

Global Internet Governance: Negotiating Power in ICANN

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Abstract

Internet governance is a contested territory in the international political debate. With the creation of the Internet Corporation for Assigned Names and Numbers, in 1998, an alternative regime for public policy-making – without, or with limited government participation was introduced in global communications. This paper explores the power dynamics in the initial period of establishing property rights in the Internet domain name space by focusing on three lines of activity (between 1998 and 2002): 1/ establishing ICANN as a legitimate source of control over the Internet root; 2/ implementing the US government White Paper model of a multi-stakeholder collaborative consensus entity; and 3/ developing substantive policies for the DNS management. By contextualizing the case in the international relations of the late 1990s, I conclude that the lack of understanding of the political aspects of the technological issues undermined the potential of the original multi-stakeholder consensus model.

This paper focuses on the Internet governance power dynamics as detected in the rationalities and practices that emerged in the late 1990s. The case in point here is the Internet Corporation for Assigned Names and Numbers, formed in October 1998, which still functions under the political oversight of the US government. 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 factors (see Mueller, 2002; Friedlander and Cooper, 2000; Froomkin, 2000; Kleinwachter, 2000; Weinberg, 2000; Holitscher, 1999; Post, 1999a, b).

The underlining argument in this paper is that ICANN, as a multistakeholder consensus-seeking entity, was an experiment in creating an alternative regime for public policy-making (that is, policy-making without government participation) in global communications. This regime 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's) potential to exert "soft power" in the international arena. As I argue elsewhere¹, ICANN is a type of global public-policy network (as defined by Reinicke, 1999/2000; Reinicke and Deng, 2000) performing alternative public policy-making.

Seven years after the inauguration of ICANN, in November 2005, in Tunisia, the UN World Summit on the Information Society (WSIS) adopted some of the vocabulary of the ICANN process and recognized the multistakeholder collaboration as a key organizational principle in global Internet governance. Yet, it re-established the leading role of the national governments and intergovernmental organizations, such as the International Telecommunications Union (ITU), in the regulation of the global Internet.

By considering such concepts as *governmentality*, *globalization*, and *multistakeholder collaboration*², in this paper I aim at providing some answers to the evocative questions: 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, when the contradicting stakes and privileged power strategies crystallized, and the functional model was "reformed" along the conventional government-led policymaking principle.

How the original definition of ICANN was developed, or contextualizing the US privatization policy

By definition, ICANN was a 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 (NSFNET/Internet backbone and the Domain Name System management), in the 1990s, signaled a decisive shift in dominant governmentality. At the time, there was a broadly shared perception that, in the Information Age, national governments' ability to sustain their

¹ See Antonova, 2007; 2005a; 2005b; 2003.

² See Antonova, 2005, for a fully developed theoretical model for studying power dynamics in ICANN.

sovereignty was problematized due to the ongoing economic globalization and the inherent non-governability of the global Net. Concurrently, with the emergence of the digital networks as the infrastructure of the globalization project, the “logic of the net” gained prominence with the governments and technical experts were seen as a self-governing epistemic community. As a result, 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 the 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 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 U.S. 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 multistakeholder collaboration on the global governance level, ICANN epitomized this shifting governmentality.

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 in the following distinct areas:

- 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 further, the transition to assuming complete authority over the Internet DNS management stumbled over the irreconcilable normative philosophies of efficiency and participatory democracy.

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: 1/ authority delegated by the US government through a memorandum of understanding (*MoU*, 1998), and 2/ 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 pressure, 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.

First, the Regional IP Address Registry (RIRs) operators insisted on being delegated increased decision-making power. They 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).

Second, the country-code TLD operators – a group of 244 ccTLD operators, characterized by diverse experiences and interests. Yet, formalizing the relationships with the ccTLD operators was established by the DoC as an issue of utmost importance for ICANN. By and large, the ccTLD community consisted of two groups:

- 1/ operators from European and Asian countries with broad public use of the Internet, who represented well-established businesses and were organized in regional entities.
- 2/ operators from Latin-American, Asian, and African countries, who 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. 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.

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. 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).

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) – was laid out. Thus the last remaining “wild” component of the Internet stakeholder community was finally incorporated in ICANN.

Implementing the multistakeholder consensus model, or fighting for structural power

In effect, ICANN began its mandate without three crucial pillars: a/ a full-fledged organizational structure, b/ a well-established bottom-up consensus process, and c/ secured financing. Moreover, ICANN did not have an operational definition of consensus, based on a set of clear-cut criteria.

A/ 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: 1/ professional/business entities as members of three supporting organizations, and 2/ individual Internet users as members of an at-large structure.

The Interim Board's decision (in March 1999) to approve the Domain Name Supporting Organization (DNSO) constituency configuration as proposed by the trademark-holder/business interests led to a permanent structural imbalance – from the seven constituencies, only one represented the end user's interests. 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.

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.

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.

B/ 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.

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 (i.e. the process of consensus-building was yet to be discussed; the stakeholder constituency structure was still evolving; 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. 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.

C/ Funding used as bargaining power

Developing a long-term funding formula was another task left to the Initial Board and Management to resolve. 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.

Overall, 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.

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.

Generating substantive policies in ICANN

As ICANN was required by the *Memorandum of Understanding* 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); 2/ establishing intellectual property rights in the DNS; and, 3/ introducing competition at the registry level through new gTLDs. 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).

As the analysis of the relevant documents demonstrates, though, only two of them 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 World Intellectual Property Organization - WIPO, respectively), and ICANN was used only to legitimize them and, thus, assure compliance from the service-providing stakeholders.

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

Why was the ICANN model compromised?

When ICANN’s practices and rationalities in self-governance are analysed 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 the technological issues undermined the attempts to implement the multistakeholder consensus model.*

ICANN’s identity was, indeed, the most contested issue in the formative years. The new corporation was subjected to two contradicting sets of expectations, or two different normative philosophies (efficiency vs. democratic process), which accounted for much of the tension.

As a result, 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 WSIS Working Group on Internet Governance (WGIG)'s language, 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.

As a ground-breaking experiment in advanced policymaking in the field of global communication, ICANN served as a test tube for probing 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 policymaking "in the public interest". The "lessons learned" from this case provide guidance for designing further the global layer of the Internet Governance regime.

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Note: All Internet addresses are current as of January 31, 2008.

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