

Panel Statement
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Responsibility for ICANN - Stability *and* Legitimacy

Herbert Burkert

GMD-IMK.NETSOC/FIR-HSG
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(1) The "Internet" - more precisely those resources which guarantee global interoperability of IP networks - is a global common resource ("global commons").

(2) The Internet is acknowledged as global commons in various US Government, GAC and other international documents.

(3) This acknowledgement has legal consequences:

(4) Each state which makes use of the global commons has to ensure that no other state depending on that resource is harmed or excluded from making use of that resource in an appropriate manner. There are justified exemptions to that rule, but these exemptions are limited.

(5) Qualification as "global commons" also has effects on the relationship between GAC countries and "their" ccTLDs - see below at (12) .

(6) The USA are currently trustees of that global resource.

(7) The way in which the USA administer that trust is within their discretion. In particular they are free as to choose an adequate form of administration (e.g. by a private corporation).

(8) However, any use of that discretion must be in accordance with US law (currently a much disputed issue in the US). The management of the global resource has to be proportionate to the global impact of that resource. The way of administering that global resource has to consider the reliance on that resource and the trust that has developed as to the manner in which it has

¹ This text - as a representation of my oral statement - remains without proper references and sources. A full text containing such references is in preparation.

been administrated; ways of administration should remain as consistent as possible with previous practice; any changes have to be announced and changes implemented should remain consistent with such prior notices.

(9) As to internal US law, following from this qualification, a Californian court deciding on an ICANN case with international implications has to consider the Restatement of Foreign Relations Law, in particular sec. 402 [2][c]- [f] (cf. Declaration of Henry H. Perritt, Jr., in PGMEDIA vs. Network Solutions, Inc. And National Science Foundation):

"(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (...)

c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system; (...)"

(10) Such assessment is often criticized for handing over ICANN to the discretion of national states.

(11) Such criticism does not recognize that public international law is also giving individuals (and private organizations) rights against states.

(12) The European Convention on Human Rights (ECHR) provides such an example: Art. 10 ECHR will soon be interpreted as providing a "right to be seen" under a freely chosen name, subject to exemptions. Those exemptions, however, are in turn subject to exemptions, e.g. they have to be put into the form of a law and must be necessary in a democratic society. This is not an empty formula - there is ample case law providing solid interpretation. This interpretation would show its effects on any activities regarding national regulation of ccTLDs.

(13) The USA have used tools from their own regulatory tool kit to regulate that global resource: Process has to be due process and is molded from the rules for rulemaking agencies with their emphasis on transparency and participation. The ICANN model (now) establishes a triangular model of balance of power stabilize

stabilizing as well as legitimizing the use of the global common resource by establishing a balance between @Large Membership and its form of direct representation, interest groups and national governments.

(14) There are examples for each of these elements in the US regulatory culture: As to direct representation e.g. there are more than ten states in the US where Commissioners for Public Utility Commissions are elected by popular vote. As a point of general observation, direct popular vote is on the increase in public international law.

(15) This regulatory model of triangular power and representation relationships should be maintained for this and other global resources.

(16) As to the role of popular vote attention should be paid on

- sufficient variety as regards the popular vote system;
- voter education as an ongoing process not only before elections and only on how to vote technically;
- *prior to future elections*, to ensure processes to evaluate and if necessary challenge elections and election results;
- *prior to future elections*, to prescribe how to implement possible future changes of the voting process;
- to introduce deliberative elements both into the election and in the governing processes;
- to help to create "a general global public" as a point of reference for accountability, including accountability of @Large-Board-Directors.

(17) With regard to the other two parts of the triangle further observations will be shared with you.

(18) The Three Columns Model is a useful base for regulating global resources in the future and to achieve an adequate balance between legitimacy *and* functionality of global commons./--