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**DECONSTRUCTING AN EXPERIMENT IN GLOBAL
INTERNET GOVERNANCE: THE ICANN CASE**

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DECONSTRUCTING AN EXPERIMENT IN GLOBAL INTERNET GOVERNANCE: THE ICANN CASE

*Slavka Antonova**

The model of a global multistakeholder collaboration in Internet domain-name system management, as developed by U.S. government in 1998 and embedded in the Internet Corporation for Assigned Names and Numbers (ICANN), held all the promises of a paradigm shift in global governance. Seven years later, the UN World Summit on the Information Society in Tunisia (November 2005) adopted some of the vocabulary of the ICANN experiment and recognized the multistakeholder collaboration as a key organizational principle in global Internet governance. Yet, it reestablished the leading role of national governments and intergovernmental organizations, such as the ITU, in the regulation of the global Internet.

This paper examines what was lost during the four years of experimenting with “multistakeholderism” in ICANN and what the stakes of the parties that influenced the policymaking process the most were. Building on Governmentality Studies’ understanding of the neo-liberal project of self-governance and Organization Studies’ collaboration theory, the document and discourse analysis of ICANN’s practices deconstructs the original model of a collaborative policymaking process conducted by a private multistakeholder corporation and formulates the expectations, stakes and strategies of the participating parties. Thus, it is suggested in the paper that, because the Internet technical elite was granted the managerial role in ICANN, the experts were able to influence the agenda of the policymaking process and its pace, and ultimately to take over the policy-proposal accumulation task and eliminate the working groups, which were open to all participants.

It is concluded in the paper that, with the globalization of Internet, a cluster of new players entered the field, such as the developing countries governments, and, in the UN WSIS setting, the concerns of “protecting the public interest” reconnected with the familiar international arrangements.

I. INTRODUCTION

Functioning under the political oversight of the US government, the Internet Corporation for Assigned Names and Numbers (ICANN) is considered today as one of the most powerful private corporations in the world. It is an agreed-upon thesis in the literature on ICANN that the corporation derives its potential power from a combination of technical and political factors¹ (see Mueller, 2002; Friedlander and Cooper, 2000; Fromkin, 2000; Kleinwachter, 2000; Weinberg, 2000; Holitscher, 1999; Post, 1999a, b).

First, ICANN was delegated policymaking authority over the single-root Internet Domain Name System (DNS), which translated into the right to decide how many and which top-level domains would be authorized, and who would benefit from the intense user demand for registration services in the most lucrative top-level domains. And, second, ICANN enjoys the unfading US Department of Commerce’s (DoC) support, which culminated, in the context of the

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¹ Because of its paradigmatic significance, the ICANN experiment has been studied by a number of scholars from different theoretical perspectives (i.e. Administrative and Constitutional Law, Institutional Economics, Normative Political Philosophy, International Relations, Corporative Management). The apparent predominance of US legal scholars in the academic debate on ICANN, though, has limited it to the issues of legitimacy and the effectiveness of the particular substantive policies. On very few occasions has the ICANN *policy-making process* itself been an object of investigation, and its power dynamics have rarely been a research focus (see Johnson, Post and Crawford, 2003; Palfrey, 2003; Frankel, 2002; Weinberg, 2001; Johnson and Crawford, 2000 - three articles; Post et al., 1999; Post, 1998).

World Summit on the Information Society (WSIS) debate (2003 - 2005), in sustaining the US unilateral control over ICANN².

This article focuses on the rationalities and practices of policy-making for the Internet DNS as they emerged in the late 1990s and up to 2002, when ICANN was reformed. In this sense, it is an exercise in unraveling “the history of the present” (Michel Foucault).

II. AN EXPERIMENT IN PRIVATE GOVERNANCE OF GLOBAL RESOURCES

The underlining argument in this article is that ICANN, as a multistakeholder consensus-seeking entity, epitomized the neo-liberal agenda of opening the global regulatory field to industry self-governance and a limited government involvement. The private corporation was an experiment in creating an alternative regime for global policy-making (that is, policy-making without government participation). This experiment relied on the bottom-up policy development formula, which both possessed a certain democratic potential, and considered the technical/political context of the Internet – its architectural code, the users’ norms of behavior in cyberspace, and the regulator’s (the US government) potential to exert “soft power” in the international arena. As I argue elsewhere³, ICANN is a type of global public-policy network (as defined by Reinicke, 1999/2000; Reinicke and Deng, 2000) performing alternative public policy-making.

The significance of the experiment becomes clear only in light of the consecutive stages of Internet global governance. Seven years after the inauguration of ICANN, in November 2005, in Tunisia, the UN WSIS recognized the multistakeholder collaboration as a key organizational principle in global Internet governance and adopted some of the vocabulary of ICANN. It re-established, as well, the leading role of the national governments and intergovernmental organizations, such as the International Telecommunications Union (ITU), in the regulation of the global Internet.

