ICANN AND GLOBAL ADMINISTRATIVE LAW

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1. Introduction

This work is aimed at highlighting some controversial issues related to the Internet governance: the recognition of public powers' influence, the problem of legitimacy and the recourse to mechanisms of accountability. In this way, the situation will provide the input to discuss the role of Global administrative law with respect to the operation of the «network of networks».[1]

In the Internet governance, the «Internet Corporation for Assigned Names and Numbers» (ICANN) owns an important role and a central position, especially in the domain name system. The analysis will be focused on the peculiarities of this new entity. A brief summary of the origins of the sectorial governance will permit to point out the relevant features of the

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[1] The increasing interest in the Internet regulation, shown by legal scholars, has improved by reason of the tight relationship existing between law and technology; the spreading of such phenomenon, in addition, enlightens certain issues concerning the supranational legal order. See J. DELLAPENNA, Law in a Shrinking World: The Interaction of Science and Technology with International Law, 88 *Kentucky Law Journal* 809 (1999-2000); J.H.H. PERRITT, JR., The Internet is Changing the Public International Legal System, *ivi*, 885 ff.

institutional model, like the shift from the original informal gathering to a completely new one. In particular, the objective is to extrapolate ICANN from the national realm in which it was created and to clarify its global nature, or, to put this differently, the worldwide effects of its activity. Then, the influence exercised by the governments will be traced out, as it enlightens a mixed structure, having a public-private nature. The system pertaining to ICANN shows the significance of public subjects in a sector initially created for the exclusive use of private ones. Most important, it reveals significant aspect of the new forms of governance: in this sense, it raises questions related to new mechanisms of legitimacy and accountability.

Accordingly, the query will move to those final matters. As for the former, a negotiation between States is questioned, in order to solve the problems likely caused by an entity that, even of unilateral nature, is performing global-interest tasks. Many voices have risen requesting for the intervention of international law. This aspect, in general, shows the tendency to stabilization and politicization (or re-politicization) of a self-reproductive system typical of the global legal pluralism.[2]

Anyway, the role of international law, for the moment, is still questioned: an agreement among States has still to be reached. Hence, the following passage to the «emerging principles» of global administrative law, in order to assure accountability. They should be provided also to ICANN: notwithstanding its private nature, it actually performs a public function, so that the mechanisms provided in the new discipline are currently very fitting. Among other things, measures of control, participation and transparency will be examined; in order to guarantee ICANN's accountability, these measures seem to acquire a specific public nature, even if they are based upon the private nature of the domain names governance; the uncertain outlines of some mechanisms give to the system its originality. These aspects reflect also the different constituencies (governmental and societal) that lie behind a particular body like ICANN, underlining the need for a model based on pluralism. The issue, in conclusion, is strictly related to the peculiar ways in which mechanisms of guarantee should be assured in the global governance.

2. The origins

ICANN is a *not-for profit corporation* established in 1998 under the laws of California. It is headquartered in Marina del Rey and started exercising its functions following the

[2] G. TEUBNER, «Global Bukowina»: Legal Pluralism in the World Society, in *Global Law without a State*, edited by G. Teubner, Aldershot, Dartmouth, 3 ff., at 22.

submission of a *Memorandum of Understanding* with the U.S. *Department of Commerce*.

Its development results, in some respects, very unusual:[3] in order to understand it, it is deemed necessary to look back to the roots of the Internet. The Net was born at a domestic level,[4] on the basis of a consensual model, through a bottom-up coordination. The technological progress has been ensured by the use of a method of communication adopted by the engineers committed to the creation of the Internet, based upon the diffusion of documents called *Request for Comments* (RFC); they were spread through the cyber community for the approval of certain techniques. If they were accepted, the new proposal would have become a new standard, to be applied in the future.[5]

Furthermore, the management of the sector was originally not assigned to a control authority: indeed, U.S. administration owned a mere financing role.[6] The project was developed in the 60's under the supervision of the Advance Research Project Agency (ARPA); the bodies initially managing the Net were set up during the 70s unofficially, such as the Information Science Institute (ISI), a centre of research affiliated to the University of South California. The whole complex of researchers involved constituted the informal Network Working Group (NWG).[7]

In the 80's a first formalization was introduced: ARPA turned into the new Defence Advance Research Project Agency (DARPA). The Internet Activities Board (IAB) and the Internet Engineering Task Force (IETF), core elements of the creation of the Net, were set up. They were concerned with tasks of technical arrangements and standardization.[8] They were different from the initial groups, as they began to show the first signs of centralization; still, they strictly worked abiding by a rule to bottom-up coordination, with decision based on consensus. Members of IETF were considered as individuals, not representatives of organization (like other standardization bodies); no property rights were imposed on its standards. IETF really represented an equal Internet community.[9] In 1988 there was the first reference to the Internet Assigned Names Authority (IANA), leaded by Jon Postel (an engineer

[3] M. MUELLER, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, Sabon, MIT, 2002, 1 on.

[4] It has developed under the protection of the U.S. government through the studies performed by American universities and their researchers,

[5] For the history of RFC, see RFC 1000, available at *http://www.faqs.org/rfcs/rfc1000.html*.

[6] See M. FROOMKIN, Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution, 50 *Duke Law Journal*, 17 (2000), esp. 57 ff.; J. ZITTRAIN, Between the Public and Private Comments before Congress, 14 *Berkeley Technology Law Journal*, 1077 (1999).

[7] M. FROOMKIN, *Habermas@Discourse.Net: Toward A Critical Theory Of Cyberspace*, 116 *Harvard Law Review*, 749 (2003), at 785 ff.

[8] M. MUELLER, *Ruling the Root*, cited, 78 ff., where the complete history of these groups is traced. See also M. FROOMKIN, Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution, quoted, 51 on.

[9] M. MUELLER, *Ruling the Root*, cited, 91.

in trust with the entire scientific community).[10] IANA had no legal personality nor it was incorporated; it did operate on the basis of a contractual relation with Universities (ISI) and the administration (DARPA). Its role has been crucial to the creation of the domain name system (DNS).

The process of formalization culminated with the creation, in 1992, of the Internet Society (ISOC), a private not for profit organization, which tried to become the vertex of the existing groups. It changed the Internet *Activities* Board into the Internet *Architecture* Board, imposing on it a kind of hierarchical control. Attempting to gain influence, it clashed with others bodies, especially with IETF. This is a relevant element: the first problems related to the legitimate control of the sector do appear; these early symptoms will later move to ICANN.[11]

These changes were due to the important growth in the number of computers connected during the 80's. But it was in the 90s that the phenomenon exploded, due to the commercial use of the new medium. It is now that institutional aspects clearly emerged. The unstoppable development of the Net started to express its huge communication and trade potentials, requiring sectorial governance. Its worldwide spreading caught the attention of several subjects on the international scenario, which started to wonder about the possible ways of management and control of such a new resource.

Different claims required the control of the Net.[12] An *International Ad Hoc Committee* (IACH) composed by experts of many organizations (including IANA, ISOC, IETF, WIPO and ITU), in 1996-97 drafted a proposal, never implemented, called *gTLD-MoU*: its objective was the definition for new institutional arrangements for the growing medium of communication, in order to assign to the sectorial governance an international nature. The proposal would have brought the sector «into a highly politicized arena, moving away from their past focus on technical standards settings and embracing a new role as policymakers and regulators».[13] Beside, its purpose was to accrue the number of domain names, in order to enlarge the size and the accessibility of the Internet. Furthermore, it introduced an important distinction in the functions related to the domain names: actually, it provided for two different kind of operators, the registries and the registrars (that will be later examined).[14]

A different claim and viewpoint (that finally prevailed) stressed the need of privatizing the sector, attributing the management to a private organization directed by technical experts.

[10] The first reference to IANA is included in RFC 1083, dated 1988.

[11] M. FROOMKIN, Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace, quoted, at 788.

[12] A complete analysis of the different claims is provided by M. MUELLER, *Ruling the Root*, cited, 134 on.

[13] M. MUELLER, *Ruling the Root*, cited, at 147.

[14] Further information on the website *http://www.iach.org*.

In this way the Net would have been protected from public powers affection, developing in an autonomous way. Those were at least the expressed intentions.

In 1997 the U.S. administration submitted a first proposal (the so called *Green Paper*), but it came across a fierce opposition (for example, the E.U. was claiming to expand its intervention power and that of the member States).[15] So, it was followed the next year by a *White paper*, providing a «NewCo» leading the operation of the sector. In few months ICANN was set up. It would have acquired a core role in the domain names management,[16] along with a number of political and legal issues, not solved yet.

3. Tasks and organization

The regulation of the Internet is fragmented and shared among a number of subjects, each competent for specific aspects.[17] For example, the Internet is based on the existence of infrastructures that are governed by telephone companies. Moreover, a number of international organizations deal with the standards, like the *International Organization for Standardization* (ISO) or with the protection of certain rights, as the Council of Europe:[18] here the discourse is concentrated to the domain names, then to ICANN and there-connected subjects. We will first try to investigate the nature of the Net.

The Internet can be defined as a method of data transfer.[19] Its name («Inter» – «net») already explains many aspects of it. The first connections in the late 60's regarded only few machines; every group of connected machines constituted a separate network. Each one of them had typical and special technical aspects: without a common ground they could not communicate. The next step was to connect not only single machines, but also different kind of networks. This task has been made possible through the adoption of an arrangement called Transfer Control Protocol, which, together with the Internet Protocol (therefore its name,

[15] See H. BURKERT, About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN, 36 *Loyola of Los Angeles Law Review*, 1111 (2003).

