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## Private Internet Governance

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# Private Internet Governance

Jay P. Kesan\*

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I. INTRODUCTION

The Internet has been growing at a frenetic pace in the last few years.<sup>1</sup> An increasing number of people are using the Internet for routine tasks such as communication, entertainment, work, and shopping. As a result, Internet markets have experienced vigorous growth as more consumers gain access to the Internet.<sup>2</sup> Despite the effect of the stock market shock experienced by many commercial websites, the importance of Internet markets is not expected to decline in the coming years.<sup>3</sup> Indeed, government statistics predict a rapid increase in the number of households logging onto cyberspace, contributing further to the growing importance of these markets.<sup>4</sup>

Since its origin, the main characteristic of the Internet has been its relatively unregulated character.<sup>5</sup> The Internet may be considered

1. Press Release, Computer Industry Almanac Inc., 625 Million Computers-in-use Year-end 2001 (July 15, 2001), available at <http://www.c-i-a.com/pr0701.htm> (last visited Oct. 5, 2003). "According to the Computer Industry Almanac there will be over 625 million computers-in-use by year-end 2001—up from 551.1 million computers-in-use at year-end 2000. The U.S. is projected to have over 182 million computers-in-use or 30.64% of the total in year 2000." *Id.*

2. See NAT'L TELECOMMS. AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION, at xv (Oct. 2000) [hereinafter DEP'T OF COMMERCE, FALLING THROUGH THE NET], available at <http://search.ntia.doc.gov/pdf/fttn00.pdf> (last visited Oct. 5, 2003). The growth in the Internet in the last few years has been remarkable. As a recent government survey concluded, "[t]he share of households with Internet access soared by 58% [since the last survey], rising from 26.2% in December 1998 to 41.5% in August 2000." *Id.* The survey goes on to state that "[m]ore than half of all households (51.0%) have computers, up from 42.1% in December 1998." *Id.*

3. See Robert D. Hof, *Why Tech Will Bloom Again*, BUSINESSWEEK ONLINE, Aug. 25, 2003, [http://www.businessweek.com/magazine/content/03\\_34/b3846605.htm](http://www.businessweek.com/magazine/content/03_34/b3846605.htm) ("[M]ore than 20 million U.S. homes have broadband connections. As fast Net access takes off, it will spark altogether new ways of using the Internet that w'ere just beginning to imagine today."); Greg Ip, *Though Nasdaq Was Massacred, Dow, S&P 500 Declines Missed Measuring Stick for Bear Market*, WALL ST. J., Jan. 2, 2001, at R1, R6, available at 2001 WL-WSJ 2849786 (explaining how the stock market behaved for Internet companies during the year 2000).

4. See DEP'T OF COMMERCE, FALLING THROUGH THE NET, *supra* note 2, at 89 (offering statistics on the projected growth of the Internet).

5. See Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 447 (2000) (book review). Professor Netanel comments on this characteristic:

In the eyes of its visionary pioneers, the Internet constituted a new kind of global

unregulated, in at least an everyday sense, when compared to entities in the real world.<sup>6</sup> As a result, many Internet users hope that it remains free from government intervention and that users develop their own rules to regulate behavior and actions in cyberspace.<sup>7</sup> Nevertheless, the growing importance of markets and commercial activities on the Internet has generated concern among many scholars, policymakers, and consumers who see the Internet as an environment that needs some regulation to improve its performance.<sup>8</sup> In addition, new forms of private Internet regulation have emerged, such as BBBOnline, PricewaterhouseCoopers' BetterWeb, and the Internet Corporation for Assigned Names and Numbers ("ICANN"). The debate about Internet governance mechanisms has begun to grow as fast as the Internet itself, and while the need for regulation is increasing, the strengths and weaknesses of the relevant regulatory regimes remain unclear in the absence of detailed, formal analysis.

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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."

*Id.*

6. 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 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, 1264–65 (2000) (providing an analysis of this type of regulation).

7. See WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 2 (July 1, 1997), available at <http://www.itmweb.com/essay541.htm> (last visited Oct. 27, 2003). The Clinton administration's report on establishing a global internet market supports this idea:

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.

*Id.*

8. Some authors note that particular Internet practices are already illegal. See, e.g., Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305, 1357 (2001) (arguing that "common information practices—collecting transactional information about consumers and selling it to others without the knowledge or consent of the affected consumers—violates both the FTC Act and state statutes").

In addition, several academics have contributed to the debate concerning government versus private regulation. See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000) [hereinafter Froomkin, *Wrong Turn*]; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000) [hereinafter Netanel, *Self-Governance*].

This Article analyzes the effectiveness and limitations of private entity regulation of electronic commerce. It concentrates on the regulation of e-commerce and the improvement of regulatory regimes on the Internet through attempts to increase the overall social welfare of both firms and consumers. My analysis relies on detailed case studies on the regulation of (a) online privacy rights by BBBOnline and (b) Internet domain names and addresses by ICANN. In putting together these case studies, I have relied exclusively on publicly available information.<sup>9</sup> I study the advantages and disadvantages of each regulatory regime and consider the problems faced by both types of institutions in efficiently managing a regulatory system.

I then demonstrate how government involvement could improve this system. I argue that the failure of these private, third party institutions (“TPIs”) to create a regulatory framework for the Internet is proof of the need for a carefully defined government role. Based on the insights from the case studies, I then define this role for government as one that is intended to solve problems in the self-regulatory approach by setting minimum baseline standards for regulatory issues such as online privacy, preventing the capture of private regulators through meaningful oversight, increasing the participation of firms in private regulatory initiatives, and also serving as the enforcer of last resort.

At the Conference, to provide a theoretical context to the case studies, I presented a larger project that includes a generalized model for an economic transaction on the Internet. In his commentary, Professor Froomkin argues that there are different markets that operate on the Internet: one market for commodities, another for services, another for markets and institutions, and still another for digitized data. Accordingly, he suggests that the analysis should be different for every one of these markets.<sup>10</sup>

I do not disagree with the fact that if we want to study any of these markets there are different factors and particular structures that need to be taken into account. However, the theoretical model presented at the Conference that Professor Froomkin refers to does not concentrate on any particular market but instead focuses on an economic transaction. This model, like many theoretical models in the economics literature, is not specific with respect to a given market but is general enough to have

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9. I do not address the constitutional due process and administrative law concerns that are implicated by the design and U.S. government oversight of private regulatory entities like ICANN.

10. A. Michael Froomkin, *Commentary: Time to Hug a Bureaucrat*, 35 LOY. U. CHI. L.J. 139, 142–43 (2003).

the particularities of many markets. In this model, one can consider any transaction that takes place on the Internet.

It follows that a given transaction has different characteristics beyond the particular structure of each market. These characteristics are specifically incorporated into the model, and if you take any example of any good, service or data exchanged on the Internet or in the real world, it will involve these characteristics. For example, if you want to buy some database software on the Internet, the result of the transaction will depend on the market structure (which appears to be the only factor that Professor Froomkin refers to), the definition and enforcement of property rights, government regulation, technology, transaction costs, informal and formal rules, and the like.

Accordingly, if you want to study a particular market, you will have to take into account the specific characteristics of that market. That does not mean that there is nothing insightful to be gained by examining a general model for any economic transaction in any market, either on the Internet or in the real world. These types of models that concentrate on a general framework of an economic transaction have been widely used in economics. A case study takes this general framework and then looks at the different characteristics of a specific market, such as the privacy rights market. In the same way, you can take any of the markets mentioned by Professor Froomkin and analyze them following the guidelines of a more general model.

Professor Froomkin focuses on the particularities of a given market, which are just part of the general framework that focuses on an economic transaction, and indeed, are what make it possible. For example, you will not be secure engaging in any transaction in any of the markets proposed by Professor Froomkin if there are not secure property rights for both parties. Accordingly, even if property rights enforcement can vary depending on a specific market on the Internet, it is nevertheless a general characteristic of any transaction, and it is possible to draw meaningful conclusions about the relationship between secure property rights and the possibility of engaging in economic transactions. Of course, in order to employ a general model to a specific market, we should consider a particular market, define its characteristics, and then determine how they affect the general conditions for market transactions.

The two case studies are not general enough to fully justify or explain the general model. But such a general model, which takes into account institutional factors, has been used to study diverse industries and markets. That is why a general model is constrained by the particular characteristics of the privacy market on the Internet. We can then

concentrate on one such market and derive policy implications from a general model. However, one cannot claim then that every market will exhibit the same result. Instead, the very same model can be applied in further studies of other Internet markets. On one hand, you do not need to evaluate every market to demonstrate that your theory is viable—that is why theories are falsifiable. In the Conference in Chicago, I proposed a theoretical framework and then applied it to the case of privacy rights and ICANN's Uniform Domain-Name Dispute-Resolution Policy ("UDRP"), and then showed that cooperation between the private sector and public sector is the best outcome from the social welfare standpoint (and yes, in agreement with Professor Froomkin, that may include hugging a bureaucrat who functions in a carefully defined role). Extending this work further to answer what might happen in other markets on the Internet can be studied with the same general setup, without necessarily reaching the same conclusions.

In his commentary, Professor Froomkin suggests that this Article may be depicting the Internet as a thing apart, a space of its own.<sup>11</sup> That is simply not the case. The general economic approach that I have described above is equally applicable to all markets, on the Internet and the real world. The Internet is not an arena that is *sui generis*, but it does have many characteristics that may qualitatively and quantitatively differentiate it from other markets or technologies, such as the telephone. Markets do work similarly on the Internet and in the physical world, but the Internet may render many government regulations less effective or useless for regulating electronic commerce. For example, in the tax context, consider the problem of how to tax Internet transactions without losing Internet companies to other tax friendly jurisdictions. This effect exists in real markets, but, given the global accessibility of the Internet, such an effect will tend to be multiplied.

In his commentary, Professor Froomkin relates the buying of a bonsai tree through the Internet as compared to buying it by phone.<sup>12</sup> Even if I assume that the two alternatives are the same, this result could be true only if one thinks of just the U.S. market and not international markets. If you can access foreign markets, then applicable regulations change, property rights may be defined differently, jurisdictions are different, norms change, market structure changes, and in the case of the Internet, all types of institutions and regulations for foreign trade are absent. You can buy a bonsai tree in the United States, and if you have any

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11. *Id.* at 144.

12. *Id.* at 148.

problems you can obtain redress through the courts. However, if you buy the bonsai tree from a firm in a foreign country, you may have problems getting similar redress for any loss from that transaction. In addition, jurisdictions are not well-established and the transaction costs involved are uncertain.

## II. CASE STUDIES: PRIVACY RIGHTS TPIs AND ICANN

This Part analyzes two examples in order to understand the effectiveness and limitations of private regulation of e-commerce. I then show how cooperation between the government and the private sector could improve this system. First, in Parts II.A and II.B, I consider the case of privacy-rights regulation within commercial transactions, one of the most important regulatory problems on the Internet.<sup>13</sup> Furthermore, its importance is based on the need to foster consumer trust of online commerce around the globe.<sup>14</sup> In this arena,

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13. FED. TRADE COMM'N, *PRIVACY ONLINE: A REPORT TO CONGRESS 3-4* (June 1998), available at <http://www.ftc.gov/reports/privacy3/priv-23a.pdf> (last visited Dec. 14, 2003). The Federal Trade Commission ("FTC") acknowledged this issue:

According to the results of a March 1998 *Business Week* survey, consumers not currently using the Internet ranked concerns about the privacy of their personal information and communications as the top reason they have stayed off the Internet. Clearly, consumers care deeply about the privacy and security of their personal information in the online environment and are looking for greater protections. These findings suggest that consumers will continue to distrust online companies and will remain wary of engaging in electronic commerce until meaningful and effective consumer privacy protections are implemented in the online marketplace.

*Id.* (referencing *Business Week/Harris Poll: Online Security*, BUS. WK., Mar. 16, 1998, at 1027). These findings are confirmed by other sources as well. Professor Schwartz noted the following:

Not surprisingly, Americans are highly concerned about who has access to their personal information in cyberspace and the kinds of decisions that are made about them with that information. A vigorous policy debate is now underway about the merits of different mechanisms for establishing privacy standards on the Internet. Despite the increasing involvement of government agencies and rising public concern, no easy solution is in sight because information privacy raises some of the most important and difficult regulatory issues for the Internet.

Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 WIS. L. REV. 743, 743-44.

14. FED. TRADE COMM'N, *supra* note 13, at 3. As the FTC recognized:

Surveys have shown that increasing numbers of consumers are concerned about how their personal information is used in the electronic marketplace. . . . [A] substantial number of online consumers would rather forego information or products available through the Web than provide a Web site personal information without knowing what the site's information practices are.

*Id.* One of the main reasons consumers do not use the Internet is the concern about privacy of their personal information. As Professor Benkler recognized:

With the rise of the Net, every move, whether part of a purchase or not, becomes a potential point of information collection, for every move entails a series of information exchanges between the source of the information and its user. All of these exchanges

the debate over top-down versus bottom-up regulation has been strong, and the emerging regulatory framework is one in which both government and private firms prefer self-regulation.<sup>15</sup> On one hand, private firms declare that they can regulate privacy rights effectively without government interference. As an example, groups of these firms have formed TPIs that offer to resolve disputes between consumers and firms registered with such institutions.<sup>16</sup> Governments and consumer groups view some of these private initiatives as indications that self-regulation can be effective on the Internet. At the same time, they also warn about some undesirable effects of a privately constructed regulatory system, such as inadequate attention to consumer privacy rights.<sup>17</sup>

Second, in Part II.C, I analyze the dispute resolution system implemented by ICANN. This institution has followed a policy of trying to incorporate private and government factors into the regulation of domain name disputes. As I show in Part II.C, ICANN continues to suffer from significant drawbacks that must be improved if it is to become an effective instrument of regulation. Finally, in Part II.D, I compare the performance of privacy rights TPIs and ICANN's UDRP.

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are in machine-readable form and they are all eminently capable of retransmission and resale to other users of a consumer's personal profile.

The result is the possibility of an online life that is more or less completely subject to surveillance by commercial companies.

Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1241 (2000).

15. See FED. TRADE COMM'N, *supra* note 13, at ii-iii (giving the U.S. government's point of view about the preeminence of the self-regulation approach for the Internet); DEP'T OF COMMERCE, LEADERSHIP FOR THE NEW MILLENNIUM: DELIVERING ON DIGITAL PROGRESS AND PROSPERITY, at v (2000) [hereinafter DEP'T OF COMMERCE, LEADERSHIP] (stating that the U.S. government has attempted to increase digital technology across America), available at <http://www.usembassy.it/pdf/other/ec2000.pdf> (last visited Dec. 14, 2003); BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC MARKETPLACE: LOOKING AHEAD, at iv (Sept. 2000) (stating that the U.S. government has attempted to increase digital technology across America), available at <http://www.ftc.gov/bcp/icmpw/lookingahead/electronicmopl.pdf> (last visited Dec. 14, 2003).