Yet, three years earlier, ICANN reformed itself along similar lines of enhancing the participation of governments in the policy-making process. For some participants, this was a desirable move away from “Reagan’s futurism of handing governmental power over to private bodies”, and towards creating “a more publicly responsible ICANN” (Karl Auerbach, interview with the author, May 3, 2002).

One of the principal “lessons learned” in the early ICANN was that it is vitally important to provide NGOs and users at large with voice and influence in the bottom up process. Consequently, this realization was reflected in the creation of the Internet Governance Forum (IGF) (October, 2006). Heading towards its second edition in Rio de Janeiro (November, 2007), the IGF is perceived by many as epitomizing the democratic ideal of generating policies for the global Internet through an open multistakeholder collaboration, which was the ICANN original mandate.

By applying concepts from Governmentality Studies and the Organization Studies’ Collaboration Theory to the constitutive ICANN practices in policymaking, this article aims at

² In a statement issued on June 30, 2005, the DoC announced that “the United States is committed to taking no action that would have the potential to adversely impact the effective and efficient operation of the DNS and will therefore maintain its historic role in authorizing changes or modifications to the authoritative root zone file” (*US Principles on the Internet’s Domain Name and Addressing System*, 2005). This meant, apparently, that the US government intended to retain its authority over the root indefinitely.

³ See Antonova 2007; 2005a; 2005b; 2003.

addressing questions that have not been yet systematically explored: *why was the original model redefined (as early as 2002), and what was lost as a result of this?* The answers are sought in those formative years of the ICANN experiment (1998 – 2002), when contradicting stakes and privileged power strategies crystallized, and the functional model was “reformed” along the conventional government-led policymaking principle.

The power dynamics of the multistakeholder consensus process are in the focus of this investigation, which is based on document analysis (more than 3,000 archival units), a number of interviews with active participants, and systematic observation of the process at two ICANN quarterly meetings⁴. Three main areas of activity in ICANN are explored in order to establish the underlying reasons for the structural, and conceptual, reform in 2002. Those are: achieving ICANN’s public legitimacy, devising the structural power formula, and generating substantive policies through a bottom up process.

The investigation presented in this article leads to a set of conclusions. The most significant among them is that, if multistakeholderism (in the WSIS participants’ jargon) is to become the *modus operandi* of the Internet global governance, the political dynamics of the collaborative process must be anticipated, studied, and managed. As the deconstruction of the early ICANN process demonstrates in this article, stakeholders could espouse irreconcilable normative philosophies (i.e. efficiency vs. participatory democracy). ICANN’s leadership was not prepared to steer a deliberative process in such an environment of heterogeneous stakeholder interests. Moreover, the Management, led by well-trusted Internet developers, subscribed to the trusteeship organizational model and could not accept the representatives of the end user community as legitimate stakeholders. This clash of opposing views, or “governmentalites” (Foucault), impacted detrimentally on the distribution of structural power among the stakeholder constituencies, on the effectiveness of the consensus process, and, ultimately, on the public acceptance of the governance model that ICANN epitomized.

III. ICANN AS A MULTISTAKEHOLDER COLLABORATIVE FORMATION: WHAT DOES THEORY HAVE TO SAY?

Contrary to the previous investigations of the Internet DNS management privatization that have endowed one particular factor (i.e. technology or cyber-community norms) with the power to induce institutional innovations, the current article discerns a socio-political trend in this instance of global stakeholder collaboration in the communications policy field. In my argument, the term used to further designate this trend is “shared power” (see Bryson and Einsweiler, 1991; Luke, 1991; Roberts, 1991), and the trend, itself, is interpreted as constitutive of a new regime of governmentality.

A. Neoliberal Governmentality and Global Governance

Inspired by Foucault’s conceptualization of “government” (as “the conduct of conduct” - see Foucault, 1991), a number of authors have defined “governmentality” as “a way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed)” (Gordon, 1991, 3), and as the way in which thought both “operates

⁴ Those were the ICANN meetings in Bucharest, Romania, June 2002 (via webcast), and in Montreal, Canada, June 2003 (participant observation).

within our organized ways of doing things” (regimes of practices) and “is embedded within programs for the direction and reform of conduct” (Dean, 1999, 17 – 18).

Following Foucault, Mitchell Dean calls this particular approach to governmentality “analytics of government” and explains that “[a]n analytics of government... assumes that... government is accomplished through multiple actors and agencies rather than a centralized set of state apparatuses, and that we must reject any *a priori* distribution and divisions of power and authority...” (Dean, 1999, 26).