[16] The new body was created through procedures that, according to some interpretations, affected its legitimacy since then. See J. WEINBERG, Icann and the Problem of Legitimacy, 50 *Duke Law Journal* 187 (2000).

[17] See the analysis of J. MATHIASON (team leader), M. MUELLER, H. KLEIN, M. HOLITSCHER and L. MCKNIGHT, *Internet Governance: the State of Play* (9 September 2004) Internet Governance Project, paper IGP04-001, available at *http://www.ip3.gatech.edu/images/IGP-State-of-Play.pdf*. The paper represents a contribution to the workshop of the U.N. *Working Group on Internet Governance*.

[18] J. MATHIASON et. al., *Internet Governance: the State of Play*, quoted above, at 27.

[19] Realized by their fragmentation and their re-assembling at the point of destination. The data transmission does not follow given paths; on the contrary, it uses free channels at a particular moment (*packet switching*). According to the «*end to end*» principle, an high standard of neutrality is ensured, as the data are not checked during the «journey», maintaining the same contents from the start to the destination. To put it differently, the check on data takes place at the starting and the destination point, not during the transfer. See J. MATHIASON et. al., *Internet Governance: the State of Play*, cited, at 7.

TCP/IP), defined the «internetworking» function. The name was then shortened into «Internet». This protocol is still the basis for the functioning of the Net.[20]

Any device connected to the Net, in order to be recognized, has to be exactly identified. Such function is exercised by the IP address, which consists of a series of four number strings that is required to reach any destination. As the series are difficult to remember, the use of alphabet letters or meaningful words results far simpler; the *domain names* respond to such requirement, mapping numbers to words. For example, the address «207.142.131.248» turns into «www.wikipedia.org».

Domain names are hierarchically allocated: in the said example «wikipedia» is the *second level domain name*; «.org» is the *top level domain name* (TLD). Other levels in the hierarchy can be placed: for example, «admin.wikipedia.org».[21] Each part between the dots represents a particular «zone». For each zone different subjects are competent, in relation to the assignation and the maintenance of database (so, one for «.org», the other for «wikipedia.org», and so on). If only one had the control of a domain name, there would be a central point of allocation. This would complicate the access to the Internet and would slow its functioning. This kind of division, on the contrary, permits the delegation of domain name assignation to different levels, so creating a form of «distributed administration».[22]

The top-level domains, in addition, are classified into two types: *generic* top level such as «.org», «.com» or. «.net» (*gTLD*) and *country code* top level domains, used by a particular State, such as «.it», «.fr», «.es» (*ccTLD*). This classification was introduced by IANA, and, with particular reference to the *ccTLD*, it relies on a ISO standard, which provides for the definition of the geographical areas using two-letter codes, worldwide recognized and applied.[23] Here, a first form of standardization is shown up: in order to define a global recognized code, an international standard was selected and applied by an informal group like IANA. This, effectively, would not have had the authority to impose such a standard; indeed, it referred to the work of an international organization like ISO, so managing to impose these criteria to private and public subjects.

While, as briefly explained above, the first development relied upon informal groups, the spreading of the Net and the growing importance of domain names called for the creation of a

[20] Present at Creation, *The Economist Technology Quarterly*, 10 June 2006, at 31-32.

[21] The example has been taken from the address *http://it.wikipedia.org/wiki/Nomi_a_dominio*. The domain name system was invented in 1983; the original specifications were provided by the RFC 882 and 883 (1983); later on, by the RFC 1034 and 1035 (1987). All of them are available at *http://www.rfc-editor.org*.

[22] M. MUELLER, *Ruling the Root*, cited, at 41-42.

[23] Such classification was created by the IANA set up by Jon Postel. See RFC 1591, of March 1994, one of the most important ones and still in use: it is available at *http://www.rfc-editor.org/cgi-bin/rfcdoctype.pl?loc=RFC&letsgo=1591&type=ftp&file_format=txt*. See also P.K. YU, The Origins Of Cctld Policymaking, 12 *Cardozo Journal of International and Comparative Law* 387 (2004).

new institution. Domain names were becoming a scarce resource, so there was the need for rules in order to perform their allocation (it has to be noted, however, that their scarcity could be overcome: a new technology could increase the possibilities of creation – and consequent assignation – of domain names. Though, this transition has not been implemented already).[24]

Which is the role of the new institution in this field? ICANN has acquired a core position in the Internet governance, the one of a new central authority. It is possible to maintain that ICANN has been set at the top of the institutional «pyramid» created to oversee the field.

Basically, its tasks include the management and the assignment of domain names, IP addresses and Internet protocols and the supervision over «root servers».[25] As for the last aspect, the governance of the «root» is the focal point that confers ICANN an apex position in Internet. The root contains the Internet existing top level domains. The entity decides whether new TLD will be added. Technically, it would be possible to create a «new» Internet (and these years have shown some attempts in this direction), that is an independent system, but this does not happens for what has been recognized as a «network externality».[26] Users will tend to aggregate to the more suitable system, the one most used that provides more possibilities of interaction with others. So, the power over the root is power over the Internet.

The first two functions, instead, are related to the assignation of a scarce resource like domain names and IP addresses; ICANN is the answer to solve these problems. This new form of institutionalization was conceived in order to assure a new management, in response to the queries of appropriation coming from the operators. Also through these functions ICANN gained a strong form of control over the functioning of the Internet.

According to the *MoU*, ICANN cannot work directly in the market of domain names; its supervision role, indeed, has the duty to leave the interested subjects free to operate. The entity, in effects, cannot operate as a registry or as a registrar. The formers are bodies entrusted (by ICANN) with the delegation of a particular *top* level domain names (for example, «.com», «.travel» or «.edu»). The latter provide for the request of *second* level domain names

[24] The technique is called IPv6, and it is based on 128-bit addresses, instead of the 32-bit provided by the actual IPv4. The IPv6 was created in mid 90s, but it is still not applied, though its introduction could resolve many problems related to the scarcity of domain names.

[25] The root servers are 13 servers managing the domain names. The search of a domain name comes from the lower level; if the lower level servers cannot fulfil a request, this is shifted to a higher level, until the *root server*, which can accomplish any application. Ten root servers are located in the U.S.; two in Europe; one in Japan. The A server contains the official database of registered TLD (*root zone file*). It is under the authority of the U.S. Department of Commerce, on the basis of an agreement with *Verisign Inc.* and ICANN. See M. FROOMKIN, Wrong Turn in Cyberspace, quoted, 42 ff.; M. MUELLER, *Ruling the Root*, cited, p. 47 (illustrating also the IP addresses routing system).

[26] M. MUELLER, *Ruling the Root*, quoted, at 52. See W.H. PAGE and J.E. LOPATKA, Network Externalities, in *Encyclopedia of Law and Economics*, edited by B. Bouckaert and G. De Geest, Cheltenham UK – Northhampton MA, USA, Elgar Publishing, 2000, vol. I, at 952 ff.

registrations. Their existence ensures (or should ensure) competition: for one registry there can be a more registrar, providing services to consumers within the market. To this regard, a great change was made to the mentioned IACH proposal. In the latter, registries should be no-profit; in addition, they should directly treat with registrars. When ICANN was created things changed. The initial system was conceived in this way: ICANN should conclude contracts with the registries; these, in their turn, should contract with registrars. But the new entity went further on, as it started to bind with contractual agreements not only the registries, but also the registrars. It acquired a central position in the domain name assignation. No commercial entity could operate with domain name without an established arrangement with ICANN. Some scholars add it has received a huge influence by the most powerful actors; in this way, also the competition goal has been questioned.[27]

As for its structure, ICANN responds to three models: a *corporation*,[28] a standardization body and a government entity.[29] It responds to a multi-stakeholder model. A *Board of Directors*, a number of supporting organizations and several advisory committees are part of ICANN.

The *Board* directs and governs the *corporation*, takes the most important decisions, for the implementation of the policy. The *Board* cooperates with the supporting organizations which are currently three: one for the addresses (ASO), one for the generic top level domain names (GNSO) and one for the country code top domain names (CCNSO).

Their intervention is necessary for domain names policy-making. The abovementioned organizations are established in order to represent sectorial operators, ensuring the bottom-up coordination, which is one of the main informing principles of ICANN (according to point I-C of the *MoU*). Nevertheless, the «weakest» operators have been often excluded almost putting in doubt the real representative ability of the body.[30]

Besides, the committees, according to their name, only own an advisory function. There is the At-Large advisory committee (with function of representation: see *infra*, paragraph 7), the Root-Server System Advisory Committee (RSSAC), the Security and Stability Advisory Committee (SSAC) and a Technical Liaison Group (TLG), with technical functions.

Finally, the structure provides for a *Governmental Advisory Committee* (GAC), which acquires a core role (also for the purposes of the present work) as representatives of national

[27] M. MUELLER, *Ruling the Root*, cited, 188-189.

[28] J. ZITTRAIN, Between Public and Private Comments before Congress, cited, at 1084.

[29] See J. PALFREY, The End of the Experiment: How Icann's Foray into Global Internet Democracy Failed, 17 *Harvard Journal of Law and Technology* 409 (2004), esp. 425 on.

[30] J. VON BERNSTORFF, The Structural Limitations of Network Governance: ICANN as a Case Point, in *Transnational Governance and Constitutionalism*, edited by C. Joerges, I.-J. Sands e G. Teubner, Oxford and Portland, Hart Publishing, 2004, 257 ff., esp. 277.

governments compose it.[31] Moreover, there are some independent bodies, internal and external, which should ensure the control over the actions performed by the body (that will be analysed further on).