16. See, e.g., BBBONLINE, DISPUTE RESOLUTION PROCESS PROCEDURES, at <http://www.bbbonline.com/privacy/dr.pdf> (effective Feb. 11, 1999) [hereinafter BBBONLINE, DISPUTE PROCEDURES]; TRUSTE, TRUSTE WEB SITE PRIVACY SEAL PROGRAM WATCHDOG DISPUTE RESOLUTION AND APPEAL PROCESS, at [http://www.truste.com/users/compliance\\_doc.htm](http://www.truste.com/users/compliance_doc.htm) (last visited Sept. 29, 2003) [hereinafter TRUSTE, DISPUTE RESOLUTION PROGRAM].

17. See FED. TRADE COMM'N, *supra* note 13, at i-ii (noting that "the Commission's goal has been to encourage and facilitate effective self-regulation as the preferred approach to protecting consumer privacy online"). In the same report, the Commission also mentions that "industry association guidelines generally encourage members to provide notice of their information practices and some choice with respect thereto, but fail to provide for access and security or for enforcement mechanisms." *Id.* at ii.

### A. *Bottom-up or Top-down Regulation?*

The debate about the design of a regulatory system for online privacy on the Internet has been based on the existence of two opposite systems—a bottom-up or decentralized regime versus a top-down or government-managed one. To evaluate the differences and possibilities of both systems, I describe the advantages and disadvantages of each of them.

#### 1. Bottom-up Regulation

There are some clear advantages to a bottom-up system based on private institutional management, such as a TPI. First, self-regulation gives firms the correct incentives to define and develop their technologies and investments.<sup>18</sup> Avoiding rules about “how to do it” and simply providing specific objectives, then leaving each firm to decide how to carry them out, is better for the normal technological evolution and investments in the private sector. In the case of government intervention, firms are generally subject to excessive rules imposed by regulators who do not always account for technological and investment requirements of the particular industry.<sup>19</sup>

Second, private firms know private sector needs better than the government does and can design rules according to the possibilities of the market. Self-generated rules can enhance investments and technological development, instead of hurting these processes.<sup>20</sup> Third, the costs of implementing such a private system are lower than those of the traditional judicial system. As a result, cases can be resolved more

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18. Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1059–60 (2001). Litan provides an example:

The OnLine Privacy Alliance (OPA), a consortium of high-tech and “old economy” companies, agreed on a set of voluntary guidelines in 1998. The guidelines urged members to announce voluntarily their privacy policies—both on and off the Net—and to offer consumers a choice to opt out of having their information forwarded to third parties or used in any way other than that for which the data were originally collected. . . . Finally, there are a number of well-known services—such as TRUSTE and BBB OnLine—that will certify sites as having at least announced a privacy policy on the Net and will audit whether they adhere to those policies.

*Id.*

19. Niva Elkin-Koren & Eli M. Salzberger, *Law and Economics in Cyberspace*, 19 INT’L REV. L. & ECON. 553, 578 (1999) (“In Cyberspace, technologies are constantly changing the substance of a legal rule that may indeed affect technological development and vice versa.”).

20. See Paul A. David, *Understanding Digital Technology’s Evolution and the Path of Measured Productivity Growth: Present and Future in the Mirror of the Past*, in UNDERSTANDING THE DIGITAL ECONOMY: DATA, TOOLS, AND RESEARCH 49 (Erik Brynjolfsson & Brian Kahin eds., 2000) (providing an analysis on the evolution of technology on the Internet).

quickly and at lower cost in these private institutions than in the courts.<sup>21</sup>

Finally, an important reason for preferring self-regulation is that private firms are less concerned about disclosing information to a private TPI than to a government agency or a court. Since the government can use this information to pursue other cases against them, firms may be unwilling to give this type of information to the government and will be more comfortable with a private resolution mechanism. As a result, a TPI can avoid some of the information asymmetries by providing a more secure disclosure procedure than the courts do.<sup>22</sup>

There are also some important drawbacks to a TPI system. First, unlike government regulatory agencies, private firms lack real capacity to enforce rules.<sup>23</sup> Private institutions also lack the ability to obligate firms to participate in such a system. As a result, few firms participate.<sup>24</sup> Different firms can create different regulatory institutions,

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21. Professor Eric Posner takes a similar view in discussing the inherent limitations of traditional courts and governmental regulation. *See* ERIC A. POSNER, *LAW AND SOCIAL NORMS* 15 (2000). Posner elaborates on these limitations:

The government is a clumsy tool. Police officers, prosecutors, judges, and juries generally can obtain only a crude, third-hand account of events. Lawsuits are expensive. If the court system cannot distinguish cooperation from defection with any accuracy, and it is costly to use, people will not rely on it for ensuring cooperation. Indeed, most people do not know much about the law, do not allow what they do know about it to influence much in their relations with other people, and do not sue each other when they have disputes.

*Id.*

22. Private information is better protected by a TPI than a government agency or court. *See, e.g.,* BB<sup>B</sup>ONLINE, DISPUTE PROCEDURES, *supra* note 16, at 3–4 (explaining how a TPI manages a private firm's disclosed information).

23. *See* FED. TRADE COMM'N, *supra* note 13, at 16 (noting that "the absence of enforcement mechanisms significantly weakens the effectiveness of industry-promulgated guidelines as a self-regulatory tool").

24. *Id.* at ii–iii. The FTC report provides the following statistics:

The Commission's survey of over 1,400 Web sites reveals that industry's efforts to encourage voluntary adoption of the most basic fair information practice principle—notice—have fallen far short of what is needed to protect consumers. The Commission's survey shows that the vast majority of Web sites—upward of 85%—collect personal information from consumers. Few of the sites—only 14% . . . provide any notice with respect to their information practices, and fewer still—approximately 2%—provide notice by means of a comprehensive privacy policy. . . . The Commission's examination of industry guidelines and actual online practices reveals that effective industry self-regulation with respect to the online collection, use, and dissemination of personal information has not yet taken hold.

*Id.* In addition, according to new FTC surveys, "62% of commercial sites post privacy policies, compared to 2% in 1998." DEP'T OF COMMERCE, LEADERSHIP, *supra* note 15, at 39. Yet the

creating competition in the market for privacy regulation. This competition can have two main effects. On the one hand, it offers different kinds of protection for different needs. Individual consumer choice is limited, however, since individuals cannot choose the TPI and instead must accept the one offered by the specific website they enter. On the other hand, competition can decrease the level of privacy-rights protection, since firms could opt for those TPIs offering lower levels of regulation.<sup>25</sup>

Second, consumer groups are not participating actively in defining this system. Their lack of participation could indicate a business-friendly regulatory environment harmful to consumer concerns.<sup>26</sup> This issue also harms the system's legitimacy, as most participants in market transactions are left without a voice.<sup>27</sup>

Third, the jurisdiction of these private regulators is limited to the same area as the government that supports them. In theory, private regulators can solve any dispute on the Internet between, for example, a consumer in the United States and a firm in Brazil. Yet there is no power to obligate the foreign firm to accept the verdict, beyond expulsion from the TPI's private seal program or bad publicity. As a result, private regulators cannot overcome one of the government's main problems in implementing regulations.

Fourth, when contracting for privacy, information asymmetries favor firms over consumers on the Internet. Consumers are not completely aware of the different uses firms have for private information on the Internet. Furthermore, consumers may not know the many economic outcomes that this kind of contract could contain. As a result, privacy

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report also mentions that “[o]nly 20 percent of the surveyed sites had policies that satisfy all the generally accepted fair information principles.” *Id.*

25. See Schwartz, *supra* note 13, at 767 (“[T]he existence of competing privacy seal programs permits forum shopping by Websites that hope for weaker enforcement from one seal service rather than the other.”).

26. Benkler, *supra* note 14, at 1252. Benkler describes this concern:

Almost certainly, however, in the absence of regulation, the digitally networked environment will be significantly more subject to surveillance than the analog environment—because it can be, and because the constraints will only be placed to reach a level just below the threshold of consumer rebellion, but no lower. Consumers will therefore likely be exposed to information chosen by vendors who guess what a user will want to see, based on past purchases reflected in a user profile.

*Id.*

27. Cf. Edith Brown Weiss, *The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?*, 69 *FORDHAM L. REV.* 345, 368–70 (2000) (indicating a need for common normative values in a community).

contracts may be biased toward firms, the parties with greater information.<sup>28</sup>

Finally, private firms have no incentives to provide good privacy protection, since they can profit from lax rules. Consequently, the self-regulatory framework will be biased toward industry participants.<sup>29</sup> This implies that the TPI could be easily taken over by some private interests, and it could start constructing rules favoring those groups.<sup>30</sup>

## 2. Top-down Regulation

Top-down government regulation also has its advantages and disadvantages. Unlike private regulatory entities, the government can obligate firms and consumers to fulfill the rules imposed.<sup>31</sup> In this case, government has the power to overcome the collective action problem and to coordinate different interests into a single system.<sup>32</sup>

Second, it is easier for the government than it is for private firms to coordinate regulatory norms on the Internet. The government has an advantage relative to private agencies in cooperating globally.<sup>33</sup> Most

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28. See Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 822 (2000) (“[W]idespread information asymmetries exist regarding personal data processing and, as a result, most visitors to Websites lack essential knowledge.”).

29. See Schwartz, *supra* note 13, at 768. Schwartz describes the extent of this bias:

Scholarship in behavioral economics has demonstrated that consumers’ general inertia towards default terms is a strong and pervasive limitation on free choice. . . . Specifically, in the current privacy market, this move will benefit the parties who process and share our information and not those who help us place limits on this processing. As a result of this current power dynamic, individuals faced with standardized terms and expected to fend for themselves with privacy-property and available technology are likely to accept whatever data processors offer them.

*Id.*

30. Schwartz, *supra* note 28, at 847 (noting that “most privacy self-regulation thus far has led to online industry drafting weak standards that ratify the current status quo or even weaken it”).

31. See Mike Hatch, *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, 27 WM. MITCHELL L. REV. 1457, 1501 (2001). Hatch displays an urgency for this kind of action: “There is an immediate need to enact privacy laws governing the use of personal information such as bank and telephone records. . . . Neither existing laws nor self-regulatory efforts are adequate to protect consumer privacy in the information age. The lack of protection undermines an individual’s right to privacy and choice.” *Id.* at 1501.

32. Schwartz, *supra* note 28, at 817 (“Indeed, the State, as part of its development of privacy standards for the Internet, is not a force that invariably opposes the market or social norms, but is capable of playing an important and positive role in helping to form both.”).

33. See Weiss, *supra* note 27, at 368. Professor Weiss notes the difficulty of the government’s position as well:

International law will face an unusually heavy challenge in the decades ahead—to provide the norms that connect the many parts of our global society. Political theory

of the attempts to converge to a common set of rules on the Internet have come from government initiatives.<sup>34</sup> This is important given that in many countries, such as European Union (“EU”) member states, there is no self-regulatory framework and the government imposes the rules. Even under a bottom-up approach, the government’s definition of rights is a point of reference for the private sector. Private firms in charge of regulation may base their rules and mechanisms on governmental developments. As a result, the government is needed to help define the system.<sup>35</sup>

Finally, the government is the point at which all social demands for regulation converge, where social consensus arises. Given this characteristic, many groups not represented on the Internet, but affected by it, can influence the government by communicating their preferences. If the Internet is completely regulated by private firms that also operate on it, the system will lack some components from other social groups. Including the government in designing a regulatory framework increases consumer participation and the resulting system’s legitimacy.

On the negative side, the government’s enforcement power on the Internet is weak.<sup>36</sup> But private firms are even weaker in this respect. Thus, the only chance of implementing an enforceable regulatory framework is through cooperation between the government and the

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tells us that viable communities need shared values, either globally or locally. Communities need to feel that they are linked to each other.

*Id.*

34. See, e.g., DEP’T OF COMMERCE, LEADERSHIP, *supra* note 15, at 39. The study notes the interest and importance of the government in this process: “In December 1999, the Federal Trade Commission . . . and other U.S. agencies, working closely with industry and consumer advocates, participated in the OECD’s effort to produce guidelines for consumer protection online . . . .” *Id.* at 37. “The FTC has gained redress for thousands of consumers in 68 foreign countries.” *Id.* at 39. “[T]he United States and the European Commission have completed the safe harbor privacy accord, which helps to ensure that trans-Atlantic data flows will not be interrupted.” *Id.* at 40.

35. Netanel, *Self-Governance*, *supra* note 8, at 476. Professor Netanel finds as follows:

Far from its promise of Pareto optimality, the proffered combination of self-regulation and market forces would likely fail adequately to protect data privacy. Industry self regulation, a group’s regulation of its members’ practices with the goal of reducing harmful externalities to outsiders, is notoriously inadequate to its task. . . . [S]uch self-regulation can only work under conditions of stringent government oversight.

*Id.*

36. See Denis T. Rice, *Jurisdiction in Cyberspace: Which Law and Forum Apply to Securities Transactions on the Internet?*, 21 U. PA. J. INT’L ECON. L. 585, 595 (2000) (“The basic principles of jurisdiction are essentially geographically-based. As a result, jurisdictional principles are difficult to apply to the Internet, which is a largely boundless medium.”).

private sector.<sup>37</sup> Second, the cost of operating a public court system is more expensive than the private alternatives. This is in part because most courts are based on real-life situations and are not appropriate for the fast environment of the Internet. This could change, however, as the government adapts to the new environment.

Third, information transferred from firms to the government in the process of regulating online privacy can expose the firms to additional liability. Finally, the government does not know the exact technological capacities of the firms it is regulating.<sup>38</sup> As a result, very strict regulations can hurt new technological developments and investment in a rapidly changing environment.<sup>39</sup>

Both systems have important faults that make it almost impossible to think of implementing a pure bottom-up or top-down regulatory framework for privacy rights on the Internet. Instead, I suggest that cooperation between the government and the private sector, exploiting the advantages that each system offers, can help construct a better regulatory system that overcomes some or all of the problems explained above. Particularly in the United States, the government is inclined to support private self-regulation instead of top-down regulation, but it is timidly cooperating with those institutions that resolve claims regarding privacy rights. A more active and well-defined role for the government could enhance this regulatory framework and foster consumer confidence in Internet commerce. Furthermore, it is important to cooperate with other governments in order to converge to a unique set

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37. See Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2061–62 (2000) (proposing government cooperation with the private sector for Internet regulation); Schwartz, *supra* note 25, at 858 (mentioning the importance of self-regulation, but also noting the need for state intervention on some issues).

