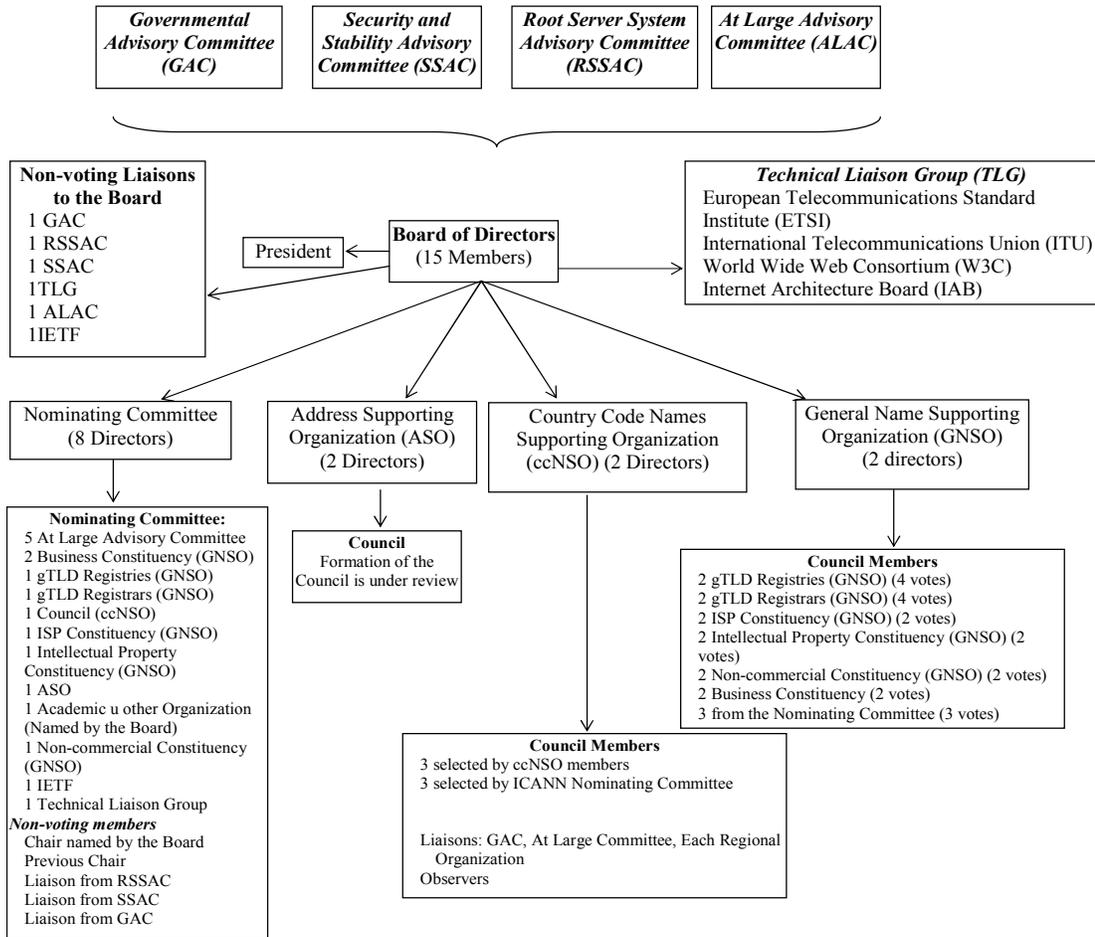
<sup>140</sup> Compare *supra* fig.8, with *supra* fig.9..

<sup>141</sup> *Id.*

<sup>142</sup> "But while the GAC is indeed a de jure only an advisory body, after ICANN reform the GAC is de facto an intergovernmental organisation. It develops policies and agrees on positions. And the GAC has now something like a "veto right" against the ICANN Board of Directors. In cases, where the ICANN Board rejects a GAC recommendation, the GAC can under ICANN 2.0 ask for a "consultation". If this consultation fails, ICANN is obliged to explain to the global Internet community why no consensus could be reached and government reserve their rights, to act on their behalf in the area of the controversial issue." Wolfgang Kleinwachter, *Beyond ICANN vs. ITU? How WSIS Tries to Enter the New Territory of Internet Governance*, at 6.

<sup>143</sup> "The GAC is open to all UN Member States, intergovernmental organisations and other invited units. But the GAC has also a number of deficiencies. Only 86 governments have been accredited until February 2004 as GAC members and in the GAC meetings the average number of participants is substantially lower, very often not higher than about 40. ... An additional conflict point is that the government of China does not recognize the membership of Taiwan in the GAC." *Id.* at 6.

Figure 9: Structure of ICANN in Accord with the Latest Bylaws



First, this higher presence of GAC members in all ICANN organizations permits a higher degree of communication between the private sector, in charge of enacting and managing ICANN policies, and governments around the world.<sup>144</sup> As a result, even if ICANN is still a corporation with a strong bottom-up approach to regulating the Internet, this change implies a movement toward a more cooperative stance with governments.<sup>145</sup> Second, the role of the ccTLDs increased by creating a new Supporting Organization, the ccNSO, which represents them.<sup>146</sup> This marks an opportunity for international cooperation and a more active role for the international community in ICANN policies. Third, the final reform proved advantageous for ASO and GNSO, which avoid being transformed into Advisory Councils, without representation in the Board, and benefit now from electing two directors each, instead of one.<sup>147</sup> Furthermore, they now participate in the Nominating Committee and have the chance to influence the election of the other eight directors.<sup>148</sup> Fourth, the Protocol Supporting Organization (PSO) was eliminated in the first proposal and also in the final Bylaws.<sup>149</sup> This means a loss of power for the technical organizations that took part in the political structure of the first ICANN. Now, the role of such organizations was reduced to that of advisor to the Board.

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<sup>144</sup> “The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.” ICANN, Bylaws, Article XI, Section 2.1.j, <http://www.icann.org/general/bylaws.htm#XI> (last visited Feb. 28. 2007).

<sup>145</sup> See *supra* note 4 (explaining the welfare enhancing qualities of a regulatory regime that enable governments and the private sector to cooperate in Internet related regulatory issues).

<sup>146</sup> See source cited *supra* note 144 at Article IX.

<sup>147</sup> See *id.* at Articles VIII, X.

<sup>148</sup> *Id.*

<sup>149</sup> See New Bylaws, *supra* note 89.

Fifth, since the first proposal, the At-Large community lost ground.<sup>150</sup> The initial proposal intended the Nominating Committee to elect five At-Large Directors. Now, in the final version of the Bylaws, the At-Large community was left with a newly created At-Large Advisory Committee (ALAC). Although ALAC can elect five delegates to the Nominating Committee, the Nominating Committee represents many other constituencies besides the At-Large members.<sup>151</sup> It seems that through the bargaining process, those organizations and constituencies, which were better represented and structured than the At-Large community, undermined the initial powers given to At-Large members in the first reform proposal. Nonetheless, the President had also proposed diminishing the role the At-Large community once held under the old Bylaws.<sup>152</sup>

As we can see, the reform of ICANN is an example of a political process to reach a consensus and maintain equilibrium of power within an organization. From this analysis, we conclude that ICANN is by no means just a technical organization with the job of technical management of Internet addresses and numbers, but rather a political organization with the power to create policies for the functioning of the Internet. Furthermore, ICANN is now definitively a political body with different groups and constituencies holding a stake in its policies. In the next section, we analyze the result of this political struggle for reform.