4. Policymaking and global context

Once briefly explained the origins, tasks and organization, some questions are to be addressed. Is ICANN a policy-maker? Is it relevant in the global context?

1. ICANN is responsible for the «coordination» of the sector, ensuring a good working system. Its tasks, in particular, are defined as merely technical. But they do not involve only these aspects. The activity of ICANN must be traced back into functions of policy-making. Indeed, many provisions of the *ByLaws* refer to this kind of activity.[32] In addition, it chooses which companies can rule a determinate TLD; this selection actually affects rights of companies or individuals. If the management of a TLD is denied to a particular company, it will have no possibility to work in the sector. This happened with Afternic.com, a New York based company, which was initially refused to act as a registrar.[33] Only after a lawsuit was settled it could become to operate.

One more example will help us. The *Board* can decide the introduction of new TLD. Their number, as explained, contributes to the extension and the size of the Internet, and guarantees to the final users a greater possibility of registration, reducing their scarcity. Since its creation, there were proposals for introducing something like 500 new TLD. During the years, only few have been introduced. Some say it was only in order to preserve market position of the existing operators. But the aspect is important because it makes clear that the *Board* does not take only technical decisions. Scientific development would allow the introduction of new top level domain names (even if solutions proposed are different): consequently, a technical decision would have brought to their introduction. Their refusal shows the discretion applied by the *Board* and draws attention to the intrinsic nature of policymaker of the entity. One more question is related to the nature of discretion applied by the *Board*: a company has long applied for the introduction of the «.xxx» domain name, relative to adult content websites. This was also required in order to create a simple

[31] Currently 101, including the European Union: see *http://gac.Icann.org/web/contact/reps/index.shtml*. There are also some observes to the GAC, like the International Telecommunication Union, the African Union Commission, or the Organization for Economic Cooperation and Development.

[32] K.E. FULLER, *ICANN: The Debate Over Governing the Internet*, available at *http://www.law.duke.edu/journals/dltr/articles/2001dltr0002.html*, point 12.

[33] *Ivi*, point 15.

recognition of these contents, thus creating the possibility to ban them form children's net surfing. ICANN first approved the introduction of the new TLD, but then refused it; the underlying reasons seem to be of ethical nature.[34]

So, the tasks of ICANN are those of a governance body, and not of mere technological supervision.

2. Two elements allow us to define the ICANN as a global institution.

First, the organizational order is indeed unusual, giving confirmation of the existence of a multi-organizational system in the supranational order.[35] It is clear that we are not facing an international organization created by national States, neither a second-generation organization, but rather an entity having a private nature.[36] Its supranational nature is enlightened by its activity, which is performed at a world scale, affecting a huge number of users.[37] Two traits are thus outlined. The entity is private, but entrusted with a public function. It is national, but its functions are global (as that «global public policy»[38] was already mentioned in the *Articles of Incorporation*).

Second, its normative system is featuring special characteristics: peripheral, quite spontaneous (in respect of nation States) and informal, it is an example of the new form of «law» making in the global arena.[39] Four observations seem appropriate:

a) ICANN can be recognized as a new international regulatory regime, as it governs a global source, adopts rules with worldwide effect, provides arrangements and decision-making procedures for the regulation of the entire sector.[40]

b) The regulatory regime can affect final users' right. For example, it is able to impose fees on the domain name registration. It first imposes them on registries and registrars (this the major source of income for ICANN; it takes place on contractual basis and the bargaining shows a big struggle between the entity and the operators), which, in their turn, impose fees to final

[34] M. MUELLER, *Ruling the Root*, cited, 203; Internet Governance Project, *Review of Documents Released under the Freedom of Information Act in the .XXX Case* (19 May 2006). Internet Governance Project. Paper IGP06-003, available at *http://internetgovernance.org/pdf/dist-sec.pdf*. See also *infra*, note 47.

[35] G. DELLA CANANEA, I pubblici poteri nello spazio giuridico globale, *Rivista trimestrale di diritto pubblico* 1 (2003), esp. at 17.

[36] See G. TEUBNER, Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?, in *Public Governance in the Age of Globalization*, edited by K.-H. Ladeur, Ashgate, 2004, 71 ff., esp. 82 ff.; see also H. SCHEPEL, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford, Hart Publishing, 2005.

[37] Statistics give 940 million on line users up to the end of 2004 (see *http://www.global-reach.biz/globstats/index.php3* where users are also classified by language). The number will increase in consideration of the spreading of the Net in China.

[38] Please note that a particular interpretation refers the word *policy* to the guidelines of decisions taken at a private stage; it does not concern administrative public functions. See A. PISANTY, *Internet Names in WGIG and WSIS: Perils and Pitfalls*, available at *http://www.wgig.org/docs/book/Alejandro_Pisanty%20.pdf*.

[39] G. TEUBNER, *Global Private Regimes*, cited, 75 -81.

[40] This character has been recognized by M. MUELLER, *Ruling the Root*, quoted, 220.

users. Another essential instance is the formulation of a dispute resolution system. On behalf of the strong influence of the World Intellectual Property Organization (WIPO), in 1999 ICANN adopted a Uniform Dispute Resolution Policy (UDRP).[41] The policy contains a procedure for the disputes concerning the property of a particular domain name. The analysis of the entire procedure and of the subject involved would deserve a separate work; here, it is only possible to mention that this procedure affects operators, defining a uniform global regime that, in many cases, can deprive individuals of their domain names. The procedure is mandatory only to the registries and registrars that have concluded agreements with ICANN (notably, relating to *gTLD*); in the rest of the cases (*ccTLD*) the procedure is voluntary. The procedure will be included in the contracts of users applying for the registration of new domain names; it will be applied, once a new controversy is set. National courts are not prevented from adjudicating the dispute, but in one case an American District Court dismissed it because it had already been judged under the UDRP. This would mean an important restriction of the right to defence. The Court of Appeal, in any case, reversed the decision.[42] In other cases, national courts have declared their competence, even if a UDRP procedure had taken place yet. The discussion was centred on whether the decision taken on a UDRP basis was binding for national courts, denying this possibility.[43]

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[41] The *Uniform Dispute Resolution Policy* (UDRP) comes along with some *Rules*. It cannot be avoided to list the relevant sources: exhaustively, see L.R. HELFER, Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?, 12 *Cardozo Journal of International and Comparative Law* 493 (2004); L.R. HELFER and G.B. DINWOODIE, Designing Non-National Systems: the Case of Uniform Domain Name Dispute Resolution Policy, 43 *William and Mary Law Review* 141 (2001); M. FROOMKIN, ICANN's «Uniform Dispute Resolution Policy» - Causes and (Partial) Cures, 67 *Brooklyn Law Review* 605 (2002); M. GEIST, Fair.Com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP, 67 *Brooklyn Journal of International Law* 903 (2002); ID., Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP, available at *http://aix1.uottawa.ca/~geist/fairupdate.pdf*; M. MUELLER, Rough Justice. An Analisys of ICANN's Dispute Resolution Policy, available at *http://dcc.syr.edu/miscarticles/roughjustice.pdf*; L.M. SHARROCK, The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions from within the Udrp Framework, 51 *Duke Law Journal* 817 (2001), also available at *http://www.law.duke.edu/shell/cite.pl?51+Duke+L.+J.+817*; J.G. WHITE, Icann's Uniform Domain Name Dispute Resolution Policy In Action, 16 *Berkeley Technology Law Journal* 229 (2001).

[42] The case was named *corinthians.com*, dismissed by the Massachusetts District Court. The U.S. Court of Appeal for the First District declared its jurisdiction on November 5, 2001. See *http://www.icannwatch.org/article.pl?sid=01/12/07/124737&mode=thread*. The decision is available at *http://www.ca1.uscourts.gov/pdf.opinions/01-1197-01A.pdf*. See also R. OWENS, Domain-Name Dispute-Resolution after Sallen v. Corinthians Licenciamentos & Barcelona.Com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 18 *Berkeley Technology Law Journal* 257 (2003).

[43] As in the case *barcelona.com*. The first decision was given by the World Intellectual Property Organization, Arbitration and Mediation Center, UDRP – Domain Name Dispute Resolution, Administrative Panel Decision, *Excelentisimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, Case no. D2000-0505, available at *http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0505.html*. The second by the United States Court Of Appeals for The Fourth Circuit, *Barcelona.com Inc. v. Excelentisimo Ayuntamiento de Barcelona*, no. 02-1396, available at *http://www.case.info/domain/barcelona2.pdf*. See Z. EFRONI, A Barcelona.com Analysis: Toward a Better Model for Adjudication of International Domain Name Disputes, 14 *Fordham Intellectual Property, Media and Entertainment Law Journal* 29 (2003).

c) ICANN legal system follows private law criteria. It is composed by the *Memorandum*, the *Articles of Incorporation* and the *ByLaws*, abundantly amended during the last years (resulting almost «obscure»); yet, the authority of the body is affirmed by submitting contracts with the domain names organizations; such submission of agreements enforces ICANN provisions, which become legally binding. Of course, there are different viewpoints regarding such definition, as some scholars recognize a clear role of public law in this field, while others deny it. In addition, also the consensual basis is contested. The power of ICANN to impose the contracts is based on its control over the root, that is on its prominent, authority-like position: so, operators are compelled to sign them if they want to start with their activity. Such contracts, thus, have been classified as «not voluntary».[44]

d) ICANN regime bypasses national States. This is the most relevant and controversial aspect in a global perspective. Once adopted, the legal provisions affecting the Internet (namely, domain names, IP addresses, protocols and the root server systems) must not be enforced at the domestic level. Indeed, those provisions are implemented prevailing on the States and addressing themselves directly to private subjects.[45] The rules regarding country code domain names constitute an exception to the rule, as it will soon be explained.