In the 1990s, the shifting power dynamics in the international arena brought to prominence the concept of global governance. Contrary to some authors, usually commissioned by the UN agencies, who still insist on the formal international organizations, comprising of state-members, as the loci of rightful leadership in global governance (see Rittberger, 2001; Reinicke and Deng, 2000), James N. Rosenau (2000) proposed a broader approach to the term “global governance”. Influenced by the Foucault’s concept of governance, he stated that “there is no single organizing principle on which global governance rests, no emergent order around which communities and nations are likely to converge. Global governance is the sum of myriad – literally millions – of control mechanisms driven by different histories, goals, structures and processes...” (183).

In this particular broad interpretation of global governance, “control mechanisms”, or self-organizing formations, “are more likely to evolve out of bottom-up than top-down processes”, because they are “steering arrangements” emerging “through the shared needs of groups” and striving for legitimacy (Rosenau, 2000, 184). In Political Science, such alternative forms of policymaking are designated as “global public policy networks”, while in Organization/Management Studies they have been conceptualized as “multistakeholder collaborative formations”.

B. The Multistakeholder Collaborative Theory

In the last two decades, coinciding with the increased pursuit of collaborative decision-making by private- and public-sector organizations, the literature on interorganizational relations began providing some insight into the dynamics and evolution of the collaborative formations.

To respond to the need for a more dynamic process-oriented mode of investigation in interorganizational relations, Barbara Gray (1989) developed an empirical theory of collaboration, which combined perspectives of organizational behavior and political science.⁵ The theory is based on the assumption that *collaboration, as a strategy for managing interdependencies, evokes political dynamics* (stakeholders are anxious to advance their own interests), *but operates in the mode of shared power as accepted by all the participants*.

In a collaborative formation, stakeholders aim at creating “a richer, more comprehensive appreciation [common understanding] of the problem... than any one of them could construct alone”, and resolving conflicts, or advancing “shared visions on the collective good” (Gray, 1989, 5).

The theory of collaboration suggests as well that, initially, a convener has the difficult task to decide whose expertise will contribute to the complete understanding of the problem (usually, these are the stakeholders who will implement the consensus decisions), and who has a legitimate stake in the problem. It is essential, Gray insists, that stakeholders believe that “the convener has legitimate authority to organize the domain” (71), namely, “convening power”. If

⁵ See also Gray and Wood, 1991.

the convener is suspected of bias, or self-interest, "other stakeholders may refuse to participate or even try to subvert the collaborative attempt" (72).

Applied to the ICANN case, the collaboration theory suggests that the US government, in its convening role, used its formal authority (being perceived as fair and being powerful). Yet, the collaboration emerged under the combined pressure exerted by the trademark domestic (US) and global interests, and the technical cadre's efforts to privatize the DNS management, relying on support from some international organizations (i.e. the ITU) and national governments. Hence, although the US DoC functioned as the convener of the ICANN collaboration, *it was not initiated by the US government, but was invented as a conflict-resolution forum in response to pressures in the organizational domain.*

Among the factors of success for a collaboration, Gray distinguishes identification of resources, in terms of financial funds for sustaining the deliberative process, information gathering, secretarial services, etc. Gray cautions that "unless these tasks are accomplished during problem setting, subsequent efforts to prepare for and engage in negotiations will be hampered" (Gray, 1989, 74).

Indeed, ICANN's practices, as discussed further, provide evidence for the significance of the preliminary dynamics. The US government, in its capacity of the convener, initiated public hearings in the spring of 1997. The accumulated information allowed for the identification of the potential stakeholders and their principal positions on different issues, the appreciation of the complexity of the field (in technical, economic, and interdependency terms), and the amassing of an agenda of substantive policy issues. The publication of the US DoC Green Paper (January 1998) and, consequently, White Paper (June 1998) on this privatization policy motivated the stakeholders to participate in the Internet Forum for the White Paper (IFWP). The US Administration's goal was to preempt any public legitimacy controversies that the envisioned private corporation would encounter by prompting the stakeholders to reach consensus on the broad organizational issues.

Although playing a discreet role in selecting stakeholders in this early stage, the DoC instructed the well-organized constituencies (trademark owners and technical experts) to include at-large Internet users in the collaboration. *Because the technical cadre in charge of the corporation perceived themselves as the guardians of the public interest in a trusteeship organization, they vigorously opposed the at-large participation on an equal basis. Ultimately, the representative power of the at-large users was curtailed.*

As Gray explains, the success of the consensus-building process depends exclusively on reaching agreement on how the stakeholders will interact with each other. This must be achieved in advance to the discussion of substantive issues and "should involve all the parties" (75), in order to create trust among the stakeholders, foster the sense of efficiency and effectiveness.

Yet, *the negotiations in ICANN began without both an agreed-upon definition of "consensus" or clear deliberative procedures, and they did not benefit from the neutrality and professionalism of a mediator.* Initially, encouraged, apparently, by the success of the self-organizing effort of the stakeholders (the IFWP), the convener – US DoC – left the consensus-building efforts to the participants in the online working groups. When these working groups, after making a sincere effort to conduct unrestricted deliberations, reached an impasse or produced a consensus on very general points, the "third party" role was assumed by the Staff. *But ICANN's management was neither neutral nor knowledgeable in mediating negotiations on complex market-regulation issues.*

Undermined by chronic suspicion and controversies, and lacking the at-large users' perspective, the process was perceived by a number of stakeholders as imposed, top-down, and biased. This was one of the decisive dynamics that precipitated the reform process in ICANN in 2002.