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<sup>150</sup> *Id.*

<sup>151</sup> *See Id.*, Article XI, Section 2, 4.

<sup>152</sup> *See supra* note 35.

***D. Losers and Winners: The Distribution of Power After Reform***

As in any political reform, some groups are better positioned than others to profit from the changes. Every constituency wants to have the changes reflect their interests and preferences. ICANN is, by no means, immune to this process. The political bargaining described in the previous section is proof of the transformation of ICANN into a political body that is in charge of important governance issues of the Internet. As in every reform, we can identify the winners and losers by comparing the previous structure of ICANN with the final reform. In Table 1, we calculate the influence of each group and constituency over the Board of Directors as the share of influence they have on the composition of the Board.<sup>153</sup> This index indicates the relative power of each group as compared with each other. As we can see, the winners from the reform have been the GNSO and ccTLD constituencies. Even though now the GNSO constituencies elect only two directors by themselves, as compared with three directors previously, they have a greater influence on the Nominating Committee, which elects eight more directors.

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<sup>153</sup> See *infra* Appendix (explaining the methodology employed in this table).

**Table 1: Political Strength of Different Groups**

(As Probability of Electing a Director to the Board)

	<b>Before Reform</b>	<b>After Reform</b>	<b>% Change</b>
<b>Director</b>	<b>5.26</b>	<b>6.67</b>	<b>26.7</b>
<b>GNSO (ex DNSO)<sup>(*)</sup></b>	<b>15.79</b>	<b>33.19</b>	<b>145.2</b>
Business	2.26	7.68	240.4
Non-Commercial	2.26	4.54	101.3
gTLD Registries	2.26	5.94	163.5
Registrars	2.26	5.94	163.5
ISPs	2.26	4.54	101.3
Intellectual Property	2.26	4.54	101.3
<b>ASO</b>	<b>15.79</b>	<b>16.47</b>	<b>4.3</b>
ARIN	3.95	4.12	4.3
RIPE NCC	3.95	4.12	4.3
APNIC	3.95	4.12	4.3
LACNIC	3.95	4.12	4.3
<b>CCNSO (ex ccTLD)</b>	<b>2.26</b>	<b>16.47</b>	<b>630.2</b>
<b>Nominating Committee</b>	<b>0</b>	<b>55.44</b>	
<b>Elected At-Large Members<sup>(**)</sup></b>	<b>26.32</b>	<b>15.69</b>	<b>-40.4</b>
<b>At-Large Constituencies</b>	<b>26.32</b>	<b>10.5</b>	<b>-60.3</b>
Africa	5.26	2.09	-60.3
Latin America	5.26	2.09	-60.3
North America	5.26	2.09	-60.3
Asia/Aust/Pac	5.26	2.09	-60.3
Europe	5.26	2.09	-60.3
<b>Non Elected (Initial Board)</b>	<b>21.1</b>	<b>0</b>	<b>-100.0</b>
<b>Academic and others</b>	<b>0</b>	<b>3.14</b>	
<b>PSO<sup>(***)</sup></b>	<b>15.79</b>	<b>5.49</b>	<b>-65.2</b>
IETF	3.95	3.14	-20.5
W3C	3.95	0.78	-80.1
ITU-T	3.95	0.78	-80.1
ETSI	3.95	0.78	-80.1
IAB		0.78	
<b>Total</b>	<b>100.00</b>	<b>100.00<sup>(****)</sup></b>	

**Source: Own elaboration based on ICANN Bylaws.**

Notes: (\*) Includes the index value corresponding to the ccTLD Constituency.

(\*\*) In the old Bylaws the At-Large Advisory Committee did not exist, but we related it to the Directors elected by the broad constituencies in each region. Under the new Bylaws the elected At-Large members come from the At-Large Advisory Committee members representing each RALO and the members elected by the Nominating Committee to the ALAC.

(\*\*\*) PSO was eliminated in the new Bylaws. We are relating this index to the influence the members of the new Technical Liaison Group (TLG) have in naming Board Directors through the Nominating Committee.

(\*\*\*\*) This total can be obtained by two procedures: First, by summing up all the subtotals for each group (not in bold numbers) plus the subtotal for ccNSO. Second by summing up the subtotals for the Director, ASO, GNSO, CCNSO, Elected At-Large Member, Academic and Others, PSO, IAB and the influence of the Nominating Committee in the GNSO (see Appendix B).

Inside the GNSO, we can see that the reform favored private businesses, which compose the only constituency sending two delegates to the Nominating Committee (one representative of small businesses and the other of large businesses). The reform favors constituencies of the gTLD registries and registrars, who receive more voting power inside the GNSO Council. Finally, Internet Service Providers (ISP), Intellectual Property and Non-Commercial Constituencies improved their situation but to a lesser extent than those entities previously mentioned. The reform primarily favors the ccTLD constituency, whose influence inside ICANN has improved substantially. First, they have upgraded their status to that of a Supporting Organization, which is more important than being a constituency among others in the GNSO. Second, as a Supporting Organization, the ccTLD constituency may elect two directors to the Board as well as one representative to the Nominating Committee. As for the ccNSO, it now shares the same status as the ASO.

The groups that lost the most power and influence in ICANN are the At-Large constituencies, elected by Internet Users, and the Technical Organizations, members of the former Protocol Supporting Organization (PSO). Previously, At-Large members could elect at least five directors through democratic elections among Internet users. Now, they are represented by only five of the seventeen representatives on the Nominating Committee. Furthermore, these five representatives are elected by ALAC, in which the Regional At-Large Organizations (RALO) can elect just two representatives each. The Nominating Committee elects the other five members of ALAC. As a result, the direct participation of Internet users in the election of ICANN Directors has been

diluted through a series of mechanisms and committees. Internet users will have less say in ICANN and its policies.

PSO members were downgraded to serve an advisory role in ICANN. The creation of the Technical Liaison Group (TLG), without any formal structure and with the aim of its giving advice to the Board on specific issues, determined the fate of PSO members in the ICANN government. The only direct influence these members have is through a delegate from the TLG on the Nominating Committee. The only organization that could maintain some influence was the IETF, which has a representative on the Nominating Committee, though it is not in the TLG. Finally, the ASO slightly increased its power inside ICANN, but overall experienced little change.