38. See John C. Beck, *Get a Grip! Regulating Cyberspace Won't Be Easy*, 10 BUS. L. TODAY 14, 16 (2001). Beck outlines the three government arguments that self regulation is self defeating:

First, they contend that by the time that deliberative and legislative bodies like the U.S. Congress investigate, debate, vote and implement regulatory rules for a particular technology, that technology has been superseded.

Second, they argue that efforts to reign in technology and its applications will only squelch progress and force firms to take their innovations, jobs and revenues to less-regulated shores.

Third, they predict that attempts to control or constrain burgeoning Net technologies only prompt developers and users to seek out new applications and network solutions even more difficult to regulate or trace back to a single source.

*Id.*

39. CLINTON & GORE, *supra* note 7, at 3 (noting that “government attempts to regulate are likely to be outmoded by the time they are finally enacted, especially to the extent such regulations are technology-specific”).

of rules for the Internet.<sup>40</sup> I suggest that government cooperation with TPIs can help define a better regulatory system for protecting privacy rights on the Internet, since the government and the private sector can complement each other and create a regulatory regime that results in higher net social welfare than the current one.

### B. Privacy Rights TPIs in Practice

TPIs can design privacy regulations and dispute resolution rules and produce verdicts that are accepted by consumers as well as firms. Nowadays, there are a number of these institutions. Some of the most important ones are BBBOnLine, TRUSTe, and PricewaterhouseCoopers' BetterWeb Program.<sup>41</sup> All of them have constructed regulatory systems and are actually resolving consumer complaints.<sup>42</sup> Their main goal is to generate a minimum set of rules that will avoid government intervention.<sup>43</sup> As my analysis shows,

40. Clinton and Gore found that "[i]n some areas, government agreements may prove necessary to facilitate electronic commerce and protect consumers. In these cases, governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation." *Id.* at 3-4. This government support had declined as the FTC recently changed its point of view about government regulation. As Litan notes, "[t]he poor compliance figures appear to have motivated the FTC in the summer of 2000 to request that Congress provide the agency with the legal authority to issue rules mandating a set of requirements relating to the collection and dissemination of personal information acquired from users of the Net." Litan, *supra* note 18, at 1061.

41. DEP'T OF COMMERCE, LEADERSHIP, *supra* note 15, at 36 ("The Administration sees the BBBOnLine Reliability Program as a model for voluntary actions that can promote consumer confidence in online transactions.").

42. See FED. TRADE COMM'N, *supra* note 13, at 10. According to the FTC:

To be effective, self-regulatory regimes should include both mechanisms to ensure compliance (enforcement) and appropriate means of recourse by injured parties (redress). Mechanisms to ensure compliance include making acceptance of and compliance with a code of fair information practices a condition of membership in an industry association; external audits to verify compliance; and certification of entities that have adopted and comply with the code at issue.

*Id.* at 10.

43. BBBOnline states: "The mission of the Reliability seal program is to help web users find reliable, trustworthy, businesses online, and to help reliable businesses identify themselves as such, via voluntary self-regulatory programs. The BBBOnLine Reliability Seal supports the growth and development of safe and secure e-commerce." BBBONLINE, FREQUENTLY ASKED QUESTIONS, at <http://www.bbbonline.org/reliability/answer.asp#> (last visited Sept. 28, 2003). A few months earlier, BBBOnLine claimed, "Our mission is to help web users find reliable, trustworthy business online, and to help reliable businesses identify themselves as such, all via voluntary self-regulatory programs that help avoid government regulation of the Internet." BBBONLINE, ABOUT THE RELIABILITY PROGRAM, at <http://www.bbbonline.org/reliability/index.asp> (last visited July 18, 2003). The language about avoiding government regulation of the Internet has now been removed.

however, this is not true, since cooperation with the government can actually enhance their regulatory systems.

### 1. Procedure and Enforcement

BBBOnLine has established a three-stage dispute resolution process. In the first phase, the TPI analyzes the complaint and decides if it is worth taking. Accepted complaints are sent to the Privacy Policy Review Service (“PPRS”). In the second phase, the PPRS asks both parties, the firm and the consumer, to reveal their cases and then renders a verdict. If both parties accept the verdict, the case is closed. If one of the parties objects to the verdict, the complaint proceeds to the Privacy Review Appeals Board (“PRAB”). In this third phase, the PRAB reviews the case and rules; its decision cannot be appealed. Participating firms are subject to control of their privacy policies, and they must adhere to BBBOnLine’s verdicts. BBBOnLine’s lack of enforcement power is obvious given the fact that the last recourse against any disobedience by participating firms is to refer the matter to the government.<sup>44</sup> Government agencies and the courts are the enforcers of last resort that BBBOnLine can rely on to regulate the participating firms, implying that BBBOnLine needs government intervention to sustain its regulatory procedures.

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TRUSTe states:

TRUSTe is an independent, non-profit privacy organization whose mission is to build users’ trust and confidence on the Internet and, in doing so, accelerate growth of the Internet industry. Through extensive consumer and Web site research and the support and guidance from many established companies and industry experts, TRUSTe has earned a reputation as the leader in promoting privacy policy disclosure, informed user consent, and consumer education. . . . The TRUSTe privacy program—based on a branded online seal, the TRUSTe “trustmark”—bridges the gap between users’ concerns over privacy and Web sites’ desire for self-regulated information disclosure standards.

TRUSTE, FREQUENTLY ASKED QUESTIONS, at [http://www.truste.com/about/truste/about\\_faqs.html](http://www.truste.com/about/truste/about_faqs.html) (last visited Sept. 28, 2003). Some time ago, TRUSTe claimed:

Our goal is to provide: [o]nline consumers with control over their personal information; Web publishers with a standardized, cost-effective solution for both satisfying the business model of their site and addressing consumers’ anxiety over sharing personal information online; [and] [g]overnment regulators with demonstrable evidence that the industry can successfully self-regulate.

TRUSTE, DISPUTE RESOLUTION PROGRAM, *supra* note 16. Now the statement about demonstrating to the government that the industry can self-regulate has been removed.

44. See Stephen R. Bergerson, *E-commerce Privacy and the Black Hole of Cyberspace*, 27 WM. MITCHELL L. REV. 1527, 1545 (2001) (“Because of anti-trust constraints, industry cannot discipline or punish those who do not abide by these voluntary codes or guidelines. Consequently, industry is limited to using ‘moral suasion’ and implicit peer pressure to encourage compliance and its effectiveness varies from industry to industry and over time.”).

TRUSTe also relies on the courts and government agencies in case firms do not want to accept the solution proposed. TRUSTe states, “the company must comply with TRUSTe’s final determination or face removal from the TRUSTe program, breach of contract legal proceeding, and/or referral to the appropriate governing body.”<sup>45</sup> It is clear, then, that this so-called “private self-regulation” is not completely as described, since its rules and procedures are defined according to pre-existent or possible government rules and institutions.<sup>46</sup> This is where coordination between the government and institutions like BBBOnline is important, since both entities need each other in order for the system to work.

## 2. Number of Firms Participating

Another aspect of the private system is the lack of firms participating in the program. BBBOnline has 9,491 firms on the Reliability Seal but only 798 on the Privacy Seal;<sup>47</sup> PricewaterhouseCoopers has just 27 associated firms; and TRUSTe has 1,576 member firms. These numbers are far from spectacular, since most of the firms operating on the Internet do not adhere to any of these programs.<sup>48</sup> Again, the only

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45. TRUSTe, DISPUTE RESOLUTION PROGRAM, *supra* note 16.

46. See Elkin-Koren & Salzberger, *supra* note 16, at 565–67. Elkin-Koren illustrates this point:

Proponents of private ordering for regulating access to information assume that the state will provide the means for enforcing the privately generated norms. Post and Johnson hold that “the prospect of governing the Internet via decentralized, emergent decision-making does not imply that the use of force by the government would be irrelevant, but only that it would be deployed in the service of rules made predominantly by private actors.” . . . The territorial governments are called to function as enforcement agencies for rules that they, and their citizenry, had no say in adopting and that may contradict the public interest.

Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155, 1165 (1998) (citation omitted).

47. These numbers correspond to March 2001, but by June 2001 the number of firms under the reliability program increased to more than 10,000, while the privacy program had more than 850 participants. Press Release, BBBOnline, Third Party Assurance Boosts Online Purchasing; BBBOnline Privacy, Reliability Seals Increase Consumer Confidence; Privacy Remains Public’s Chief Concern (Oct. 17, 2001), available at [www.bbbonline.org/about/press/2001/101701.asp](http://www.bbbonline.org/about/press/2001/101701.asp) (last visited Sept. 29, 2003).

48. Bergerson, *supra* note 44, at 1543. Bergerson states:

[I]ndustry’s self-regulatory momentum stalled. A year later, the FTC’s 2000 survey revealed that only 20% of Web sites had implemented the principles of notice, choice, access and security. Only 41% of Websites posted “opt out” information.

While new self-regulatory “seal” programs . . . were noted as “significant accomplishments,” only “8% of heavily trafficked Websites display(ed) a seal from one of them.” Citing industry’s failure to meet “the meaningful broad-based privacy protections the Commission was seeking and that consumers want,” the FTC concluded that, “industry efforts alone have not been sufficient to properly protect

institution with enough power to overcome this problem is the government, which can require obligation in any system or provide an alternative public system of conflict resolution. As long as the system is merely voluntary for firms and the government does not take further action, the majority of firms will refrain from engaging in some of these procedures, given the lack of incentives to do so.

### 3. International Cooperation

This lack of enforcement is not limited to the capacity of TPIs to enforce their rules, it is also related to the possibility of enforcing their rules beyond the government's jurisdictional limits. *BBBOnLine* and *TRUSTe* are incapable of offering their services to firms outside the United States and Canada. This limitation arises from the fact that they rely on the U.S. government as a last-resort enforcer of their rules. Their expansion depends on the cooperation of the U.S. government with other governments. Given the characteristics of these institutions, cooperation is expected from the U.S. government. For example, the agreement that the U.S. government reached with the EU in creating a safe-harbor policy helps TPIs solve some of their jurisdictional problems.<sup>49</sup> Given the EU's top-down system, it would be unimaginable for a private institution to resolve such jurisdictional issues without government intervention.<sup>50</sup>

### 4. Consumer Participation

Consumers are not participating widely in the private regulatory process. For example, *BBBOnLine* declares that a consumer representative should be part of a panel that intervenes in appeals.<sup>51</sup> A *BBBOnLine* appellate panel consists of a representative of a member company, an expert on World Wide Web designs and data management, and finally, a consumer representative. But this says nothing about

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privacy rights." The Report gave Congress the signal it needed to start privacy legislation bandwagon.

*Id.* (citations omitted).

49. See Marcia Howe Adams, *Regulating the Net: Online Privacy and Advertising*, 631 PRACTISING L. INST. PAT. COPYRIGHT TRADEMARK & LITERARY PROP. COURSE HANDBOOK SERIES 1031, 1034-39 (2001) (providing a description of U.S. and EU legislation and safe harbor principles).

50. See *BBBONLINE*, *BBBONLINE* JAPANESE PRIVACY SEAL, at <http://www.bbbonline.com/Privacy/jipdec.asp> (last visited July 18, 2003) (providing an example of international cooperation between TPIs and an agreement implemented by *BBBOnLine* and a Japanese TPI).

51. *BBBONLINE*, DISPUTE PROCEDURES, *supra* note 16, at 13.

which consumer institutions or groups will participate in the process.<sup>52</sup> This omission permits firms to choose a consumer representative they like.

Accordingly, the government should step in as a last resource in those cases in which the parties do not accept the TPI's decision, increasing the cost of defecting from the regulatory system and promoting firm participation without resorting to higher costs of control. Second, the government should also oversee the TPI institution to prevent agency capture by economic interests of private firms that harms consumer interests. Government oversight can ensure that a TPI's policies address both consumers' and firms' concerns. Government involvement will also help to coordinate similar actions with other governments that, in turn, can help create a converging system for privacy protection on the Internet.

From my previous analysis, it is easy to see that the actual functioning of private TPIs is not optimal. There are many problems with the implementation of such a self-regulatory system that make for a weak regulatory framework for privacy rights in Internet markets. Government intervention can improve this regulatory system by cooperating in the design and enforcement of the substantive rules. This intervention, given that it is moderated by the existence of private institutions such as TPIs, could actually foster consumer confidence and improve market functioning on the Internet.

In his commentary, when Professor Froomkin offers his lucid description of how firms choose a private regulator, mentioning costs  $C$  and  $C^*$  and  $N$  identical firms,<sup>53</sup> I am not certain if he is explaining my thinking or arguing against it. If it is the second, then I am concerned. I agree that private firms will offer the minimum amount of privacy protection in order to make consumers indifferent between engaging in a market transaction or not doing so (Professor Froomkin's third alternative). In this circumstance, the government can collaborate with the private sector by elevating the level and number of privacy rights. However, I warn off against excessive government regulation that could harm private investment and create incentives for private firms to defect by trying to avoid government regulation through the use of their superior technological knowledge. This is the essence of the private-public cooperation that this Article leads to. In short, we appear to be saying the same thing, but I hope to offer a better solution by enhancing

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52. *See id.*

53. Froomkin, *Commentary*, *supra* note 10, at 146–47.

government participation without creating incentives for the private sector to defect.

### C. Performance of the ICANN Dispute Resolution System

ICANN manages IP address space allocation, protocol parameter assignment, domain name system, and root server system functions on the Internet.<sup>54</sup> It is a non-profit organization supported by many governments, but primarily the U.S. government promoted its creation in 1998.<sup>55</sup> Among its different activities, the management of the domain-name system has proved to be a delicate area in which property and trademark rights from the real world collide with the unregulated nature of the Internet.<sup>56</sup> When local courts could not adequately handle domain-name disputes,<sup>57</sup> a need for an arbitration mechanism arose.<sup>58</sup>

54. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, ABOUT ICANN, at <http://www.icann.org/general/abouticann.htm> (last modified Sept. 18, 2003) [hereinafter ICANN, ABOUT ICANN]. See generally Edward C. Anderson & Timothy S. Cole, *The UDRP—A Model for Dispute Resolution in E-Commerce?*, 6 J. SMALL & EMERGING BUS. L. 235 (2002) (discussing the history and development of the UDRP); A. Michael Froomkin, *Habermas@discourse.net: Toward A Critical Theory Of Cyberspace*, 116 HARV. L. REV. 749 (2003) (discussing the history and development of ICANN); Froomkin, *Wrong Turn*, *supra* note 8 (discussing the history and development of ICANN).