5. The influence of public powers

Notwithstanding the formal private nature of ICANN, there is a direct influence of public powers in the entity. This causes a systematic outcome, meaning a hybrid regulatory system. To this regard, the perspective offered by global administrative law acquires a special importance. ICANN, in effects, has been identified as one of the types related to the emergence of the new discipline's principles.[46]

The influence of the domestic governments is growing under three points of view. First, the GAC, created as a mere advisory body, has gained from time to time a larger importance; following a deep analysis,[47] it has taken on the function of a *supporting organization*, getting

[44] S. CRAWFORD, The Icann Experiment, 12 *Cardozo Journal of International and Comparative Law* 409 (2004), at 442.

[45] S. BATTINI, *International Organizations and Private Subjects: A Move Toward a Global Administrative Law?*, IILJ Working Paper 2005/3 (Global Administrative Law Series), available at *http://www.iilj.org*, at 21.

[46] B. KINGSBURY, R.B. STEWART and N. KRISCH, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1 (Global Administrative Law Series), available at *http://www.iilj.org/papers/2004/2004.1.htm*, at 9.

[47] M. MUELLER, *Governments and Country Names: ICANN's Transformation into an Intergovernmental Regime*, available at *http://www.inernetgovernance.org*. A recent confirmation of this statement can be found in the mentioned case of the new top level domain name «.xxx», rejected by ICANN also following the objection of certain governments and the negative advice of the GAC. See *http://www.icannwatch.org/articles/06/05/11/0114241.shtml*.

to affect the adoption of policies by the *Board*.[48] At this regard, art. XI, *section* 2, n. 1, lett. *i)* and *j)*, provides that the GAC can give advice on public policy matters (by itself or upon request of the *Board*). The *Board* has to take the advice in due consideration and in case it determines to take an action that is not consistent with the advice, it shall so inform the Committee. The GAC and the *Board* will then try to find a mutually acceptable solution. If no such solution can be found, ICANN *Board* will state in its final decision the reasons why the GAC advice was not followed (art. XI, 2.1, *lett. k*).

Secondly, the *ByLaws* set forth a number of derogatory provisions concerning the GAC: some of them deprive the *Board* of review powers on the Committee: for example, art. IV, section 4, of the *ByLaws* provides that the *Board* causes a periodic review (no less frequently than every three years) of the performance and operation of each supporting organization and advisory committee, with the possibility of adopting relevant measures after the review. This is not feasible with regard to the GAC that, instead, shall provide its own review mechanisms (art. IV, section 4.3).

Thirdly, as for the country code domain names, ICANN has not succeeded in imposing its authority through the aforesaid agreements. Actually, it is developing an «Accountability Framework», under which the *ccTLD* registries «formalise their relationship with ICANN», specifying the obligations and providing for dispute resolution.[49] The interesting point is that nation States still exercise a strong influence on the *ccTLD* registries.[50] Recently, the GAC has formalized and recognized such authority:[51] in a document it is underlined how the accredited organizations for the management of the country code domain names are subject to the direct (and ultimate) control of domestic governments.

The intervention of the States has a two-fold implication: on the one hand, it sets out rules in a sector which was not considered to be under States' control, according to its

[48] See also W. KLEINWÄCHTER, From Self-Governance to Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources, 36 *Loyola of Los Angeles Law Review* 1103 (2003).

[49] See the signed documents at *http://www.icann.org/cctld/agreements.html*.

[50] See T. FRANKEL, Governing by Negotiation: the Internet Naming System, 12 *Cardozo Journal of International and Comparative Law* 449 (2004); S. CRAWFORD, The Icann Experiment, cited, 409 ff.

[51] See *Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains*, presented by the *Governmental Advisory Committee*, 5 April 2005, available at *http://www.icann.org*. A first version was published in 2000.

borderless nature;[52] on the other hand, it creates a particular relationship between the private organizations and public powers.

Under the first point of view, the States have kept on exercising their influence and have tried to expand their competence, internationally speaking,[53] in order to obtain the full control of the Net. The intention of the Chinese government to create new independent domain names constitutes an example thereof.[54]

With reference to the second issue, instead, the public-private interaction illustrates the new paradigm of global governance: public subjects' activity, which increasingly affects the sector, is mixed with private actors' one. That is confirmed also by the U.N. presence (even if its intervention had the different purpose of legitimating the institution: see *infra*). If we move back to ICANN origins and the intention to assign the sector to the privates' *self-governance*, it is easier to understand the importance of such evolution. At the whole, the interaction of the several subjects allows to affirm that the role of the States is limited, but relevant for certain aspects. The investigation of the sector, then, shows how the States, at the whole, lose some authority but do not totally disappear: rather, they sort of redesign the exercise of their powers. Although the paradigm of «westphalian» state is overcome,[55] public subjects' intervention is not excluded, but follows different paths. National States cross their borders (according to a model of «open State»[56]) and invade the activity of a private entity, thus creating a new form of cooperation necessary to preserve some aspects of their sovereignty.[57]

If national governments, and not only private actors, are deeply involved in the field, there is space enough for questioning who has the legitimate power over such institution. These aspects will be examined in the next paragraph.

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[52] See J. PERRY BARLOW, *A Declaration of Independence of Cyberspace*, at *http://www.eff.org/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration.txt*. Critically, N. WEINSTOCK NETANEL, Cyberspace Self-Governance: a Sceptical View from Liberal Democratic Theory, 88 *California Law Review* 395 (2000). The first author contemplating the possibility of the government intervention was Lawrence Lessig. See *Code and other Laws of Cyberspace*, Basic Books, New York, 1999, where the author explains how State intervention is made possible through *software* and *hardware* («code»).

[53] See M. DIEZ DE VELASCO, *Instituciones de Derecho Internacional Público*, Madrid, Tecnos, 1999, 339 on.

[54] See the comment of M. MUELLER, *Alternate Realities: Playing the China Card*, on the website *http://www.icannwatch.org/article.pl?sid=06/03/01/156233&mode=thread*.

[55] K.-H. LADEUR, Globalization and Global Governance: A Contradiction?, in *Public Governance in the Age of Globalization*, cited, p. 16. G. DELLA CANANEA, *I pubblici poteri nello spazio giuridico globale*, quoted, *passim*. See also J. MCLEAN, *Divergent Legal Conceptions of the State: Implications for Global Administrative Law*, IILJ Working Paper 2005/2 (Global Administrative Law Series), available at *http://www.iilj.org*, now also in 68 *Law and Contemporary Problems* 167 (2005).

[56] K.-H. LADEUR, *Globalization and Global Governance: A Contradiction?*, cited, at 15.

[57] *Ivi*, at 17.

6. Legitimacy

The legitimacy of the activities performed by the corporation is the most controversial issue. Formally, the use of private law sources creates a separation between ICANN and the U.S. administration. Therefore, only experienced *elite* governs the sector, which is in line with the creation and the evolution of the Internet itself. Anyhow, the relationship with the Department of Commerce cannot be denied[58] and yet further, as it has been pointed out, even the role of the domestic governments is growing deeper.[59]

The relevant issue is the lack of an effective measure, of political and legal nature, legitimating the competences of ICANN.[60] This is particularly true with regard to the U.S. legal order: American scholars have at length lingered over the classification of ICANN within the U.S. administrative system, assigning to it an *agency-like regulatory function*, also suggesting a number of possible solutions to the raised issues.[61]

Our point of view, still, focuses the attention upon the supranational legal order: it must be underlined that the global arena is marked by the existence of private subjects, exercising global regulatory functions. So, the attention must be focused on mechanism and subjects of the space created beyond the State.

A first solution could be provided by international law, with the adoption of a multilateral treaty. The recent intervention of the United Nations could be a turning point: in 2003, a *World Summit on Information Society* (WSIS) was organized by the U.N., for the study of the developing aspects of Information Society. It was held in two stages. After the first, held in Geneva in 2003, the *Working Group on Internet Governance* (WGIG) was created with the purpose of studying the issues related to Internet governance and to propose alternative solutions. The committee, at the end of its workshop, filed a report, which was discussed during the second stage of the WSIS (Tunis, 16-18 November 2005) without obtaining a particular outcome. Currently, a new *Forum* should proceed in the analysis of the sectorial matters.[62] Indeed, through U.N., the States could move towards a functional scheme which could likely lead to the establishment of an international treaty.[63]

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[58] See the cited works of M. FROOMKIN (in addition, Form and Substance in Cyberspace, 6 *Journal of Small and Emerging Business Law* 93 (2002) and Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace, cited, 844 ff.), M. MUELLER, J. WEINBERG e J. ZITTRAIN; for a different point of view, which does not envisage a particular problem related to the democratic deficit, see D. HUNTER, ICANN and the Concept of Democratic Deficit, 36 *Loyola of Los Angeles Law Review* 1149 (2003).

[59] See also D. DRAZNER, The Global Governance of the Internet: Bringing the State Back In, *Political Science Quarterly* 477 (2004).

[60] H. KLEIN, *ICANN Reform: Establishing the Rule of Law*, paper submitted to the WSIS, Tunis, 16-18 November 2005, available on *http://www.ip3.gatech.edu/images/ICANN-Reform_Establishing-the-Rule-of-Law.pdf*.

[61] J. WEINBERG, ICANN and the Problem of Legitimacy, cited, 218 ff.

[62] For further details, see *http://www.wgig.org*.