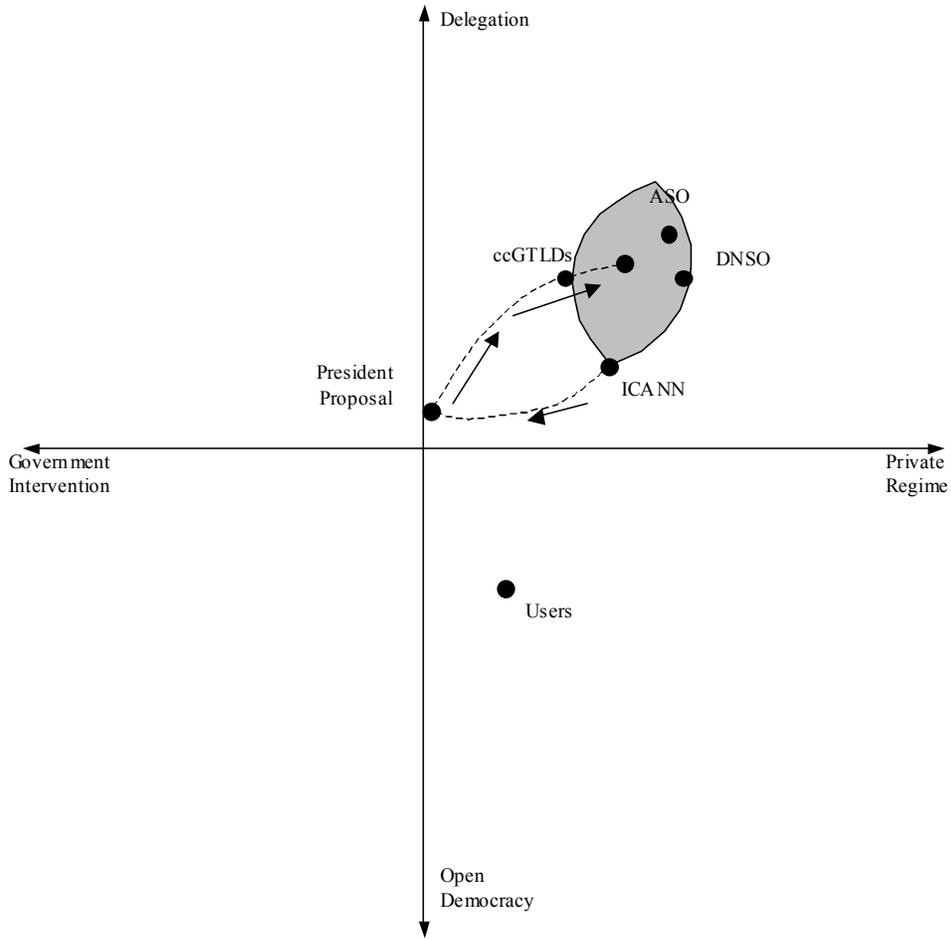
If we look at the influence of governments in ICANN there is a greater role for the GAC (Government Advisory Committee). However, this Committee does not have any direct participation in the policymaking process, because governments elect no member of the Board. Although the role of governments in ICANN has increased compared with the previous structure of ICANN, the final result is far from the ambitious changes initially proposed by the President. Consequently, the winners and losers of this process are well described by our political model of preferences, since the initial proposal by the president was steered toward a regime closer to the preferences of ICANN's original constituencies.

The reform proposed in early 2002 was far from ideal for the main ICANN constituencies. As a result, the political influence of each of these constituencies gave shape to the final reforms of ICANN. In the end, most of the President's changes were

overturned; instead reforms were instituted that favored the stakeholders with political power in the decision-making process. Figure 10 shows the movement of the reform in the last year. As shown, the final result has been detrimental to the direct participation of Internet users and the technical organizations.

We can expect more direct policymaking, without as much dispersion of power, but also more political decisions, because the private sector with political interests in the Internet has a more important role now, and governments are also taking a more active stance. Finally, as ICANN becomes more international, we should expect better enforcement of its policies throughout the Internet, especially from ccTLDs with greater Board power. Nonetheless, we should not expect this structure to be stable, as ICANN is an organization still in its formative stage. As the new groups with more power begin to shape ICANN policies, new constituencies will form and challenge the status quo. It is therefore important to recognize the political nature of ICANN, as recent reforms may anticipate how ICANN will develop.

Figure 10: Evolution of the Reform



## VII. Outside-in Reform: International Community Proposals

The reform process failed to bring a more active role for government, as sought by the President of ICANN, and in the end reinforced the power of the groups already represented on the Board. This result represented a major success for the private sector in controlling ICANN, but also generated an outcry from the international community, which was already opposed to the particular structure of ICANN. In the end, the attempt by ICANN's president to seamlessly bring the international community onboard failed.

Since the inception of ICANN in 1997, most countries have envisioned the Internet as an international phenomenon that transcends the frontiers of a country. As such, the control by the United States government of ICANN, through a contract with the Department of Commerce, represented a unilateral approach to Internet governance, which required reform.<sup>154</sup> A group of countries wanted to transfer the governance of the Internet to an intergovernmental body of the United Nation, the International

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<sup>154</sup> “There are two major limitations to a national government’s power. First, while it has power to pull the plug on Internet access, as North Korea did, it cannot single-handedly influence the content of foreign Web sites. Attempts to filter the data flow from other countries come at a price: success is uncertain, the performance of the data flow suffers, and the filter may often dismiss valuable material. The second limitation is caused by the structure of the DNS. Even the country-code TLDs are dependent on the root file that is only under U.S. control. A country could force all computers within its territory to follow a new DNS, but that would not apply to computers anywhere else. A country can therefore threaten the United States with a split of the Internet in two parts and thereby cause the loss of network gains, but it cannot alter the DNS for the whole Internet. In contrast, the United States, by virtue of its control of the root file, can cause great difficulties for a country by transferring the authority for the country-code TLD to an entity outside that country. The new, foreign entity would be able to program its now controlling name servers to stop referring to the “old” corresponding IP addresses, and thereby cancel all current domain names. In response, a country can only resort to creating its own DNS and accept the inevitability of a split of the Internet.” Marcus Muller, *Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 709, 725 (2005).

Telecommunication Union (ITU).<sup>155</sup> In this respect, the reform attempt by ICANN's President can be seen as an attempt to bridge this gap. However, the final reform did not satisfy developing countries<sup>156</sup> and generated a withdrawal of support for ICANN's Government Advisory Committee (GAC) from many countries and also the ITU. The United Nations, through the International Telecommunication Union, created a series of summits in 2003 called the World Summit on the Information Society (WSIS). Because the issue of Internet governance was of increasing importance, the United Nations created the Working Group on Internet Governance<sup>157</sup> (WGIG) with the specific purpose of

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<sup>155</sup> See, Wolfgang Kleinwachter, *Beyond ICANN vs. ITU? How WSIS Tries to Enter the New Territory of Internet Governance*.

<sup>156</sup> "During the Marrakesh conference a bitter controversy about private sector leadership and the future role of ITU in Internet Governance took place. In Marrakesh, US and EU governments, supported by private ITU sector members, expressed their satisfaction with the ICANN reform process and argued in favour of a continuation of the leading role of ICANN in Internet Governance. On the other hand, a growing number of third world countries discovered the management of domain names and IP addresses as an issue related to their sovereignty and economic development. They felt underrepresented in ICANN and blamed the California based private corporation for being US dominated and deepening the "digital divide". They felt, that they do not have adequate opportunities to participate in the bottom up decision making process in such a private corporation. And they criticized the control function for the A Root Server of the US government. Additionally, some governments came with the idea, to regulate the Internet in general –similar to telecommunications and broadcasting- to protect unspecified national economic or political interests in areas like content control, cybercrime or VoIP." *Id.* at 5.

<sup>157</sup> "The first WGIG meeting took place at the United Nations' Geneva headquarters on 23-25 November 2004, almost one year after the first phase of WSIS (WSIS-I) had asked the United Nations Secretary-General to establish a working group on Internet governance and set out the following terms of reference: 13.b) We ask the Secretary General of the United Nations to set up a working group on Internet governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005. The group should, inter alia:

- i) develop a working definition of Internet governance;
- ii) identify the public policy issues that are relevant to Internet governance;
- iii) develop a common understanding of the respective roles and responsibilities of governments, existing intergovernmental and international organizations and other forums as well as the private sector and civil society from both developing and developed countries;
- iv) prepare a report on the results of this activity to be presented for consideration and appropriate action for the second phase of WSIS in Tunis in 2005."