IV. HOW THE ORIGINAL DEFINITION OF ICANN WAS DEVELOPED OR CONTEXTUALIZING THE US PRIVATIZATION POLICY

By definition, ICANN was this private non-profit corporation mandated by the US government to manage global resources (that is the Internet domain-name space) in the public interest without government involvement. Through it, the neoliberal governmentality of industry self-regulation and stakeholder collaboration by consensus was introduced to the global communications field, and the role of national governments and intergovernmental institutions was redefined.

The US government privatization policies of Internet infrastructure layers, in the 1990s,⁶ *signaled a decisive shift in the dominant governmentality in response to some social dynamics*. First, the national governments' ability to sustain their sovereignty in the Information Age was problematized due to the ongoing economic globalization project of the developed countries. Second, a new form of knowledge, namely, expert knowledge, was institutionalized as the digital networks emerged as the infrastructure of the globalization project. Third, as the governmentality studies scholars inferred, particular practices and techniques of government were promoted, in order to "fabricate and maintain self-government" (Miller and Rose, 1993) and substitute "community" for "society" as the new moral-relations network (Rose, 1996).

The multistakeholder consensus model was chosen by the Clinton Administration to legitimize the privatization policy of the management of a global resource. It was a policy lobbied for by the big American telecommunications/Internet companies, but feared by the US' G7 trade partners (see Mueller, 2002). The selected policy approach was a continuation of the long-term US politics in foreign trade (free flow of information, no taxation, privatization, deregulation). Thus, in view of the fluctuating, at the time, US and the European Union (EU) negotiations over trade-barriers and protection measures (see Dizard, 2001), it was of vital importance to the US Administration to prove to its trading partners that the self-regulation principle could be successfully applied to the Internet, which was conceptualized as the new digital global marketplace.

The transfer of policymaking authority to a private non-profit corporation was seen, though, by some global stakeholders as a plot to effectively bypass the existing intergovernmental regulatory regime in telecommunications and increase the US influence on it. Thus, the EU and the ITU were not ready to stay on the sidelines when decisions on domain-name trademark conflicts or the level of central regulation of country-code top-level domains (ccTLDs) were to be made by the new corporation.

Nonetheless, the US political leadership was convinced that the trend was away from "a huge ITU, which while it may have been good for the industrial age, is not applicable for a decentralized medium" and towards "a series of private not-for-profit organizations" (Magaziner, 1998). It was largely believed at the time that, as the first experiment in applying a purely private

⁶ In 1994, the privatization of the National Science Foundation's NSFNET/Internet backbone was completed, and, in 1998, the Internet DNS management privatization was initiated.

multistakeholder collaboration on the global governance level, ICANN epitomized this shifting governmentality.

V. POWER DYNAMICS IN ICANN'S FORMATIVE YEARS: LINES OF ACTIVITY

In the first four years of ICANN's activity, the most significant policies on regulating a common pool resource – the Internet domain-name space – were put in place and the winners and losers of these policies emerged from the constant power struggle.

Creating a regime of assigning property rights in the Internet address and name spaces was the *raison d'être* of ICANN as mandated by the US DoC. To complete the task for only two years, as required by the Memorandum of Understanding with the DoC (1998), ICANN directed its decision-making process to: 1/ establishing ICANN as a legitimate source of control over the Internet root; 2/ implementing the US government White Paper model of a multistakeholder collaborative consensus entity; and 3/ developing substantive policies for the DNS management.

Yet, as discussed next, the transition to assuming complete authority over the Internet DNS management stumbled over *the irreconcilable normative philosophies of efficiency and participatory democracy*.

A. Legitimizing ICANN or Knitting the Contractual Web of Principal Stakeholders

The governance model that ICANN was expected to implement relied on two principal sources of authority - authority delegated by the US government⁷ and public legitimacy, or recognition of the new regulator by the managers and operators of the globally distributed Internet domain name infrastructure (root server operators, address IP regional registries - RIRs, and domain name registries – generic top-level domains – gTLD - and ccTLDs).

Among the stakeholders that, initially, contested ICANN's newly-acquired authority was Network Solutions, Inc. (NSI), which operated the Internet "A" root server. It was only under public pressure⁸, and with the expiration date of its Cooperative Agreement with the DoC approaching, that NSI agreed to sign a set of three-party agreements with the DoC and ICANN (*Approved Agreements...*, November 1999).