It has been suggested that only a «framework convention» should be set up, defining the exact outline of the *Internet governance* (one of the main points discussed by the U.N. committee), the involved subjects (marking the roles of the States and the relationship between public and private subjects), the legal requirements and the competent authorities for the enforcement.[64] The whole transformation should be realized by degrees (at this regard, it could be compared to the development of the international environmental law and institutions[65]) and should be limited to the most relevant issues, allowing the autonomous development of a number of regimes, ruling the single features.[66]

Moreover, going over the strict area of domain names, it could lay down the basic rules for the protection of certain rights, such as the freedom of thought that has been recently restrained[67] and should be put to the attention of the entire international community. In one case, a journalist has been arrested and condemned to prison for sending e-mails with critic points of view towards Chinese government. The government asked the mail provider (Yahoo!) the access to the content of such e-mails, and the society accorded it. Have the freedom of thoughts and the respect of private correspondence been violated? Other cases involve search engine, such as Google, which have restricted the access to certain words for their chinese-based services. In this way, final users cannot display the links to some words, like «democracy»; a recent investigation demonstrates that on 10.000 words, about 901 (9%) returned censored results.[68] The operators defend their behaviour saying that they must accomplish with the local norms (again, is Internet still without borders and free of nation States influence?); but Google, ultimately, has declared it will put an end with these restrictions. These facts have raised the attention of the public opinion, and many NGO's are making their efforts to come up with them.[69] They show how an international agreement could establish minimal guarantees to freedom of expression for the new medium of communication; a lack of it implies possible local violations of human rights that, in a general way, receive

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[63] On United Nations, see B. CONFORTI, *Le Nazioni Unite*, Padova, Cedam, 2000; P.C. SZASZ, The Complexification of the United Nations System, in *Max Planck Yearbook of United Nations Law*, edited by J.A. Frowein e R. Wolfrum, Leiden-Boston, Martinus Nijhoff Publishers, 1999, vol. 3, 1 ff.; M. DIEZ DE VELASCO, *Las Organizaciones Internacionales*, XIV ed., Tecnos, Madrid, 2006.

[64] See J. MATHIASON, *A Framework Convention: An Institutional Option for Internet Governance* (21 December 2004), Internet Governance Project, paper IGP04-002, available at *http://www.internetgovernance.org/pdf/igp-fc.pdf*, 2-3.

[65] J. MATHIASON, *A Framework Convention: An Institutional Option for Internet Governance*, cited, 2.

[66] *Ivi*, at 3.

[67] See the article China and the Internet, *The Economist*, 28 April 2006; S. RODOTÀ, Una costituzione per Internet?, *La Repubblica*, 20 October 2005.

[68] See *http://blog.outer-court.com/archive/2006-06-18-n85.html*.

[69] A section of the Amnesty International website is dedicated to human rights in the Internet field. Further information is available at *http://web.amnesty.org/pages/internet-index-eng*.

international protection. It is possible to remind the international protection accorded by the Covenant on Civil and Political Rights (art. 17 and 18), or, at a regional level, by the European Convention of Human Rights (art. 8).[70] Would these treaties be proficient to protect the mentioned rights in the cyberspace? The question is related to the intrinsic nature of the latter: it is well known that scholars are divided into «unexceptionalists» and «exceptionalists». The formers believe that the legal problems of cyberspace, and their solution, do not differ from those of the real world: so there is not a need for original normative arrangements. The latter, on the contrary are convinced that the technical aspects of cyberspace require different legal solutions.[71] In this case, it seems that the second point of view must be followed. The cyberspace requests for different rules: its technical aspects, in effects, bring into question the enforcement of fundamental rights already recognized and protected in diverse legal orders (national and supranational). As the cases described above demonstrate, there are particular modalities in which such fundamental rights have been breached: so, the solution deserves new legal arrangements to assure their protection. Different responsibilities should be envisaged by the norms; the functions carried on by the Net operators present some peculiarities that should be included under new legal definitions.

Finally, the treaty could constitute a measure in order to establish adequate guarantees of representation and participation to the countries which are still not completely involved in the sector; notably, countries of Third World. An effort should be made in order to assure these countries and their people access to new technologies.

At presents, anyhow, it cannot be denied how the recourse to international law is in dispute: the interested subjects, indeed, have not effectively acted to establish an international treaty, which is enlightened by the difficulties faced by the United Nations to find a solution for the sectorial matters.[72] The intervention of national governments, in a formal sense (establishing a multilateral treaty), is opposed by those who claim for the independence and autonomy of private subjects. From this point of view, it is not clear which values will prevail in the international scenario, which shows exactly which are the difficulties when political bargaining is at stake.

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[70] The texts are available online at *http://www.unhchr.ch/html/menu3/b/a_ccpr.htm* and *http://www.hri.org/docs/ECH50.html#Convention.*

[71] For this debate, see D.R. JOHNSON and D.G. POST, Law and Borders – The Rise of Law in Cyberspace, 48 *Stanford Law Review* 1367 (1996); a critique followed from J.L. GOLDSMITH, Against Cyberanarchy, 65 *University of Chicago Law Review* 1199 (1998); see, finally, the response of D.G. POST, Against «Against Cyberanarchy», 17 *Berkeley Technology Law Journal* 1 (2002).

[72] For the analysis of the WSIS outcomes, see H. KLEIN, *An Assessment of the WSIS-2/Tunis '05 Outcomes*, available at *http://www.IP3.gatech.edu* and *http://www.internetgovernance.org*.

If the role of international law is actually in doubt, other mechanism can be provided: this is the core point of the issue. In particular, the ones of global administrative law[73] (with particular attention towards accountability) could represent a further step to guarantee participation and transparency (within the limits that will be pointed out) and so to constitute an attempt for the control of the entity, ensuring the compliance with certain aspects of the due process and the rule of law.[74] Mechanisms to control the concrete operations of such a global institution will be required: they become necessary if the system is not sufficient to involve the wide reaching interested subjects.[75] Not only national governments will be guaranteed, but also non-state and private actors, which will have the possibility to defend and preserve their interests.[76]

An exception and a counter exception could be envisaged in this line of reasoning. The first is that global administrative law mechanisms could not provide legitimacy by itself.[77] In a general sense, the solution to the above-mentioned problems requires a satisfactory substantial legal background. It has been said that[78] the value of global administrative law can be accrued by the strengthening of the underlying substantial law principles that could be in particular the grounds given by international law. The counter exception is that it has still to be clarified if

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[73] The literature concerning global administrative law is vast. Here it is possible to mention B. KINGSBURY, R.B. STEWART and N. KRISCH, *The Emergence of Global Administrative Law*, quoted, now also published in 68 *Law and Contemporary Problems* 15 (2005); S. CASSESE, Il diritto amministrativo globale: una introduzione, in *Rivista trimestrale di diritto pubblico* 331 (2005); ID., *Legal Imperialism and «Raison d'Etat» in the Global Administrative Law*, paper presented at the NYU Law School «Global Administrative Law Conference» (22-23 April 2005); R.B. STEWART, Il diritto amministrativo globale, *Rivista trimestrale di diritto pubblico* 633 (2005); D.C. ESTY, *Toward Good Global Governance: The Role of Administrative Law*, paper presented at the NYU Law School «Global Administrative Law Conference» (22-23 April 2005); S. BATTINI., *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Milano, Giuffrè, 2003, ID., L'impatto della globalizzazione sulla pubblica amministrazione e sul diritto amministrativo: quattro percorsi, *Giornale di diritto amministrativo* 339 (2006); S. CASSESE, *Lo spazio giuridico globale*, Roma-Bari, Laterza, 2003; A.C. AMAN JR., Globalization, Democracy and the Need for a New Administrative Law, 10 *Indiana Journal of Global Legal Studies* 125 (2003). See also L. CASINI, Diritto amministrativo globale, in *Dizionario di diritto pubblico*, directed by S. Cassese, Milano, Giuffrè, 2006, *ad vocem*, M.-C. PONTHOREAU, Trois interprétations de la globalisation juridique. Approche critique des mutations du droit public, *Ajda* 20 (2006); M.R. FERRARESE, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, Il Mulino, 2000. See, finally, the Symposium on «Global Governance and Global Administrative Law in the International Legal Order», 17 *European Journal of International Law* (2006). Updated information at *http://www.iilj.org*.

[74] See D. DYZENHAUS, *The Rule of (Administrative) Law in International Law*, IILJ Working Paper 2005/1 (Global Administrative Law Series), available at *http://www.iilj.org/papers/documents/2005.1Dyzenhaus_001.pdf*, now also published in 68 *Law and Contemporary Problems* 127 (2005).

[75] J. BERNSTORFF, The Structural Limitations of Network Governance: ICANN as a Case Point, cited.

[76] E. BENVENISTI, *The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, IILJ Working Papers 2004/3 (Global Administrative Law Series), available at *http://www.iilj.org/papers/2004/2004.3%20Benvenisti.pdf*; see also 68 *Law and Contemporary Problems* 319 (2005), at 327.

[77] R.B. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, (draft) paper presented at the «Second Global Administrative Law Seminar», 9-10 June 2006, at 10.