55. ICANN, ABOUT ICANN, *supra* note 50.

Prior to the formation of ICANN, administration of the authoritative list ultimately linking particular names and numbers (Internet Protocol (IP) addresses) to specific computers was the responsibility of various departments of the U.S. government and, later, Network Solutions Inc. (NSI), a for profit corporation operating under contract with the U.S. Department of Commerce. . . . Objections to the monopoly over registration services held by NSI (and the U.S. government) led in 1998 to the creation of ICANN and in particular ICANN's capacity to authorize multiple registrars to compete over registration services.

Gillian K. Hadfield, *Privatizing Commercial Law: Lessons from ICANN*, 6 J. SMALL & EMERGING BUS. L. 257, 259–60 (2002).

Many critics have said that ICANN received important power from the U.S. government, which should be reserved for the government instead of a private institution. See, e.g., Froomkin, *Wrong Turn*, *supra* note 8, at 132–33, 141–43 (claiming that the creation of ICANN is inconsistent with both the Constitution and the Administrative Procedures Act). However, this is a highly debatable topic, as evidenced by Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1 (2002).

56. See *infra* Parts III–IV (describing the problems of Internet regulation).

57. See Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275 (2002) (analyzing the problems courts have in dealing with Internet-related issues); *infra* Parts III–IV (analyzing the problems local laws and courts face with the Internet).

58. See Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 155–56 (2001).

Reconciling the competing interests of trademark owners and domain name registrars has not proved an easy task, either nationally or internationally. The territorial nature of trademark rights, the lack of a single body of rules governing trademark-domain

Many private actors with interests in the creation of such a system and with influence over ICANN policymaking, together with other public organizations such as the World Intellectual Property Organization (“WIPO”), promoted the creation of a dispute resolution mechanism for domain-name disputes.<sup>59</sup> Consequently, in 1999, ICANN created the UDRP.<sup>60</sup> Under this policy, ICANN authorized a number of private TPIs to evaluate disputes between Internet users regarding domain-name rights.<sup>61</sup> ICANN then designed a series of dispute resolution procedures, leaving TPIs to add their own complementary rules.<sup>62</sup>

ICANN and its UDRP have received mixed reviews.<sup>63</sup> Professor

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name disputes, the difficulty of locating registrants, and the possibility that different domain name registrants own multiple iterations of a preexisting mark all make the prospect of litigating before national courts protracted, expensive and perhaps even futile. Not surprisingly, trademark owners have expressed interest in streamlined and inexpensive non-national dispute settlement alternatives, particularly for disputes with a class of domain name registrants known as cybersquatters.

*Id.*

59. WIPO produced a report for ICANN detailing the necessity of creating a dispute resolution system and proposing the specific characteristics of such a system. See ICANN, TIMELINE FOR THE FORMULATION AND IMPLEMENTATION OF THE UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY, at <http://www.icann.org/udrp/udrp-schedule.htm> (last updated Feb. 5, 2002) [hereinafter ICANN, TIMELINE] (describing the timetable of creation of the UDRP with links to the WIPO initiative); see also Helfer & Dinwoodie, *supra* note 58, at 171–79 (describing the proposal of WIPO and the reforms introduced by ICANN when implementing the system).

60. See Helfer & Dinwoodie, *supra* note 58, at 178–79 (describing the creation of the UDRP); see also ICANN, TIMELINE, *supra* note 59 (giving a chronology of UDRP’s implementation).

61. The approved providers are: WIPO, as of December 1, 1999; The National Arbitration Forum (“NAF”), as of December 23, 1999; eResolutions (“eRes”), as of January 1, 2000 (but terminated effective November 30, 2001); CPR Institute for Dispute Resolution (“CPR”), as of May 22, 2000; and Asian Domain Name Dispute Resolution Centre (“ADNDRC”), as of February 28, 2002. ICANN, APPROVED PROVIDERS FOR UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY, at <http://www.icann.org/dndr/udrp/approved-providers.htm> (last updated Mar. 1, 2002) [hereinafter ICANN, APPROVED PROVIDERS].

62. The two main instruments that regulate the system are the UDRP and the Rules for the Uniform Domain-Name Dispute-Resolution Policy. See ICANN, UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY, GENERAL INFORMATION, at <http://www.icann.org/udrp/> (last updated Feb. 5, 2002) [hereinafter ICANN, UDRP GENERAL INFORMATION] (introducing the UDRP as well as the Rules for the Uniform Domain-Name Dispute-Resolution Policy and providing links to each). Both documents were approved on October 24, 1999. ICANN, TIMELINE, *supra* note 59. Each provider can produce its own rules in those areas not regulated by the policy. ICANN, RULES FOR UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY, at <http://www.icann.org/dndr/udrp/uniform-rules.htm> (Oct. 24, 1999) [hereinafter ICANN, RULES FOR UDRP].

63. There is a wide range of criticism and some support of the UDRP by ICANN. For criticism, see MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002) [hereinafter MUELLER, RULING THE ROOT]; MILTON MUELLER, SUCCESS BY DEFAULT: A NEW PROFILE OF DOMAIN NAME TRADEMARK DISPUTES UNDER ICANN’S UDRP (Syracuse Univ. Sch. of Info. Studies, Working Paper, 2002), available at <http://dcc.syr.edu/markle/markle-report-final.pdf>; Wayde Brooks, *Wrestling over the World Wide*

Web: ICANN's Uniform Dispute Resolution Policy for Domain Name Disputes, 22 HAMLINE J. PUB. L. & POL'Y 297 (2001); A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93 (2002) [hereinafter Froomkin, *Form and Substance*]; A. Michael Froomkin, ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures, 67 BROOK. L. REV. 605 (2002) [hereinafter Froomkin, ICANN'S "UDRP"]; Froomkin, *Wrong Turn*, *supra* note 8; Kathleen E. Fuller, ICANN: *The Debate over Governing the Internet*, 2001 DUKE L. & TECH. REV. 0002, at <http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html>; Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903 (2002); Adam Goldstein, ICANNSUCKS.BIZ (*And Why You Can't Say That*): *How Fair Use of Trademarks in Domain Names is Being Restrained*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1151 (2002); Hadfield, *supra* note 55; Helfer & Dinwoodie, *supra* note 58; Holger P. Hestermeyer, *The Invalidity of ICANN's UDRP Under National Law*, 3 MINN. INTELL. PROP. REV. 1 (2002); Stacy H. King, *The "Law That It Deems Applicable": ICANN Dispute Resolution, and the Problem of Cybersquatting*, 22 HASTINGS COMM. & ENT. L.J. 453 (2000); Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. SMALL & EMERGING BUS. L. 149 (2000); Pamela Segal, *Attempts to Solve the UDRP's Trademark Holder Bias: A Problem That Remains Unsolved Despite the Introduction of New Top Level Domain Names*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 1 (2001), at <http://www.cardozoicr.com/vol3no1/notes02.html>; 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); Elizabeth G. Thornburg, *Fast, Cheap and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191 (2002); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (October 2000); Neil Batavia, Comment, *That Which We Call a Domain by Any Other Name Would Smell as Sweet: The Overbroad Protection of Trademark Law as It Applies to Domain Names on the Internet*, 53 S.C. L. REV. 461 (2002); Keith Blackman, Note, *The Uniform Domain Name Dispute Resolution Policy: A Cheaper Way to Hijack Domain Names and Suppress Critics*, 15 HARV. J.L. & TECH. 211 (2001); Scott Hejny, Comment, *Opening the Door to Controversy: How Recent ICANN Decisions Have Muddied the Waters of Domain Name Dispute Resolution*, 38 HOUS. L. REV. 1037 (2001).

For articles that are generally supportive of the UDRP, see Brunet, *supra* note 55; Patrick D. Kelley, *Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution Policy*, 17 BERKELEY TECH. L.J. 181 (2002); Joe Sims & Cynthia L. Bauerly, *A Reply to Professor Froomkin's Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 125 (Spring 2002) [hereinafter Sims & Bauerly, *A Reply*]; Joe Sims & Cynthia L. Bauerly, *A Response to Professor Froomkin: Why ICANN Does Not Violate The APA or The Constitution*, 6 J. SMALL & EMERGING BUS. L. 65 (2002) [hereinafter Sims & Bauerly, *A Response*]; Stephen J. Ware, *Domain Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP*, 6 J. SMALL & EMERGING BUS. L. 129 (2002); Leah Phillips Falzone, Comment, *Playing The Hollywood Name Game in Cyberspace: The Battle over Domain Names in the Age of Celebrity-Squatting*, 21 LOY. L.A. ENT. L. REV. 289 (2001); Christopher P. Rains, Comment, *A Domain by Any Other Name: Forging International Solutions for the Governance of Internet Domain Names*, 14 EMORY INT'L L. REV. 355 (2000); Lisa M. Sharrock, Note, *The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions from Within the UDRP Framework*, 51 DUKE L.J. 817 (2001).

For articles that outline the UDRP decision-making process generally, see Olivia Maria Baratta & Dana L. Hanaman, *A Global Update on the Domain Name System and the Law: Alternative Dispute Resolution for Increasing Internet Competition—Oh, the Times They Are A-Changin'!*, 8 TUL. J. INT'L & COMP. L. 325 (2000); David H. Bernstein, *The Alphabet Soup of Domain Name Dispute Resolution: The UDRP and ACPA*, 716 PRACTICING L. INST. PAT. COPYRIGHT TRADEMARK & LITERARY PROP. COURSE HANDBOOK SERIES 251 (2002); Jeffrey J. Look, *Law and Order on the Wild, Wild West (WWW)*, 24 U. ARK. LITTLE ROCK L. REV. 817 (2002); David

Froomkin, one of the most thoughtful critics of ICANN and one of the founding editors of <http://www.icannwatch.org>, persuasively demonstrates that the Department of Commerce's actions in forming ICANN and granting it broad authority to govern Internet addresses violated the Administrative Procedures Act ("APA") and also possibly ran afoul of the constitutional non-delegation doctrine.<sup>64</sup> Professor Froomkin finds a system in which ICANN simply regulates domain names in a manner that favors trademark owners and ICANN insiders, without any concerns for fundamental due process considerations.<sup>65</sup> Along similar lines, Milton Mueller, one of the foremost scholars of the domain name system and ICANN, urges that the U.S. government abdicated its responsibility to define the scope of the rights and assets that were transferred to ICANN. According to Mueller, ICANN lacks the accountability and representation of a private sector organization but possesses the monopoly power and legislative authority of a governmental entity.<sup>66</sup>

ICANN's specific UDRP policies do not fare much better. Elizabeth Thornburg finds that the UDRP is fundamentally flawed and unfair and highlights the need for government intervention to improve its functioning.<sup>67</sup> Michael Geist provides persuasive evidence that forum shopping is a key aspect of the UDRP and that the whole system is biased toward trademark holders.<sup>68</sup>

### 1. Procedure and Enforcement

The general procedure for considering complaints is competitive and one in which different organizations can offer dispute resolution services to users.<sup>69</sup> This is different from TPIS, in which consumers are subject to the private provider imposed by the website visited, and different providers create different rules. In the UDRP system, Internet users can choose the provider knowing that the underlying set of rules is

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E. Sorkin, *Judicial Review of ICANN Domain Name Dispute Decisions*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 35 (2001).

64. Froomkin, *Form and Substance*, *supra* note 63, at 118–19; Froomkin, *ICANN's "UDRP,"* *supra* note 63; Froomkin, *Wrong Turn*, *supra* note 8, at 132–33, 143–53; Sims & Bauerly, *A Reply*, *supra* note 63, at 126–27; Sims & Bauerly, *A Response*, *supra* note 63, at 90–91.

65. Froomkin, *Form and Substance*, *supra* note 63, at 118–19; Sims & Bauerly, *A Reply*, *supra* note 63, at 126–27.

66. MUELLER, RULING THE ROOT, *supra* note 63, at 217–22; Milton Mueller, *ICANN and Internet Governance: Sorting Through the Debris of 'Self-Regulation,'* 1 INFO 497, 518–19 (1999), available at <http://www.icannwatch.org/archive/muell.pdf> (last visited July 14, 2003).

67. Thornburg, *supra* note 63, at 207, 228–32.

68. Geist, *supra* note 63, at 936.

69. See ICANN, APPROVED PROVIDERS, *supra* note 61.

uniform and consistent. ICANN provides a set of rules that delimits the issues to be regulated, the cases that providers should evaluate, panel composition, and penalties.<sup>70</sup> Yet, it permits providers freedom to implement further rules and to charge the corresponding fees.<sup>71</sup>

Thus, users face a common set of rules, but complainants can choose the provider they prefer. This framework has provided good competitive incentives for domain-name dispute-resolution service providers.<sup>72</sup> Nonetheless, it has also generated problems of bias in favor of complainants because they choose the provider.<sup>73</sup> Therefore, in the current system, complainants have an incentive to choose the provider who is friendlier to complainants, and the providers' optimal strategy is to favor complainants to ensure that they continue to be chosen in the future.<sup>74</sup>

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70. ICANN, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, at <http://www.icann.org/dndr/udrp/policy.htm> (Oct. 24, 1999) [hereinafter ICANN, UDRP] (listing the policy rules). For an analysis of the policy, see Froomkin, *ICANN'S "UDRP,"* *supra* note 63.

71. See *supra* note 62 and accompanying text (noting the ability of TPIs to formulate rules beyond those created by ICANN).

72. Anderson & Cole, *supra* note 54, at 249.

Considering that the filing fee for a dispute involving a single domain name, heard by a single panelist, can be as low as \$1,150[,] [t]he UDRP is an attractive alternative to protracted litigation. While there are several factors that contribute to the low cost of a UDRP proceeding, the primary reason is the simplicity of the process. The administrative panel is limited to considering the written submissions made by the parties. The UDRP does not provide for discovery or submission of interrogatories by the parties, elements that typically increase the cost of other processes, in both time and money.

*Id.*

73. Geist, *supra* note 63, at 936.

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 NAF, the two dominant ICANN-accredited arbitration providers, feature case allocation 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 the 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%.

*Id.*

74. It is interesting to notice that the only provider that declared bankruptcy was e-Resolution, which was an entity in which more cases were won by respondents. See UDRPINFO.COM, ERESOLUTION (ERES), at <http://www.udrpinfo.com/prov.php#eres> (last visited Sept. 28, 2003).