The co-opting of NSI into the new regulative regime opened the way to concluding the testbed phase of the shared registry for the *.com*, *.org* and *.net* domains. In April 1999, the first five registrars signed Registrar Accreditation Agreements with ICANN, accepting a number of obligations to protect trademark interests and to contribute to ICANN's budget.

By the end of the first year of the new private regime, there were still major holes in the contractual web ICANN was knitting, and, hence, in the fabric of its authority.

⁷On November 25, 1998, the DoC entered into a Memorandum of Understanding (MoU) with ICANN (see *Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers*, November 25, 1998).

⁸At the Congressional Hearing of the Commerce Subcommittee of Oversight and Investigations (July 26, 1999), Rep. Ron Klink stated the obvious, namely, that "NSI does not want competition... They're dragging their feet". Network Solutions' Chairman Jim Rutt was pressed to explain NSI's hesitation to recognize ICANN's authority by signing a contract with the corporation and NSI's claim of ownership over the central database of registered names (see Marson, 1999). At the time, NSI was investigated by the Department of Justice for antitrust activities, and by the EU as to whether its "contract for new registrars violated continental antitrust laws" (see Dawson, 1999).

1. *The Regional IP Address Registries (RIRs).*

Negotiating contracts with each of the three regional IP address registries – InterNIC (later ARIN), serving North America, RIPE NCC, serving Europe, and AP-NIC, serving the Asia-Pacific region proved a difficult task. The negotiations stumbled over “the appropriate allocation of responsibilities for address policy formulation and implementation between regional and global forums” (see *ICANN Second Status Report*, June 30, 2000).

In 2002, when the ICANN reform process began, the ICANN Staff was not prepared to accommodate the insistence on delegating increased decision-making power to the RIR operators. In response, the RIRs created a common front - the Number Resource Organization (NRO). Seeing themselves in ICANN mainly as “guardians of both the unallocated number resource pool and the policy development process” (see *Open Letter to ICANN...*, October 24, 2003), they, ultimately, negotiated a Memorandum of Understanding between ICANN and the NRO along those lines (see *ICANN Tenth Status Report*, October 7, 2004).

2. *The Country-code TLD Operators.*

Formalizing the relationships with the ccTLD operators was established by the DoC as an issue of utmost importance in the MoU with ICANN (1998). Yet, populous as it was (consisting of 244 ccTLD registries), the ccTLD group was characterized by diverse experiences and interests. By and large, the ccTLD community consisted of two groups.

The operators from European and Asian countries, with broad public use of the Internet, represented well-established businesses and were organized in regional entities. They preferred to work in the fairly liberal economic regimes of their respective countries rather than under the control of a US-based private corporation. Those operators had the potential to participate (physically and online) in a very vocal manner in the ICANN process.

Conversely, the operators from Latin-American, Asian, and African countries, where the Internet was still gaining popularity, constituted the silent majority in the ICANN process, with few noticeable exceptions.

Accordingly, entering into formal contractual relations with ICANN was undesirable for the former, because this would limit their freedom of market policies (it was expected that ICANN would attempt to impose uniform global policies on their practices). Yet, it was preferable for the latter, as they saw in ICANN a counterforce to their national governments, which, in a number of cases, attempted to take over the ccTLD assignments.

Meanwhile, the ICANN Governmental Advisory Committee (GAC) emerged as a consolidated group of powerful stakeholders, which intended to limit the scope of ICANN’s responsibility strictly to the technical maintenance of the ccTLDs’ link to the root. ICANN, on its part, was content to have the GAC members mediate the difficult negotiations with the individual ccTLD operators. *The ICANN Staff was willing to go to any possible extent in order to speed up the process of transfer of complete authority over the Internet DNS management from the US government to the corporation.*

Overall, the major ccTLD administrators looked with suspicion at ICANN’s insistence on entering into contractual relations with them, and, in early 2003, they found a powerful ally, namely, the ITU. As the ITU’s ambition toward Internet governance was stimulated by the stalemate in the agreement-negotiations between ICANN and the ccTLDs, the WSIS process was

underway. The first major Internet governance event under this United Nations umbrella was an ITU workshop in Geneva dedicated specifically to the ccTLD issues (March 3 – 4, 2003).⁹

The ccTLD community's strategy of seeking mighty allies was a success, for, at the ICANN Montreal meeting (June 2003), the foundations of a separate Supporting Organization in ICANN – the Country-Code Names Supporting Organization (ccNSO) – were finally laid out. The consolidation of the new Supporting Organization's membership was completed at the ccNSO's inaugural meeting in Rome (March 1, 2004). Thus, the last remaining “wild” component of the Internet stakeholder community was finally incorporated in ICANN.