[78] B.S. CHIMNI, *Cooption and Resistance: Two Faces of Global Administrative Law*, IILJ Working Paper 2005/16 (Global Administrative Law Series), available at *http://www.iilj.org/papers/documents/2005.16Chimni.pdf*.

this «constitution» requires a formal definition or if the fundamental norms can be recognized in the existing system. It would be sufficient to reflect on the European legal order or, as a chief example borrowed from a national context, the English constitution, which relies on non-written norms.[79]

In general, anyhow, it is possible to recognize that the system of global administrative law still acts without a constitutional ground, and this embodies the most relevant difference from domestic administrative law; of course, the situation is changing.[80] So, it seems that the introduction of a «constitutional rank»[81] provision setting out only the main principles of the area under discussion would be extremely advisable. The legitimation of supranational powers still constitutes the main relevant challenge.[82]

Certainly, global administrative law is really proper for accountability: proceduralization offers instruments of guarantee. This means that not a single discipline will prevail, but rather that the paradigm of international law could be assisted by the one of global administrative law, exercising a joint effort, which could probably lead to a better outcome.

It is now indispensable to see how these mechanisms actually work (or should do so).

7. Accountability

The role and, most of all, the public function performed by ICANN require a global form of accountability. The asserted lack of democracy, control, participation and transparency has always triggered bitter criticism against ICANN. Functionally speaking, the underlying reason of the mechanisms that will be examined responds to the requirement of ensuring a stronger control, in order to ameliorate the function performed by the body and increase transparency

[79] I am grateful to Giacinto della Cananea and Armin von Bogdandy for suggesting me this points. See S. CASSESE, Albert Venn Dicey e il diritto amministrativo, 19 *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 5 (1990), esp. at 25-26.

[80] See L. CASINI, *Diritto amministrativo globale*, quoted, at 1948.

[81] With respect of new constitutionalism in the international arena, see A. VON BOGDANDY, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 *Harvard International Law Journal* 223 (2006); G. SILVERSTEIN, Globalization and the Rule of Law: «A Machine that Runs of Itself?», 1 *International Journal of Constitutional Law* 429 (2003); *Transnational Governance and Constitutionalism*, edited by C. Joerges, I.-J. Sands e G. Teubner, Oxford and Portland, Hart Publishing, 2004.

[82] See A. VON BOGDANDY, Constitutionalism in International Law, cited above, where the legitimation value of international law is evidently affirmed. The Author explains the relevance of international law in the thought of Christian Tomuschat, where the *international community* acquires a central position (even if it still presents different conceptions). He also makes reference to the thinking of Jürgen Habermas, where the possibility of conferring power to supranational institutions is due to the understanding of a *divisible sovereignty* (as the concept of an *indivisible* one led Immanuel Kant to reject the compatibility of a international institutions with international law). The supranational way (the one of a «constitution») is necessary for the maintenance of peace and the protection of human rights. In other cases, a transnational approach is appropriate (for example, in the economic field).

and efficacy. In particular, «constraints on decision-making process [are required to] reduce power disparities between strong and weak actors».[83]

The analysis will try to evaluate the nature of the involved arrangements. The global arena presents different issues, each concerning a particular sector; it is still difficult to extrapolate common principles and general norms. Each sector must be analysed in a separate way. In the case of ICANN, an effort is to be made in order to clarify which are the used institutional tools. The existing types of accountability will be divided into categories, following the partition specified by Stewart:[84] hierarchical, supervisory, legal and electoral, (the only one mechanism not envisaged is the fiscal one). While the first only enlightens the source of ICANN power, the others appear very suitable for the protection of individuals' interests. Different forms, with a «soft» nature (transparency, participation), will be transversally examined. Finally, the role of constituencies that are part of the Internet community will be discussed from a global perspective.

Some of these mechanisms are provided by the internal norms of ICANN; others pertain to domestic legal orders. So, the differences with domestic mechanisms of accountability will be pointed out, creating the basis to evaluate the position of global administrative law in the Internet governance.

1. Hierarchical Accountability. The first form of accountability is related to the source of power: namely, the contract with U.S. Department of Commerce. The contract is renewed every three years. So, if the administration does not envisage a good performance of ICANN, it could shift its functions to another subject. The sanction, in this case, is to retain its power. Yet this aspect is tightly related to the problem of legitimacy, as it is helpful to understand who keeps hold of the final competence to create and distribute the control of the sector.

2. Supervisory Mechanisms. The second form is supervisory. It is related to the users and economic operators (companies, registries and so on), even if the latter still have major possibility to use these mechanisms (and also to influence the decision-making process). Here, the analysis will be focused on some specific arrangements provided by ICANN *ByLaws*.

In 2002, ICANN was deeply reformed: this caused the creation of mechanisms having the purpose of guaranteeing a better degree of accountability.[85] In particular, the ICANN's Articles of Incorporation provided some procedures for the reconsideration and review of the actions of

[83] E. BENVENISTI, *The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, quoted above, at 325.

[84] R.B. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, cited, at 11.

the *Board*, in three ways: by a *Reconsideration Committee*, an *Independent Review Panel* (IRP) and an *Ombudsman*.

The first one is an *ad hoc* committee, which is composed by not less than three directors of the *Board* (art. IV, section 2, *ByLaws*). It has to provide for the claims filed by legal or natural persons whose interests have been affected by an action or inaction of the ICANN's staff or *Board*. As this last situation, in order to carry out the procedure, a «violation of the preliminary investigation» is necessary, and is realized when the *Board* has not taken into account the information provided by the petitioner, filed within the terms. In 90 days the Committee shall issue a decision, after a preliminary investigation performed by all the requesting subjects, giving motivation in case of rejection.

The IRP, an independent third-party body, shall be referred to for any review procedure concerning the *Board* actions (art. IV, section 3.1). Then, the IRP should be operated by an *International Arbitration Provider*, acting separately from the ICANN (art. IV, section 3.4), in order to ensure a fair degree of autonomy under the structural point of view. That is a typical aspect of global administrative law: the interconnection among the legal orders, a system «which lends its institutions to solve the others' disputes».[86]

In particular, the IRP has to investigate if an action of the *Board* (or its inaction) be inconsistent with ICANN *Articles of Incorporation* and *ByLaws*. It can be composed by one arbitrator (in lack of a specific request by the parties) or by three arbitrators. The IRP owns limited powers of investigation and is entitled to recommend that the *Board* stay any action or decision or stop the effects deriving from its inaction. At the end, it will issue a declaration in writing whose implementation shall be considered at the *Board*'s next meeting (art. IV, section 3.15).

The third subject is an internal office of ICANN, which exercises its charter independently and neutrally (art. V, section 2). It has a residual nature, and shall act only when the other two procedures have not been invoked. In particular, the *Ombudsman* is entitled to resolve the disputes arising from those subjects whose interests have been harmed by the *Board* or the staff, excluding internal administrative issues and those concerning the personnel. The *Ombudsman* should be guaranteed of freedom, through the access to the documents (art. V, section 3) and the opportunity to request information from institutions separated from ICANN (art. V, section 4).

[85] Which have not reached the expected purposes. See J. PALFREY, The End of the Experiment: How Icann's Foray into Global Internet Democracy Failed, cited, 446 ff.

[86] S. CASSESE, Il diritto amministrativo globale: una introduzione, quoted, at 340.

The said three subjects do not have the authority to bind the *Board* by their decisions because the Board maintains a broad discretionary power in their application, even if it takes such decisions into the due consideration. Therefore, the importance of those mechanisms results weakened.

There is also an important difference in these mechanisms. The first and the third, as they are conceived, are internal to the body: they are included in the organization of ICANN. The second, on the contrary, is structurally different from the institution, and so it presents a major degree of impartiality. This is true, indeed, only in a theoretical speech: indeed, the mechanisms identified above are scarcely effective, as the *Ombudsman* has already commenced its activity while the IRP has not been set up yet.[87] There was a resolution of ICANN *Board* in 2004, which designated the International Centre for Dispute Resolution (ICDR)[88] as the provider for the service. However, the *Board* resolution seems not affective at all: ICDR has never entered in contact with ICANN, as a recent case shows.

A journalist tried to obtain an IRP in order to obtain access to ICANN documents related to the creation of a new *gTLD*, the «.travel». In his opinion, acting as a journalist, the creation of this *gTLD* was not fair, as legitimate subjects for the registration were only companies of the sector. He argued, on the contrary, that this domain name, which is referred to the travel activities, should have been accessible also to the public, the travellers or journalists like him. In addition, the agreements that conduced to the approval of this TLD, in 2005, remained secret. So, the actor demanded that the decision to introduce the «.travel» would be referred to an independent review, as provided by the *ByLaws*. This was never accomplished by ICANN, though the submission of several requests.[89] The petitioner also contacted the ICDR, chosen as IRP in the 2004 *Board*'s Resolution, which responded he had no relationship with ICANN.

This case is interesting for two reasons. First, it explains how the public constituency in Internet governance is still not considered and protected in an efficient way. Public has not an electoral form of accountability in ICANN (see *infra*); the supervisory mechanism reveals deep insufficiencies. Secondly, decision-making process is still secret and not accessible, thus demonstrating that representation is scarce and that decisions are taken only by some subjects, which do not take into due account the interests of the generality of the users (individuals and companies), but only of some of them. There is a disproportionate accountability to some

[87] The case has raised further critics towards ICANN. Information is available at the address *http://www.icannwatch.org/article.pl?sid=06/04/24/1518252&mode=thread*.

[88] See *http://adr.org/international*.

[89] For complete details of the question, see *http://www.hasbrouck.org/icann/*.

interests.[90] A decision of this kind could be brought to an independent body; furthermore, the «secret» behaviour of ICANN could be disclosed, but the time has still not come. So, we can maybe argue that ICANN is still not accountable to anybody, and that its mechanisms are those of a corporation in search of efficacy for its decision and policy-making.

The IRP could certainly give a contribution to improve the ICANN management, but the fact that such «just on paper» provision has not been effectuated, points out that the system is still evolving.[91] The presence of a «judge», which could guarantee the protection of rights and interests pertaining to the legitimated subjects, is perceived as a necessity, but such hypothesis has not been enacted already.