Only domain-name disputes are evaluated under this system.<sup>75</sup> The complainant can file a complaint with any of the approved providers that ICANN has authorized. Once the complaint is received by the provider, it has to evaluate its validity. If the complaint is invalid, then the provider can ask for further information or discard it. Once the respondent has submitted an answer to a valid complaint, or the legal time period for a response has expired, the provider forms a panel of either one or three members, depending on the parties' requests.<sup>76</sup> However, in contrast to TPIs from the previous section, here the panelists are elected from a list created by the provider and in agreement with the parties. As a result, even though the complainant can elect the provider, the respondent participates in panel selection. Thus, the panel is more transparent than in a TPI, where panelists are appointed directly by a TPI without the aggrieved consumer's intervention.<sup>77</sup>

Once the panel is constituted, it must decide the case and has the power to ask for additional information from any of the parties. If the parties reach a private agreement, the panel terminates its process without any further decision. If the parties initiate a court trial, the panel can continue with its deliberations or decide to terminate the case.<sup>78</sup> As in the case of the privacy rights TPIs, the providers do not have jurisdiction over matters initiated in court, which is one of the main limitations of these types of dispute resolution regimes. That said, most UDRP cases have not been contested in court, and the parties have accepted the panel decisions.<sup>79</sup>

From a regulatory perspective, one of the UDRP's main advantages relative to the TPI regime is that ICANN is able to enforce panel decisions. The only action that the panel can enforce is the termination or transfer of the domain name in dispute, which is, of course, under

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75. ICANN, UDRP, *supra* note 70, para. 5.

All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available.

*Id.*

76. ICANN, RULES FOR UDRP, *supra* note 62, para 6.

77. See *supra* Part II.B.4 (noting that firms, and not consumers, select consumer representatives on appellate panels).

78. ICANN, UDRP, *supra* note 70, para. 4k.

79. According to UDRPLaw.net, just seventy-three UDRP cases went to court through July 2002. This is a small number as compared with the more than 4,000 cases UDRP providers had considered since 1999. See UDRPLAW.NET, THE UDRP-COURT CHALLENGE DATABASE, at <http://www.udrplaw.net/UDRPappeals.htm> (last updated Mar. 27, 2003); UDRPINFO.COM, at <http://www.udrpinfo.com> (last visited Oct. 24, 2003).

ICANN's management.<sup>80</sup> ICANN's enforcement ability arises from both its design as a regulatory agency and the design of the subject matter it regulates. ICANN is supported by the U.S. government and accepted by other countries as the organization which manages domain names. The root system that ICANN regulates favors an uncompetitive market for root names.<sup>81</sup> The legitimacy of its functions is the basis for effectively enforcing domain-name dispute-resolution rules.<sup>82</sup> This characteristic makes the UDRP one of the most viable systems for dispute resolution on the Internet.

Nonetheless, to maintain its legitimacy among countries and different Internet users, ICANN has to develop new ways to include the Internet's many constituencies in its decision-making process. If we look at how ICANN is formed, we can see that some constituencies on the Internet have a high degree of control over its policymaking process, while other groups—mainly users but also the private sector—have a low level of participation. The success of the UDRP, and ICANN itself, will depend on the political pressure exerted over ICANN to involve new participants and to develop new ways of letting wide-ranging interest groups influence its decision-making.<sup>83</sup>

## 2. Number of Firms Participating

Under the UDRP system, every person or entity that registers a new domain name is subject to ICANN's policies, since the companies that manage domain-name assignments on the Internet are subject to ICANN authorization.<sup>84</sup> As a result, most of the domain-name owners

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80. Again, the characteristic of the root system for the Internet, which is managed and monopolized by ICANN, generates a disincentive to other providers to offer other root of domain names. As a result, the actual design of the system provides ICANN with a well-defined power of enforcement for the UDRP. See MUELLER, *RULING THE ROOT*, *supra* note 63, at 215–17 (describing the lack of competition, ICANN's monopoly, and the incentives of the organization participants to maintain the system as it is).

81. *Id.*

82. The legitimacy of ICANN action has been under strong debate lately. See Helfer & Dinwoodie, *supra* note 58, at 244–45 (discussing how the problems of the UDRP undermine the legitimacy on which it is based).

83. See *infra* Part III (discussing the political process of ICANN).

84. ICANN, UDRP, *supra* note 70, para. 1. The UDRP's purpose statement reads:

1. Purpose. This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by [ICANN], is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under . . . this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at [www.icann.org/udrp/udrp-](http://www.icann.org/udrp/udrp-)

are subject to the UDRP.<sup>85</sup> From a regulatory perspective, this provides the system with wide coverage and uniform regulation throughout most of the Internet. This feature is another important difference with respect to privacy rights TPIs, since adoption of their regulatory regime is voluntary. The specific design of ICANN as the only institution that manages domain names, and the support from different governments, generates a quasi-automatic jurisdiction for those who request a new domain name.

### 3. International Cooperation

In the case of the UDRP, the nature of the issue regulated permits enhanced enforcement of the rules. However, international cooperation is necessary to sustain the policy in place throughout the Internet.<sup>86</sup> Since ICANN relied on the U.S. government's support, other developed countries have followed, and most countries now accept its jurisdiction.<sup>87</sup> There are some characteristics of the ICANN structure that help explain this success in reaching international consensus. First, the management structure of ICANN has become more open to participation and, especially after last year's reforms, the international community has more say on ICANN policymaking.<sup>88</sup> Different constituencies from all around the globe can participate in the decision-making and shaping of ICANN policies.<sup>89</sup> Given the interest in ICANN becoming an international body with jurisdiction over the Internet, it is not surprising that there have been major changes in the way Board members are elected and in the participation of country code top-level

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rules-24oct99.htm, and the selected administrative-dispute-resolution service provider's supplemental rules.

*Id.*

85. This characteristic depends on the concentrated structure of the root system and the lack of competition. See MUELLER, RULING THE ROOT, *supra* note 63, at 186–89, 216.

86. The need for international cooperation is explained by the participation of country code registries (“ccTLDs”) as one of the most active ICANN constituencies. Furthermore, it is through these international actors that ICANN can cooperate in the development of rules that apply throughout the Internet. Recently, ccTLDs registries have upgraded their participation and voice in the ICANN policymaking process. See *infra* Part III (discussing the political evolution and structure of ICANN).

87. See INTERNET ASSIGNED NUMBERS AUTHORITY (“IANA”), ROOT-ZONE WHOIS INFORMATION, at <http://www.iana.org/cctld/cctld-whois.htm> (last updated Nov. 26, 2001) (listing all countries that participate in ICANN).

88. See *infra* Part III (discussing the historical and political evolution of ICANN).

89. See ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS art. I, § 2, para. 4, at <http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm> (Dec. 15, 2002) [hereinafter ICANN, DECEMBER 2002 BYLAWS] (listing participation of diverse constituents as a core value).

domains (“ccTLDs”) registries.<sup>90</sup> These changes will permit more cooperation at the international level, which will allow for better enforcement of dispute resolution policies.<sup>91</sup>

Nonetheless, the inclusion of international actors will also increase the need for reform in the UDRP to accommodate different perspectives. For example, the Internet’s growth in Asia and ICANN’s interest in being the main source of domain-name control and regulation have prompted the creation of two new offices to resolve disputes in that region.<sup>92</sup> As a result, the UDRP could accommodate different views and be open to changes, even though groups with more power inside ICANN will resist such reforms.<sup>93</sup> Second, one purpose of

90. See *id.* art. VI, § 1 (providing a complete version of ICANN’s new bylaws). Until December 15, 2002, the Board of Directors of the ICANN consisted of nineteen members. Five of them came from the original Board of Directors established in 1998 and the other fourteen came from the following organizations: (a) five from At-Large membership, each of these five representing a different geographic area (Africa, Asia-Australia-Pacific, Europe, Latin America and the Caribbean and North America); (b) three from the Domain-Name Supporting Organization (“DNSO”), which consisted of different constituency groups, including Business, Non-Commercial, ccTLD Registries, gTLD Registries, ISPs, Registrars, and Intellectual Property interests; (c) three from the Address Supporting Organization (“ASO”), which consisted of the Asian Pacific Network Information Center (“APNIC”), American Registry for Internet Numbers (“ARIN”), Latin American and Caribbean Internet Address Registry (“LACNIC”), and Réseau IP Européens Network Coordination Centre (“RIPE NCC”); and finally, (d) three from the Protocol Supporting Organization (“PSO”), which consisted of the Internet Engineering Task Force (“IETF”), the World Wide Web Consortium (“W3C”), the International Telecommunication Union (“ITU”), and the European Telecommunications Standard Institute (“ETSI”). See ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS art. V, § 4, at <http://www.icann.org/general/archive-bylaws/bylaws-12feb02.htm> (Feb. 12, 2002); see also *infra* fig. 2.

Under the new ICANN bylaws, beginning December 15, 2002, the Board of Directors should consist of fifteen members elected as follows: eight from the Nominating Committee, two from ASO, two from Country Code Names Supporting Organization (“ccNSO”), two by Generic Name Supporting Organization (“GNSO”), and one is the President of ICANN. ICANN, DECEMBER 2002 BYLAWS, *supra* note 89, art. VI. The Nominating Committee is composed as follows: five members from At-Large Representation, two from Business Constituency of GNSO, one from gTLD Registries, one from gTLD Registrars, one from Council ccNSO, one from ISP Constituency of GNSO, one from Intellectual Property Constituency of GNSO, one from ASO, one designated by the ICANN Board to represent academic and other similar institutions, one from Consumer and Civil Society Groups from the non-commercial constituency of GNSO, one from IETF, and one from ICANN Technical Liaison Group. *Id.* art. VII, § 2.

91. See ICANN, CCTLD RESOURCE MATERIALS, at <http://www.icann.org/cctlds/> (last updated June 3, 2003) (describing the objectives and activities of ccTLDs in ICANN).

92. See CHINA INT’L ECON. & TRADE ARBITRATION COMM’N & H.K. INT’L ARBITRATION CTR., ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE, at <http://www.adndrc.org/adndrc/index.html> (Feb. 28, 2002) (stating that the Asian Domain Name Dispute Resolution Center “was formed to provide dispute resolution services in regard to disputed generic top level domain names”).

93. See *infra* Part III (analyzing how stakeholders of ICANN can resist major reforms in policymaking and retain power).

ICANN's board was to permit the participation of people from different countries and provide them a voice in the political process.<sup>94</sup> But ICANN's governance has been relegated to groups and constituencies that were introduced as initial parts of the organization.<sup>95</sup> As ICANN tries to move to a more international environment, these constituencies should accommodate interests mainly from other countries—the private sector, Internet users, and the government.

In this sense, ICANN is an institution in its formative stage, in which different constituencies and groups try to establish positions in the management of the institution.<sup>96</sup> The forces that shape the political characteristics of ICANN will also shape the rules of its dispute-resolution policy. In the end, if ICANN succeeds in promoting and enforcing a set of dispute resolution rules for domain names throughout the Internet, it will be due to the capacity of its constituencies to accommodate different demands and to the political process inside the corporation that enables such a process to occur.

#### 4. User Participation

User participation is much higher in the UDRP than in the previous case study of the privacy rights TPIs.<sup>97</sup> First, every user that registers a domain name on the ICANN-managed root server is automatically under the jurisdiction of the providers and is subject to the rules of the UDRP.<sup>98</sup> Second, ICANN has provided, in theory, numerous ways by which users can contact the organization and propose reforms to the dispute resolution system.<sup>99</sup> Furthermore, users participate directly in

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94. See ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS BACKGROUND, at <http://www.icann.org/general/support-orgs.htm> (last updated Dec. 16, 2002).

The ICANN Bylaws provide for three Supporting Organizations (SOs) to assist, review, and develop recommendations on Internet policy and structure within three specialized areas. (See Bylaws, Articles VIII, IX, and X.) The SOs help to promote the development of Internet policy and encourage diverse and international participation in the technical management of the Internet. Each SO names three Directors to the ICANN Board.

*Id.*

95. See *infra* Part III (discussing the historical and political evolution of ICANN).

96. See *supra* notes 88–91 and accompanying text (overviewing changes in ICANN's board of directors to provide for more diverse participation in ICANN's affairs).

97. Since 1999, UDRP providers have considered more than 4,000 cases. See *supra* note 79.

98. ICANN, UDRP GENERAL INFORMATION, *supra* note 62 (stating that “[a]ll registrars in the .aero, .biz, .com, .coop, .info, .museum, .name, .net, and .org top-level domains follow the [UDRP]”).

99. ICANN, THE ICANN HOMEPAGE, at <http://www.icann.org> (last updated Oct. 22, 2003) (describing multiple instruments users have to reach ICANN and participate).

the Board of Directors through the election of representatives in the At-Large Group and in the Generic Name Supporting Organization (“GNSO”) under the constituency of non-commercial users.<sup>100</sup> However, user participation in ICANN policymaking has been scarce, and the commercial private sector is the main power that controls ICANN. As a result, although ICANN fares better than the privacy rights TPIs, it is still biased toward private firms’ interests regarding domain-name policies.

Many thoughtful critics, such as Professors Froomkin and Mueller, point to the lack of democratic participation in ICANN’s decision-making.<sup>101</sup> For example, ICANN has strictly controlled the number of top-level domain names, which has created an artificial scarcity in the market.<sup>102</sup> This scarcity favors specific private firms with interests in controlling the resource.<sup>103</sup> By letting private firms compete to provide options in the top-level domain name arena, ICANN could improve users’ welfare by providing more consumer choice. However, competition at this level will decrease the value of the top-level domain names that already exist today, hurting the profits of the firms that control them. As these firms have significant influence over ICANN’s decisions, it is to be expected that they will exert pressure to avoid such competition. Nonetheless, if ICANN wants to promote cooperation and continue to advance in its governance of the domain name system, it should accommodate users’ demands.

One of the most common criticisms of the UDRP is that the domain-name rules enforced by providers are designed to protect trademark holders’ interests on the Internet, at the expense of free speech interests. For example, if someone registers a domain name called “FIFAWorldCup.com,” devoted to criticizing the way the Fédération Internationale de Football Association (“FIFA”) has designed the classification groups for the 2006 World Cup in Germany, FIFA could claim that this domain name infringes on its own trademark rights and seek to cancel this registration by initiating a complaint with a UDRP

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100. See ICANN, ICANN AT-LARGE ADVISORY COMMITTEE, at <http://www.icann.org/committees/alac/> (last updated June 26, 2003) (describing the tasks and composition of the At-Large Group); see also ICANN, GENERIC NAMES SUPPORTING ORGANIZATIONS, at <http://gnso.icann.org/> (last updated Sept. 25, 2003) (describing and detailing the different constituencies that make up the GNSO).

101. See *supra* notes 63–68 and accompanying text (summarizing Mueller and Froomkin’s criticisms).

102. See MUELLER, RULING THE ROOT, *supra* note 63, at 219 (describing how ICANN regulates the supply of top-level domain names, and the price, performance, and market structure of the domain-name industry).