B. Implementing the Multistakeholder Consensus Model or Fighting for Structural Power

Creating ICANN's contractual relationships with some key infrastructure and service providers was a step towards establishing the new regulator's combined powers of decision-making and implementation. In effect, *ICANN began its mandate without three crucial pillars - a full-fledged organizational structure, a well-established bottom-up consensus process, and secured financing. Moreover, ICANN did not have an operational definition of consensus, based on a set of clear-cut criteria.*

1. Stakeholder Constituencies

ICANN's organizational model was based on a fundamental architectural principle: to balance the perspectives by carving structural niches for a variety of stakeholders. Participation of two categories of global stakeholders was anticipated - professional/business entities as members of three supporting organizations, and individual Internet users as members of an at-large structure.

The Interim Board's decision (March 1999) to approve a particular constituency configuration for the Domain Name Supporting Organization (DNSO), as it was proposed by the trademark-holder/business interests, led to a permanent structural imbalance.¹⁰ By controlling 18 of the 21 seats on the Names Council, the industry/trademark/business constituencies were able to circumvent undesired recommendations submitted by the working groups on substantive DNS policy issues. The ultimate result was *the compromising of the working-group format of a consensus process.*

Designing the DNSO was a significant exercise as well, because it was the first instance in ICANN, where the stakeholders' incapability to compromise and reach consensus required the Board and the Staff to step in and find a middle-ground solution. Instead of being concerned, though, with mediating the deliberations, the ICANN management gradually began to take over

⁹ Commenting on the ITU ccTLD workshop, Adam Peake (GLOCOM) cautioned: “Let's not be politically naïve and understand that this [the WSIS process] is not ICANN; it's a UN process, where we [civil society, private sector, Internet users] have very little power” (as cited in “<nettime> ccTLDs, WSIS, ITU, ICANN, ETC”, March 6, 2003).

¹⁰ There were seven constituencies represented in the DNSO: business users, Internet service providers, non-commercial domain name holders, ccTLD registries, gTLD registries, registrars, and intellectual property owners. The resulting DNSO constituency structure was strongly criticized for generating “underrepresentation”, because many interested parties cannot find a home in any of the approved constituencies; “overrepresentation”, because other parties can participate in multiple constituencies; and “misrepresentation”, because the selection of constituency representatives “obscures... significant differences of opinion within the constituency” (see Alvestrand, 2000).

the policymaking tasks. This was done in the name of efficiency, and, under the time-pressure imposed by the DoC.

Along with achieving functional diversity of representation via supporting organizations and constituencies, ICANN's structure aimed at geographical diversity. Through a series of ratio requirements for the composition of the Board and the Supporting Organizations (SO) councils, ICANN was portraying itself as a globally representative body. This was a political issue since the corporation was perceived by the non-American participants as an instrument of the US domination over the Internet.

In reality, ICANN badly needed more non-Anglophone participants in order to assemble a globally-representative at-large membership to elect nine directors on the Board by September 2000.¹¹

In sum, amidst controversy and power play, by the end of ICANN's second year, the corporation had erected the towers of its three supporting organizations, filled the Board seats with their representatives, and experimented with the global e-election of five at-large directors. The tensions accumulated along the way, nevertheless, threatened to eradicate ICANN as a private self-regulation initiative.

2. Working Groups

As an innovation in global governance, ICANN was a concoction of "good intentions" and controversial implementation. Nowhere was this paradox more explicit than in the series of working groups created after the Berlin meeting (May 1999) to produce consensus recommendations in the main policy areas of the ICANN mandate.¹²

A closer look at the DNSO "bottom-up" process initiation, in mid-June 1999, reveals that *the working groups were doomed to failure due to the lack of a number of necessary conditions*. First and foremost, when the working groups were convened, the manner in which the process of consensus-building was to be conducted was yet to be discussed. In addition, when the working groups' online debates began, the stakeholder constituency structure was still evolving. Finally, although considered an innovation in governance, the "bottom-up" process was left to the collective amateurish efforts of the participants. Not surprisingly, without professional mediation, the stakeholders could not agree on the procedural issues.

In mid-2000, many commercial-constituency representatives on the Names Council, and on the Board, were on the verge of losing patience with the prolonged working-group discussions on substantive issues. Businesses were interested in promoting the e-commerce rationality into the emerging regulative property-rights regime, and it was irrelevant for them how this would impact the individual user's rights of privacy, security, and free-speech online.

When the working-group process failed to deliver the expected full-fledged policy recommendations on substantive and organizational issues, the Staff readily stepped in and single-handedly began producing draft policy resolutions for the Board to approve. The Staff, indeed, had a vested interest in enhancing the effectiveness of the policy-making in ICANN,

¹¹ Ultimately, 34,035 Internet users around the world voted in the at-large directors elections in October 2000 (see "Carter Center Representatives Observe ICANN Balloting", October 11, 2000), yet they were mostly from the US and Western Europe.

¹² The working groups were: WG-A on Dispute Resolution Policy, WG-B on Famous Trademarks, WG-C on New gTLDs, WG-D on (DNSO) Business Plan and Internal Procedures, WG-E on Global Awareness and Outreach, and WG Review on conducting the DNSO Review.

since the complete transfer of authority over the DNS root depended on the fulfillment of the original mandate.