Don MacLean, *A Brief Story of WGIG*, in *REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG)* 10 (William J. Drake ed., 2005).

analyzing the appropriate form for Internet Governance.<sup>158</sup> The forty members of WGIG<sup>159</sup> have held several meetings since 2003 in preparation for the second phase of WSIS in Tunis in November 2005. As we show in this section, the approach of WGIG with respect to Internet governance, specifically ICANN, is based on a top-down approach in which governments are in charge of the regulatory system.<sup>160</sup> This is in striking contrast to the regulatory model ICANN has been implementing, which was supported by the United States government.<sup>161</sup>

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<sup>158</sup> “The WGIG has been asked, *inter alia*, to “investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005”, dealing with the following issues:

- Develop a working definition of Internet governance
- Identify the public policy issues that are relevant to Internet governance
- Develop a common understanding of the respective roles and responsibilities of Governments, existing international organizations and other forums, as well as the private sector and civil society in both developing and developed countries”

WGIG, Report of the Working Group on Internet Governance, \*3, <http://www.wgig.org/docs/WGIGREPORT.pdf> (last visited Mar. 1, 2007).

<sup>159</sup> “In line with the decisions of WSIS-I, the forty members of WGIG who assembled in the Palais des Nations represented government, the private sector and civil society from both developing and developed countries in a reasonably balanced fashion, taking into account geographic and demographic factors and making allowance for the gender inequality that currently characterizes the ICT sector. All members of the group had expertise in aspects of Internet governance. Many had also been involved in WSIS-I and previous multistakeholder policy processes, such as the Group of Eight’s (G-8) digital Opportunities Task Force and the United Nations Information and Technologies Task force. Others were new to the game of global, inter-sectoral cooperation.” MacLean, *supra* note 157, at 11.

<sup>160</sup> “Thus, the current governance of the naming system seems to reflect the second model of a market more than the government of a private or public organization.” Frankel, *supra* note 11, at 459.

“In the context of discussions on global governance, Governments have been confronted with other stakeholders requesting to be allowed to participate in decision-making arrangements. The debate on Internet governance, however, followed a different pattern. Here, Governments wanted to obtain a say in the running of the Internet, which has developed outside a classical intergovernmental framework.” Markus Kummer, *Introduction*, in REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG) 1 (William J. Drake ed., 2005).

<sup>161</sup> “To obtain the overall picture of U.S. power it is necessary to look at how the United States, through ICANN, has a grip on the entire world by chain of contracts. ICANN imposes contractual obligations on all domain names holders in the space of TLDs like .com, .net, .org, and newly introduced generic TLDs like .museum. Users can register domain names only with “registrars”, which in turn have to register them with the “registry” that is the highest level administrator of a TLD chosen by ICANN. First, through contracts, ICANN can force all registries of generic TLDs to deal only with ICANN- accredited registrars, i.e. with entities subject to contractual obligations imposed by ICANN. Second, ICANN’s contracts with the registrars require them to include certain obligations on the registrants (the individual domain name holders). Currently, the most important example of the power that the United States and ICANN derive from controlling the root file is the enforcement of the Uniform Domain Name Dispute Resolution Policy

In preparation for the WSIS held in Tunis in November 2005, the WGIG held four meetings in 2004 and 2005.<sup>162</sup> In the last meeting the Working Group produced a report delineating the approach for Internet governance, specifically with respect to ICANN.<sup>163</sup> The WGIG defined Internet governance as “the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.”<sup>164</sup>

This vision of Internet governance, with governments as the main source of rules and regulations, contrasts with the ongoing definition by ICANN stakeholders and the United States government of a bottom-up, private-sector led regulatory regime.<sup>165</sup> The preeminence of a top-down approach is apparent when the WGIG outlines the role of governments with respect to Internet Governance:

- “Public policymaking and coordination and implementation, as appropriate, at the national level, and policy development and coordination at the regional and international levels
- Creating an enabling environment for information and communication technology (ICT) development
- Oversight functions
- Development and adoption of laws, regulations and standards
- Treaty-making
- Development of best practices
- Fostering capacity-building in and through ICTs

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(UDRP), which is a set of rules for conflicts between trademark and domain-name holders.” Muller, *supra* note 111, at 719.

<sup>162</sup> The meetings of the WGIG were Geneva 23-25 November 2004, 14-18 February 2005, 18-20 April 2005 and 14-17 June 2005. *See* World Summit on the Information Society, [www.wsis.org](http://www.wsis.org) (last visited Feb. 28, 2007).

<sup>163</sup> *See* WGIG, Report of the Working Group on Internet Governance, <http://www.wgig.org/docs/WGIGREPORT.pdf> (last visited Mar. 1, 2007).

<sup>164</sup> *Id.* at 4.

<sup>165</sup> “Hence, the negotiations focused on process rather than substance. They reflected the two basic visions - -- namely private sector leadership versus intergovernmental cooperation.” Kummer, *supra* note 115, at 2.

- Promoting research and development of technologies and standards
- Promoting access to ICT services
- Combating cybercrime
- Fostering international and regional cooperation
- Promoting the development of infrastructure and ICT applications
- Addressing general development issues
- Promoting multilingualism and cultural diversity
- Dispute resolution and arbitration.”<sup>166</sup>

As we can see, the extent of government’s role in Internet governance under this vision is much enhanced as compared to the roles provided by the GAC of ICANN. In the case of names and numbers, the role of governments was to provide advice and oversight of ICANN’s Board decisions, while under the WGIG report, governments are in charge of the governance system.

In accord with this definition of Internet governance and the government’s role in it, the WGIG proposed the creation of an organizational form for the governance of the Internet, under the following general principles:

- No single government should have a pre-eminent role in relation to the international Internet governance
- The organizational form for the governance function will be multilateral, transparent and democratic, with the full involvement of Governments, the private sector, civil society and international organizations
- The organizational form for the governance function will involve all the stakeholders and relevant intergovernmental and international organizations within their respective roles.”<sup>167</sup>

In the case of names and numbers, these principles imply the end of the United States control of ICANN and the transfer of these activities to a multilateral organization,

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<sup>166</sup> *Id.* at 8-9.

<sup>167</sup> *Id.* at 12

modeled closely on the United Nations. This indeed implies a purer top-down regulatory regime as opposed to the bottom-up approach of ICANN.

Furthermore, the WGIG proposed four different models for such organization. These models included, in some form or another, the tasks currently performed by ICANN. An analysis of these models provides useful insights into the international debate regarding Internet governance and the alternative models to ICANN.