103. *Id.*

provider. These kinds of problems have arisen because of the small number of top-level domain names and the broad definitions employed to determine the type of content that is admissible under each top-level domain name. ICANN could create a new top-level domain name for free speech, such as .fsp, in which all domain-name registrants have to be individuals or non-commercial entities. All names, including trademarks, could be used in this new top-level domain name, so long as no one engaged in commercial activities in the space. In this way, many of the free speech concerns can be accommodated. ICANN can then have a commercial set of top-level domain names in which trademarks are the rule for name assignment and also a free speech section in which users can express themselves without fear that their domain names and free speech rights will be suppressed.

With respect to the UDRP itself, there are more Internet users employing these dispute procedures, as compared to the privacy rights TPIs. First, both parties have the opportunity to take part in panel formation, guaranteeing a higher degree of impartiality and independence than in the case of panels formed directly by TPIs with interests dominated by private businesses.<sup>104</sup> Nonetheless, it is clear that the ICANN system is far from independent, given its bias toward private firms, although this bias is less than that of the totally private privacy rights TPIs. Second, given that the general governing rules employed by the UDRP providers are supplied by ICANN, and users do have the opportunity to place representatives on ICANN's Board of Directors, these rules will be subject to review to insure fairer treatment of non-commercial parties. Third, international users have a larger voice in the rules and management of ICANN than they do in privacy rights TPIs, given the attempts to construct a more international organization. As a result, more cooperation can be expected on the international sphere, and a broader consensus may be achieved around the UDRP. Finally, as governments participate in the process, it is more probable that consumers and other users can exert greater influence over ICANN's decisions than the decisions of the totally private TPIs that regulate privacy.

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104. See ICANN, RULES FOR UDRP, *supra* note 62, para. 7 (stating that “[a] Panelist shall be impartial and independent and shall have, before accepting appointment, disclosed to the Provider any circumstances giving rise to justifiable doubt as to the Panelist’s impartiality or independence.”).

*D. Comparison Between Privacy Rights TPIs and ICANN/UDRP*

In order to compare private TPIs that regulate privacy on the Internet with the UDRP, which regulates domain name disputes, I summarize the characteristics of both systems in Table 1.

**Table 1: TPI and ICANN Characteristics**

<b>Issue</b>	<b>Privacy Rights TPIs</b>	<b>ICANN/UDRP</b>
Cost	Low	Low
Enforcement	Low	High
Coverage	Limited	Global
Government Participation	Low	Moderate
User Participation	Low	Low (though there is more room for improvement)
International Cooperation	Low	Moderate (but increasing)
Independence from Private Firms' Interests	Low	Low (though there is increasing pressure to change)
Transparency	Low	Moderate
Political Instruments (Board, Elections, etc.)	No	Yes (though user participation is still limited)

I conclude that the UDRP is a closer example of a mixed regulatory regime for the Internet than the totally private TPIs. However, ICANN still has significant room for improvement, and perhaps we can expect ICANN to continue evolving and modifying the nature of its regulatory regime. The design of the regulatory regime that may result would then be a consequence of bargaining among the different interest groups on the Internet.

### III. POLITICS ON THE INTERNET: EVOLUTION AND REFORM OF ICANN

In this section, I provide a case study of one of the most important yet heavily criticized attempts to build an institution for Internet governance based on a bottom-up approach.<sup>105</sup> In 1998, ICANN formed to manage

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105. See *supra* note 63 and accompanying text (providing the critics' sources and support for ICANN policies).

online addresses and numbers on the Internet.<sup>106</sup> A non-profit organization, ICANN was designed to be an instrument for managing this system from a technical viewpoint, without government intervention or political influence.<sup>107</sup> According to its creators, and most importantly, the U.S. government, ICANN was the paradigm of bottom-up regulation, in which the private sector could design its own rules without political intervention.<sup>108</sup>

Nonetheless, after ICANN existed for more than three years, its own president initiated significant reforms based on the recognition that ICANN could not fulfill its tasks without government and international cooperation.<sup>109</sup> During most of 2002, different stakeholders within ICANN debated the type and depth of these reforms.<sup>110</sup> Most of them tried to avoid the inclusion of governments and politics in the corporation.<sup>111</sup> As a result, the first proposal of wide government intervention was changed toward a more cooperative role for the state, more integrated international interests within the corporation, and a continued reinforcement of private interests.

Even when the process of change succeeded in limiting government intervention, it also transformed ICANN into a political organization, in which the participating constituencies are the main actors shaping its policymaking. ICANN's evolution had two main phases. In the first

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106. See ICANN, ICANN HOMEPAGE, *supra* note 99 (providing information on the creation of ICANN).

107. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,750 (June 10, 1998). The policy states in part:

The organizing documents (Charter, Bylaws, etc.) should provide that the new corporation is governed on the basis of a sound and transparent decision-making process, which protects against capture by a self-interested faction, and which provides for robust, professional management of the new corporation. The new corporation could rely on separate, diverse, and robust name and number councils responsible for developing, reviewing, and recommending for the board's approval policy related to matters within each council's competence. Such councils, if developed, should also abide by rules and decision-making processes that are sound, transparent, protect against capture by a self-interested party and provide an open process for the presentation of petitions for consideration. The elected Board of Directors, however, should have final authority to approve or reject policies recommended by the councils.

*Id.*

108. See *id.* (describing the need for private management of the Internet due to the rapid expansion, globalization, and commercialization of the Internet).

109. See M. STUART LYNN, PRESIDENT'S REPORT: ICANN—THE CASE FOR REFORM, at <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> (Feb. 24, 2002) (describing the problems ICANN faced without government support).

110. See ICANN, LINKS CONCERNING ICANN'S 2002 EVOLUTION AND REFORM PROCESS, at <http://www.icann.org/committees/evol-reform/links.htm> (last updated Aug. 20, 2003) (providing cite links to reports on the various perspectives on the ICANN reforms).

111. *Id.*

phase, it evolved as a completely private corporation in which the state's role was minimal. In the second phase, the participants within ICANN tried to change its structure to allow more government and international participation in its decision-making.

This change highlights the need for a consensual governance mechanism for the Internet. Furthermore, I explain how ICANN's political role has become as important as its technical role for the governance of the Internet. Nonetheless, the political players of the different ICANN constituencies tried to avoid reforms that undermined their power. The resulting structure of ICANN eliminated most of the changes proposed by the president; the structure now reflects the bargaining process among the different participant constituencies and the relative power of each group inside the corporation. As a result, we cannot consider ICANN a technical management corporation, but rather a political organization with well-specified constituencies and power groups.

#### A. *History and Political Structure of ICANN*

Initially, because most of the Internet activity was limited to the United States, the American government was in charge of the Internet's functioning.<sup>112</sup> Yet, the Internet quickly became an international phenomenon, connecting people globally. Even so, the U.S. government continued to provide the main instruments for its normal operation.<sup>113</sup> It delegated domain-name system management to Network Solutions, Inc. ("NSI"), a private, for-profit firm under a special contract with the government.<sup>114</sup> The management of numerical addresses on the Internet was under the charge of the Internet Assigned Numbers Authority ("IANA").<sup>115</sup>

In 1997, the U.S. government explained the necessity of creating a new institution, without ties to the government, which would provide these services on the Internet.<sup>116</sup> Both the Department of

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112. See Management of Internet Names and Addresses, 63 Fed. Reg. at 31,741-42 (describing the management of the Internet through the U.S. government support).

113. See *id.* (describing the necessity of the U.S. government to step down the management of names and numbers, given the international character of the Internet).

114. *Id.*

115. *Id.*

116. See CLINTON & GORE, *supra* note 7, at 2. This document states:

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.

Commerce<sup>117</sup> and the U.S. government itself believed that the best regulatory regime for the Internet was a bottom-up system.<sup>118</sup> The government proposed the creation of a private, non-profit organization for the management of names and addresses on the Internet.<sup>119</sup> ICANN grew out of these proposals.<sup>120</sup>

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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.

*Id.*

117. Management of Internet Names and Addresses, 63 Fed. Reg. at 31,742. The policy states as follows:

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 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.

*Id.*

118. See *supra* note 116 and accompanying text (stating that governments should encourage private sector oversight of the Internet).

119. See Management of Internet Names and Addresses, 63 Fed. Reg. at 31,749. The policy states:

As set out below, the U.S. Government is prepared to recognize, by entering into agreement with, and to seek international support for, a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system. Under such agreement(s) or understanding(s), the new corporation would undertake various responsibilities for the administration of the domain name system now performed by or on behalf of the U.S. Government or by third parties under arrangements or agreements with the U.S. Government. The U.S. Government would also ensure that the new corporation has appropriate access to needed databases and software developed under those agreements.

*Id.*

120. See ICANN, ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, art. 3, at <http://www.icann.org/general/articles.htm> (Nov. 21, 1998)

Since then, ICANN has managed Internet names and numbers and the proposal of policies to resolve problems and conflicts in this arena. This action has not been limited to technological matters, but also political ones, since the Board was concerned with creating an institutional structure that facilitated the participation of different constituencies in ICANN.<sup>121</sup> As a result, the corporation has become a point of convergence for debate on most policies regarding addresses and numbers on the Internet, and it has been subject to pressure from many interest groups and countries. Among the successes of ICANN, I note the establishment of the UDRP, the creation of other top-level domain names, and the expansion of its influence all over the world.<sup>122</sup> However, ICANN has failed to create a forum for the many constituencies on the Internet.<sup>123</sup> As a result, there has been a movement to urge changes to the political mechanisms within ICANN.<sup>124</sup>

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

Since its creation, ICANN's structure has gradually evolved to fulfill its initial goals. Most changes that took place between its creation in 1998 and up to 2002 were intended to provide a governance structure inside the organization that made it possible for different groups and constituencies to participate in the policymaking process.<sup>125</sup>

ICANN was created with an initial board of directors ("Initial Board"), composed of nine people from the At-Large members of ICANN, with authority to manage and develop ICANN's main

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(stating that "the corporation shall . . . pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet").

121. See *infra* Part III.B (discussing the historical and political evolution of ICANN's governing body).

122. *But see infra* Part III.C (discussing how these successes have been limited in scope).

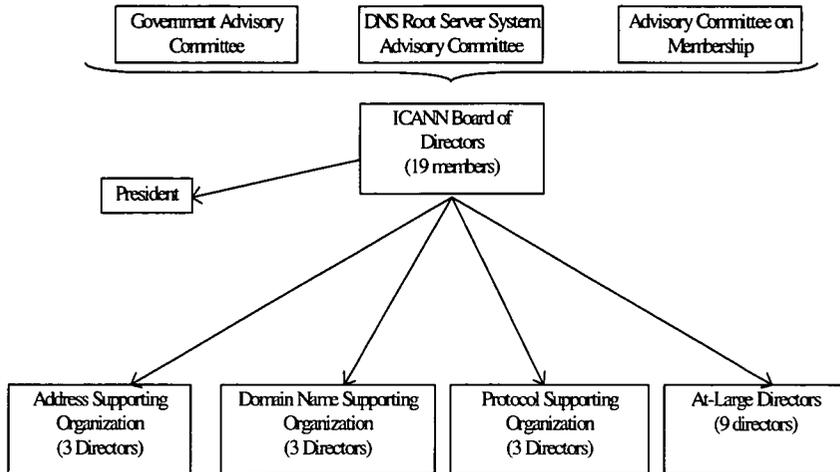
123. See *infra* notes 161–64 and accompanying text (noting the decreased role for At-Large Members following the most recent rounds of ICANN reforms); see also *infra* Part III.C (observing that while "[t]he private sector consolidated its political position within ICANN's structure," users of the Internet "have lost their prerogative to elect At-Large members directly by popular vote," and that "[w]hile reformers initially tried to move toward a more participative environment with governments and other Internet users, powerful constituencies within ICANN prevented major reforms").

124. This movement can be described as a top-down reform, since it was the president of ICANN who proposed to change the way the corporation was working. See *supra* note 109 and accompanying text (first describing the reforms initiated by ICANN's president); see also notes 136–45 and accompanying text (discussing the president's proposal in greater detail).

125. See ICANN, BYLAWS ARCHIVES, at <http://www.icann.org/general/archive-bylaws/> (last updated June 28, 2003) (showing the different changes in the bylaws of the corporation).

structure.<sup>126</sup> As shown in Figure 1, in the first bylaws enacted by the Initial Board, ICANN consisted of a board of directors and three supporting organizations that contained the main constituencies with interests in ICANN's activities.<sup>127</sup>

**Figure 1: Initial Structure of ICANN**



The board of directors (“Board”) included nineteen directors elected by the Supporting Organizations and by the At-Large members of ICANN.<sup>128</sup> Three Advisory Committees<sup>129</sup> aided the Board in its

126. ICANN, BYLAWS FOR THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, at <http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm> (Nov. 6, 1998).

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.

*Id.* art. IV, § 1(a).

127. *See id.* art. VI, §3(a) (stating that there shall be at least the following three Supporting Organizations: Address Supporting Organization, Domain Name Supporting Organization, and Protocol Supporting Organization).

128. *See id.* art. V, §§ 3–4 (outlining the numbers of directors who can be nominated from a committee and elected).

129. *Id.* art. VII, § 3. The three Advisory Committees were: the Government Advisory Committee (“GAC”), consisting of international governments, multinational governmental organizations, and treaty organizations; the DNS Root Server System Advisory Committee (“RSSAC”), consisting of the organizations responsible for the operation of the world’s thirteen root name servers and other organizations related to the root server system; and the Advisory

policymaking process.<sup>130</sup> The initial bylaws did not define a specific composition of the different Supporting Organizations, leaving this task open to future reviews by the Board upon consultation with the specific groups and constituencies.<sup>131</sup>

From the creation of the first bylaws by the Initial Board, a process of defining the governing structure of the organization was set in motion.<sup>132</sup> After several reviews of the bylaws and the creation of the different organizations planned by the bylaws, the first structural process for organizing ICANN culminated in the year 2000 (see Figure 2).<sup>133</sup> As one can see, Councils and General Assemblies were well-defined as the main policymaking bodies in each supporting organization structure.<sup>134</sup> These organizations were thought to be both part of the Board and capable of providing policy advice to the Board. In the case of the At-Large members, a general election took place in

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Committee on Membership ("ACM"), a temporary committee with members appointed by the Board. *Id.*

130. *Id.* Under the bylaws, GAC's role was described as follows:

[The 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 [GAC] 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.* art. VII, § 3(a). RSSAC's role was defined as follows:

The responsibility of [RSSAC] shall be to advise the Board about the operation of the root name servers of the domain name system. [RSSAC] 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. [RSSAC] should examine and advise on the security aspects of the root name server system. Further, [RSSAC] should review the number, location, and distribution of root name servers considering the total system performance, robustness, and reliability.