3. *Funding Used as Bargaining Power*

Developing a long-term funding formula was another task left to the Initial Board and Management to resolve. The US government's White Paper (1998) contained the assumption that those, who would benefit from ICANN's technical coordination and policy development activities should contribute to its budget, but this principle presumed contractual obligations, which ICANN was not able to secure easily.

By the time the ICANN supporting-organization structure was created (March – May 1999), the sense of financial crisis was palpable in ICANN. In these circumstances, *being major ICANN income-contributors provided certain stakeholders with high bargaining power*. As Karl Auerbach, the former North-American at-large director on the Board, explained, “the domain name registry/registrar – they are the [main] source of income for ICANN, so ICANN listens to them...” (interview with the author, May 3, 2002).

Network Solutions, for instance, was able to secure its role as the registry for the *.com*, *.net* and *.org* domains simply because half of the ICANN annual budget, in its transition period, depended on NSI's financial contribution.

The ccTLD registries group constituted the second largest funding source for ICANN; yet, as discussed previously, involving each of them in contractual relations with ICANN became quite an ordeal in the formative years.¹³

Overall, in the first two years, the corporation struggled mostly to collect stakeholder contributions to its budget. It was only when NSI paid the contractually-required fees, and the application fees for operating a new gTLD registry were accumulated, that the corporation began noticeably expanding its expenses. The way in which funds were managed, though, was an issue neglected by the participants.

Meanwhile, a lawsuit against the corporation filed by Karl Auerbach, one of the newly elected at-large directors, illuminated *the basic controversy of the “private-corporation-acting-in-public-interest” formula, embodied in ICANN*. Charged with curtailing a director's right to inspect the financial records, the ICANN Management revealed its particular understanding of where a director's loyalty lay: “Auerbach... clearly is wrong in implying that his ‘duty’ to the general public could, for example, permit him to disclose to the general public documents that the corporation appropriately decides to treat as confidential” (see *ICANN's Reply...*, July 29, 2002, 12). But, indeed, *according to the trusteeship organizational model that was championed by ICANN's Management, the level of openness and transparency was arbitrary, depending on the directors (trustees) 'discretion*.

Accordingly, as the process of generating substantive policies in ICANN demonstrated, *the decision-making process gradually concentrated at the top, as the discussions in working groups, which lasted for months but often generated only limited consensus, were discarded as ineffective*.

¹³ As a result, only 75 of all ccTLD operators had paid all or some of their contribution amount by June 30, 2000, and the collectability of approximately \$1,355,500 from the rest was uncertain (see *ICANN Board Meeting Minutes*, October 17, 2000). Apparently, they had used the “money power” as leverage in their contract negotiations with ICANN.

4. *Generating Substantive Policies in ICANN*

As ICANN was required by the MoU with the DoC to complete its part of the joint project by September 30, 2000, the first two years marked a frenetic period of undertaking all substantial and organizational tasks at once. Certain issues were prioritized, and these related to 1/ introducing competition at the registrar level (creating a “retail” domain-name registration market) – breaking the NSI’s monopoly over the lucrative .com domain market, and endowing ICANN with regulative power via the registrar accreditation agreements; 2/ establishing intellectual property rights in the DNS; and 3/ introducing competition at the registry level through new gTLDs (creating a “wholesale” domain-name registration market). Indeed, as the ICANN Interim President Michael Roberts estimated, about ninety percent of all policies that ICANN had enacted by the end of 2001 had to do with the business practices of and the dispute mechanism for domain names (interview with the author, February 20, 2002).

The World Intellectual Property Organizations (WIPO) recommendations¹⁴ on protecting trademarks and intellectual property in the domain name space, themselves, constituted a full-fledged substantial-issue list that consumed most of the ICANN volunteer-participants’ time and energy in the first two years. As the analysis of relevant documents demonstrates, though, only two of those issues were openly discussed in working groups, namely, the famous trademark-protection and the new gTLDs issues. Even in these cases, certain stakeholders engaged in private inter-constituency negotiations to reach agreements and impose them as consensus points on the working group.

As for the Registrar Accreditation Policy and the Uniform Dispute Resolution Policy (UDRP), these policy items were developed outside ICANN (by the US DoC and the WIPO, respectively), and ICANN was used only to legitimize them and, thus, assure compliance by the service-providing stakeholders.

In this light, *the question as to whether the policies developed by ICANN were consensus policies cannot be answered uniformly for the several substantive areas*. The scope of the consensus reached varied as well depending on whose stakeholder positions were involved and were taken into consideration.

Overall, *while the Management measured success of the corporation with the number of developed policies (the efficiency argument), for many stakeholders the notion of success was linked to the inclusiveness of the policy development process and the level of consensus behind each of the policies (the participatory democracy view)*.