The first model proposed the creation of a Global Internet Council (GIC) with members from governments of each region.<sup>168</sup> The main objective of the GIC was to overtake the function of the US Department of Commerce with respect to ICANN (Figure 11).<sup>169</sup>

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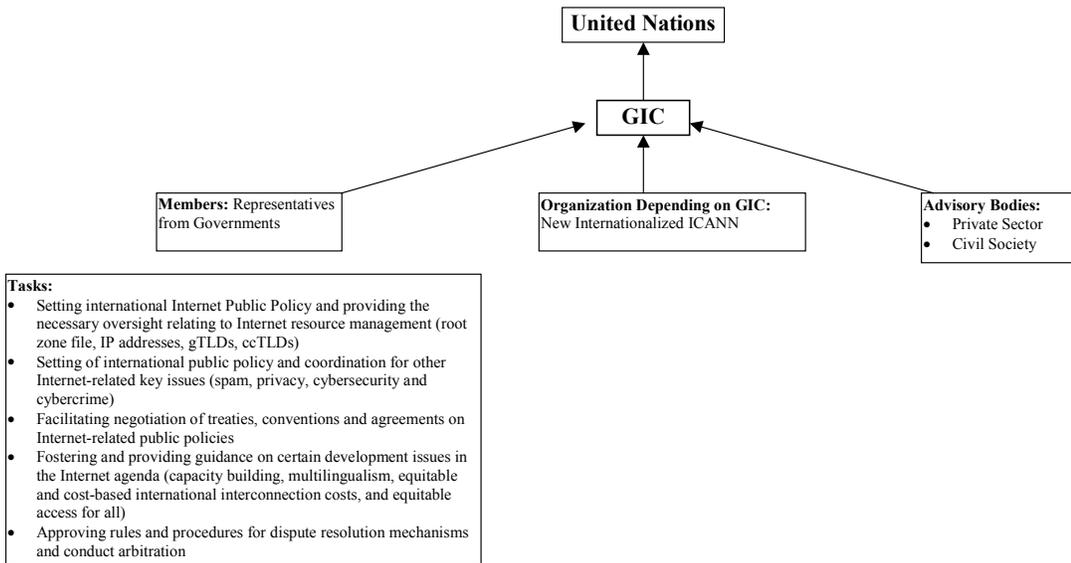
<sup>168</sup> See Abdullah A. Al-Darrab, *The Need for International Internet Governance Oversight*, in REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG) 178 (William J. Drake ed., 2005). (explaining that Model 1 was the one that many in the WGIG believed to be the most appropriate for Internet governance).

<sup>169</sup> “It can be seen from the discussion above that:

- Oversight of the monopoly, regulatory and policy functions of ICANN is needed;
- This oversight is currently provided by a single Government;
- There are some areas of international public policy for which oversight is needed, and which are outside the scope of existing organizations and are not being fully addressed;
- Policy authority for Internet-related public policy issues is the sovereign right of States.

It follows that a global organization in which Governments have a leading role is needed to perform the public policy setting and oversight functions including the role currently performed by the US Department of Commerce with an input from all stakeholders. With establishment of the council, and the Internationalization of ICANN, ICANN would continue to execute its technical and operational functions under a United Nations-like host-country agreement. ICANN’s Government Advisory Committee would no longer be required.” *Id.* at 181-182.

Figure 11



The GIC will accomplish most of the tasks regarding Internet governance and ICANN will depend on GIC, as it now depends on the United States government. In this regime the private sector and civil society will be relegated to an advisory role without any role in the decision-making process.<sup>170</sup> Finally, the GIC would depend on the United

<sup>170</sup> “National Governments are the most representative entities for the public, as they are appointed by the people, and they are responsible for the development of public policy within their territories. It therefore follows that governments must also be responsible for the setting of international public policy. The private sector and the civil society cannot take the place of Governments in undertaking this role. However, their participation and support to Governments through the provision of advice and opinions is an important element in the successful execution by Governments of their policy setting and oversight role.” *Id.* at 180.

Nations.<sup>171</sup> As a result, this model represents a strong departure from the current system to a top-down regime controlled by a multinational body.

The second model proposed a significantly minor reform of ICANN. According to this proposal, there is no need for a specific organization, but the current regime could continue operating under the same rules. However, it proposes to change the Government Advisory Committee (GAC) of ICANN in order to take into account the preferences of all countries.<sup>172</sup> In this new forum, government could participate and debate different policy proposals and recommend specific courses of action. However, this new forum would not have any power to implement these policies. This proposal seems minor compared to the previous one, and it resembles the proposal from ICANN's President in 2002.<sup>173</sup>

The third model proposes a departure from the current system in line with the first model (Figure 12). This model proposes the creation of an International Internet Council (IIC), which would assume the current role of the United States in the governance of ICANN. The IIC would replace ICANN's GAC with the private sector and civil society as advisory bodies.

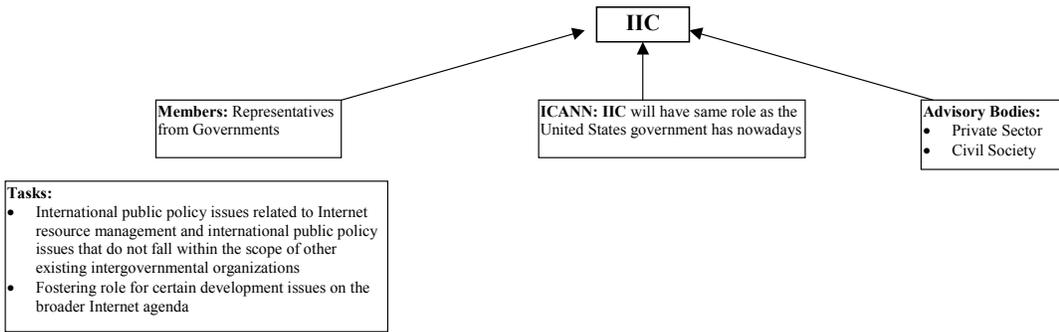
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<sup>171</sup> "To facilitate its establishment, the Council should be anchored in the United Nations. This would provide an existing and credible legal framework and reduce costs by providing access to an existing administrative support capability." *Id.* at 182.

<sup>172</sup> WGIG, *supra* note 120, at 14.

<sup>173</sup> *See supra* Part IV.

Figure 12



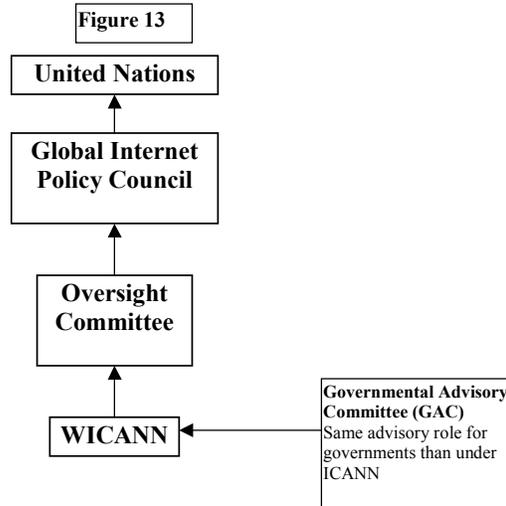
Finally, the fourth model also proposes a departure from the current system, but envisions the creation of three different organizations to handle three main governance issues:

- “Public policy development and decision-making on international Internet-related public policy issues led by Governments
- Oversight over the body responsible at the global level for the technical and operational functioning of the Internet led by the private sector
- Global coordination of the development of the Internet through dialogue between Governments, the private sector and civil society on an equal footing.”<sup>174</sup>

The first organization is the proposed Global Internet Policy Council (GIPC), which is led by the government with the private sector and the civil society participating as advisors. The second organization is the World Internet Corporation for Assigned Names and Numbers (WICANN), which is similar to the current ICANN but led by the international private sector and linked to the United Nations (Figure 13).

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<sup>174</sup> WGIG, *supra* note 120, at 15.



In this case, the Oversight Committee, which will be appointed and controlled by the Global Internet Council (GIC), will have the same role the United States government currently has with respect to ICANN. This new organization will be linked to the United Nations. Governments will also have an advisory role through GAC, as it does under the current ICANN. Finally, civil society will participate through an advisory role.