*Id.* art. VII, § 3(b). The ACM's role was described as follows: "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.* art. VII, § 3(c).

131. *Id.* art. VI (describing the Supporting Organizations and the powers of the Board to add additional supporting organizations by vote).

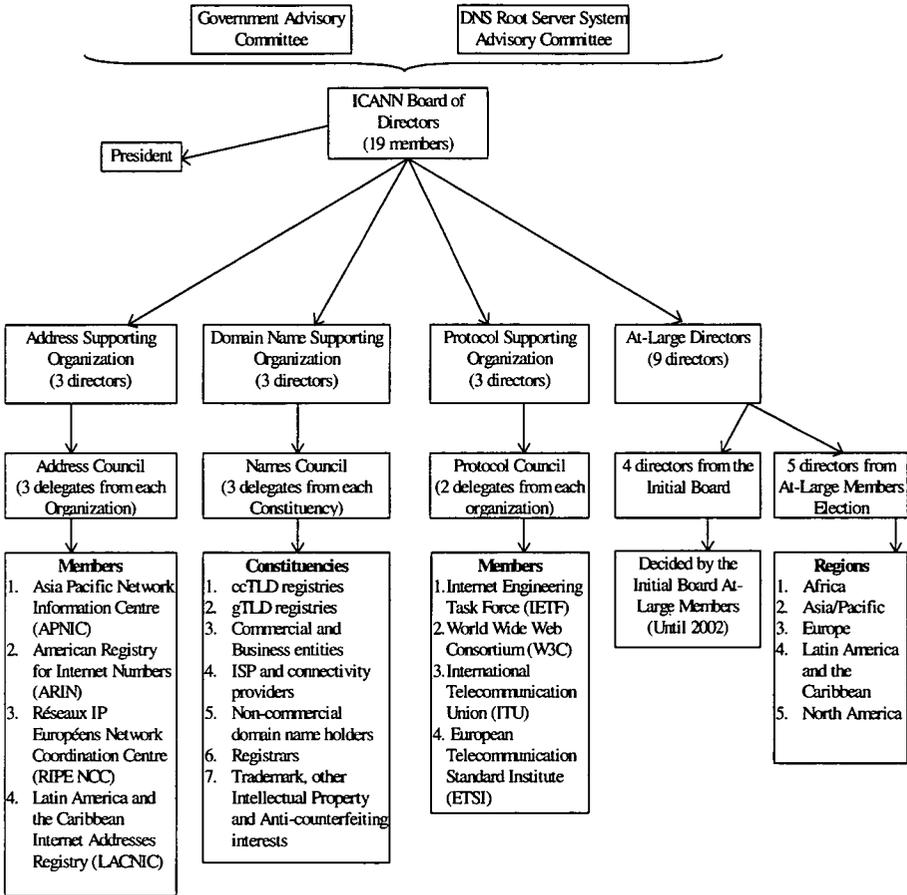
132. See ICANN, BYLAWS ARCHIVES, *supra* note 125 (showing the different reforms of the corporation's structure since its creation).

133. See generally ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, at <http://www.icann.org/general/archive-bylaws/bylaws-16jul00.htm> (July 16, 2000) (illustrating structural changes and containing resulting amendments through July 2000).

134. *Id.*; see also *infra* fig. 2.

2001, in which registered Internet users from all over the world elected their representatives to the Board.<sup>135</sup>

**Figure 2: ICANN Structure Year 2001**



In February 2002, ICANN’s president proposed a set of structural changes, particularly with respect to Board composition and election of directors. Among the factors mentioned as supporting these changes, the president noted the following:

135. See generally ICANN, AT-LARGE MEMBERSHIP SITE, at <http://members.icann.org/activestats.html> (Oct. 10, 2000) (providing demographic information about the At-Large membership).

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>136</sup>

This short paragraph summarizes the main problems that ICANN faced just two years after its founding. The view that change was necessary to better address the organization's issues was widely accepted.

As for the direction of this change, the president noted that a purely private agency was impractical.<sup>137</sup> The president blamed most of ICANN's failures on its pure bottom-up organizational design. While he advocated a more active role for government, he was nevertheless reluctant to follow a pure top-down approach. This proposal recognized a need to move toward a mixed system with cooperation among various governments and the private sector.<sup>138</sup>

The newly proposed ICANN structure emerged from this setup of a mixed organization with active participation from governments and the private sector. First, the board of directors became a board of trustees with fifteen members: five nominated by governments, one from each geographic area; five nominated by a nominating committee and confirmed by the Board of Trustees; and five *ex officio* trustees integrated by the president and the chairs of the Policy Councils and the Technical Advisory Committee.<sup>139</sup> The Supporting Organizations were replaced by Policy Councils. These Councils are divided into the Address and Numbering Policy Council, the Generic TLD Names Policy Council, and the Geographic TLD Names Policy Council.

The new proposal considered the creation of the Government and Technical Standing Advisory Committees that would advise the Board regarding policy decisions. Finally, two more technical committees were proposed—the Root Name Server Operations Committee and the Security Committee. Furthermore, the figure of an Ombudsman was proposed. This Ombudsman would be in charge of public comments

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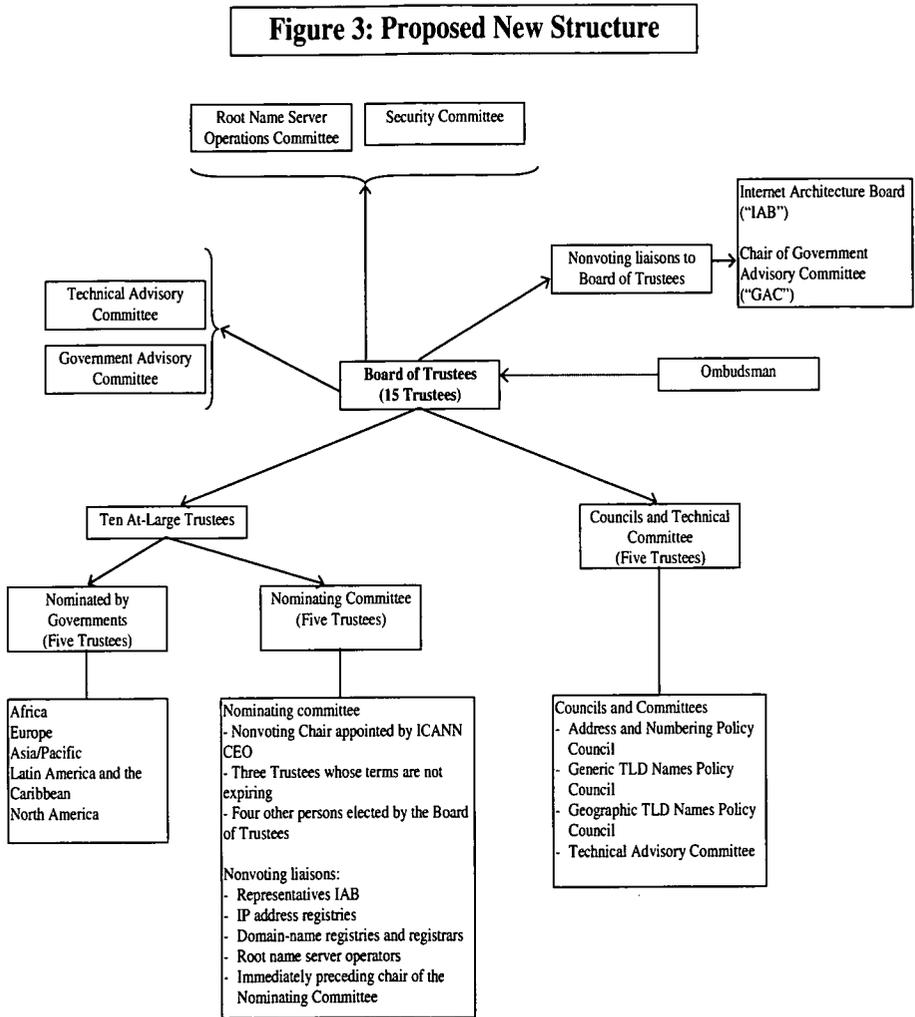
136. LYNN, *supra* note 109.

137. *Id.*

138. *Id.*

139. *Id.*

and general transparency of all ICANN operations.<sup>140</sup> Figure 3 shows the new structure of ICANN following this proposal.



ICANN’s proposed structure strongly differs from the actual structure described in Figure 2. As one can see, the number of directors, now named trustees, decreased from nineteen to fifteen.<sup>141</sup> Furthermore, election directly by the governments replaced direct elections by the At-

140. *Id.*

141. *Id.* (“The current Board, I believe, is somewhat larger than desirable, and thus I would reduce the new Board of Trustees to 15 people.”).

Large members.<sup>142</sup> The Supporting Organizations are replaced by Councils, which now elect just one Trustee each.<sup>143</sup> The final five trustees are elected by the newly created Nominating Committee, which directly depends on the Board.<sup>144</sup>

The proposed structure is more centralized than the previous one, and the Board's power is increased. Now the Board clearly represents governments, different private sectors (through the Councils), and some independent Trustees who would be elected by the Nominating Committee. Governments and technical organizations also have an important role in advising the Board through the two new Advisory Committees and the two non-voting liaisons on the Board.<sup>145</sup> As a consequence, ICANN's proposed political structure represents a stronger role for both governments and the private sector and less participation for independent Internet users. If there was a hope to construct a democratic organization for names and numbers on the Internet, in which users could vote and participate directly, this proposal went in the opposite direction by constructing a new board of trustees more in control of the situation and with the ability to respond directly to governments and the private sector. Nonetheless, this proposal was

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142. *Id.*

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 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.

*Id.*

143. *Id.*

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.

*Id.*

144. *Id.*

145. *Id.*

widely discussed and criticized and the bylaws that were finally approved were far from this initiative.

As a result of this proposal, in March 2002, the Board renamed the Committee on Restructuring, created in November 2001, as the Committee on ICANN Evolution and Reform (“ERC”).<sup>146</sup> The ERC began to work on the proposed changes, trying to address all the concerns and proposals from different constituencies and groups with interests on ICANN functioning.<sup>147</sup>

Finally, in June 2002, the Committee published *A Blueprint for Reform*.<sup>148</sup> In this document, the Committee elaborated on the president’s proposal, introduced some changes, and recommended its approval to the Board. After much debate, the ERC changed much of the president’s initial proposal. In the *Blueprint*, the government’s role decreased, but was still more important than it had been before the reforms.<sup>149</sup> Government representatives were assigned to every

146. See ICANN, PRELIMINARY REPORT, ICANN MEETING IN ACCRA, at <http://www.icann.org/minutes/prelim-report-14mar02.htm> (Mar. 14, 2002) (stating the resolution to change the committee’s name). The main tasks of the new Committee were:

- monitoring and providing reports to the Board on possible changes to the structure of ICANN;
- evaluating and making recommendations to the Board concerning any specific proposals or applications to the Board that would or could affect the structure of ICANN or the composition of the Board;
- considering input from the community on reform of ICANN’s structure and consulting with specific stakeholders for clarifications or further input; and
- preparing recommendations to the Board regarding, first and foremost, a statement of ICANN’s essential functions and its mission, as well as the appropriate structure of ICANN and the processes by which it should function.

ICANN, COMMITTEE ON ICANN EVOLUTION AND REFORM, at <http://www.icann.org/committees/evol-reform/> (last modified Aug. 20, 2003) [hereinafter ICANN, COMMITTEE ON ICANN].

147. See COMM. ON ICANN EVOLUTION AND REFORM, ICANN: A BLUEPRINT FOR REFORM, at <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm> (June 20, 2002) [hereinafter BLUEPRINT] (summarizing the recommendations of the ERC to the ICANN Board of Directors).

148. See *id.*

149. *Id.*

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 [Supporting Organization] Councils and to the RSSAC, the TAC [Technical Advisory Committee], and the SAC [Security Advisory Committee]. 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

organization in ICANN. In this way, the Committee sought to tie the governments to all policymaking areas.

Pressure from different constituencies and organizations protected some of the old structures from reform.<sup>150</sup> As a result, the Address Supporting Organization (“ASO”) and the GNSO (previously, the Domain Name Supporting Organization) were preserved from the changes proposed previously. Furthermore, the proposal left open the door to a new agreement among ccTLDs, International Governments, and the ICANN Board in order to create a new structure inside the corporation that better addressed the interests of ccTLDs.<sup>151</sup> This ongoing debate emerged from the pressure from the country code managers and the aim of expanding ICANN into the international arena.<sup>152</sup> Further, the Protocol Advisory Organization was eliminated, and the organizations participating in it were redirected to the Technical Advisory Committee. One of the most important changes was the creation of a more ambitious Nominating Committee, with seventeen members coming from different constituencies and groups. Moreover, this committee had the power to name more than half of the members of the Board.<sup>153</sup>

In sum, the ERC’s proposal reflected a compromise between the deep reforms proposed by the ICANN president and the interests of different organizations and constituencies with a stake in the current structure

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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 . . . .

*Id.*

150. See ICANN, COMMITTEE ON ICANN, *supra* note 146.

151. BLUEPRINT, *supra* note 147.

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 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 [Internet Coordination Policy].