VI. WHY WAS THE ORIGINAL ICANN MODEL COMPROMISED, AND WHAT ARE THE ‘LESSONS LEARNED’?

When the early ICANN practices and rationalities in self-governance are analysed through the lens of power dynamics, and along the lines of legitimization, model implementation, and substantive policy creation efforts, it becomes clear that *the lack of understanding of the political aspects of technology management undermined the attempts to implement the multistakeholder consensus model*.

Multistakeholder collaboration, as a strategy for managing interdependencies, was enabled in ICANN by the common goal of preserving Internet’s stability. Despite their differing interests, the stakeholders were attracted to participate in ICANN by the corporation’s mandate to create a

¹⁴ See WIPO, 1999.

global regime for regulating a common pool resource, namely the sign-root Internet DNS. Yet, the lack of proper management strategies and mechanisms for steering the shared power process (i.e. what constitutes consensus; how to conduct the online deliberative consensus-generating process; how to mediate conflict) allowed certain well-organized stakeholder interests to dominate the public discussion. Ultimately, the experiment diverted from its original purely private-stakeholder collaborative formula to the more conventional public-private consultative design.

ICANN's identity and legitimacy were the most contested issues in the formative years. The reason was that *the new corporation was subjected to two contradicting sets of expectations, or two different normative philosophies, which accounted for much of the tension.*

ICANN was seen by the technical cadre as a trusteeship organization, where the experts act in public interest as a homogenous group of guardians of the global resource. In principle, this would result in a speedy and efficient policy-making process, leading to ICANN assuming the full authority in governing the Internet number and name resources.

For the noncommercial participants, and for the champions of neoliberalism in the US and some West European governments, ICANN was about promoting multistakeholderism to the global governance level. A functioning purely private corporation that was able to gain public legitimacy was seen as a successful experiment in devising proper political mechanisms for the economic globalization.

The irreconcilable ideologies clashed on a number of issues in ICANN - from the need for an at-large membership electing half of the directors to represent the interests of the end users, to opening the Board meetings to observation, and to the right to be informed of the corporation's financial policy.

As a result, by 2002, there was a prevailing perception of the bottom-up consensus process in working groups as being slow and inefficient. As this investigation demonstrated, the working group format in ICANN was doomed to failure, indeed, but not because the stakeholders could not agree on regulating property issues in the Internet DNS. Rather, the lack of understanding of the political dynamics in a multistakeholder collaboration allowed for misbalance of the distribution of structural power among constituencies to the detriment of the non-commercial and end-user representatives.

In 2002, ICANN was redefined as a public-private corporation with an empowered Board and Management, and relying on public consultations instead of the bottom-up consensus process. In the language of the WSIS Working Group on Internet Governance (WGIG), on a scale from "soft" to "hard" forms of governance, ICANN shifted towards the "hard" side by identifying itself as a public-private partnership, and not a purely private multistakeholder collaboration (see WGIG, 2005, 54-55).

The experimental stage of creating a private regime to govern a global resource in the public interest came to a conclusion. Regrettably, a number of active non-commercial participants withdrew from the process. More importantly, the conviction that ICANN was a failure as an institutional innovation spread to the very model that the corporation was to epitomize.¹⁵

As a ground-breaking experiment in advanced policymaking in the field of global communication, ICANN served as a test case of both the real scope of the alleged "withdrawal" of the governments, and the real capacity of the private sector and civil society to take over

¹⁵ See Palfrey (2003), for instance.

policymaking “in the public interest”. The “lessons learned” from this case provide guidance in designing further the global layer of the Internet Governance regime.

VII. REFERENCES

Note: All Internet addresses are current as of October 11, 2007.

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VIII. LIST OF ACRONYMS

APNIC – Asia-Pacific Network Information Center

ARIN – American Registry for Internet Numbers

ccNSO – Country-code Name Supporting Organization

ccTLD – country-code top-level domain

DNSO - Domain Name Supporting Organization

DoC – Department of Commerce (US)

DNS - Domain Name System (Internet)

EU – European Union

G7 – the Group of Seven

GAC – Governmental Advisory Committee

gTLD – generic top-level domain

ICANN - Internet Corporation for Assigned Names and Numbers

IFWP – Internet Forum for the White Paper

ITU – International Telecommunications Union

MoU – Memorandum of Understanding

NRO – Number Resource Organization

NSF – National Science Foundation (US)

NSI - Network Solutions, Inc.

NTIA – National Telecommunications and Information Administration (US)

RIPE – Réseaux IP Européens

RIRs – Regional IP address Registries

SOs – supporting organizations

UDRP – Uniform Dispute Resolution Policy

WG – working group

WGIG – Working Group on Internet Governance (UN WSIS)

WIPO - World Intellectual Property Organization

WSIS – World Summit on Information Society (UN)