The third organization is the Global Internet Governance Forum (GIGF) which will be a forum for governments, the private sector and civil society to facilitate the coordination and debate of public policy issues.<sup>175</sup>

As we can see, these models for Internet governance signify a strong departure from the bottom-up regime of ICANN and a transfer of control to the United Nations, or any international organization, from the United States. These proposals were considered in the WSIS Tunis meeting on November 2005. The United States and ICANN rejected

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<sup>175</sup> WGIG, *supra* note 120, at 16.

such a sweeping reform,<sup>176</sup> while most developing countries and even the European Union supported some departure from the current regime.<sup>177</sup> In the end, the United States position prevailed and ICANN was saved. However, the WSIS approved the creation of an Internet Governance Forum (IGF), which should evaluate future policies and governance regimes for the Internet.<sup>178</sup> The IGF is given a wide spectrum of policy issues to consider,<sup>179</sup> but its role is limited to an advising organization. The document clearly

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<sup>176</sup> “In a statement released on 30 June 2005, the US Government made clear that at this moment it will not consider such a handover:

The United States Government intends to preserve the security and stability of the Internet’s Domain Name and Addressing System (DNS). Given the Internet’s importance to the world’s economy, it is essential that the underlying DNS of the Internet remains stable and secure. As such, the United States is committed to taking no action that would have the potential to adversely impact the effective and efficient operation of the DNS and will therefore maintain its historic role in authorizing changes or modifications to the authoritative root zone file.” Wolfgang Kleinwachter, *De-Mystification of the Internet root: Do We Need Governmental Oversight?*, in REFORMING INTERNET GOVERNANCE: PERSPECTIVES FROM THE WORKING GROUP ON INTERNET GOVERNANCE (WGIG) 223 (William J. Drake ed., 2005).

<sup>177</sup> See ICANN COMMENTS ON THE REPORT OF THE WORKING GROUP ON INTERNET GOVERNANCE, (2005), <http://www.icann.org/announcements/ICANN-WGIG-report-comments-15aug05.pdf> (describing the issues in which ICANN disagree with the WGIG Report).

<sup>178</sup> See, WSIS, “Tunis Agenda for the Information Society” World Summit on the Information Society, November 18<sup>th</sup> 2005 at [www.wsis.org](http://www.wsis.org), at 11 (asking the United Nations to create the Internet Governance Forum).

<sup>179</sup> “The mandate of the Forum is to:

- a) Discuss public policy issues related to key elements of Internet governance in order to foster the sustainability, robustness, security, stability and development of the Internet;
- b) Facilitate discourse between bodies dealing with different cross-cutting international public policies regarding the Internet and discuss issues that do not fall within the scope of any existing body;
- c) Interface with appropriate inter-governmental organisations and other institutions on matters under their purview;
- d) Facilitate the exchange of information and best practices, and in this regard make full use of the expertise of the academic, scientific and technical communities;
- e) Advise all stakeholders in proposing ways and means to accelerate the availability and affordability of the Internet in the developing world;
- f) Strengthen and enhance the engagement of stakeholders in existing and/or future Internet governance mechanisms, particularly those from developing countries;
- g) Identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations;
- h) Contribute to capacity building for Internet governance in developing countries, drawing fully on local sources of knowledge and expertise;
- i) Promote and assess, on an ongoing basis, the embodiment of WSIS principles in Internet governance processes;
- j) Discuss, *inter alia*, issues relating to critical Internet resources;

specifies that the IGF is not intended to have any “oversight function and would not replace existing arrangements, mechanisms, institutions and organizations, but would involve them and take advantage of their expertise. It would be constituted as a neutral, non-duplicative and non-binding process. It would have no involvement in day-to-day or technical operations of the Internet.”<sup>180</sup>This clause seems to protect ICANN from being replaced by an international institution, but it also leaves the possibility that the IGF can recommend to replace ICANN in the future. Furthermore, the need for change in the current system is clearly expressed in the document,

61. We are convinced that there is a need to initiate, and reinforce, as appropriate, a transparent, democratic, and multilateral process, with the participation of governments, the private sector, civil society and international organisations, in their respective roles. This process could envisage creation of a suitable framework or mechanisms, where justified, thus spurring the ongoing and active evolution of the current arrangements in order to synergise the efforts in this regard.

62. We emphasise that any Internet governance approach should be inclusive and responsive and should continue to promote an enabling environment for innovation, competition and investment.

63. Countries should not be involved in decisions regarding another country’s country-code Top-Level Domain (ccTLD). Their legitimate interests, as expressed and defined by each country, in diverse ways, regarding the decisions affecting their ccTLDs, need to be respected, upheld and addressed via a flexible and improved framework and mechanisms.

64. We recognise the need for further development of, and strengthened cooperation among, stakeholders for public policies for generic top-level domain names (gTLDs).<sup>181</sup>

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k) Help to find solutions to the issues arising from the use and misuse of the Internet, of particular concern to everyday users;

l) Publish its proceedings.”

*Id.* at 11.

<sup>180</sup> *Id.* at 12.

<sup>181</sup> *Id.* at 10.

As a result, the future of ICANN looks uncertain, not just because of the internal struggle for power, but also because of the opening of Internet governance to the international arena, where governments have a stronger say than the private sector. Furthermore, we have two incommensurable approaches to Internet governance. On one hand, we have a hands-off approach promoted by the United States through its contract with ICANN.<sup>182</sup> This approach pushes for a continuation of the actual regime, which in turn gives the United States the monopoly of controlling oversight of ICANN. The European Union supports this hands-off approach, but prefers the United States to step down as the government in charge of ICANN activities.<sup>183</sup> On the other hand, the top-down approach of the WGIG, promoted by developing countries, implies a multilateral approach with direct control of Internet governance by the government.<sup>184</sup> Note that this preferred point represents the sentiment of the majority of the members of WGIG and country participants of WSIS, because there are countries, like the United States, that

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<sup>182</sup> See *supra* note 133 and accompanying text.

<sup>183</sup> “The EU recognizes the great job the California-based non-profit organization Icann (Internet Corporation for Assigned Names and Numbers) is doing in its technical management of the world-wide domain name system. We have been staunch supporters since its privatization in 1998. Applying the old adage, “if it ain’t broke don’t fix it,” we should not try to change this successful example of management in private hands. Icann enjoys the trust of the global Internet community. Consequently we believe governments should not have a say in the day-to-day management of the Internet. To involve them could result in unnecessarily burdensome structures and even endanger its stability. The EU therefore supports an approach to Internet governance that even further removes government control from Icann. For many years, we have understood that this objective was also shared by the U.S. administration. The next step, therefore, should be to complete the privatization process of the day-to-day management of the Internet by phasing out the oversight functions of the U.S. Department of Commerce over Icann.”

Viviane Reding, *ICANN? We All Can*, WALL ST. J., Nov.16, 2005, at \_\_\_.

<sup>184</sup> “Countries including China, Iran, Brazil, Saudi Arabia and Russia lobbied at the first-ever global summit on the Internet, hosted by the United Nations’ International Telecommunication Union, for changes to the current arrangement, which gives the Commerce Department sole oversight of determining the technical foundation for how Internet users communicate with one another. Among other matters, the U.S. oversees the creation of domain names and Internet addresses”

John Miller & Christopher Rhoads, *U.S. Fights to Get Control of Global Internet Oversight*, WALL ST. J., Nov. 16, 2005, at \_\_\_.

prefer to continue with a decentralized system.<sup>185</sup> Figure 14 shows where the proposed reform by the International Community ranks with respect to the changes introduced by ICANN. As we can see, the initial proposal by the President tried to engage government in a greater degree in ICANN's decision-making process, but failed. In the end, the reform process gave way to a system with a higher degree of participation of ICANN stakeholders, with more participation from the governments, but at an advisory level. On the other hand, the WGIG proposes a dramatic change to Internet governance by giving governments a much bigger role.