3. Legal Accountability and Judicial Review. In some cases, still, national courts provide the review. Some provisions of *ByLaws* regard certain devices, such as the minutes of the *Board* meetings and the posting of the main decisions on the website, also in view of any possible comments by operators and users (art. III, section 2). Through those rules, the principle of transparency is feebly enlightened. Such principle, in one case, has been granted by the application of the U.S. legislation, governing the ICANN: a former director of the *Board* was once asking to access some financial documentation retained by the corporation: ICANN denied the access but a Californian court, seized by the director, sentenced the company to allow the access.[92] Certain mechanisms, though, are still based on the domestic legal systems and their remedies and the review is operated by domestic actors, like national courts. There is a clear difference between the establishing IRP, which provides for a review mechanism based on international regulatory regime (see *supra*).

Another case in which the right to defence will be probably granted by national courts is the mentioned case of the «.xxx» top level domain. The applying company has obtained the access to the relevant documents under the Freedom of Information Act. Moreover, the *Board* resolution that has denied its introduction could be challenged. This would be done, probably, not following the mechanism provided by the internal rules of ICANN, but through a lawsuit before an American tribunal. So, judicial review would be sought through recourse to the domestic legal order.[93]

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[90] N. N. KRISCH, The Pluralism of Global Administrative Law, 17 *European Journal of International Law* 247 (2006), at 250; R.B. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, quoted, at 7.

[91] S. CASSESE, A Global Due Process of Law?, forthcoming.

[92] Further information are available at the following addresses: *http://www.icann.org/announcements/advisory-29jul02.htm*, *http://www.icannwatch.org/article.pl?sid=06/02/06/0354225&mode=thread* and *http://www.icannwatch.org/article.pl?sid=02/03/20/081052&tid=24*.

[93] See references cited above, note 34.

Finally, a third interesting case is the one of a lawsuit proposed in a different jurisdiction: in particular, the Canadian one. Pool.com Inc., a company operating in the market of «.com» and «.net» and providing expired domain names to customers (without being a registrar, but in connection with many of them), sued ICANN before the Superior Court of Justice of Ontario.[94] ICANN and its contractor Verisign Inc. (the registry of «.com», «.org» and «.net») have adopted a new service, for the accreditation of operators, called Wait List Service (WLS). In plaintiff's statement, this new service has negative effects on his business plans (as it is deprived from the possibility of «assisting customers in obtaining dropped or deleted domain names»[95]) and it clearly breaches the policies established in his Accreditation Agreement with ICANN (the new service assigning 10 per cent of proceeds to Verisign). The defendant, ICANN, has presented a motion to dismiss for lack of jurisdiction, requiring the transmission to a Californian Court, which could be, from its viewpoint, the only the one competent for the enforcement.

4. Electoral Accountability. The representation is the core element for the Internet community. Since the creation of ICANN, questions like these have risen: does the new medium of communication, with millions of users connected, require a global form of representation? Is it possible to achieve a new form of democracy into the Internet? I would like to distinguish, even if only as a matter of terminology, a form of «selection» from one of «election». I will use the first for questions related to ICANN representatives; the second for more general questions.

a) *ByLaws* describe a highly detailed procedure for the selection of the *Board* members (see art. VII *ByLaws*). The *Board* is composed by 15 voting members (the Directors) and 6 non-voting liaisons, which can participate in the discussion and have access to the material, but do not have the right to vote (art. VI, section 9). Six directors are selected by the three supporting organization; eight are selected through the presence of a particular organ, called Nominating Committee (NOMCOM). The President, then, is chosen by the *Board*, once this is established (art. XIII, section 2). The presence of the NOMCOM is due to guarantee a wide representation: it is composed by very different constituencies (advisory committees, business, operators, consumers and civil groups: see art. VII of the *ByLaws*). It is expected to act independently. So, the internal rules of ICANN try to involve the entire constituencies of the sector and to foster wide representation. In 2006, as a renewal of the NOMCOM and of the *Board* is at issue, a new procedure has been published, in order to receive and examine new

[94] Information available at *http://www.icann.org/general/litigation-pool.html*.
[95] Plaintiff's Statement of Claim, 8 July 2003, point 6.

recruitments. The procedure has come along with an «Ethic Code», in order to dictate some principle over the behaviour of the delegates (it provides for integrity and conflict of interest, for example).[96] Critics underline the modest position reserved for the real «Internet community», as the At-large advisory committee elects only five directors, instead of the nine provided by the original *ByLaws* in 1998.[97]

Is there the possibility to talk of a political mechanism, as a form of control over the entity? The political value could be questioned, as more technical aspects are concerned. First, selection of ICANN staff cannot be acquire a political significance: rather, it is a form representing some sectorial interests: namely, those of the operators involved. Things would be different if all final users would have the right to vote, but this is still not in practice, and various attempts in this way have failed. In any case, it is still difficult to conceive a global form of on-line selection to appoint directors. Second, the structure and procedure provided still reflects some inconvenience. According to section 2, art. VI of the *ByLaws*, «ICANN *Board* is composed of members who in the aggregate display diversity in geography, culture, skills, experience, and perspective». Section 5 also speaks of «International representation». But, sometimes, the outcomes of the selection mechanisms still seem not adequate. For example, in 2000 there was an election for the representatives of the described At-large committee. «The results […], were stunning», as «all of the candidates nominated by ICANN's nominating committee were defeated». Notwithstanding this outcome, the new representatives, which maintained critical positions towards ICANN, were «put aside in order to reduce their impact over the corporation activity».[98] It has been made clear that these mechanisms haven't provided a form of control over ICANN'S activity.[99]

b) Mechanisms of «election», in a general sense, lead to cogitate on whether some forms of electoral links are capable of bringing democratic solutions into the Internet governance. The global arena strongly deserves mechanism to foster such kind values, in order to face the problems of political and democratic legitimacy.[100] In our case, a trade-off between legalization and democracy is pointed out: there is an appearance of legal formality, but there

[96] See *http://www.icann.org/committees/nom-comm/*.

[97] The first version is available at *http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm*.

[98] M. MUELLER, *Ruling the Root*, cited, at 200.

[99] S. CRAWFORD, The Icann Experiment, cited, 416 on; J. PALFREY, The End of Experiment, cited, 446 ff., who has defined ICANN a «semi-democratic» entity (450).

[100] R. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, cited, at 3; C. MÖLLERS, Patterns of Legitimacy in Global Administrative Law: Trade-offs between Due Process and Democratic Accountability, paper presented at the cited «Second Global Administrative Law Seminar», Viterbo, 9-10 June 2006, *passim*.

is uncertainty on the underlying values.[101] Without encouraging a utopian viewpoint, it is due to understand if new democracy paths in this field can be followed.

Internet is a new category of public space, where is possible a new definition of the political discourse, as it increases the participation of citizens. It is true that the relationship with the democratic institutions has not changed yet: anyway, the method of communication in the Internet gives more possibilities of interaction between actors, thus accruing the possibilities of political outcomes, as it has visibly clarified.[102] Communication brings more information, more participation and more public knowledge control amongst citizens. Information previously hard to find is now available easily and at low-cost. This could bring benefit to the entire population: for example, a major degree of information can bring more attention on the actions of the institutions. Constitutional theory is strongly concerned with these aspects, and the relevance of the field is given away by the presence of many research activities that are aimed at questioning new possible characterizations of constitutional rights and freedoms in cyberspace.[103]

5. Decisional Rules. The *Board* takes its decisions on a majority vote of directors present at the meeting; some matters require the majority of all members (art. II, section 1, *ByLaws*). Looking for transparent decisional mechanisms, some devices are devoted to ensure the right of participation, contained in a provision setting out a *notice and comment* procedure, regarding the implementation of the policies. The said provision was originally contained in the first draft of the *ByLaws*, but the following extensions and amendments have contributed to its identification and enlargement (art. III, section 6). Especially, the *Board*, before adopting a policy affecting the operation of the Internet and the interests of third parties, shall provide public notice explaining the motivations and post it immediately on ICANN website (within a term allowing the affected subjects to file their comments and giving them the opportunity to

[101] These concepts have been outlined by C. MÖLLERS, Patterns of Legitimacy in Global Administrative Law: Trade-offs between Due Process and Democratic Accountability, quoted, at 1. The Author clarifies that problems of political discourse cannot be solved though simple mechanisms of administrative law in the global order, as they seem to foster only individual rights protection, and not political values and egalitarian forms of self-determination. In a similar way, see C. HARLOW, Global Administrative Law: The Quest for Principles and Values, 17 *European Journal of International Law* 187 (2006): here, principles of the new disciplines are criticized under many points of view. The main relies upon the observation that they could overcome principles coming from different traditions, thus denying the pluralism so much required in the supranational arena. The Author brightly exposes also the difference existing between «principles» and «values», recognizing an economic and sectorial nature to the latter.

[102] See Y. BENKLER, Technical is Political: Access to an Open Information Environment, recorded lesson, 11 February 2004, The Berkman Center for Internet & Society at Harvard Law School.

[103] There are many research fields related to the new democracy in the Internet, developed by different institutes. See the Berkman Center for Internet & Society at Harvard Law School, at *http://cyber.law.harvard.edu/home/*, the Stanford Law School Center for Internet and Society, at *http://cyberlaw.stanford.edu/* and the University of Oxford Internet Institute, at *http://www.oii.ox.ac.uk/*.

reply). Consequently, those could be considered as participation mechanisms in the decision-making.