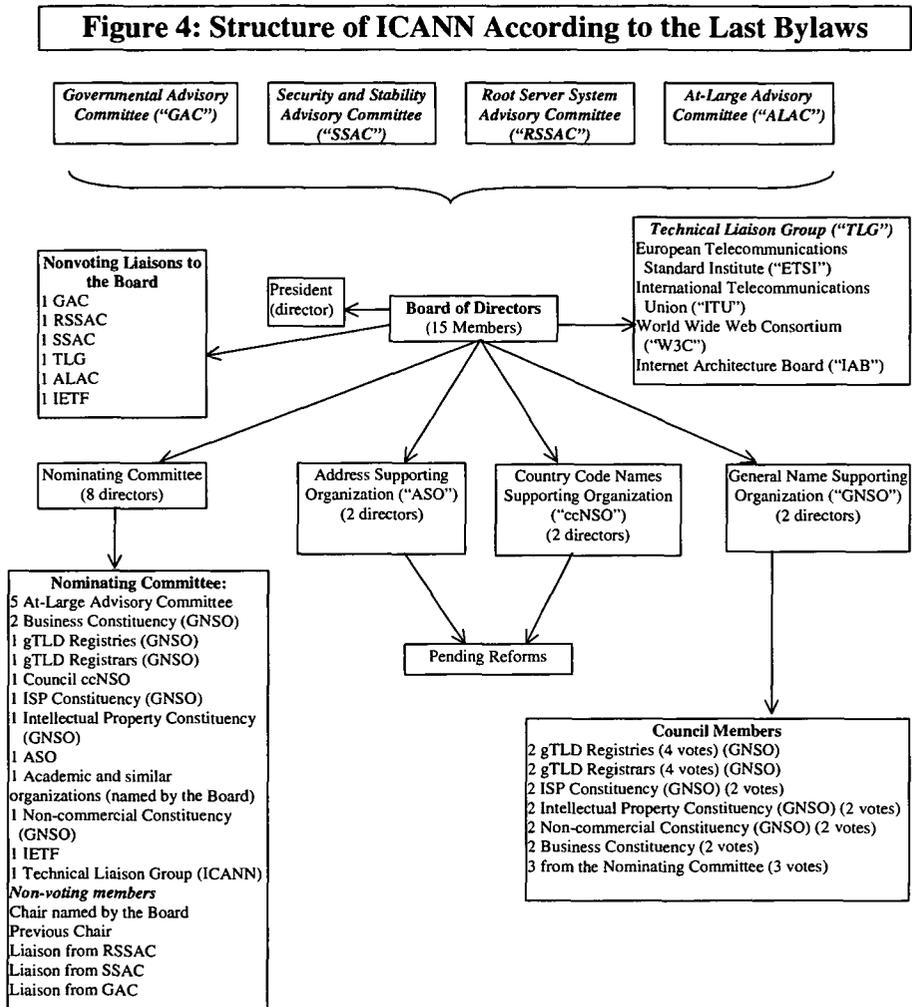
As a step towards addressing this issue and possibly considering whether policy changes may be required, the Committee on Evolution and Reform recommends that the Board encourage the GAC and delegates from the global ccTLD community to explore possible paths to resolution of this problem.

*Id.*

152. See ICANN, COMMITTEE ON ICANN, *supra* note 146.

153. See LYNN, *supra* note 109 (stating that the nominating committee elects five trustees).

and policymaking process of the corporation. Although much of the relationship between the ICANN Board and the groups that are part of the corporation is still under discussion, in October 2002, the Board approved the new, modified bylaws.<sup>154</sup> The structure of ICANN was finally defined as shown in Figure 4.



154. For the minutes of the October 28–31, 2002, meetings, which approved the new bylaws, see ICANN, ICANN MEETINGS IN SHANGHAI, at <http://www.icann.org/shanghai/> (last updated Apr. 11, 2003).

If one compares this final structure of ICANN with the president's initial proposal in Figure 3, we can see that there are many changes. First, the role of the government is reduced.<sup>155</sup> In the first proposal, the GAC was to elect five directors, or one-third of the total Board. In the final structure, the GAC does not elect any directors.<sup>156</sup> Nonetheless, there is an improvement in the role of governments, since the GAC now has more direct participation in all the groups of ICANN.<sup>157</sup>

Second, the role of the ccTLDs improved through the creation of a new supporting organization that represents them.<sup>158</sup> This marks an opening of ICANN to international cooperation and a more active role for the international community in ICANN policies.

Third, the ASO and GNSO improved their situations by avoiding transformation into Councils and electing two directors each, instead of one.<sup>159</sup> Further, both can participate in the Nominating Committee and thereby gain the opportunity to influence the election of the other eight Directors.<sup>160</sup>

Fourth, the Protocol Supporting Organization ("PSO") was eliminated in the first proposal and also in the final bylaws.<sup>161</sup> This meant a loss of power for the technical organizations that took part in the political structure of the first ICANN. Now, these organizations merely advise the Board. Fifth, the At-Large community lost ground from the first proposed design.<sup>162</sup> The initial proposal intended the Nominating Committee to elect five At-Large directors. In the final version of the bylaws, the At-Large community was left with a newly created At-Large Advisory Committee, which can elect five delegates to the Nominating Committee that now represents many other constituencies in addition to the At-Large members.<sup>163</sup> It appears that through the bargaining process, those organizations and constituencies

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155. See ICANN, BYLAWS, art. XI, §§ 1-2, at <http://www.icann.org/general/archive-bylaws/bylaws-26jun03.htm> (June 26, 2003) (outlining the role of the Governmental Advisory Committee).

156. *Id.*

157. *Id.* (outlining that the GAC "shall" appoint a non-voting liaison to the ICANN Board of Directors and one non-voting liaison to the ICANN Nominating Committee, and that the GAC may also designate non-voting liaisons to each of the Supporting Organization Councils and Advisory Committees).

158. *Id.* art. IX (stating that the membership of the ccNSO shall consist of ccTLD managers).

159. *Id.* arts. VIII, X (stating that the GNSO appoints two directors while the ASO "shall select Directors to those seats on the Board designated to be filled by the ASO").

160. *Id.* art. X.

161. *Id.* art. XX, § 6.

162. *Id.* art. XI.

163. *Id.* art. XI, § 2(4).

that were better structured and coordinated than the At-Large community undermined the initial powers granted by the first reform to the At-Large members. This should be viewed against a backdrop of the first reform, which had already decreased the power that the At-Large community enjoyed in the old bylaws and in ICANN's structure.<sup>164</sup>

ICANN's reform is an example of a political process used to reach a consensus and power equilibrium within the organization. From this analysis, I conclude that ICANN is by no means just a technical organization assigned the task 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. Moreover, it is now a political body with different groups and constituencies with a stake in its policies, all interacting with each other.

### *C. Results of the Reform*

The U.S. government sought the creation of ICANN as a needed step toward promoting international cooperation regarding the governance of the Internet and, at the same time, creating a bottom-up system in which government intervention was limited, if not eliminated. ICANN's evolution shows that the corporation slowly departed from its mere technical role and became a more political entity, in which participants from all groups and constituencies tried to reach consensus about the policies to be applied. Furthermore, the timid success of ICANN's first three years showed that a pure bottom-up model is not able to regulate the Internet efficiently, as the private sector is the main beneficiary of the political structure of the corporation. As the reform movement began inside the corporation, the different constituencies tried to exploit this situation by gaining power positions in the new structure. The initial proposal recognized a bigger role for international governments as a way to overcome the structural deficiencies of a private institution. However, the political strength of different groups and constituencies inside the corporation negated some of the initial reforms and produced a totally new structure.

The private sector consolidated its political position within ICANN's structure. GNSO constituencies gained important power spaces in the new design. ASO members had some gains, but more importantly they are still debating their future relationship with ICANN and the ccNSO. The ccNSO, recognized as an independent supporting organization, will

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164. See ICANN, AT-LARGE MEMBERSHIP SITE, *supra* note 135 (outlining the powers of At-Large Community prior to the adoption of the final bylaws).

provide new ways of cooperating with international organizations and governments.

Internet users have lost their prerogative to elect At-Large members directly by popular vote. The new bylaws created a Nominating Committee, which undermined most of the original power enjoyed by the At-Large members. PSO members lost most of their power inside the ICANN organization. The PSO was eliminated and its members transferred to the Technical Liaison Group ("TLG") with only an advisory role and with slight participation in the naming of Board members.

The process of change permits one to examine the political strength of different groups and also shows 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 ICANN's reform centered on how to divide the power inside the corporation, more specifically inside the Board, and the capacity of each group to enforce its policies.

The government gained more space in policymaking. Through the reinforcement of the GAC as an advisory institution inside all major groups and constituencies of the corporation, ICANN initiated a new relationship with government, which could be positive regarding the implementation of future policies.

Reforms enhanced international cooperation. The creation of a supporting organization for the ccNSO and the incentives for international governments to participate in a better GAC opened the gates of ICANN to wide international participation in policymaking. This step could provide effective power to enforce policies throughout the Internet, enhancing the power of ICANN as a regulator.

Finally, we are now presented with a more open model for regulation, in which more than just one sector is taken into account. This will provide better opportunities to create a more effective regulatory regime for the Internet. Nonetheless, those groups that have lost in the process should be accommodated in the new structure to provide better participation and improve overall decision-making. This tendency to concentrate decision-making also provides ICANN with a lower dispersion of power and more effective decision-making, since all groups are focused in small organizations inside ICANN. While reformers initially tried to move toward a more participative environment with governments and other Internet users, powerful constituencies within ICANN prevented major reforms. The new organization's efficacy will depend on how the specific structure and dispersion of power provides opportunity for consensus and how groups

left outside the policymaking process can be accommodated in the new structure. In the end, with reform and political struggle behind it, what is finally unmasked is the fundamental political nature of ICANN. As in every political institution, its legitimacy and survival depends on the access the different constituencies are accorded with respect to policymaking. In short, a more open and publicly accountable institution is necessary for constructing an effective governance body for the Internet.

While not all countries accept ICANN jurisdiction, some important countries do accept ICANN's jurisdiction. Furthermore, even if most countries do not accept ICANN's jurisdiction, they have designed dispute-resolution systems that are a reflection of ICANN's own UDRP. As a result, ICANN's influence is established by the generation of followers among the ccTLDs. For example, the United Kingdom has a dispute-resolution system similar to ICANN, with a winning rate for complainants of close to eighty percent, also similar to the UDRP.<sup>165</sup> Other countries, like Mexico, have a dispute-resolution system in which the only provider is WIPO.<sup>166</sup> In Asia, the new provider associated with ICANN also controls the ccTLDs for important countries, like China.<sup>167</sup>

As a result, even though ICANN is not directly involved in dispute resolution, most countries have in place such a procedure, based on the experience of ICANN. Furthermore, the creation of the new ccNSO will provide ccTLDs with more voice in ICANN decision-making and, as a result, we may see rules that will have general application. Indeed,

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165. See NOMINET.UK, GRAPHICAL REPRESENTATION OF STATISTICS, at <http://www.nominet.org.uk/DisputeResolution/Statistics/GraphicalRepresentationOfStatistics.html> (last visited Dec. 29, 2003) (recording an approximately eighty percent win rate for complainants under Nominet.uk's dispute resolution system); ICANN, STATISTICAL SUMMARY OF PROCEEDINGS UNDER UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, at <http://www.icann.org/udrp/proceedings-stat.htm> (last updated Dec. 17, 2003) (recording an eighty-one percent win rate for complainants). See generally NOMINET.UK, DISPUTE RESOLUTION SERVICE (DRS) POLICY, at <http://www.nominet.org.uk/DisputeResolution/DrsPolicy/DrsPolicy.html> (last visited Dec. 29, 2003); NOMINET.UK, DISPUTE RESOLUTION SERVICE (DRS) PROCEDURE, at <http://www.nominet.org.uk/DisputeResolution/DrsProcedure/DrsProcedure.html> (last visited Dec. 29, 2003).

166. See POLÍTICA DE SOLUCIÓN DE CONTROVERSIAS EN MATERIA DE NOMBRES DE DOMINIO PARA .MX (LDRP), at [http://www.nic.mx/nic-html/Politiclas\\_LDRP.htm#panelistas](http://www.nic.mx/nic-html/Politiclas_LDRP.htm#panelistas) (last visited Dec. 29, 2003) (providing only links to WIPO under its list of dispute resolution service providers, located under Appendix A).

167. See generally ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE (ADNDRC), at <http://www.adndrc.org/adndrc/index.html> (last updated Feb. 28, 2002); see also ICANN, ICANN Announces New Dispute Resolution Provider in the Asia Pacific Region, at <http://www.icann.org/announcements/announcement-03dec01.htm> (Dec. 3, 2001) (describing the ADNDRC).

as a suggestion for future work, it would be very interesting to do a comparative analysis of the different dispute resolution systems in the ccTLDs and compare them with ICANN's UDRP.

Professor Froomkin also notes that the reforms in ICANN are not different from the proposal of the former president of ICANN, Stuart Lynn.<sup>168</sup> Mr. Lynn did try to introduce the government into ICANN's structure, which would have changed the way ICANN functions today. But the already entrenched interests in ICANN resisted the changes and preserved their power. Understanding these changes is important. Without discussing whether Lynn was right, it is easy to see that ICANN is a political structure in which political and economic interests give shape to its policymaking.

#### IV. CONCLUSION

This work offers an analysis of private regulation of electronic commerce through the introduction of two case studies—the regulation of online privacy rights by BBBOnline and the ICANN's UDRP regime for domain-name disputes. Private industry insists that a self-regulatory approach has been successful in providing adequate privacy protection to consumers on the Internet. It claims that the government should not intervene in this issue and must permit Internet users to decide the relevant rules. This bottom-up regime is based on TPIs that generate and manage voluntary self-regulatory programs. After studying some of these programs, and BBBOnline in particular, I found numerous, somewhat predictable failures. TPIs are incapable of providing effective enforcement throughout the Internet. Their limited efforts are circumscribed by the same jurisdiction as the government's. They are also unable to overcome collective action problems, as the number of firms associated with these TPIs is minimal. Finally, and most importantly, they rely on government as an enforcer of last resort when their efforts produce no results. As a result, government intervention is imperative to improve the functioning of this regulatory regime. More importantly, if actions in this direction are not taken, the pendulum could very well swing towards the other end, prompting a change to a top-down regulatory regime that then brings along its own well-recognized limitations.

The UDRP system is somewhat closer to an optimal mixed system, but is nevertheless deeply flawed. Government and user participation is more significant under this system. Furthermore, there is a higher level

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168. Froomkin, *Commentary*, *supra* note 10, at 151–53 & n.73.

of international participation in advising and decision-making, as compared with a pure bottom-up system. Yet, this mixed system is beset with problems, like bias toward complainants and low user participation, and further legitimacy in the international arena is necessary. It may still be possible to transform ICANN into an instrument that provides consensus at the international level and promotes effective Internet regulation. This implies a further deepening of the mixed regime, combining top-down and bottom-up regulatory approaches within ICANN.

As might be expected, the construction of a regulatory regime based on a bottom-up approach cannot succeed in regulating the Internet effectively. In the case of ICANN, the president of the corporation tried to move toward a more cooperative regime with the government. Yet, political interests within ICANN reduced the thrust of these proposed reforms. In the end, we are now left with a corporation in which governments and international actors have more say, but a corporation that is, nevertheless, still controlled by those constituencies that successfully blocked most reforms. This is a clear indication that ICANN is now a political institution rather than a technical group, and it must, therefore, respond and accommodate the interests and preferences of its diverse member groups.

Based on the insights from the two case studies, it is possible to define at least a minimal role for government as one that is intended to solve problems in these self-regulatory approaches by setting minimum baseline standards for rights and regulations, preventing the capture of private regulators through meaningful oversight, increasing the participation of firms in private regulatory initiatives, and also serving as the enforcer of last resort.