As for voting under a democratic versus a delegate system, there is evidence, as shown throughout the paper, that direct democracy by Internet users has lost any chance of survival. Furthermore, under the WGIG proposal, the system would move toward a stronger delegation system, internally democratic, in the sense that more countries will have more say on regulatory issues, but not democratic in terms of selecting representatives for each sector; this is even more important in the case of the WGIG regime. As a result, we have a classical confrontation between a top-down approach and a bottom-up approach for regulating the Internet. As analyzed before, these different

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<sup>185</sup> "From a point of view of Internet users, there is no extra value if the present oversight function is "internationalized" in a sense that instead of one Government twenty or fifty Governments get the authorization function for root zone file changes. On the contrary, such a model, while probably closer to the United Nations principle of sovereign equality, could have rather negative side effects and has a higher risk to undermine the proper functioning and development of the Internet as a whole. ... If the introduction of new gTLDs would need the approval by the 190+ members of the United Nations, users could probably wait for years until Governments reach a final agreement. If a root zone file change for the TLD of India would need the approval of the Government of Pakistan, then the current simple system could become rather complex and could provoke unneeded but complicated "Internet wars". Another risk could be that sooner or later a substantial majority of Governments could have the idea, to create an artificial scarcity on Internet resources –domain names and IP addresses- with the aim to justify global or local domain taxes or IP address license fees."

Kleinwachter, *supra* note 133, at 221.

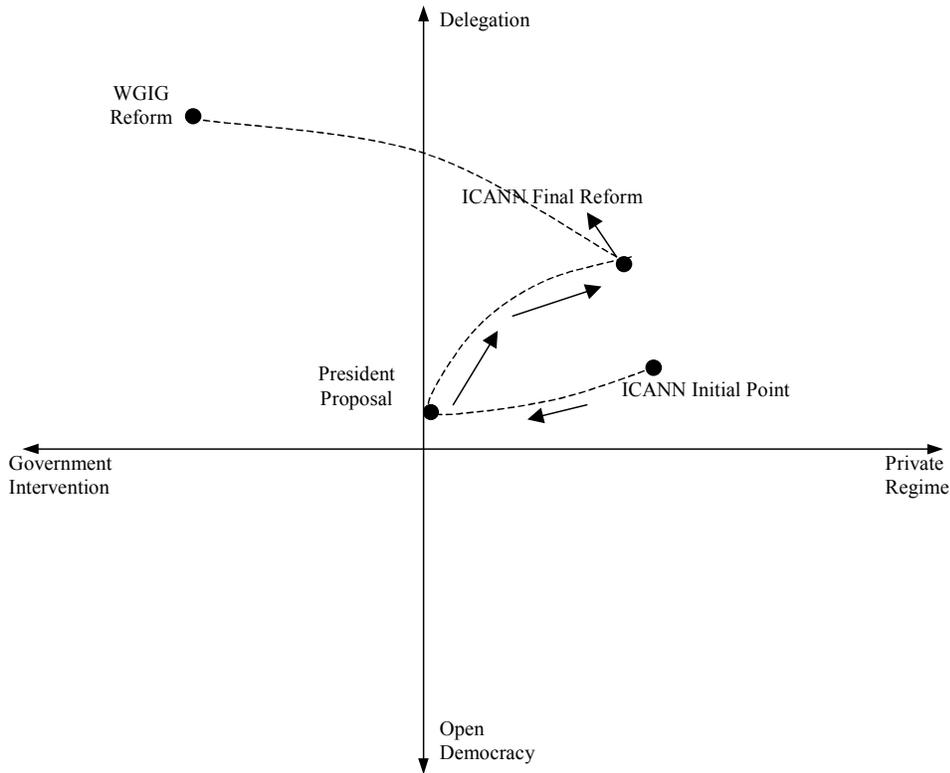
positions were clearly discussed during the WSIS meeting in Tunis, where the international community decided to maintain ICANN and the current system under the control of the United States. However, this decision is not definitive, and the newly created Internet Governance Forum could push for moving the system to a more top-down regime in the future. As a consequence, an unstable situation exists, where the international community is trying to propose an alternative to ICANN, which currently maintains the control of the DNS thanks to the support of the United States.

**A. *The World Internet Governance Organization (WIGO)***

Given the tension between both parties, we believe that this transition could be pushed forward by the creation of a supranational entity in charge, not just of ICANN's responsibilities, but also of other areas related to the Internet, i.e., e-commerce, Internet security. We call this organization the World Internet Governance Organization (WIGO), managed by a board representing the developed countries and the technical groups with a stake in the Internet. This would entail an institution organized somewhere in between the unilateral regime represented by ICANN and the multilateral approach proposed by the United Nations. In order to succeed in such an enterprise, it should follow the example of other international organizations, like the World Trade Organization (WTO), and build Internet governance around well-defined technical and regulatory rules that foster the economic and social development of this space. In this case, instead of trying to build an organization based on the consensus of all countries with a stake on the system, developed countries should rely on the technical advice of organizations with a stake in

the Internet. Based on these general guidelines, countries would be offered incentives to participate in this system, for example through economic gains or the availability of a seal of quality. In exchange, countries would adhere to the international norms regulating the Internet and provide secure access to their respective country's domain names.

**Figure 14: Proposed ICANN Reform**



In terms of Figure 14, an organization like WIGO could strike a compromise between the UN and the US, which will not debate the power of governance without clear rules. WIGO would allow both parties to obtain part of what they are looking for. The US would retain some power in designing the system, while other developed and developing countries would have more say in the direction of the system. A well-thought proposal that considers the foremost needs of the Internet will have a greater chance of succeeding than individual attempts to overtake over the governance of the Internet. Furthermore, it

will generate a point of convergence for the diverse preferences of international stakeholders. Nonetheless, the success of such a proposal requires countries to realize that unorganized or individual attempts to regulate will not carry the day.

## **VIII. Conclusions**

The creation of ICANN was sought by the United States government to promote international cooperation in the governance of the Internet based on a bottom-up system in which government intervention was limited, if not eliminated. However, as the Internet has become a global phenomenon this initiative has faced important opposition from the international community. As we have shown in this work, the evolution of ICANN reveals how ICANN slowly departed from its mere technical role into a more political one, in which all groups and constituencies try to reach consensus about its policies. Furthermore, the mild success of ICANN in its first three years showed that a pure bottom-up model is unable to efficiently regulate the Internet. As the reform movement was initiated from inside ICANN, the different constituencies tried to exploit the situation by gaining power positions in the new structure. The initial proposal recognized a bigger role for international governments as a way to overcome structural deficiencies of a private institution. However, the political strength of different groups and constituencies within ICANN reversed some of the initial reforms and produced a totally new structure. Reform attempts from inside ICANN were complemented by reform attempts by the international community. These efforts concentrated on changing the main structure of ICANN into a multilateral organization controlled by international governments and

removing the direct control of ICANN from the United States government. In the end, even though the proposals seem to look for different structures to regulate domain names and numbers on the Internet, they represent a political struggle between opposite points of view.