Even the effects of this provision could be discussed, because the guarantees are not correctly applied[104] or could be frequently «caught». How could these difficulties be solved? There are, substantially, two ways to operate. The difference is centred between the American and the European method. The first conduces to an «adversarial system», providing mechanism for constraining discretion with legal rules and providing judicial review of the decision: it is a «hard look» perspective. The second is more concentrated to consensus based deliberative process, in the wake of the Habermasian theory of procedural legitimation.[105]

The second approach should be put into practice. In this way, even the peculiar form of decision making of ICANN should be based on a new form of discursive consensus; not restricted to some actors, but open to all the subjects involved.[106] The cooperation amongst these actors could ameliorate the decisional capacities of the entity. Actually, as said, there is a disproportionate representation of some interests: some receive more protection in respect to others. Fostering accountability should assure the protection of the whole constituencies. As it has been shown,[107] this approach is particularly indicated in deliberative processes involving technical aspects and it permits better results than the system based on majority votes. In this way, finally, there could be the possibility to protect disregarded interests, in a better and more efficient way, granting a higher degree of quality in the decisions adopted by the *Board*.

This does not exclude the use of mixed mechanisms. Guarantees of participation to all actors should be made following the European way: all the interests should be represented, not only the one that can win «competition mechanisms». The discourse should prevail in the decision-making processes, with each voice able to influence the others and thus reach a common solution. Then, a review of the decisions should be granted, but overcoming with all the difficulties outlined in the IRP case.

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[104] J. PALFREY, The End of the Experiment, cited, 437.

[105] R.B. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, cited, at 29, 32, 38.

[106] This is also the opinion of S. CRAWFORD, The Icann Experiment, cited, esp. 436 ff., who envisages the consensus model as the instrument to ameliorate ICANN'S activity. M. FROOMKIN, Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace, quoted, affirms the strong prevalence of the discursive approach in the standard making process of IETF. In the Author's opinion this method, which represents, somehow, the ideal of the philosophy of Habermas, should be envisaged as the true, fundamental characteristic of the sector, to be preserved in the future shape of the Internet governance, whatever it may be.

[107] R.B. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, cited, 25.

6. Different Constituencies. The previous analysis leads to wonder about *to whom* ICANN should be accountable. As many times explained, the core aspect seems the presence of function related to a global resource. So, the constituency should be the public: not only national governments but also commercial entities and final users. Account holders should be recognized as the whole Internet community, as individual rights can be affected by the entity (the few examples made have shown this aspect). This target could be reached through representation inside ICANN. The mentioned gNSO and At-large committee could have a primary role to this regard. Effective participation inside them should be assured without the exclusion of any and granting to each equal position. And there should be a direct link with the *Board*, granting the At-large representatives to designate and elect some of the *Board* members, thus creating an important connection and avoiding events like the 2000 elections.

The influence of these different constituencies and their balance of power inside ICANN will determine the evolution of the legal norms and participation mechanisms, as well as the function of a primordial judicial review. As in the case of consensus in decision-making, an equivalent position between the actors will be fundamental, granting equal possibilities, without imposing hierarchical models but leaving smooth mechanisms free to play. The concept of «public arena»[108] seems very fitting. Horizontal relations are not established in a fix manner, there is no more a simple bipolar relationship between citizen and States, but more complex interactions, which lead to reciprocal exchanges.

The presence of such constituencies and their operation, at the end, should allow having a body effectively based on pluralism.[109]

From a general viewpoint, the provisions of the described procedures enlighten, finally, three interesting profiles: the direct relationship existing between private subjects and supranational institutions; the operation of mechanisms belonging to administrative law, which, at least, reveal their differences form the national realms; the scope of some principles in the global context.

a) As for the first, it must be pointed out that the direct relationship between private subjects and supranational institution is one of the characterizing elements of global administrative law.[110] In particular, the herein analysed mechanisms totally fit in a similar case, even if at a reduced scale, as we are just examining the subjects affected by the Internet

[108] For the concept of «public arena», see S. CASSESE, L'arena pubblica. Nuovi paradigmi per lo Stato, 51 *Rivista trimestrale di diritto pubblico* 601 (2001), now in ID., *La crisi dello Stato*, Roma-Bari, Laterza, 2002, 74 ff.

[109] For this aspect, see cited work of N. KRISCH, The Pluralism of Global Administrative Law, cited, where the concept of constituencies used above is defined and applied in the international arena.

[110] S. BATTINI, International Organizations and Private Subjects, quoted above, at 15.

governance sector, or, better, by ICANN competences. It is necessary that those subjects be affected by the entity's policies and actions for the purpose of invoking the procedures, putting directly in touch the private subjects and the body, without the involvement of the States.

b) As for the second element, instead, the said mechanisms are similar to those used by the domestic administrations. We can notice how an organization of private nature operates procedures ordinarily belonging to a public administration. Obviously, those mechanisms acquire a different «texture» with respect to the domestic ones: we are still facing a private governance regime, with «new and original» profiles.[111] The mechanisms of global administrative space remain still subject to transformations and exchanges between different systems and disciplines. Thus, is there the space for administrative law in this field? Administrative law mechanisms are not picked by national legal orders and transposed automatically into a global level. On the contrary, the direction followed is different: the sectorial governance is in search for some mechanisms of accountability, but they differ from traditional realities and present a different legal structure. Moreover, in the global context institutions vary, and this is particularly true in regard of international organization. So, the mechanisms provided for one body may differ from others: the consequence is that we cannot mesh the legal value of these mechanisms in a unique concept, as they are to be separated.[112] This approach is still true in ICANN case, even if it represents a new type of organization. The mechanisms outlined constitute a unique attempt and their theoretical approach does not trespass the «institution's borders».

c) Some principles, still, reflect their national origin, as they were formed and conceived in national legal orders. Transparency and control are obvious examples. Their early development shows a top-down approach:[113] a global body applies well-known values of national administrative law. It is noticeable, though, an important distinction. They acquire a different scope, as they are not established for the activity of public administration. This, for example, occurs with the application and the provisions of the Aarhus Convention of 1998, or with some principles defined by the SPS Agreement, which provides for procedurals guarantees to be respected by national agencies.[114] The question here presents typical features, as the principles resemble the national ones but are not provided for a public agency. Rather, they are applied directly to a global body, of a particular nature like ICANN.

[111] G. DELLA CANANEA, I pubblici poteri nello spazio giuridico globale, quoted, 3, 13.

[112] E. BENVENISTI, The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions, cited, at 330.

[113] R.B. STEWART, Accountability and Discontents of Globalization: US and EU Models for Regulatory Governance, cited, at 35.

[114] S. BATTINI, La globalizzazione del diritto amministrativo e della pubblica amministrazione: quattro percorsi, quoted, at 341.

8. Conclusions

ICANN has been conceived as the institutional solution for an innovative and extraordinary invention like the Internet. According to the peculiarities described above, it has a controversial nature and keeps on bringing up serious issues of legitimacy and accountability. Its functions are not to be completely rejected, but corrected in the right way.

It represents a new model of organization, featuring typical aspects: the mixed nature of the sources, the lack of a formal constitution, the presence of subjects having a different nature. In particular, it follows the pattern of a private organization, which is not sufficient to protect the sectorial interests;[115] then, it is required to adopt mechanisms similar to the public ones.

Global administrative law could constitute a way to pass over the contradictions of the sectorial governance, offering the instruments to ameliorate control, review and transparency and the participation of the interested subjects. Certainly, we are still at an early stage.[116] The said principles are still limited and not always obeyed, where the function of control is still ineffective. Their use in this context, furthermore, shows the difference between the global level of governance and the domestic ones. Mechanisms applied to national agencies must be differentiated, as they cannot be simply transferred to the supranational realm.

As for the legitimacy, it is necessary to find a solution to the substantial underlying profiles, referring, in particular, to the establishment of a «constitution» for the purpose of solving the matters that have affected ICANN from the start. The (actual) difficulty to find a solution grounded on international law has been enlightened: the global arena, thus, offer another example in which the relationships between States is not the traditional one; rather, there is a shift towards new roles of the subjects involved.[117] There are nation States, but also individuals, companies, groups. The different constituencies of Internet governance require alternative solutions. In this sense, it would be advisable a synergetic action between the paradigms of international law and global administrative law, as an instrument to achieve the legitimate exercise of new powers within the international scenario.

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[115] J. VON BERNSTORFF, The Structural Limitations of Network Governance: ICANN as a Case Point, quoted, 278-279.

[116] As underlined by S. CASSESE, A Global Due Process of Law?, quoted.

[117] M.P. CHITI, *Diritto amministrativo europeo*, Milano, Giuffrè, 2004, at 37.

In the Ninth Symphony composed by Beethoven there is the effort to find the tonality of D major which indicates the turning back to the *Elisio*, a state of purity, musically represented by the Ode to Joy. The accords played by the Master, during the movements preceding the last, are composed by tonalities that apparently reach the main, but that actually never arrive at it.[118]

Net regulation has the same swinging mechanism, in quest for transparency and stability. Its transformations are similar to the witty use of triads made by Beethoven in his masterpiece. But, while the Ninth symphony is an accomplished work, full in details, the legal scheme of the Net results from circumstances: various stabilizations have tried to give remedy to the structural vices of the initial model, but the results are still not the expected ones.

We will see if the Internet governance will lead us, in the next future, to an *Elisio* of a similar extension.

[118] M. SOLOMON, *Su Beethoven. Musica, mito, psicanalisi, utopia*, Torino, Einaudi, 1998, at 16, 20 and 24 ff.