Among the results of our analysis we can highlight the following: first, as a result of the reform process, the private sector consolidated its political position in the ICANN structure, at least in the short run. With the new Bylaws, the private sector could retain some of the power they had before and even gain more power. Among the winners of the reforms are: the GNSO constituencies, which gained important power spaces in the new design, ASO members, which had some gains, but more importantly, are still debating their future, possibly more expansive, relationship with ICANN, and the ccNSO, which were recognized as an independent Supporting Organization. The latter group will provide one of the few ways to cooperate with international organizations and governments. Nonetheless, the inside-out attempt to reform proved to be weak, because it failed to bring outside constituencies to the governance body and created opposition from the international community. Thus, Internet users are among the losers of the inside-out reform attempt because they lost the privilege to elect At-Large members by popular vote. The new Bylaws created a Nominating Committee, which undermined most of the original power Internet At-Large members had. PSO members lost more power than any other entity inside the ICANN organization. The PSO was eliminated and their members were transferred to the Technical Liaison Group (TLG) to serve mere advisory roles, with slight participation in selecting Board members. Even though, this group retained the

capacity to give technical advice to the Board, it does not have as much say on the definitive implementation of policies. By reinforcing CGA as an advisory institution inside all major corporate groups and constituencies, ICANN initiated a new relationship with its governments, which could positively effect future policy implementation. However, the stakeholders of ICANN, who resisted governmental intervention, rapidly watered down the active role for governments suggested in the first reform proposal.

The inside-out reform process allowed us to examine the political strength of its different groups. This process also showed how ICANN has become more of a political instrument, instead of a technical corporation. An indication of this is that most of the debate on the reform was based on how to divide the power inside ICANN, more specifically inside the Board of Directors, and how to maximize the capacity of each group to enforce their policies.

Second, our analysis shows how the inside-out reforms sought to enhance international cooperation. Creating a Supporting Organization for the ccNSO and the incentives for international governments to participate in a better CGA opened the ICANN gates to more extensive international participation in policymaking. However, the international community did not respond adequately to the reform and tried to generate its own model for Internet Governance.

The response of the International community to the regulatory regime of ICANN was the creation of a new organization with international ties and controlled by governments. This proposal, as summarized in the WGIG report, sought to overhaul ICANN and take away the United States direct control of ICANN and the management of

names and numbers on the Internet. As a result, we face a struggle between two different types of regulation, a bottom-up approach, with more participation from the private sector, and a top-down approach which intends to take Internet governance into the international arena.

As shown in this paper, Internet regulation has become a hot political issue, and the organizations in charge of managing the regulatory regime will reflect these political preferences. The effectiveness of any of these regulatory regimes will depend on how well the specific structure of power provides an opportunity for consensus. In the end, the reform and the political struggle behind it have unmasked the political nature of ICANN. As a result, its future will depend on the consensus of its constituents and on the struggle between state and private sectors. In this debate, the United States government is one of the only governments defending ICANN in its current structure, because of the contract that ties ICANN directly to the US Department of Commerce. On the other hand, the international community is pushing the United States to hand over its sole control of ICANN.

Given the tension between both parties, we believe that this transition could be pushed forward by the creation of a supranational entity in charge, not just of ICANN's responsibilities, but also of other areas related to the Internet, i.e., e-commerce, Internet security. We call this organization the World Internet Governance Organization (WIGO), managed by a board representing the developed countries and the technical groups with a stake in the Internet. This would entail an institution organized somewhere in between the unilateral regime represented by ICANN and the multilateral approach proposed by the

United Nations. WIGO would allow both parties to obtain part of what they are looking for. The US would retain some power in designing the system, while other developed and developing countries would have more say in the direction of the system. A well-thought proposal that considers the foremost needs of the Internet will have a greater chance of succeeding than individual attempts to overtake over the governance of the Internet. Furthermore, it will generate a point of convergence for the diverse preferences of international stakeholders. Nonetheless, the success of such a proposal requires countries to realize that unorganized or individual attempts to regulate will not carry the day.

## **Appendix**

The methodology for the construction of the Index for Distribution of Power is as follows:

First, we measured the influence of each constituency according to the old structure of ICANN (beginning of 2002). This influence is represented by the percentage of seats in the Board each constituency elects.

<b>Table A1: ICANN Political Distribution of Power (Old Bylaws)</b>			
<i>Constituency</i>	<i>Directors</i>	<i>Weight in the Board of Directors</i>	<i>Political Strength particular groups</i>
<b>At-Large Directors</b>	<b>9</b>	<b>47.4</b>	
<i>Not Elected</i>	<b>4</b>	<b>21.1</b>	
<i>Elected</i>	<b>5</b>	<b>26.3</b>	
Africa	1		5.26
North America	1		5.26
Europe	1		5.26
Latin America and Caribbean	1		5.26
Asian/Australia/Pacific Region	1		5.26
<b>DNSO</b>	<b>3</b>	<b>15.8</b>	
Business			2.26
Non Commercial			2.26
ccTLD Registries			2.26
gTLD Registries			2.26
Registrars			2.26
ISPs			2.26
Intellectual Property			2.26
<b>ASO</b>	<b>3</b>	<b>15.8</b>	
ARIN			3.95
RIPE NCC			3.95
APNIC			3.95
LACNIC			3.95
<b>PSO</b>	<b>3</b>	<b>15.8</b>	
IETF			3.95
W3C			3.95
ITU-T			3.95
ETSI			3.95
<b>Director</b>	<b>1</b>	<b>5.2</b>	<b>5.2</b>
<b>Total</b>	<b>19</b>	<b>100.0</b>	<b>100.0</b>

Second, we measured the same index after the reform. Accordingly, those groups that are favored by the reform would have more direct decision-making in the naming of Board members. It is important to mention that we considered the representation of each constituency in the Nominating Committee multiplied by the percentage of directors the Nominating Committee elects as further evidence of each constituency's direct influence on the Board of Directors.

**Table A2: New Regime**

	Directors	Weight in Board of Directors	Political Strength Particular Groups
<b>GNSO</b>	<b>2</b>	<b>13.33</b>	
Business			1.4
Non Commercial			1.4
gTLD Registries			2.81
Registrars			2.81
ISPs			1.4
Intellectual Property			1.4
ICANN Nominating Committee			2.1
<b>ASO</b>	<b>2</b>	<b>13.33</b>	
ARIN			3.325
RIPE NCC			3.325
APNIC			3.325
LACNIC			3.325
<b>CCNSO</b>	<b>2</b>	<b>13.33</b>	
<b>Director</b>	<b>1</b>	<b>6.7</b>	
<b>Nominating Committee</b>	<b>8</b>	<b>53.3</b>	
<i>At-Large Advisory Committee</i>			15.7
Africa			2.1
Latin America			2.1
North America			2.1
Asia/Aust/Pac			2.1
Europe			2.1
Nom Committee			5.2
<i>Business GNSO</i>			6.3
<i>gLTD Registry GNSO</i>			3.1
<i>Registrars GNSO</i>			3.1
<i>CCNSO</i>			3.1
<i>ISP GNSO</i>			3.1
<i>IP GNSO</i>			3.1
<i>ASO</i>			3.1
ARIN			0.7
RIPE NCC			0.7
APNIC			0.7
LACNIC			0.7
<i>Academic and others</i>			3.1
<i>Non Commercial GNSO</i>			3.1
<i>IETF</i>			3.1
<i>ICANN TLG</i>			3.1
W3C			0.7
ITU-T			0.7
ETSI			0.7
IAB			0.7
<b>Total</b>	<b>15</b>	<b>100.0</b>	<b>100.0</b>